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## The ABA Task Force on Corporate Responsibility and the 2003 Changes to the Model Rules of Professional Conduct

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## I. INTRODUCTION

Established in March 2002 to address “systemic issues relating to corporate responsibility arising out of the unexpected and traumatic bankruptcy of Enron and other Enron-like situations,”<sup>1</sup> the American Bar Association Presidential Task Force on Corporate Responsibility (“Task Force”) presented a series of policy recommendations to the ABA House of Delegates at its 2003 Annual Meeting in San Francisco.<sup>2</sup> Two of those recommendations involved proposals to amend the ABA’s *Model Rules of Professional Conduct* (“*Model Rules*”), specifically Model Rules 1.6 and 1.13.<sup>3</sup>

With one exception accepted by the Task Force in floor debate, the proposals set forth in the Report of the American Bar Association Task Force on Corporate Responsibility (“*Final Report*”)<sup>4</sup> were adopted by the House of Delegates without change. That adoption followed highly charged controversy, including accusations that the Task Force’s recommended changes to Model Rules 1.6 and 1.13 would sacrifice “core values” of the legal profession.<sup>5</sup> This Article attempts

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1. Mission Statement, ABA Presidential Task Force on Corporate Responsibility, at [http://www.abanet.org/buslaw/corporateresponsibility/mission\\_statement.html](http://www.abanet.org/buslaw/corporateresponsibility/mission_statement.html).

2. The Task Force presented its recommendations to the ABA House of Delegates in the form of three resolutions (119A, 119B, and 119C), addressing, respectively, Model Rule 1.13, Model Rule 1.6(b) and public company governance policies generally. Recommendations 119A, 119B, and 119C, along with the Task Force’s Preliminary and Final Reports and the oral and written testimony submitted to the Task Force in its public hearings, are available at the Task Force’s web site, which is <http://www.abanet.org/buslaw/corporateresponsibility/home.html>.

3. Model Rules 1.6 and 1.13, marked to show changes approved by the ABA House of Delegates in August 2003, are reproduced in Appendix A to this Article.

4. Final Report, ABA Presidential Task Force on Corporate Responsibility, (Mar. 31, 2003), at [http://www.abanet.org/buslaw/corporateresponsibility/final\\_report.pdf](http://www.abanet.org/buslaw/corporateresponsibility/final_report.pdf) [hereinafter *Final Report*].

5. Lawrence Fox, *Let’s Not Let Arthur Andersen and Enron Destroy our Profession’s Core Values: Why Reports 119A and 119B Should Be Rejected* 2 (July 31, 2003) (unpublished monograph distributed to members

to illuminate, and perhaps calm, that controversy in three ways: (1) by reviewing the background and content of the 2003 changes to Model Rules 1.6 and 1.13,<sup>6</sup> (2) by responding briefly to some of the concerns expressed by opponents of the changes, and (3) by emphasizing other important and related policies recommended by the Task Force.

This Article's description of the history and context of the recent changes to Model Rules 1.6 and 1.13 may provide, at most, a limited service. A focus exclusively on the changes to the *Model Rules* would obscure the more important point of this Article: namely, that the revised provisions of Model Rules 1.6 and 1.13 are merely a backstop addressing extraordinary and deviant circumstances, and that the Task Force's recommendations with the greatest importance to the responsibility and value of the legal profession in public company governance are those that prescribe regular modes of communication and advice among in-house lawyers (particularly the general counsel), outside counsel, and independent members of the organizational client's governing body such as the board of directors.

## II. THE TASK FORCE'S DEVELOPMENT OF THE *MODEL RULES* AMENDMENTS

The Task Force began its work in the spring of 2002 – before WorldCom, Tyco, and HealthSouth joined Enron in the ranks of major corporate scandals, and before Senator Sarbanes and Representative Oxley became irrevocably conjoined through the enactment of the Sarbanes-Oxley Act of 2002.<sup>6</sup> A wide range of institutions and laws – boards of directors, outside auditing firms, ERISA, the system of accounting regulation, and securities analysts, to name a few – appeared to be fair game for consideration in the search for appropriate responses to the corporate scandals. Early in its work, however, the Task Force – being, after all, an arm of an association of lawyers – concentrated its attention on the role of lawyers in the promotion of corporate responsibility. The Task Force's recommendations could not conceivably have won acceptance by the legal profession, let alone the public, unless it at least attempted to assess the adequacy of the legal profession's own rules and practices in relation to public company governance.

The Task Force promptly identified two such rules for review. One rule, Model Rule 1.6, was still relatively fresh in the minds of the Task Force members, since the ABA House of Delegates had less than a year earlier rejected key

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of the ABA House of Delegates, on file with author). The votes on the two proposals to amend the *Model Rules* were quite close: the recommendation to amend Model Rule 1.6 (Recommendation 119A) passed by a vote of 218-201; the recommendation to amend Model Rule 1.13 passed, somewhat more comfortably, by a vote of 239-147. See HOUSE OF DELEGATES, AM. BAR ASS'N, DAILY JOURNAL, 2003 ANNUAL MEETING (Aug. 11-12, 2003), at <http://www.abanet.org/leadership/2003/2003journal.pdf> (Aug. 11-12, 2003).

6. Sarbanes-Oxley Act of 2002, Pub. L. 107-204, 116 Stat. 745 (2002).

amendments to Rule 1.6 proposed by the Ethics 2000 Commission.<sup>7</sup> Those amendments, dealing with the lawyer's ability to disclose client information in order to prevent or rectify the consequences of client crime or fraud in limited circumstances, appeared to the Task Force to be responsive to swirling charges that lawyers associated with recent corporate scandals had, at least by silence, failed to prevent the criminal or fraudulent conduct of senior corporate officials.<sup>8</sup> Another rule, Model Rule 1.13, was also the subject of active criticism, most notably in the form of a well-publicized letter to the Securities and Exchange Commission from forty law professors, asserting that Rule 1.13 was too weak and urging that the SEC adopt its own rules of attorney conduct to require that lawyers for public companies bring corporate crime or fraud to the attention of the corporation's board of directors.<sup>9</sup> The suggestion that existing Model Rule 1.13 had failed to adequately encourage or require lawyers to raise concerns about corporate fraud with higher organizational authorities invited reconsideration of that rule as well as Rule 1.6.

#### A. EVALUATION AND DEVELOPMENT OF AMENDMENTS TO RULE 1.6

With respect to Rule 1.6, the Task Force was unwavering, from its earliest meetings, in the belief that the ABA House of Delegates should reconsider and adopt the Ethics 2000 amendments it had recently rejected. Although the public record may not reflect it, that Task Force position ripened into a firm view well before any expression of federal interest in regulating the ability or duty of lawyers to report corporate fraud to the SEC. Senator John Edwards first publicly suggested the amendment that became Section 307 of the Sarbanes-Oxley Act of 2002 on June 18, 2002,<sup>10</sup> by which time the drafting of the Task Force's Preliminary Report of July 16, 2002 was in an advanced stage.<sup>11</sup> And, as is surely

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7. That Commission was formally named the ABA Commission on Evaluation of the Rules of Professional Conduct. See ABA Center for Professional Responsibility, *Ethics 2000 Commission Report with Recommendation to the ABA House of Delegates* (website providing links to Rule revisions as recommended by the Ethics 2000 Commission and as passed by the House of Delegates) at [http://www.abanet.org/cpr/e2k-report\\_home.html](http://www.abanet.org/cpr/e2k-report_home.html).

8. Perhaps the most notorious contemporaneous criticism of public company lawyers was the report of the special committee of the board of directors of Enron Corp. which, among other things, criticized the performance of Vinson & Elkins. WILLIAM C. POWERS, JR., ET AL., Report of Investigation by the Special Investigative Committee of the Board of Directors of Enron Corp., (Feb. 1, 2002), available at <http://news.findlaw.com/hdocs/docs/enron/sicreport> [hereinafter Powers Report].

9. Letter from Prof. Richard H. Painter et al., to Harvey Pitt, Chairman, SEC (Mar. 7, 2002), available at <http://www.abanet.org/buslaw/corporateresponsibility/pitt.pdf>.

10. On June 18, 2002, Senator Edwards submitted a letter to SEC Chairman Harvey Pitt and presented remarks in the Senate suggesting the possibility of legislation requiring public company lawyers to report corporate misconduct to the board of directors. 148 CONG. REC. S5652-02 (daily ed. June 18, 2002) (statement of Sen. Edwards).

11. Preliminary Report, ABA Task Force on Corporate Responsibility, (July 16, 2002), reprinted in 58 BUS. LAW. 189 (2002) [hereinafter Preliminary Report].

well known to any reader of this Article, Section 307 says nothing explicit about “reporting out” – i.e., disclosure of client information to persons outside of the corporate issuer. It was only on November 21, 2002, after publication of the Task Force’s Preliminary Report, that the SEC – somewhat surprisingly, given statements in the legislative debate on Section 307<sup>12</sup> – advanced the idea of a requirement of such disclosure.<sup>13</sup> In short, the Task Force’s embrace of the Ethics 2000 amendments preceded any post-Enron federal regulatory initiative addressing lawyer disclosure of client information to third parties.

In one significant respect, the proposals in the Task Force’s Preliminary Report went further than the Ethics 2000 recommendations to amend Model Rule 1.6. Specifically, the Task Force preliminarily urged that Model Rule 1.6 be amended

to make disclosure [of client information] mandatory, rather than permissive, in order to prevent client conduct known to the lawyer to involve a crime, including violations of federal securities laws and regulations, in furtherance of which the client has used or is using the lawyer’s services, and which is reasonably certain to result in substantial injury to the financial interests or property of another.<sup>14</sup>

It was perhaps unfortunate that the Task Force’s Preliminary Report did not elaborate on the rationale for this proposal. It could have been pointed out, for example, how extremely limited such mandatory disclosure would have been. For that mandate to apply, the lawyer would have to *know* the client’s conduct is criminal. The requirement would not apply to non-criminal fraud, and the requirement would only apply in order to prevent client crime, and not to mitigate or rectify its consequences.<sup>15</sup> Within the Task Force, moreover, there was sentiment that in such extreme and limited circumstances, mandatory disclosure of client crime would strengthen the lawyer’s hand in persuading a client to abandon conduct known by the lawyer to be criminal, and would do so more effectively than mere permission to disclose.

Whatever might have been said in its favor, however, the preliminary

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12. “The amendment I am supporting would not require the attorneys to report violations to the SEC, only to corporate legal counsel or the CEO, and ultimately, to the board of directors.” 148 CONG. REC. S6524-02, S6555 (daily ed. July 10, 2002) (statement of Sen. Enzi).

13. Proposed Rule: Implementation of Standards of Professional Conduct for Attorneys, Exchange Act Release No. 33-8150, 17 C.F.R. pt. 205 (Nov. 21, 2002) [hereinafter SEC Proposed Rule], *available at* <http://www.sec.gov/rules/proposed/33-8150.htm>.

14. Preliminary Report, *supra* note 11, at 206.

15. In addition to these limitations, the disclosure requirement, like the permissive disclosure advanced by the Ethics 2000 Commission, would only apply where the lawyer’s services are being used to further the crime, and only where it is “reasonably certain” that substantial financial injury would result. Although it is for now a moot point, it was persuasively suggested in testimony to the Task Force that if reporting out were to be required in any circumstances to prevent financial harm, it would be incongruous not to require such disclosure at least as broadly to prevent death or substantial bodily harm. *See* Testimony of John W. Allen before the ABA Task Force on Corporate Repsonsibility, 10 (Sept. 20, 2002), *available at* [http://www.abanet.org/buslaw/corporateresponsibility/hearings02/20020920/oraltestimony\\_allen.pdf](http://www.abanet.org/buslaw/corporateresponsibility/hearings02/20020920/oraltestimony_allen.pdf).

mandatory disclosure proposal encountered severe criticism, and was withdrawn in the Task Force's Final Report.<sup>16</sup> What ultimately led to that withdrawal was a concern that mandatory reporting out (disclosure of client crime to a third party) would undermine, rather than elicit, compliance with law. The Task Force acknowledged that an enforceable duty to disclose client information would likely have two counterproductive consequences: first, that clients would choose not even to consult lawyers with regard to questionable conduct; and second, that out of (self-protective) concern about promptly fulfilling a professional obligation to disclose to third parties, the lawyer would forgo efforts to remonstrate with the client or to engage in factual inquiry that might establish the legality of the client's conduct.<sup>17</sup> These perceived consequences of a mandatory disclosure rule, in the view of the Task Force, would have undermined the ability of lawyers to play a useful role in promoting compliance with law by their clients.<sup>18</sup>

What remained, then, in the Task Force's Final Report was a verbatim adoption of the extensions of permissive disclosure recommended by the Ethics 2000 Commission but rejected by the House of Delegates in 2001.<sup>19</sup> Several aspects of these extensions merit brief emphasis:

- With the 2003 amendments, Model Rule 1.6(b) permits disclosure to prevent crime or fraud, or to mitigate or rectify consequences of such misconduct, only if the required harm – “substantial injury to the financial interests or property of another” – is “reasonably certain to result.”<sup>20</sup>
- The authorization to disclose client information in order to rectify the consequences of past client crime or fraud does not extend so far as to permit a lawyer, having disclosed just enough to enable others (including victims) to rectify such consequences, to provide further assistance in pursuing claims against the client, or to assist in apprehending or prosecuting the client.<sup>21</sup>
- Most important, the new additions to Model Rule 1.6(b) permit disclosure of

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16. Final Report, *supra* note 4, at 53.

17. *Id.* In its Final Report, the Task Force drew in this regard on the insights of another ABA task force (the “Section 307 Task Force”), expressed in its comments on rules proposed by the SEC in November 2002 to require lawyers to report securities fraud to the SEC. See E-mail from Alfred P. Carlton, Jr., President, ABA, to Jonathan G. Katz, Secretary, SEC (Dec. 18, 2002) [hereinafter Carlton E-mail], available at <http://www.sec.gov/rules/proposed/s74502/apcarlton1.htm>.

18. Final Report, *supra* note 4, at 20-22 (emphasizing the importance of the lawyer – particularly the lawyer for the public corporation – as a promoter of legal compliance).

19. The House of Delegates, by a large margin (255-151), rejected the Ethics 2000 proposal to add Rule 1.6(b)(2) permitting disclosure of client information to prevent client crime or fraud. See Jonathan Glater, *Lawyers May Reveal Secrets of Client, Bar Group Rules*, N.Y. TIMES, Aug. 8, 2001, at A12. A second proposal, to add Model Rule 1.6(b)(3) permitting disclosure of client information to mitigate or rectify injury resulting from client crime or fraud, was withdrawn in light of the margin of defeat on the proposal to add Model Rule 1.6(b)(2). See AM. BAR ASS'N CENTER FOR PROFESSIONAL RESPONSIBILITY, *Summary of House of Delegates Action on Ethics 2000 Commission Report*, available at [http://www.abanet.org/cpr/e2k-summary\\_2002.html](http://www.abanet.org/cpr/e2k-summary_2002.html).

20. MODEL RULES Rule 1.6(b)(2) (2003) [hereinafter MODEL RULES].

21. See Final Report, *supra* note 4, at 54-55 n.95, quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 67 cmt. f (2000).

client information if and only if the client has used or is using the lawyer's own services in furtherance of the crime or fraud.<sup>22</sup> This limitation is the moral and ethical linchpin of the 2003 amendments to Model Rule 1.6: as the Task Force (following the Ethics 2000 Commission and the American Law Institute before it) emphasized, the client's use of the lawyer's services to perpetrate crime or fraud "constitutes an abuse by the client of the client-lawyer relationship, forfeiting the client's absolute entitlement to the protection of Model Rule 1.6."<sup>23</sup>

- As was the case before the 2003 amendments, Model Rule 1.6(b) does not permit disclosure of client information unless the lawyer "reasonably believes" that such disclosure is "necessary" to achieve one of the permitted purposes for disclosure.<sup>24</sup>
- As was the case before the 2003 amendments, Rule 1.6(b) allows disclosure of client information only "to the extent" reasonably believed necessary to achieve a permitted purpose.<sup>25</sup>

The Task Force was certainly aware that the lawyer's withdrawal from representation (either permissive or mandatory) may largely or sometimes even fully satisfy any duty (under Model Rule 1.2(d) or otherwise) to refrain from assisting a client in committing any criminal or fraudulent acts.<sup>26</sup> Thus, the Task Force in no way intended to limit or alter existing duties or rights on the part of the lawyer to withdraw as counsel in the face of client crime or fraud.<sup>27</sup>

#### B. EVALUATION AND DEVELOPMENT OF AMENDMENTS TO MODEL RULE 1.13

In contrast with its early and persistent advocacy of the Ethics 2000 recommendations with respect to Model Rule 1.6, the Task Force's treatment of Model Rule 1.13 varied substantially through the course of its deliberations, in turn influencing and then being influenced by pronouncements by the SEC in

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22. MODEL RULES Rule 1.6(b)(2) (2003).

23. Final Report, *supra* note 4, at 54.

24. MODEL RULES Rule 1.6(b) (2003).

25. *Id.*

26. See MODEL RULES Rule 1.16(c) (2002).

27. In various communications subsequent to the issuance of the Task Force's Final Report, it has been suggested to the author that the elimination of former Comment [14] to Model Rule 1.6 might have such an effect. In the author's view, however, that deletion should not be understood to have any such substantive effect. The first three sentences of former Comment [14] (the portion of the Comment that addresses withdrawal) duplicated matters addressed in other Model Rules or their Comments: specifically, the first sentence of old Comment [14] duplicated matter in Model Rule 1.16(a) and its Comment [2]; the second sentence of old Comment [14] duplicated matter in old Comment [17] (now renumbered [18]) to Model Rule 1.6; and the third sentence of old Comment [14] duplicated matter in Comment [3] to Model Rule 4.1. The last two sentences of former Comment [14] related to Model Rule 1.13, and became either superfluous or perhaps even misleading in light of the changes being made to Model Rule 1.13. The author is grateful to Professor Myles V. Lynk for first questioning the deletion of former Comment [14] and reviewing the basis of that deletion.

promulgating regulations under Section 307. While some elements of the Task Force's recommendations were established early in the process,<sup>28</sup> several of the most substantial elements did not come to rest until the Task Force issued its Final Report, and the most elusive element – defining the trigger for lawyer action under Model Rule 1.13 – was not resolved until the debate on the floor of the House of Delegates.

In its Preliminary Report, the Task Force advanced two principal views with respect to Model Rule 1.13. First, Model Rule 1.13 did not articulate with sufficient clarity the steps a lawyer should take upon encountering misconduct by a constituent of an organizational client.<sup>29</sup> Second, Model Rule 1.13's trigger – the lawyer's *knowledge* of such misconduct – was unduly restrictive and permitted lawyers to “turn[ ] a blind eye to the natural consequences of what they observe and claim[ ] that they did not ‘know’ that the corporate officers they were advising were engaged in misconduct.”<sup>30</sup>

#### 1. SPECIFICATION OF ACTIONS REQUIRED UNDER MODEL RULE 1.13

With regard to the first concern – the lack of clarity concerning the choice of remedial measures – the Task Force's Preliminary Report itself did not supply much in the way of specific clarification. In part this was due to the fact that the Task Force initially preferred not to draft specific Rule amendment proposals. The Task Force phrased its recommendations in considerable generality in deference to the long-standing and ongoing drafting role of the ABA's Standing Committee on Ethics and Professional Responsibility and in the belief that the Standing Committee would be the appropriate body to undertake specific implementation of the Task Force's more general recommendations.<sup>31</sup> At its most specific, the Task Force's Preliminary Report urged that Model Rule 1.13 be amended so as

to emphasize in the text of the Rule itself that the list of potential remedial measures need not be pursued in sequential order, and that in circumstances involving potentially serious misconduct with significant risk to the corpora-

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28. For instance, the Task Force consistently urged that the Comment to Model Rule 1.13 unduly discouraged lawyers from bringing constituent misconduct to the attention of higher organizational authorities. See Preliminary Report, *supra* note 11, at 203-04; Final Report, *supra* note 4, at 41-42 n.74. In particular, the statement in former Comment [3] requiring “clear justification” before seeking review by a higher organizational authority unduly deterred lawyers from taking useful steps to protect the interests of the organizational client, as distinct from the constituent with whom the lawyer may be dealing. See MODEL RULES Rule 1.13 cmt. 3 (2002). Similarly, concern about “disruption of the organization” appeared to outweigh countervailing but equally legitimate concern about harm to the organization that might arise from not reporting constituent misconduct to a higher organizational authority. *Id.* Rule 1.13 (2002).

29. Preliminary Report, *supra* note 11, at 204.

30. *Id.* at 208.

31. *Id.* at 203. In completing its Final Report, the Task Force did work closely with the Standing Committee, which was a co-sponsor of the Task Force's recommendations to the House of Delegates.



tion, an effort to seek reconsideration by a particular officer or employee that is unlikely to succeed should be bypassed in favor of referral to a higher authority in the corporation.<sup>32</sup>

After the Task Force issued its Preliminary Report, however, the enactment of Section 307 of the Sarbanes-Oxley Act of 2002 and the implementing regulations promulgated by the SEC supplied a great deal in the way of prescriptive clarity with respect to the “up the ladder” reporting obligations of lawyers for public companies.<sup>33</sup> Once triggered, the lawyer’s duty under the SEC’s rules require the lawyer to report directly and “forthwith” to either the corporation’s chief legal officer or its chief executive officer.<sup>34</sup> These rules thus do not explicitly afford the lawyer any substantial discretion or flexibility with respect to when or to whom specified misconduct is to be reported.

The Task Force rejected such inflexibility in Model Rule 1.13. Recognizing that the lawyer, upon discovering a violation of law by an organizational client’s constituent that is likely to result in substantial injury to the client, must take *some* action to protect the client, the Task Force concluded that the lawyer should nonetheless continue in such circumstances to exercise professional judgment as to the appropriate way to “proceed as is reasonably necessary in the best interest of the organization.”<sup>35</sup> In the interest of overcoming natural reluctance on the part of the lawyer to “go over the head” of the constituent with whom the lawyer may be dealing, however, the Task Force felt that Model Rule 1.13 should more actively encourage such reporting.<sup>36</sup> To that end, the Task Force recommended the creation of a presumption in Model Rule 1.13 itself, namely that reporting to higher authority within the organization is required *unless* “the lawyer reasonably

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32. *Id.* at 204.

33. Section 307 of the Sarbanes-Oxley Act provides that the Securities and Exchange Commission shall issue rules, in the public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers, including a rule –

(1) requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); and

(2) if the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors.

15 U.S.C. § 7245 (2003). On January 29, 2003, the SEC adopted regulations (“Part 205 Rules”) pursuant to Section 307. *See* SEC Standards of Professional Conduct for Attorneys Appearing and Practicing Before the Commission in the Representation of an Issuer, 17 C.F.R. § 205 (2003).

34. 17 C.F.R. § 205.3(b)(1).

35. MODEL RULES Rule 1.13(b) (2003); Final Report, *supra* note 4, at 44 n.78.

36. FINAL REPORT, *supra* note 4, at 43-44.

believes that it is not necessary in the best interest of the organization to do so.”<sup>37</sup> Thus, when the lawyer encounters illegal behavior by a constituent of an organizational client that is likely to cause substantial injury to the client, the lawyer must either report that behavior or achieve a reasonable belief that reporting such behavior to a higher authority within the organization is not necessary in the best interest of the organization. While this approach does not necessarily mandate reporting to the *highest* authority of the organization, it explicitly does require such reporting “if warranted by the circumstances.”<sup>38</sup> In all respects, the Task Force’s recommendations seek to reinforce the norm and perception that the lawyer is to represent the best interests of the organization, and not any particular officer, director, employee, or other constituent.<sup>39</sup>

## 2. DEFINING THE TRIGGER FOR REQUIRING ACTION UNDER MODEL RULE 1.13

The Task Force’s handling of its second principal concern about Model Rule 1.13 – the fact that the Rule only requires action when the lawyer “knows” of a violation of law threatening substantial harm to the organization – evolved even more substantially. Initially, the Task Force recommended in its Preliminary Report that this actual knowledge standard in existing Model Rule 1.13 should be replaced with a requirement that the lawyer take action when the lawyer “reasonably should know” of the specified misconduct.<sup>40</sup> The proffered justification for this change was that “while lawyers should not be subject to discipline for simple negligence, they should not be permitted to ignore the obvious.”<sup>41</sup>

This preliminary proposal, however, was the subject of some dissension even within the Task Force. As the Preliminary Report explained, “[s]ome members of the Task Force preferred limiting [the] expansion of Rule [ ]1.13 . . . to matters that should have been obvious to a lawyer of reasonable prudence and competence given the facts actually known to the lawyer.”<sup>42</sup> That expressed preference foreshadowed a deluge of criticism of the Task Force’s preliminary “reasonably should know” proposal.<sup>43</sup> Although this criticism took on a variety of forms, its general thrust was that the proposed standard would impose upon the lawyer an amorphous duty to investigate a client’s actions in circumstances in which the lawyer may not even be able to insist that the client pay for or even permit such investigation, and that any reporting obligation should arise only

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37. MODEL RULES Rule 1.13(b) (2003).

38. *Id.*

39. MODEL RULES Rule 1.13(a) (2003); Final Report, *supra* note 4, at 41, 44-45.

40. Preliminary Report, *supra* note 11, at 208, 214.

41. *Id.* at 208.

42. *Id.*

43. Final Report, *supra* note 4, at 42-43.

from facts actually known to the lawyer.<sup>44</sup>

In its proposed rules under Section 307, the SEC entered the debate with a proposal resembling the Task Force's suggestion. As originally proposed, SEC Rule 205.2(e) would have defined "evidence of a material violation" (requiring reporting by the attorney) as "information that would lead an attorney reasonably to believe that a material violation has occurred, is occurring, or is about to occur."<sup>45</sup> In the face of criticism similar to that directed to the Task Force's preliminary proposal to amend Model Rule 1.13, however, the SEC's final rule more closely resembled the alternative approach suggested in the Task Force's Preliminary Report: specifically, the final Part 205 Rules require up the ladder reporting only on the basis of "credible evidence, based upon which it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that it is reasonably likely that a material violation has occurred, is ongoing, or is about to occur."<sup>46</sup> In presenting this formulation, the SEC essentially rejected the "reasonably should know" standard for requiring reporting, explaining that an attorney would not be found derelict for having failed in retrospect to draw an inference of reportable misconduct.<sup>47</sup>

Echoing the evolution of the SEC's position on the trigger for reporting up the ladder, the Task Force's Final Report proposed an amendment to Model Rule 1.13(b) that would have triggered reporting only on the basis of facts known to the lawyer, and only where "a reasonable lawyer, under the circumstances, would conclude" that the specified constituent misconduct is present.<sup>48</sup> The proposed Comment associated with this amendment explained that conduct within a "range" would satisfy the lawyer's duties under the rule – suggesting, in essence, that action would not be required simply because *some* reasonable lawyer would have found a duty to act, and that no such duty would arise if a reasonable lawyer could have concluded that no action was required.<sup>49</sup> Even this formulation, however, elicited expressions of concern from many lawyers that the "reasonable lawyer" standard would create undue risks of civil liability for lawyers on the basis of hindsight judgments that they had a duty to take action under Model Rule

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44. *Id.* The most forceful and persuasive articulation of this criticism was the written testimony of Prof. Thomas D. Morgan to the Task Force. See Written Testimony of Prof. Thomas Morgan before the ABA Task Force on Corporate Responsibility, 16-18 (Sept. 20, 2002), available at [http://www.abanet.org/buslaw/corporateresponsibility/hearings02/20020920/morgan\\_testimony.pdf](http://www.abanet.org/buslaw/corporateresponsibility/hearings02/20020920/morgan_testimony.pdf).

45. See SEC Proposed Rule, *supra* note 13; see also Carlton E-Mail, *supra* note 17.

46. SEC Standards of Professional Conduct for Attorneys Appearing and Practicing Before the Commission, 17 C.F.R. § 205.2(e) (2003).

47. Final Rule: Implementation of Standards of Professional Conduct for Attorneys, Exchange Act Release Nos. 33-8185, 34-47276, 17 C.F.R. § 205 (Jan. 29, 2003) ("Nor is the rule's reporting obligation triggered by 'a combination of circumstances from which the attorney, in retrospect, should have drawn an inference,' as one commenter feared."), available at <http://www.sec.gov/rules/final/33-8185.htm>.

48. Final Report, *supra* note 4, at 42-44.

49. MODEL RULES Proposed Rule 1.13 cmt. 3 (2003), available at <http://www.abanet.org/leadership/2003/summary/119b.pdf>.

1.13(b).<sup>50</sup>

In a compromise concluded in the debate on the floor of the ABA House of Delegates on August 12, 2003, the Task Force withdrew its trigger proposal, and consented to an amendment to its resolution on Model Rule 1.13 that left the Rule's existing trigger – the actual knowledge standard – in place.<sup>51</sup> From the standpoint of advocates of reforms to Model Rules 1.6 and 1.13, this withdrawal was a small (or perhaps null) price to pay for eliciting support on what turned out to be close votes on the proposed rule changes. In the face of known facts demonstrating to any reasonable lawyer in the same circumstances that a client constituent is violating the law in a way that is likely to result in substantial injury to the client, it is likely to be a rare lawyer who will be able to say that he nonetheless did not “know” of such misconduct – especially since knowledge can be inferred from circumstances,<sup>52</sup> and the lawyer may not “ignore the obvious.”<sup>53</sup> In any event, the lawyer is required by Model Rule 1.3 to “act with reasonable diligence and promptness in representing [the] client,”<sup>54</sup> and it is surely at least arguable that this duty requires the lawyer for the organizational client to take reasonable steps to prevent harm to the client when any reasonable lawyer would be aware that a constituent's misconduct threatens the client with substantial harm.<sup>55</sup>

## 3. DISCLOSING CLIENT INFORMATION UNDER MODEL RULE 1.13(C) AND (D)

In the public hearings that followed the release of its Preliminary Report, Professor Stephen Gillers called to the attention of the Task Force that its proposed amendments to Model Rules 1.6 and 1.13 failed to address a significant gap in the coverage of the *Model Rules*: namely, the situation in which an organizational client's highest authority, due to conflict of interest or some other factor disabling it from acting in the best interests of the organization, has resolved to persist in a violation of law that is reasonably certain to result in substantial injury to the client.<sup>56</sup> Under the prior version of Model Rule 1.13, the most that the lawyer in such circumstances could do was withdraw under Model Rule 1.16 – with no apparent effective way to protect the client from misconduct by its own constituents. The authorization of permissive disclosure in the Task

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50. See, e.g., Fox, *supra* note 5, at 13-15.

51. See 2003 Annual Meeting, *supra* note 5, Attach. at 5.

52. MODEL RULES Rule 1.0(f) (2002) (while the term “knows” “denotes actual knowledge of the fact in question[, a] person's knowledge may be inferred from circumstances.”).

53. MODEL RULES Rule 1.13 cmt. 3 (2003).

54. MODEL RULES Rule 1.3 (2003).

55. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 67 cmt. e (2000); GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 4.8 (3d ed. Supp. 2003).

56. Written Testimony of Prof. Stephen Gillers before the ABA Task Force on Corporate Responsibility (Oct. 25, 2002), available at [http://www.abanet.org/buslaw/corporateresponsibility/hearings02/20021025/gillers\\_testimony.pdf](http://www.abanet.org/buslaw/corporateresponsibility/hearings02/20021025/gillers_testimony.pdf).

Force's proposals to amend Model Rule 1.6 would not necessarily even apply, unless the situation happened to be one in which the lawyer's services were used or being used in furtherance of the violation of law.

The solution embraced by the Task Force and reflected in new Model Rule 1.13(c) is a provision, independent of Model Rule 1.6(b), allowing for disclosure of client information if the organization's highest authority insists on or fails to address a violation of law by the organization, and the lawyer reasonably believes that disclosure to a third party is necessary to prevent substantial injury to the organization.<sup>57</sup> The violation of law must be "clear," and the threatened injury to the organization must be "reasonably certain."<sup>58</sup> The Task Force's Final Report, moreover, reflected the limited context in which the authorization to disclose the organizational client's information should apply. The Final Report emphasized the importance of such authorization in the situation in which the organizational client's highest authority is disabled, due, for instance, to conflict of interest on the part of its members.<sup>59</sup> Indeed, it seems highly unlikely as a practical matter, if not inappropriate, that in the absence of such disqualification or disability, a lawyer for an organization would find it necessary to reveal client information to a third party where the organization's highest authority has, in good faith and in a disinterested fashion, rejected the lawyer's view that an organizational constituent is violating the law in a manner that is reasonably likely to result in substantial injury to the organization.

Nevertheless, the Task Force felt it appropriate to limit even further this authority to disclose the organizational client's information to third parties. New Model Rule 1.13(d) would deny such authority to lawyers for whom the organizational client's confidentiality is most important; namely, lawyers whom the organization engages to investigate a potential violation of law (who particularly depend on frank communication from client constituents in order to protect the interests of the organization and help promote legal compliance), and lawyers retained to defend the organization or a constituent against claims of violating the law (where an effective defense likewise depends on assurances of confidentiality for the constituents who communicate with the lawyers).<sup>60</sup>

#### 4. ALERTING THE ORGANIZATION'S HIGHEST AUTHORITY TO WITHDRAWALS OR DISCHARGES PREMISED ON UP-THE-LADDER REPORTING

The Task Force's recommended amendments to Model Rule 1.13 in its Final

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57. MODEL RULES Rule 1.13(c) (2003).

58. *Id.*

59. Final Report, *supra* note 4, at 58. The Final Report draws an analogy to Model Rule 1.14, dealing with clients who are natural persons suffering from diminished capacity, and authorizing their lawyers to disclose client information, notwithstanding Model Rule 1.6(a), "to the extent reasonably necessary to protect the client's interests." *Id.* at 58 n.100 (quoting MODEL RULES Rule 1.14(c) (2002)).

60. *Id.* at 59. As the Final Report notes, the SEC's Part 205 Rules similarly limit the application of its "up the ladder" reporting requirements. *See also* 17 C.F.R. § 205.3(b)(6), (7).

Report included one further element, one that tracked a comparable aspect of the SEC's Part 205 Rules:<sup>61</sup> specifically, a requirement (in Model Rule 1.13(e)) that a lawyer take steps to assure that an organizational client's highest authority is informed of the lawyer's withdrawal or discharge in circumstances in which Model Rule 1.13(b) or (c) requires or permits the lawyer to report to higher authority or to third parties.<sup>62</sup> The Task Force believed that withdrawal or discharge in such circumstances would most likely reflect a serious issue of organizational policy, one that should be made known to the organization's highest authority so that it could address any possibility that a constituent (such as a senior corporate officer) might be obstructing efforts to stop conduct threatening substantial harm to the organization.<sup>63</sup>

### III. THE PRINCIPAL OBJECTIONS TO THE TASK FORCE PROPOSALS

The history of debate within the ABA on the subject of disclosure of client information to third parties has been long and frequently acrimonious.<sup>64</sup> It was therefore quite predictable that the Task Force's proposals to amend the *Model Rules* elicited highly charged criticism. In the public hearings convened by the Task Force in late 2002, most of that criticism was directed at the preliminary proposals to require (rather than merely permit) disclosure of client information to third parties in certain circumstances, and to require lawyers for an organizational client to report constituent misconduct to higher authority when the lawyer "reasonably should know" of such misconduct.<sup>65</sup> Even after those more aggressive proposals were withdrawn in the Task Force's Final Report, however, there remained vociferous objections to the remaining proposals to amend Model Rules 1.6 and 1.13. Lawrence Fox, widely recognized as the

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61. 17 C.F.R. § 205.3(b)(10).

An attorney formerly employed or retained by an issuer who has reported evidence of a material violation under this part and reasonably believes that he or she has been discharged for so doing may notify the issuer's board of directors or any committee thereof that he or she believes that he or she has been discharged for reporting evidence of a material violation under this section.

*Id.*

62. Final Report, *supra* note 4, at 45-46.

63. Cf. SEC Proposed Rule, *supra* note 13 (describing comparable Rule 205.3(b)(10) as "an important corollary to the up-the-ladder reporting requirement, [ ] designed to ensure that a chief legal officer (or the equivalent thereof) is not permitted to block a report to the issuer's board or other committee by discharging a reporting attorney").

64. See, e.g., RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 67, Reporter's Note to cmt. b (2000) ("the subject [of disclosure of confidential client information] was the chief disputed issue in considering adoption of the proposed ABA *Model Rules of Professional Conduct*"); Harry I. Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 IOWA L. REV. 1091, 1095 (1985) ("One question has . . . plainly provoked the most attention and controversy: how should the lawyer's obligation of loyalty to the client be balanced against the need to protect individuals and society from a client's unlawful conduct"?).

65. See *supra* text accompanying notes 14-18, 40-44.

leading critic of the Task Force's *Model Rule* proposals, went so far as to characterize them as "deeply flawed responses that are totally unwarranted either as a factual or a public policy matter, proposals that will destroy the very core values [of the legal profession]." <sup>66</sup>

The principal concerns invoked by the opponents of the Task Force's recommendations are summarized below, along with brief responses explaining why the Task Force believed that its recommendations, now adopted as ABA policy, will strengthen, not destroy, the "core values" of the legal profession.

A. "NEW RULES 1.6 AND 1.13 GUT THE TRADITIONAL SCOPE OF THE ATTORNEY-CLIENT PRIVILEGE"

In a statement that will never be faulted as mild, Larry Fox asserted that the Task Force's proposals "would systematically change lawyers from trusted counselors to flat-footed detectives turning their keys in various watchguard stations spotted strategically throughout their corporate clients." <sup>67</sup> Somewhat less colorfully, the American College of Trial Lawyers has asserted that the 2003 amendments to Model Rule 1.6 would "destroy[ ] the trust, loyalty, and confidentiality that our legal system requires and assumes," and strip away "the most basic protections of the attorney-client privilege." <sup>68</sup>

These assertions, however, did not impress the Task Force as correct, either historically or empirically. As an historical matter, they overlook decades of actual positions and practices within the profession. As noted elsewhere, <sup>69</sup> the *Model Rules* have never rigidly required lawyers to maintain the confidentiality of their clients' information. No client reasonably informed of the lawyer's obligations could rationally believe that the confidence of the attorney-client relationship was inviolate. Even with regard to disclosure of client information to prevent or rectify the effects of client crime or fraud, there has hardly been a monolithic insistence by the ABA, let alone the states' own professional disciplinary rulemakers, that such disclosure is unethical.

In 1928, when the ABA first adopted a formal declaration of the lawyer's duty to preserve client confidences in its *Canons of Professional Ethics* ("Canons"), <sup>70</sup> its declaration included the position that "[t]he announced intention of a client to commit a crime is not included within the confidences which he is bound to

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66. Fox, *supra* note 5, at 2.

67. *Id.* at 4. The tone of this description of Mr. Fox's statement should not be interpreted as sarcastic: one can assert that his position on Model Rule 1.6 has been wrong or even unduly bombastic, but one cannot deny the quality and professional integrity of the extraordinary efforts he has made in support of his position.

68. AM. COLL. OF TRIAL LAWYERS, REPORT OF THE LEGAL ETHICS COMMITTEE ON DUTIES OF CONFIDENTIALITY 23 (Mar. 2001), available at [http://www.actl.com/PDFs/DutiesOfConfidentiality\\_2.pdf](http://www.actl.com/PDFs/DutiesOfConfidentiality_2.pdf).

69. See *infra* text accompanying note 79.

70. CANONS OF PROFESSIONAL ETHICS Canon 37 (1928) [hereinafter CANONS]. For a thorough description of the development of the ABA's positions in this field through 1983, see Subin, *supra* note 64, at 1145-59.

respect. He may properly make such disclosures as may be necessary to prevent the act or protect those against whom it is threatened.” Another Canon, also adopted in 1928, declared further that

[w]hen a lawyer discovers that some fraud or deception has been practiced, which has unjustly imposed upon the court or a party, he should endeavor to rectify it; at first by advising his client, and if his client refuses to forego the advantage thus unjustly gained, he should promptly inform the injured person or his counsel, so that they may take appropriate steps.<sup>71</sup>

These rules obviously substantially limited the lawyer’s duty of confidentiality and permitted a broad range of disclosure of client information to prevent or rectify client fraud. These *Canons* remained ABA policy until 1969, when they were replaced by the *Model Code of Professional Responsibility* (“*Model Code*”). The *Model Code* continued the thrust of the *Canons’* limits on the duty of confidentiality. Model Code DR 4-101(C)(3) permitted the lawyer to reveal “[t]he intention of his client to commit a crime and the information necessary to prevent the crime”; and Model Code DR 7-102(B)(1), as originally adopted, required the lawyer, if unsuccessful in an appeal to the client, to “reveal the [client’s] fraud to the affected person or tribunal.”<sup>72</sup> It was only in 1983 – fifty-five years after the adoption of the pertinent *Canons* – that the ABA House of Delegates came to embrace the restrictive version of Model Rule 1.6 that prevailed as ABA policy until 2003. In short, the argument that the Ethics 2000 and Task Force proposals to amend Model Rule 1.6 would eviscerate the core values of the legal profession was impossible to square with long-standing positions of the ABA itself.

Perhaps more importantly, the argument that the proposals would destroy the attorney-client privilege and the relation of trust between attorney and client was difficult to accept in light of the resounding refusal of the states to adopt the ABA’s 1983 version of Model Rule 1.6. That response was a strong vote of no confidence. Many states that had adopted the language of Model Code DR 4-101(C)(2) simply left that language in place, at least tacitly rejecting Model Rule 1.6.<sup>73</sup> The Task Force’s Final Report recites that

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71. CANONS Canon 41 (1928).

72. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Codes DR 4-101(C)(3) & DR 7-102(B)(1) (1969). In 1974 Model Code DR 7-102(B)(1) was amended to clarify that it did not require disclosure of information “protected as a privileged communication.” Subin, *supra* note 64 at 1149 n.295.

73. See, e.g., ARIZONA RULES OF PROFESSIONAL CONDUCT Rule 1.6 (2002); COLORADO RULES OF PROFESSIONAL CONDUCT Rule 1.6 (2002); IOWA CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (2002); MAINE BAR RULES Rule 3.6 (2002); MICHIGAN RULES OF PROFESSIONAL CONDUCT Rule 1.6 (2002); MINNESOTA RULES OF PROFESSIONAL CONDUCT Rule 1.6 (2001); NEBRASKA CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (2002); NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (2002); NORTH CAROLINA RULES OF PROFESSIONAL CONDUCT Rule 1.6 (2002); OHIO CODE OF RESPONSIBILITY DR 4-101 (2002); OKLAHOMA RULES OF PROFESSIONAL CONDUCT Rule 1.6 (2002); OREGON CODE OF RESPONSIBILITY DR 4-101 (2002); VIRGINIA RULES OF PROFESSIONAL CONDUCT Rule 1.6 (2002).



the lawyer disciplinary rules of forty-one states permit a lawyer to disclose client information in order to prevent a client from perpetrating a fraud that constitutes a crime, and eighteen states permit such disclosure to rectify substantial loss resulting from client crime or fraud in which the client used the lawyer's services.<sup>74</sup>

Despite this rather substantial refusal by the states to follow the ABA's 1983 decision, the Task Force was unable to discern any evidence that in the majority of states where the older and more permissive confidentiality rules prevailed, the quality of lawyering and the lawyer-client relationship had been suffering from lack of candor or client reticence, relative to the experience in the small minority of states that adopted a more restrictive approach like the one reflected in the 1983 version of Model Rule 1.6.<sup>75</sup> Indeed, in the debate on the Task Force recommendations, the American Corporate Counsel Association ("ACCA") asserted that the experience of its members in the states with relatively permissive disclosure rules indicated that adopting the Task Force's proposed amendments to Model Rule 1.6 would "do no damage to the preservation of an appropriate and trusting relationship between a lawyer and her client . . . ."<sup>76</sup>

#### B. "NEW RULES 1.6 AND 1.13 WILL DRAMATICALLY EXPAND LAWYER LIABILITY"

The next concern raised by opponents of the Task Force's recommendations was the fear that, once *permitted* to disclose client information to prevent crime or fraud, lawyers would be exposed to civil liability if they *failed* to make such disclosure and the crime or fraud ultimately injured third parties.<sup>77</sup> The experience under ethics rules at least as permissive as those proposed by the Task Force, however, also undercuts the validity of this concern. Despite the breadth of such permission existing for many years under the rules of a large majority of states, no case was cited in the debates on the proposed amendments to Model Rule 1.6 in which a lawyer was found liable for having failed to make a permitted disclosure. Even those who have advocated such liability acknowledge that they seek a change in the law.<sup>78</sup> Contrary to the liability concern expressed in opposition to the 2003 amendments to Model Rule 1.6, the most pertinent

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74. Final Report, *supra* note 4, at 49. After the Final Report was published, the ethics rules of yet another state (Delaware) were amended to conform to the Ethics 2000/Task Force approach. DELAWARE RULES OF PROFESSIONAL CONDUCT Rule 1.6 (2003), available at <http://courts.state.de.us/supreme/>.

75. See Subin, *supra* note 64, at 1163-66.

76. Memorandum from the American Corporate Counsel Association, to the American Bar Association Task Force on Corporate Responsibility (July 29, 2003) (on file with author) [hereinafter Memo from the ACCA].

77. Fox, *supra* note 5, at 14. This concern also came up in discussions with various members of the House of Delegates leading up to the vote on the Task Force recommendations.

78. E.g., Joshua James Sears, Comment, *Blood on Our Hands: The Failure of Rule 1.6 to Protect Third Parties from Violent Clients, and the Movement Toward a Common-Law Solution*, 39 IDAHO L. REV. 451, 465-76 (2003); Davalene Cooper, *The Ethical Rules Lack Ethics: Tort Liability When a Lawyer Fails to Warn a*

precedent suggests the absence of any legal duty on the part of the lawyer to warn third parties of client crime or fraud.<sup>79</sup> In any event, if the law were otherwise, and a lawyer had some legal duty to disclose client information to prevent accomplishment of a crime or fraud, it would seem at least arguable that the *Model Rules* (specifically Rule 1.6(b)(6), formerly (b)(4)) would already have permitted disclosure by the lawyer, in order to “comply with other law.”<sup>80</sup>

Finally, one consideration of lawyer self-interest actually (and appropriately) favored the proposed amendments to Model Rule 1.6. A lawyer whose services are being or have been used to further a crime or fraud is inevitably a potential target for liability, along with the client, for having assisted in the misconduct. Where the client refuses to cease or cure the wrongful conduct, a lawyer committed by rule to confidentiality may be helpless (“noisy withdrawal” aside) to prevent or mitigate damages for which the lawyer herself may be held accountable. The ability to disclose client information to third parties in order to prevent or rectify injury due to client crime or fraud dependent on the use of the lawyer’s services may be particularly valuable to the lawyer, rather than harmful, because it may be the only effective way for the lawyer to achieve such prevention or mitigation of damages.<sup>81</sup>

#### C. “LAWYERS WILL HAVE TO GIVE THEIR CLIENTS ‘MIRANDA WARNINGS’ ”

In a July 8, 2003 letter to members of the ABA House of Delegates, the President of the American College of Trial Lawyers, urging rejection of the Task Force proposals to amend the *Model Rules*, cautioned that if such proposals were adopted, “lawyers would have to consider giving Miranda-like warnings to clients at the beginning of consultations.”<sup>82</sup> The implication, according to the letter, was that the proposals “would change the lawyer overnight from trusted advisor to potential adversary . . . .”<sup>83</sup>

At one level, this criticism implicates some serious questions: when must

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*Third Party of a Client’s Threat to Cause Serious Physical Harm or Death*, 36 IDAHO L. REV. 479, 480-82 (2000).

79. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 67 cmt. k (2000) (citing *Fahnestock & Co. v. Castelazo*, 741 F. Supp. 72, 76 (S.D.N.Y. 1990); *L & H Airco, Inc. v. Rapistan Corp.*, 446 N.W.2d 372, 380 (Minn. 1989)).

80. MODEL RULES Rule 1.6(b)(6) (2003).

81. HAZARD & HODES, *supra* note 55, §§ 9.23, 9.27. The authors suggest that permitting such disclosure of client information in order to prevent or rectify injury due to client crime or fraud might have been the result even without the 2003 amendments to Model Rule 1.6, on the theory that such disclosure is preemptively necessary, under former Model Rule 1.6(b)(3), “to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved . . . .” *Id.* § 9.27 (quoting MODEL RULES Rule 1.6(b)(3) (2002) (Renumbered as 1.6(b)(5) in the 2003 version).

82. Letter from Warren B. Lightfoot, President, American College of Trial Lawyers, to ABA Delegates (July 8, 2003) (on file with author).

83. *Id.*

lawyers inform their clients of the possibility that the clients' information may be disclosed to third parties, and to what extent do lawyers actually fulfill such obligations?<sup>84</sup> These are questions that deserve further consideration. As criticism of the Task Force's proposals, however, these questions are essentially irrelevant. Rules of legal ethics – including the ABA *Model Rules* prior to their 2003 amendments, and even California's relatively strict confidentiality statute – have always prescribed a variety of circumstances in which the lawyer could, or even would be required to, disclose the client's information to third parties.<sup>85</sup> The Task Force proposals to amend Model Rules 1.6 and 1.13 merely add some additional possibilities, and therefore add at most marginally to the content of any "Miranda warning" that a lawyer should give in relation to the possibility of disclosing client information, either at the outset or during the course of the representation.

D. "THE TEXAS ETHICS RULES WERE PERMISSIVE, SO NEW RULES 1.6 AND 1.13 WON'T STOP FUTURE ENRONS"

The premise of this argument was that much of the alleged lawyer misconduct associated with Enron<sup>86</sup> was by Texas lawyers, subject to Texas ethics rules that already permitted disclosure of client information to prevent client crime or fraud.<sup>87</sup> Indeed, the Texas rules were in several material respects considerably more permissive than new Model Rule 1.6.<sup>88</sup> Therefore, the argument concluded, the Task Force had failed to make out a case establishing that its recommended revisions to the *Model Rules* would do anything to prevent the corporate

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84. See Lee A. Pizzimenti, *The Lawyer's Duty to Warn Clients About the Limits on Confidentiality*, 39 CATH. U. L. REV. 441 (1990); Fred Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 382-83 (1989) (noting that 22.6% of lawyers surveyed "almost never" inform their clients about limitations on confidentiality).

85. Final Report, *supra* note 4, at 48-49 (citing MODEL RULES Rule 4.1(b) (2002), MODEL RULES Rule 4.1 cmt. 3 (2002) (disaffirmance of opinion or document to avoid continued assistance to client crime or fraud), MODEL RULES Rule 3.3(b) (2002), MODEL RULES Rule 3.3 cmts. 10-11 (2002) (requiring disclosure of perjured testimony), MODEL RULES Rule 1.6(b)(5) (2003) (formerly 1.6(b)(3)) (disclosure to establish claim or defense against client)); see also Mark L. Tuft, *For Your Eyes Only*, L.A. LAW. DEC. 2002, at 26, 27-28 (stating that "the duty of confidentiality in California is often erroneously characterized as absolute," and noting exceptions recognized by case law and ethics opinions).

86. See, e.g., *In re Enron Corp. Securities*, 235 F. Supp. 2d 549 (S.D. Tex. 2002).

87. TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT Rule 1.05(c)(7) (1995) [hereinafter TEXAS RULES] ("A lawyer may reveal confidential information . . . [w]hen the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act.").

88. *Id.* Unlike newly amended Model Rule 1.6(b), Texas's Rule 1.05(c)(7) permits disclosure of client information regardless of (i) the nature or impact of the client crime or fraud, or (ii) whether the lawyer's services were used or are being used in the crime or fraud. In contrast, new Model Rule 1.6(b) permits disclosure only if (i) injury due to client crime or fraud is "substantial," (ii) such injury is "reasonably certain to result," and (iii) the lawyer's services have been or are being used in furtherance of the crime or fraud. In a more subtle liberality, the Texas rule permits disclosure if the lawyer simply "has reason to believe" in the necessity of disclosure to prevent client crime or fraud, while the Model Rule continues to require, as a prerequisite to permissive disclosure, and somewhat more demanding, that the lawyer "reasonably believe[ ]" such disclosure to be necessary. Compare TEXAS RULES Rule 1.05(c)(7) with MODEL RULES Rule 1.6 (2003).

misconduct that the Task Force was assigned to address.<sup>89</sup>

In a limited way, this argument was quite cogent: the Task Force did not and could not credibly maintain that revising Model Rule 1.6 would single-handedly nip all future corporate fraud in the bud. Any such assertion would have been particularly absurd given that the *Model Rules* have no formal legal effect, and that most state ethics rules already provide lawyers leeway in disclosing client information greater in some respects than new Model Rule 1.6.<sup>90</sup> Clearly, empirical evidence that client crime or fraud correlated positively with severe restrictions on lawyer disclosure of client information would have made a much better case for revision of Model Rule 1.6.

To have insisted upon such proof as a condition to such a revision, however, would have been unreasonably unrealistic. Corporate governance, let alone client behavior in general, is a complex web of overlapping motivations and constraints. A state ethics rule like that of Texas which permits lawyers to disclose client information to third parties to prevent criminal fraud, may exist in a system which otherwise discourages lawyers from making such disclosure due, for example, to a lack of lawyer independence from corporate management. At a minimum, however, if such disclosure would ever be beneficial – and certainly Enron and WorldCom seem like situations in which it might have been helpful – it is surely *unhelpful* to have a prevailing model ethics rule that flatly prohibits it. While there can be no certainty that changing the prevailing ethics rule to permit such disclosure will head off any client crime or fraud, it is almost certain that a rule prohibiting such disclosure will foreclose any such potentially beneficial result.

#### IV. THE RELATION BETWEEN THE NEW ETHICS RULES AND CORPORATE GOVERNANCE REFORM

The adoption of the 2003 amendments to Model Rules 1.6 and 1.13 has been widely, although not universally, praised as a positive step in professional self-regulation.<sup>91</sup> In a

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89. Two Wrongs Still Do Not Make a Right: Comment on Amendments to the *Model Rules* Proposed in the Final Report of the American Bar Association Task Force on Corporate Responsibility (Aug. 2, 2003), at 3-4 (monograph distributed to members of the ABA House of Delegates, on file with author).

90. Thus, for example, the many state rules that still follow the relevant *Model Code* provision (DR 4-101(C)(3)) permit disclosure to prevent *any* client crime regardless of whether the lawyer's services have been or are being used in furtherance of the crime, and regardless of the extent or nature of any injury threatened by such crime. On the other hand, relatively few states' rules have thus far permitted disclosure of client information to prevent non-criminal fraud (likely to be a rare species, to be sure), or to mitigate or rectify the consequences of a completed client crime or fraud.

91. Editorial, *The Right Verdicts at the ABA*, WASH. TIMES, Aug. 13, 2003, at A16; Editorial, *Corporate Scandals and the ABA*, N.Y. TIMES, Aug. 11, 2003, at A14. Cf. Editorial, *Hold Lawyers Accountable in Corporate Fraud Scandals*, USA TODAY, Aug. 15, 2003, at 11A (urging that the Task Force proposals were not stringent enough).

number of ways, however, these amendments, *standing alone*, are ineffectual and incomplete:

- Most obviously, the 2003 amendments affect *model* rules, not rules enforceable by disciplinary authorities or otherwise. The amendments will only have formal consequences if and to the extent that they are adopted by the states. Moreover, and particularly with regard to rules governing confidentiality of client information, many states already have rules that permit disclosure in circumstances that the 2003 amendments to Rule 1.6 address, so the amendments to Model Rule 1.6 will not likely have a major formal impact.
- Disclosure of client crime or fraud to third parties, even where now permitted under Model Rules 1.6 and 1.13, is still permissive only, not required.<sup>92</sup> Whether the new authority to disclose client information will help deter client crime or fraud will depend entirely on how lawyers use that new authority.<sup>93</sup>
- Nothing in the recent amendments to Model Rules 1.6 and 1.13 will guarantee that a lawyer confronted by incomplete evidence of client misconduct will recognize that a crime or fraud is under way and take steps to prevent it. Lawyers whose representation exposes them only to limited aspects of the client's affairs will inherently be limited in their ability to use the recent rule amendments, or even to recognize that they might apply.
- Even as amended, Model Rule 1.13 is not, as the Task Force explained, "a guide to 'best legal practices.'" <sup>94</sup> Except for its insistent focus on the principle that the organization – rather than its constituents – is the client,

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92. Some have suggested that Model Rule 4.1(b), coupled with new Model Rule 1.6(b), will now require – and not just permit – lawyers to disclose client information. *E.g.*, Jolyn M. Pope, *Transactional Attorneys – The Forgotten Actors in Rule 1.6 Disclosure Dramas: Financial Crime and Fraud Mandate Permissive Disclosure of Confidential Information*, 69 TENN. L. REV. 145, 170 (2001). Whatever else might be said about this assertion, however, it is quite certain that the Task Force, in recommending changes to Model Rule 1.6(b), had no intention or expectation that it was recommending a mandatory disclosure obligation. To the contrary, the history of the Task Force's treatment of the subject reflects a deliberate determination *not* to impose a requirement of mandatory disclosure. Nor should such a requirement be understood to have been inadvertently allowed to sneak in some back door opened by the 2003 amendments to Model Rule 1.6(b). Model Rule 4.1(b)'s disclosure mandate only applies to lawyer conduct "in the course of representing a client" – *i.e.*, before representation has ceased. Thus, Comment [3] to Model Rule 4.1(b) points out that "[o]rdinarily, a lawyer can avoid assisting a client's crime or fraud" – and thus avoid the Rule's disclosure obligation – "by withdrawing from the representation." MODEL RULES Rule 4.1 cmt. 3 (2002). "Ordinarily," therefore, a lawyer could avoid any disclosure obligation under Model Rule 4.1(b) by withdrawing or, in rarer cases, taking steps "to disaffirm an opinion, document, affirmation or the like" where withdrawal is insufficient to avoid assisting in the client's crime or fraud. *Id.* Finally, even if withdrawal or disaffirmance were not enough to avoid assisting in client crime or fraud and the concomitant disclosure mandate of Model Rule 4.1(b), former Model Rule 1.6(b)(4) (now (b)(6)) would itself permit the lawyer to disclose client information in order to avoid violating the law. *See* MODEL RULES Rule 1.6 cmt. 12 (2003) (formerly cmt. 10).

93. *See* Sears, *supra* note 78, at 462-65 (citing Leslie C. Levin, *Testing the Radical Experiment: A Study of Lawyer Response to Clients Who Intend to Harm Others*, 47 RUTGERS L. REV. 81 (1994)).

94. Final Report, *supra* note 4, at 44.

Model Rule 1.13 only addresses relatively extraordinary exigent circumstances; as the Task Force explained, Model Rule 1.13 “does not limit the responsibility of the lawyer to act always in the best interest of the organization, and it certainly permits the lawyer to bring to the attention of the client, including its highest authority, matters not covered by the Rule, but which the lawyer reasonably believes to be of sufficient importance that the client needs to be informed of them.”<sup>95</sup> Thus, new Model Rule 1.13 will only directly encourage effective representation of the organizational client at extreme margins of constituent misconduct.

Fortunately, the Task Force’s recommended changes to Model Rules 1.6 and 1.13 were not submitted in a vacuum; they were recommended only as a supplement, or backstop, to corporate compliance initiatives designed to permit both internal and outside counsel to “more readily and effectively convey to appropriate organizational authorities information and analysis concerning issues of legal compliance.”<sup>96</sup>

The treatment of reporting violations of law to higher corporate authority illustrates this point well. As previously discussed, even amended Model Rule 1.13(b) will apply only in relatively extreme cases. Of far greater practical importance, then, is the establishment of mechanisms that will more generally and effectively promote communication of legal compliance concerns to the senior officers or the members of the board of directors who are in a position to deal effectively with such concerns in the interest of the client/corporation.

Thus, the Task Force recommended the creation of channels of communication from general counsel to independent directors, and from outside counsel to general counsel, that are designed to make “up the ladder” communication of legal compliance concerns comfortable and routine, rather than a confrontational challenge to executives’ managerial authority.<sup>97</sup> For example, the Task Force recommended that the corporation’s general counsel should, “as a matter of routine,” meet periodically with a committee of directors independent of senior corporate management, and that the directors should instruct general counsel to use those meetings as the occasion to report on substantial legal compliance concerns.<sup>98</sup> Regularizing this practice, the Task Force explained, “would to some extent insulate such communications from being perceived by senior executive

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95. *Id.* at 44-45.

96. *Id.* at 35.

97. *Id.* at 36-40; see also Jill E. Fisch & Kenneth M. Rosen, *Is There a Role for Lawyers in Preventing Future Enrons?* 48 VILL. L. REV. 1097, 1136 (2003). Fisch and Rosen write,

Structures in which lawyers regularly report directly to the board or a key corporate official allow lawyers to bypass managers without creating the risk of retaliation that might result from sporadic reporting up. Moreover, reporting structures signal to outside lawyers the corporation’s receptiveness to such information and reduce the perceived risk of client displeasure.

*Id.*

98. Final Report, *supra* note 4, at 37-38.

officers as disruptive,” and might even “persuade the CEO to take corrective action or personally report such issues directly to the committee.”<sup>99</sup>

Similarly, outside counsel may be discouraged from reporting legal compliance concerns to the superiors of the operational personnel with whom they deal directly. Therefore, it may facilitate such communication if the general counsel were routinely to instruct outside counsel that they are expected to inform the general counsel of situations in which an officer or employee is violating the law or breaching a fiduciary duty to the organization.<sup>100</sup> Such communication would direct information about legal compliance concerns to the person (general counsel) most likely to be best able to investigate and evaluate the matter.<sup>101</sup>

All of this is not to say that the 2003 amendments to Model Rules 1.6 and 1.13 lack practical consequence. They do have a practical significance that may help explain what would otherwise appear to be a paradoxical aspect of the intense debate surrounding their adoption. That apparent paradox is this: on one hand, since these amendments only address model rules, and since most states already permitted disclosure of client information in circumstances addressed by the 2003 amendments to Model Rule 1.6, one could argue that these amendments will do little more than conform the *Model Rules* to pre-existing practice, and will therefore do nothing to change behavior. On the other hand, if this were the only result of the amendments, why did advocates on both sides of the debate labor so hard over a matter with such little apparent practical significance?

The answer to this apparent paradox is that the *Model Rules* surely have a symbolic importance and salience to practicing lawyers that may even exceed that of formally applicable ethics rules of individual states. The post-Enron controversy over Model Rule 1.6 may not have directly addressed the formally applicable body of professional ethics rules, but the participants undoubtedly considered the controversy as one fought over the spirit of the profession. At a time when business lawyers, at least, appear to be paying more attention than ever before to the ethical responsibilities that govern their practice,<sup>102</sup> the highly visible battle culminating in the adoption of the 2003 amendments to Model

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99. *Id.* at 38.

100. *Id.* at 39-40.

101. *Id.* at 40. Of course, if the general counsel were disabled, due to conflict of interest or otherwise, from independently and effectively evaluating a report of a legal compliance issue, Model Rule 1.13(b) might require outside counsel to report the matter to a higher authority such as the board of directors. *Id.* at 40 n.72.

102. For example, the American Corporate Counsel Association, representing over 14,000 corporate counsel for over 6,000 organizational clients, closely evaluated and ultimately supported the Task Force's recommendations. Memo from the ACCA, *supra* note 76. The American Bar Association's Section of Business Law has also actively addressed standards of professional conduct for business lawyers. *E.g.*, Letter from Myles V. Lynk, Professor, The College of Law at Arizona State University, et al., to members of the ABA House of Delegates (July 21, 2003) (on file with author) (supporting the Task Force recommendations). For comments on the SEC's proposed Part 205 Rules, including comments of A.P. Carlton, Jr. on behalf of the American Bar Association, prepared by the ABA Task Force on Implementation of Section 307 of the Sarbanes-Oxley Act of 2002, see <http://www.sec.gov/rules/proposed/s74502.shtml>.

Rules 1.6 and 1.13 is likely to affect profoundly the way in which such lawyers conduct themselves in relation to their corporate clients and their clients' managers. If the intense dialogue associated with the adoption of those amendments does nothing else, it will have contributed significantly – although surely not permanently – to the “consciousness raising”<sup>103</sup> that the Task Force felt necessary to improve our system of corporate governance and, perhaps as well, the value of the legal profession as a whole.

## APPENDIX A

### AMENDMENTS TO THE *MODEL RULES OF PROFESSIONAL CONDUCT* APPROVED BY THE ABA HOUSE OF DELEGATES AT ITS AUGUST 2003 ANNUAL MEETING

#### **RULE 1.6: CONFIDENTIALITY OF INFORMATION**

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
- (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
- (4) to secure legal advice about the lawyer's compliance with these Rules;
- (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
- (6) to comply with other law or a court order.

#### **Comment**

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal

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103. Final Report, *supra* note 4, at 20.



information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

#### **Authorized Disclosure**

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

**Disclosure Adverse to Client**

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c) which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the

representation. Even when the disclosure is not impliedly authorized, paragraph (b)(2) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[12] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

[13] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

[14] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably

believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[15] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

#### **Acting Competently to Preserve Confidentiality**

[16] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

[17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

#### **Former Client**

[18] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

### **RULE 1.13: ORGANIZATION AS CLIENT**

- (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
- (b) If a lawyer for an organization knows that an officer, employee or other

person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization.

Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in Paragraph (d), if

(1) despite the lawyer's efforts in accordance with Paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate fashion action, or a refusal to act, that is clearly a violation of law , and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization.

then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's engagement by an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other person associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to Paragraphs (b) or (c), or who withdraws in circumstances that require or permit the lawyer to take action under either of those Paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

## Comment

### The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. “Other constituents” as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization’s lawyer in that person’s organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client’s employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer’s province. Paragraph (b) makes clear, however, that when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law and might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in Rule 1.0(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.

[4] In determining how to proceed under Paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent’s innocent misunderstanding of law and subsequent acceptance of the lawyer’s advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer’s advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the

matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated to proceed by Rule 1.13, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.

[5] Paragraph (b) also makes clear that when reasonably necessary to enable the organization to address the matter in a timely and appropriate fashion the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

### **Relation to Other Rules**

[6] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rule 1.8, 1.16, 3.3 or 4.1. Paragraph (c) of this Rule supplements Rule 1.6(b) by providing an additional basis upon which the lawyer may reveal information relating to the representation, but does not modify, restrict, or limit the provisions of Rule 1.6(b)(1) – (6). Under Paragraph (c) the lawyer may reveal such information only when the organization's highest authority insists upon or fails to address threatened or ongoing action that is clearly a violation of law, and then only to the extent the lawyer reasonably believes necessary to prevent reasonably certain substantial injury to the organization. It is not necessary that the lawyer's services be used in furtherance of the violation, but it is required that the matter be related to the lawyer's representation of the organization. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rules 1.6(b)(2) and 1.6(b)(3) may permit the lawyer to disclose confidential information. In such circumstances Rule 1.2(d) may also be applicable, in which event, withdrawal from the representation under Rule 1.16(a)(1) may be required.

[7] Paragraph (d) makes clear that the authority of a lawyer to disclose information relating to a representation in circumstances described in Paragraph (c) does not apply with respect to information relating to a lawyer's engagement by an organization to investigate an alleged violation of law or to defend the organization or an officer, employee or other person associated with the organization against a claim arising out of an alleged violation of law. This is necessary in order to enable organizational clients to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.

[8] A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to Paragraph (b) or (c), or who withdraws in circumstances that require or permit the lawyer to take action under either of these Paragraphs, must proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal, and what the lawyer reasonably believes to be the basis for his or her discharge or withdrawal.<sup>104</sup>

### **Government Agency**

[9] The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope [18]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See Scope.

### **Clarifying the Lawyer's Role**

[10] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

[11] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

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104. The phrase "and what the lawyer reasonably believes to be the basis for his or her discharge or withdrawal" was deleted subsequent to the adoption of the amendments to Model Rule 1.13 in August 2003.



**Dual Representation**

[12] Paragraph (g) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

**Derivative Actions**

[13] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

[14] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization