Sarbanes-Oxley and the Oklahoma Rules of Professional Conduct Recent Developments in Oklahoma

Drew L. Kershen, University of Oklahoma College of Law

Available at: http://works.bepress.com/drew_kershen/83/
SARBANES-OXLEY AND THE OKLAHOMA RULES OF PROFESSIONAL CONDUCT

DREW L. KERSHEN*

With the signature of President George W. Bush on July 30, 2002, the Sarbanes-Oxley Act of 2002 (the Act, or Sarbanes-Oxley) became law. Although the Act contains new law relating to corporate governance, financial disclosure, and public accounting/auditing, of interest to this article is solely § 307 entitled "Rules of Professional Responsibility for Attorneys." As required by § 307, the Securities and Exchange Commission (SEC) issued final regulations concerning a lawyer’s duty to report evidence of material violations to the chief legal

---

* Earl Sneed Centennial Professor of Law, University of Oklahoma College of Law. © 2003 Drew L. Kershen, all rights reserved. I express my appreciation to Professor George Cohen, University of Virginia School of Law, Mr. Herrick Lidstone, Burns, Figa & Will, P.C., Englewood, CO, and Professor Steven Cleveland, University of Oklahoma College of Law, who provided insightful and clarifying comments on the article in a first draft. Their helpfulness significantly improved the article.

3. 15 U.S.C. § 7245 (2002). Section 307 reads as follows:

Not later than 180 days after July 30, 2002, 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.
counsel or the chief executive officer, and to report to higher corporate authority above these two officials if they do not appropriately respond.\(^4\) This final regulation is generally referred to as the "up-the-ladder-reporting" requirement. On the same date, the SEC also issued a proposed final regulation, in two alternatives, concerning a lawyer's duty when the higher corporate authority fails to respond appropriately to what has been reported.\(^5\) These alternative proposals deal with what is generally referred to as "noisy withdrawal" and present alternative withdrawal options that attorneys must or may take.

This article compares the SEC Sarbanes-Oxley regulations with the Oklahoma Rules of Professional Conduct (OkRPC). Through this comparison, this article seeks to accomplish two goals: firstly, to inform the Oklahoma lawyer of professional obligations arising under Sarbanes-Oxley; and, secondly, to alert the Oklahoma lawyer to similarities and differences between the professional obligations under Sarbanes-Oxley and the professional obligations under the OkRPC. By focusing on the comparison of professional obligations under these two laws governing Oklahoma lawyers, this article purposefully does not argue for or against the policy and linguistic choices the SEC made in drafting and adopting the Sarbanes-Oxley regulations.\(^6\) Rather, this article takes the regulations as given and attempts to explain how an Oklahoma attorney can comply simultaneously with the professional obligations of Sarbanes-Oxley and the professional obligations of the OkRPC.\(^7\)

---

6. For anyone interested in these policy and linguistic debates about the regulations, read the SEC’s explanation of its choices and its response to comments received as set forth in the Federal Register when the regulations were proposed and when the regulations were adopted as final. 67 Fed. Reg. 71670 (Dec. 2, 2002) (proposed rule); see supra notes 4-5. For those interested for even more depth on the policy and linguistic debates, the SEC folder on the comments it received about the Sarbanes-Oxley regulations is publicly available. The author of this article was a signatory to the Comments of Susan P. Koniak, Roger C. Cramton, and George M. Cohen filed in December 2002 and in April 2003. By signing the Koniak-Cramton-Cohen comments, this author indicated that he agreed generally with their substance and tone.
7. To assist the reader, this article has two appendices: Appendix A sets forth the Sarbanes-Oxley regulations and Appendix B sets forth the relevant Oklahoma Rules of Professional Conduct (plus accompanying comments) and the Oklahoma Rules Governing Disciplinary Proceedings. By placing the regulations and the relevant Oklahoma documents in these appendices, the footnotes do not contain long quotations of these professional obligations.

Three other articles that also compare Sarbanes-Oxley to state professional ethics rules
I. SARBANES-OXLEY § 205.1 PURPOSE AND SCOPE

In § 205.1, the SEC makes clear that the Sarbanes-Oxley professional regulations are minimum professional standards that supplement the professional standards of the states in which any particular attorney is admitted to practice. In addition, the SEC makes clear that states are free to impose additional standards above the minimum without Sarbanes-Oxley preempting these additional standards. Finally, the SEC rules state that Sarbanes-Oxley does preempt when state standards conflict with the Sarbanes-Oxley standards or set a lower minimum standard. The SEC does not intend to displace the Supreme Court of Oklahoma as the guardian of professional standards applicable to Oklahoma lawyers; the SEC does intend to set minimum standards of professional conduct for lawyers representing issuers in securities matters, such as lawyers practicing before the SEC on behalf of public corporations. Moreover, the SEC intends to include lawyers, giving legal advice to an issuer in the attorney-client relationship, who have notice that their advice will be filed or included in a document submitted to the SEC. For example, an attorney who prepares an auditor response letter probably has notice that the auditor will file or include the response in an SEC document. Moreover, the SEC states that lawyers are also covered if they provide advice to an issuer (which would include a private corporation) about whether an exemption from filing with the SEC for a securities transaction is available. Hence, Oklahoma attorneys are thus simultaneously accountable to both the Sarbanes-Oxley professional regulations and the OkRPC.

9. Id.
10. Id.
11. For the SEC discussion of those attorneys within the scope of the Sarbanes-Oxley regulations, see 68 Fed. Reg. 6296, 6297 (Feb. 6, 2003). This discussion occurs in relation to the definition of the term “appearing and practicing before the Commission.” Id. The article discusses this definition at greater length in the next textual heading “Sarbanes-Oxley § 205.2 Definitions.”
In light of § 205.1, an Oklahoma attorney who complies with Sarbanes-Oxley would still be subject to professional discipline in Oklahoma for failure to comply with the OkRPC, if the OkRPC imposes additional standards. Similarly, an Oklahoma attorney who complies with the OkRPC would still be subject to professional discipline by the SEC if the Sarbanes-Oxley regulations impose directly conflicting or stricter minimum standards. Hence, the relationship between the Sarbanes-Oxley and the OkRPC is that attorneys are always subject to the stricter standards of professional conduct. This default for always-the-stricter-standard is consistent with the basic purpose for the enactment of Sarbanes-Oxley – to increase investor confidence in public corporations and other issuers by enhancing the culture of honesty within the corporation and the commitment to honesty among the corporation’s officers and advisors, including lawyers for the corporation.

II. SARBANES-OXLEY § 205.2 DEFINITIONS

Several definitions – “appearing and practicing before the Commission,” “in the representation of an issuer” and “issuer” – establish which Oklahoma attorneys will be subject to Sarbanes-Oxley. In essence, attorneys representing clients that must register securities with or file reports with the SEC are those attorneys accountable for the minimum professional standards of Sarbanes-Oxley. Attorneys are in this representational role when they transact business with the SEC, represent an issuer in SEC administrative proceedings, provide advice about documents that will be filed with the SEC, or advise whether or not information or statements are required to be included in a document that will be filed with the SEC. In addition, attorneys who provide advice about the availability of an exemption from registering a transaction in


13. For a fuller understanding of the relationship between the Sarbanes-Oxley professional regulations and the state professional responsibility codes, it is necessary also to consult § 205.6 – Sanctions and Discipline. This article has a heading “Sarbanes-Oxley § 205.6 Sanctions and Discipline” where this fuller understanding of the relationship is discussed.


15. Id. §205.2 (a), (g), and (h).
securities are also likely to be included within the definition of "appearing and practicing before the Commission."16

In light of these definitions establishing who is subject to Sarbanes-Oxley, Oklahoma attorneys can categorize their practices along the following lines:

- Oklahoma attorneys who practice federal securities law are obviously accountable for Sarbanes-Oxley professional standards.

- Oklahoma attorneys probably are accountable if they are providing legal services to a public corporation and if they have notice that the specific work being done will be incorporated into any document filed with or submitted to the SEC. For example, an attorney who does a title opinion about a public corporation's mineral leases that will be filed as part of, or described in, a registration statement is probably accountable for Sarbanes-Oxley professional regulations as related to the title opinion.17 By contrast, an attorney for a public corporation who is representing it in a contract negotiation or dispute with a supplier would likely not be subject to Sarbanes-Oxley because this contract representation is unlikely to become part of an SEC filing.18

- Oklahoma attorneys are unlikely to be accountable to Sarbanes-Oxley if they represent non-public entities such as private corporations, unless they advise a private corporation about exemptions from federal

---

16. Id. For SEC discussion of which attorneys are accountable for Sarbanes-Oxley, see 68 Fed. Reg. 6297-98 (appearing and practicing before the SEC), 6302 (in the representation of an issuer), 6303 (issuer) (Feb. 6, 2003).

17. In comments to the SEC, the American Bar Association (ABA) has requested clarification as to whether the definition of "appearing and practicing before the [SEC]" requires that an attorney, preparing a document that the attorney has notice will be filed with the SEC, must also be providing advice about securities law. An attorney may know that a document will be attached as an exhibit to an SEC filing but the attorney may not be providing advice about securities law. ABA Comment letter of April 2, 2003, reprinted in CENTER FOR PROFESSIONAL RESPONSIBILITY, 29TH NAT. CONF. ON PROF. RESPONSIBILITY COURSEBOOK 71, 79 (2003) [hereinafter ABA comment letter].

18. The example of the attorney representing a corporation in a contract dispute raises the question as to whether that attorney becomes accountable for Sarbanes-Oxley when the attorney responds to an auditor's request for information about present or potential legal liabilities facing the corporation. The ABA has requested clarification on this issue. ABA Comment letter, supra note 17, at 80. If the contract dispute is sufficiently serious in magnitude that an auditor would include a reference to the contract dispute in contingent liabilities, the lawyer representing the company in the contract dispute probably is "appearing and practicing before the [SEC]" and would be subject to the Sarbanes-Oxley professional regulations. For similar issues related to environmental liabilities, see William J. Walsh, Marc D. Machlin, & Jeffrey S. Tibbals, New Initiatives to Encourage Disclosure of Environmental Costs and Liabilities, 34 BNA ENVIRON. REP. 217 (Jan. 24, 2003).
securities laws. However, these attorneys are accountable to OkRPC Rule 1.13 "Organization as Client."
In the interplay between Sarbanes-Oxley and the OkRPC, it is possible that Sarbanes-Oxley will set a
benchmark as to the professional standards for attorneys under Rule 1.13.20

- Oklahoma attorneys are very unlikely ever to be accountable for Sarbanes-Oxley professional standards if, to name three examples, they limit their practice to family law, workers compensation law, or local government law.

All Oklahoma attorneys, however, must have sufficient awareness of and familiarity with Sarbanes-Oxley so that they intuitively sense when the issue of Sarbanes-Oxley compliance may arise.21 As the Comment to OkRPC Rule 1.1 "Competence" states: "Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge."22

Other definitions—"appropriate response," "breach of fiduciary duty," "evidence of a material violation," "material violation," "qualified legal compliance committee," "reasonable or reasonably," "reasonably believes," and "report"—are important for understanding the substantive rules of Sarbanes-Oxley.23 This article discusses these definitions in the comparison of the Sarbanes-Oxley professional standards with the OkRPC and does not discuss them separately from that comparative analysis.

20. AMERICAN CORPORATE COUNSEL ASSOC., "Five Practical Steps" for In-House Counsel Concerned about changes in lawyer regulation pursuant to Sarbanes-Oxley Section 307, reprinted in CENTER FOR PROFESSIONAL RESPONSIBILITY, 29TH NAT. CONF. ON PROF. RESPONSIBILITY COURSEBOOK 39, 40 (2003).
21. Section 205.2(a)(2)(i) explicitly excludes from Sarbanes-Oxley coverage those persons admitted to the bar who do not provide legal services in an attorney-client relationship to an issuer. For example, persons who are members of the Oklahoma Bar Association but who are employed in non-legal capacities for an issuer are not within the scope of the Sarbanes-Oxley professional regulations. However, in Oklahoma, any Oklahoma attorney is accountable for professional discipline for conduct "in the course of his professional capacity, or otherwise, which act would reasonably be found to bring discred it upon the legal profession." OKLA. RULES OF PROF'L CONDUCT R. 1.3 (2001). Thus, a corporate manager helping the corporation perpetrate a fraud, whether involving securities or not, who happens to be an Oklahoma attorney, is subject to Oklahoma professional discipline but not SEC discipline.
22. OKLA. RULES OF PROF'L CONDUCT R. 1.1 cmt.
23. 17 C.F.R. § 205.2(b), (d), (e), (i), (k)-(n) (2003).
III. SARBANES-OXLEY § 205.3 ISSUER AS CLIENT

A. Section 205.3(a)

Section 205.3(a) adopts the position that when an attorney has an issuer as client, the attorney represents the issuer and not the issuer’s officers, directors, or employees. Section 205.3(a) thus adopts the entity-as-client answer to the question of who is the client when an attorney represents an organization. OkRPC Rule 1.13(a) adopts the identical answer for organizational clients. Consequently, § 205.3(a) reinforces OkRPC Rule 1.13(a) by reminding Oklahoma attorneys that they cannot let personal relationships with the living human beings who manage or direct legal entities trump their professional obligations to the legal entity as an abstract, conceptual legal person.

B. Section 205.3(b)

Section 205.3(b) of Sarbanes-Oxley is comparable to OkRPC Rule 1.13(b). For clarity in the comparison, it is necessary to move sub-subsection by sub-subsection through subsection (b).

Section 205.3(b)(1) mandates the duty to report evidence of a material violation. The language is so crucial that it is quoted below:

If an attorney, appearing and practicing before the Commission in the representation of an issuer, becomes aware of evidence of a material violation by the issuer or by any officer, director, employee, or agent of the issuer, the attorney shall report such evidence to the issuer’s chief legal officer (or the equivalent thereof) or to both the issuer’s chief legal officer and its chief executive officer (or the equivalents thereof) forthwith.

24. Id. § 205.3.
26. Section 205.2(n) defines report as meaning “to make known to directly, either in person, by telephone, by e-mail, electronically, or in writing.” 17 C.F.R. § 205.2(n) (2003). Hence, an attorney fulfills the duty to report by a telephone call or by sending an e-mail. The SEC eliminated from the final regulation a proposed duty to document the report. 68 Fed. Reg. 6296, 6306 (Feb. 6, 2002) (§ 205.3(b)(2) in Proposed (December) Rule: Withdrawn).
27. 17 C.F.R. § 205.3(b)(1).
28. Id.
When comparing § 205.3(b)(1) to Rule 1.13(b), three issues come to the forefront: the standard for when the attorney must take action, the action the attorney must take, and the timing of that action.

i. The Standard for when the Attorney Must Take Action

Under OkRPC Rule 1.13(b), the attorney must act when the attorney knows of a violation of a legal obligation or a violation of law and that the violation is likely to result in a substantial injury to the organization. The Sarbanes-Oxley attorney must act on awareness of evidence of a material violation. Section 205.2(e) defines “evidence of a material violation” to stress that an attorney must not act unreasonably, must act as a prudent and competent attorney, and must act when reasonably likely that a material violation has occurred, is occurring, or is about to occur. Sarbanes-Oxley § 205.3(b)(1) thus differs from Rule 1.13(b) by changing the mental standard from a subjective standard (knows) to an objective standard (must not act unreasonably as a prudent, competent attorney) and changing the informational standard from “a violation... likely to result in substantial injury” to the informational standard of “credible evidence... that it is reasonably likely that a material violation has occurred, is ongoing, or is about to occur.”

By the mental standard and the informational standard of § 205.3(b)(1), attorneys representing issuers by “appearing and practicing before the Commission” will be required to act more frequently to raise questions about honesty and legal compliance within the issuer-client than does OkRPC Rule 1.13(b). Attorneys, as competent advisors of their clients, have always had the ability to serve as a conscience for their clients. However, § 205.3(b)(1) mandates that attorneys become more actively the conscience of the client. Section 205.3(b)(1) makes

30. 17 C.F.R. § 205.3(b)(1).
31. Id. § 205.2(e). The § 205.2(e) definition of “evidence of a material violation” uses a double negative. The author has paraphrased in the text for clarity while intentionally avoiding the issue, raised by several who commented on this definition, of whether the definition with its double negative is a sensibly-drafted, intelligible, and enforceable definition.
33. 17 C.F.R. § 205.2(e). For the SEC discussion of the mental standard and informational standard in the definition of “evidence of a material violation,” see 68 Fed. Reg. 6296, 6301-02 (Feb. 6, 2003). The author does not pursue the issue of whether the “substantial injury” of Rule 1.13(b) and “material violation” of Sarbanes-Oxley are equivalent. Section 205.2(i) defines “material violation.”
attorneys act regardless of whether the evidence of a material violation directly falls within the specific attorney's corporate legal representation and regardless of whether the evidence of a material violation points to the past, present, or the future.  

Section 205.3(b)(1) requires that the attorney shall report to the chief legal officer (CLO) or to both the CLO and the chief executive officer (CEO). By contrast, OkRPC Rule 1.13(b) allows the attorney considerable discretion as to how to proceed with the choice designed to minimize disruption to the organization and to minimize the risk of revealing client information. Section 205.3(b)(1) eliminates that discretion because it mandates that the evidence of a material violation must be reported to specific senior officials within the organization. The Sarbanes-Oxley regulation mandates that evidence of a material violation be addressed by senior officials and does not allow evidence of a material violation to remain within the decisional domain of lower corporate officials. In its last sentence, § 205.3(b)(1) punctuates this duty to report to senior officials by reminding the reporting attorney that raising questions of honesty and legal compliance with senior officials is simply revealing client information to those who need the information to take appropriate action on behalf of the client.
iii. The Timing of the Action the Attorney Must Take.

Section 205.3(b)(1) uses the word "forthwith" which might imply that the attorney has no flexibility to pursue other alternatives prior to the duty to report to the CLO.\(^{38}\) OkRPC Rule 1.13(b) sets forth alternatives that an attorney may pursue before referring the matter to higher authority within the organization.\(^{39}\) In this author's analysis, whether \(\S\) 205.3(b)(1) does or does not permit other alternatives may be inconsequential to the attorney with the duty to report. As the attorney has the mandatory duty to report evidence of a material violation to the CLO, as the CLO knows that Sarbanes-Oxley mandates that the CLO accept such reports, and as the CLO knows that Sarbanes-Oxley mandates that the CLO take appropriate action to respond to such reports, the prudent behavioral response of attorneys will usually be to report without considering alternatives. The attorney with the duty to report may often be too junior to make decisions about appropriate alternatives.\(^{40}\) Even if the attorney with the duty to report is a long-time, trusted lawyer, the attorney should sense that evidence of a material violation, after Sarbanes-Oxley, is sufficiently serious that the attorney should communicate with the CLO to learn the client's thoughts and decisions.\(^{41}\) As the CLO must ultimately be informed, senior officials (the CLO and CEO specifically) should ordinarily be those who consider the alternatives relating to evidence of a material violation.\(^{42}\)

Section 205.3(b)(2) shifts the focus from the attorney with the duty to report to the CLO who receives the report. Section 205.3(b)(2) sets forth the professional standards for the CLO in responding to the report of evidence of a material violation.\(^{43}\) CLOs are accountable to OkRPC Rule 1.13(b) which mandates that when Rule 1.13(b) comes into

\(^{38}\) ABA Comment letter, supra note 17, at 81.

\(^{39}\) OKLA. RULES OF PROF'L CONDUCT R. 1.13(b) (2001).

\(^{40}\) In certain circumstances, junior attorneys have different reporting obligations as discussed under the heading "Sarbanes-Oxley 205.5 Responsibilities of Subordinate Attorneys" infra.


\(^{42}\) While communication between lawyers and their clients has always been crucial in establishing a relationship of trust and confidence, Sarbanes-Oxley makes communication between attorneys and clients even more crucial. For discussion of post-Sarbanes-Oxley attorney-client relationships, see generally AMERICAN CORPORATE COUNSEL ASSOC., supra note 20 and Report of the ABA Task Force on Corporate Responsibility, (Mar. 31, 2003) available at http://www.abanet.org/buslaw/corporateresponsibility/.

\(^{43}\) 17 C.F.R. \(\S\) 205.3(b)(2) (2003).
application the CLO "shall proceed as is reasonably necessary in the best interest of the organization." Rule 1.13 allows the CLO discretion as to how to proceed so long as the CLO is acting as a competent advisor to the organization as the client. With regard to the CLO, § 205.3(b)(2) appears not so much to change Rule 1.13 conceptually as to specify concrete steps that the CLO must take to proceed reasonably as a competent advisor to the issuer as an entity client. The concrete steps listed in § 205.3(b)(2) include the duty to investigate the report of evidence of a material violation, the duty to determine after investigation whether or not a material violation has occurred, is ongoing, or is about to occur, and the duty to cause the issuer to take an appropriate response—including actions to stop and to remedy the material violation (if any). Section 205.3(b)(2) does create one duty for the CLO that Rule 1.13 does not imply—the duty of the CLO to report back to the attorney who reported the evidence of a material violation.

What if the CLO is the attorney who becomes aware of evidence of a material violation by the issuer? Section 205.3(b)(2) does not explicitly address this possibility. The author thinks it implicit in subsection (b)(2) that the CLO would have the professional obligations to abide by the concrete steps listed in the subsection. If the CLO did not undertake the subsection (b)(2) concrete steps, the CLO would almost assuredly be in violation of OkRPC Rule 1.2(c) for counseling or assisting a client “in conduct that the lawyer knows is criminal or fraudulent.”

Section 205.3(b)(3) refocuses on the attorney with the duty to report under subsection (b)(1) in order to have that reporting attorney serve as a check and balance on the CLO under subsection (b)(2). Unless the reporting attorney reasonably believes that the CLO has reported back with an appropriate response within a reasonable time, § 205.3(b)(3) creates an additional mandatory duty for the reporting attorney to report to a committee of the issuer’s board of directors or the board of directors

44. OKLA. RULES OF PROF'L CONDUCT R. 1.13(b) (2001).
45. Id.
46. 17 C.F.R. § 205.3(b)(2). Under § 205.3(b)(2) the CLO must take these concrete steps in response to a report of evidence of a material violation whereas under Rule 1.13 a CLO shall proceed as is reasonably necessary when the CLO knows of a violation that is likely to result in substantial injury to the organization. Hence, the trigger for CLO action differs between Sarbanes-Oxley and Rule 1.13.
47. Id. Section 205.3(b)(2), with its concrete steps that the CLO must take after a report of evidence of a material violation, may be an example of Sarbanes-Oxley creating a benchmark for the interpretation of Rule 1.13. See AMERICAN CORPORATE COUNSEL ASSOC., supra note 20 and accompanying text.
48. OKLA. RULES OF PROF'L CONDUCT R. 1.2(c) (2001).
The reporting attorney therefore has a duty to expect a timely response from the CLO about the report of evidence of a material violation. Under the circumstance where the CLO does not timely report back with an appropriate response, § 205.3(b)(3) creates a mandatory obligation to report the evidence of the material violation to the highest authority of the issuer. The Sarbanes-Oxley mandatory duty to report, at times, to the highest authority of the issuer removes any discretion that an attorney has under Rule 1.13 about referring the matter to the highest authority of an entity client. By contrast, if the reporting attorney reasonably believes that the CLO reported back an appropriate, timely response, the reporting attorney has satisfied the professional obligations of the Sarbanes-Oxley regulations.

What is an appropriate response by a CLO in a report back to a reporting attorney? Section 205.2(b) delimits the appropriate responses that a CLO can give for the reporting attorney’s reasonable-belief evaluation. First, the CLO can report that there was no material violation. Second, the CLO can report that the issuer has adopted remedial measures to stop the material violation and to remedy the material violation. Third, the CLO can report that the issuer’s board of directors has retained or directed an attorney (hereafter called the ret-dir attorney) to review the reported evidence and, after the review, either has implemented remedial recommendations or has been advised that the issuer has a colorable defense in any investigation, or judicial/administrative proceeding relating to the reported material violation. Once the reporting attorney receives the CLO’s report, the reporting attorney must evaluate the report to determine whether the attorney has the duty to report to the highest authority because of an inappropriate response.

---

50. Id.
52. 17 C.F.R. § 205.3(b)(8).
53. For the SEC discussion of an appropriate response, see 68 Fed. Reg. 6296, 6298-6301 (Feb. 6, 2003).
54. 17 C.F.R. § 205.2(b).
55. Id. § 205.2(b)(1).
56. Id. § 205.2(b)(2).
57. Id. § 205.2(b)(3).
58. Id.
With respect to a colorable defense, § 205.2(b)(3)(ii) adds the words "consistent with his or her professional obligations." The professional obligations with which the colorable defense must be consistent are especially the following three under the OkRPC. First, the defense must not be a frivolous defense under Rule 3.1. Second, attorneys may not assert a defense that involves the attorney in counseling or assisting conduct that the attorney knows is criminal or fraudulent, which violates Rule 1.2(c). Third, the attorney must not assert a defense that involves the attorney in knowingly making a false statement of material fact or knowingly failing to disclose a material fact to avoid assisting a criminal or fraudulent act by the issuer, doing so violates Rule 4.1. Any defense that violates OkRPC 3.1, 1.2(c), or 4.1 is not a colorable defense under Sarbanes-Oxley.

As indicated in § 205.2(b)(3), an appropriate response by the CLO back to a reporting attorney is to inform the reporting attorney that the issuer has a ret-dir attorney now investigating the report. Sections 205.3(b)(5) and (6) focus on the ret-dir attorney and the CLO to prescribe their professional standards in this appropriate response option.

Sections 205.3(b)(5) and (6) are comparable to OkRPC Rule 1.13(b)(2) – seeking a second opinion "for presentation to [the] appropriate authority in the organization." Subsections (b)(5) and (b)(6) differ from Rule 1.13(b)(2) in that these Sarbanes-Oxley subsections set forth concrete steps that the attorney rendering the second

59. Id. § 205.2(b)(3)(ii).
61. Id. at 1.2(c).
62. Okla. Rules of Prof'L Conduct R. 4.1 (2001). "Truthfulness in Statements to Others" has the ending phrase "unless disclosure is prohibited by Rule 1.6." Id. As will be discussed later in this article, OkRPC Rule 1.6 "Confidentiality of Information" has broadly permissive exceptions to confidentiality. Id. at R. 1.6. As Rule 1.6 does not prohibit disclosures when Rule 4.1 applies, the Rule 4.1 language, "shall not knowingly," turns the Rule 1.6 permissive disclosures into a Rule 4.1 must-disclose professional obligation. Accord Brian Redding, Client Confidentiality, Corporate Responsibility and Sarbanes-Oxley in Center For Professional Responsibility, 29th Nat. Conf. On Prof. Responsibility Coursebook 5, 14 (OK chart line), 18 (note 3) (2003).
63. For the SEC discussion of colorable defense, see 68 Fed. Reg. 6296, 6300-01 (Feb. 6, 2003). Sarbanes-Oxley and other securities laws are primary, but not exclusive, sources of the crimes or frauds about which the attorney must be concerned under Okla. Rules of Prof'L Conduct 1.2(c) and 4.1.
64. 17 C.F.R. § 205.2(b)(3).
65. Id. § 205.2(b)(5)-(6).
opinion (the ret-dir attorney) and the attorney receiving the second opinion (the CLO) must take to act professionally.\textsuperscript{67} The ret-dir attorney has the duty to investigate, the duty to report to the CLO, and the duty jointly with the CLO to evaluate, using a reasonably-believes standard, whether or not a material violation has occurred, is ongoing, or is about to occur.\textsuperscript{68} With the second opinion in-hand, the CLO has the following duties:

- jointly with the ret-dir attorney to evaluate, using a reasonably-believes standard, whether or not a material violation has occurred, is ongoing, or is about to occur;
- to report to the issuer's board of directors or a board committee the results of the second opinion and the joint evaluation unless both the ret-dir attorney and the CLO reasonably believe that no material violation has occurred, is ongoing, or is about to occur;\textsuperscript{69}
- to report to the issuer's board of directors or a board committee that the issuer has a colorable defense to any investigation, judicial/administrative proceeding related to the material violation, and to keep the issuer's board or board committee updated on the progress of these proceedings; and
- to report back to the reporting attorney.\textsuperscript{70}

Taking all these duties together, subsections (5) and (6) require that the second opinion and an evaluation of its results be presented to the board of directors or a board committee as the highest authority of the issuer.\textsuperscript{71} Sections 205.3(b)(5) and (6) effectively define the "appropriate authority" under Rule 1.13(b)(2) as the issuer's highest authority.\textsuperscript{72}

Section 205.3(b)(9) creates one final mandatory duty for the reporting attorney who has reported evidence of a material violation under subsections (b)(1), (b)(3), or (b)(4).\textsuperscript{73} Section 205.3(b)(9) creates a

\textsuperscript{67}. 17 C.F.R. § 205.3(b)(5)-(6).
\textsuperscript{68}. Id.
\textsuperscript{69}. Id. Section 205.3(b)(6)(i)(B) requires the CLO to report to the issuer's board unless the CLO and ret-dir attorney each reasonably believes that no material violation is described in the second opinion. However, as the issuer has specifically requested the second opinion, the prudent CLO would almost assuredly report the results of the second opinion and the joint evaluation whatever the determination about a material violation. Indeed, OKLA. RULES OF PROF'L CONDUCT R. 1.4 "Communication" likely mandates that the CLO inform the issuer of the second opinion and the two lawyers' evaluations fully and completely.
\textsuperscript{70}. 17 C.F.R. § 205.3 (b)(5)-(6).
\textsuperscript{71}. Id.
\textsuperscript{73}. 17 C.F.R. § 205.3(b)(9).
mandatory duty that the reporting attorney support his or her report.\textsuperscript{74} If the reporting attorney does not reasonably believe that the issuer has made an appropriate response, the reporting attorney must explain his or her reasons to the CLO, the CEO, and directors to whom the reporting attorney made the report.\textsuperscript{75} The author thinks it appropriate to name this subsection (b)(9) duty as the duty of tenacious courage. The reporting attorney must serve as the conscience of the issuer one last time in an attempt to persuade the issuer to adopt an appropriate response to the evidence of a material violation.

OkRPC Rule 1.13 has no comparable duty of tenacious courage, though Rule 1.13(c) states that an attorney "may resign" in the circumstances that subsection (b)(9) covers.\textsuperscript{76} Similarly, § 205.3(b)(9) does not impose the duty of tenacious courage upon the CLO or the ret-dir attorney acting under subsections (b)(2), (b)(5), or (b)(6).\textsuperscript{77} However, in light of CLO's and the ret-dir attorney's Sarbanes-Oxley duties (especially to investigate the report of evidence of a material violation and to evaluate an appropriate response), OkRPC Rule 1.1 "Competence" and 2.1 "Advisor" may imply that the CLO and ret-dir attorney act as competent advisors to the issuer only if they also act with tenacious courage before the issuer's CEO and board of directors.\textsuperscript{78}

Under § 205.3(b)(10), the reporting attorney who reasonably believes that he or she has been discharged for reporting the evidence of a material violation may notify the issuer's board of directors or a committee of the board.\textsuperscript{79} Of course, if the reporting attorney has been discharged by the issuer's board or a committee thereof, after reporting in accordance with subsections (b)(3), (b)(4), or (b)(9), the issuer will obviously know about the reporting attorney being discharged. Consequently, subsection (b)(10) is for those instances in which the reporting attorney is discharged by the CLO, the CEO, or other corporate officers. Section 205.3(b)(10) serves as a permissive check and balance on possible retaliation against a reporting attorney who has fulfilled Sarbanes-Oxley professional obligations. The OkRPC have no comparable provision to subsection (b)(10). Rather, subsection (b)(10)

\textsuperscript{74} Id.
\textsuperscript{75} Id.
\textsuperscript{76} OKLA. RULES OF PROF'L CONDUCT R. 1.13(c) (2003).
\textsuperscript{77} 17 C.F.R. § 205.3(b)(9).
\textsuperscript{79} 17 C.F.R. § 205.3(b)(10).
may be thought of as more closely related to the issue of wrongful discharge of attorneys.\textsuperscript{80}

\textbf{C. Section 205.3(c)}

Section 205.3(c) creates an alternative reporting procedure for all three attorneys (the reporting attorney, the CLO, and the ret-dir attorney) identified in § 205.3(b).\textsuperscript{81} If the issuer has created a qualified legal compliance committee (QLCC),\textsuperscript{82} these attorneys may make their reports about evidence of a material violation and an appropriate response, to the QLCC.

The QLCC is a corporate governance institution especially created in the Sarbanes-Oxley regulations.\textsuperscript{83} If an issuer creates a QLCC, the QLCC becomes the institutional conscience of the issuer about evidence of a material violation.\textsuperscript{84} The QLCC must have written procedures for the confidential receipt, retention, and consideration of any report.\textsuperscript{85} Furthermore, the QLCC must have the following authority and responsibility:

- to initiate investigations;\textsuperscript{86}
- to hire appropriate legal and other professional personnel;\textsuperscript{87}
- to inform the CLO, the CEO, and the board of the initial report,\textsuperscript{88} the decision to investigate,\textsuperscript{89} and the investigation’s results;\textsuperscript{90} and

\textsuperscript{80} See generally Gen. Dynamics Corp. v. Superior Court, 876 P.2d 487 (Cal. 1994) and Balla v. Gambro, Inc., 584 N.E.2d 104 (Ill. 1991) (two prominent cases on whether attorneys may pursue a wrongful discharge claim against corporate employers).

\textsuperscript{81} 17 C.F.R. § 205.3(c).

\textsuperscript{82} Id. § 205.2(k) (2003). Section 205.2(k) defines “qualified legal compliance committee.” The QLCC must be part of the corporate structure by being formed prior to a specific incident of evidence of a material violation. Section 205.3(c)(1) sets forth this previously-formed requirement. 17 C.F.R. § 205.3(c)(1) (2003).

\textsuperscript{83} For SEC discussion of the QLCC, see 68 Fed. Reg. 6296, 6309-10 (Feb. 6, 2003).

\textsuperscript{84} For discussion of the pros and cons of establishing a QLCC, see Joseph R. Lundy & Lori S. Gordon, SEC Adopts Final Lawyer Conduct Rule under Sarbanes-Oxley Section 307: Postpones Decision on “Noisy Withdrawal” Requirement in CENTER FOR PROFESSIONAL RESPONSIBILITY, 29TH NAT’L CONF. ON PROF. RESPONSIBILITY COURSEBOOK 27, 31 (2003); AMERICAN CORPORATE COUNSEL ASSOC., supra note 20, at 43-44. See also Wheeler, supra note 7, at 492-97 (discussing the law practice implications of the establishment of a QLCC upon in-house legal departments).

\textsuperscript{85} 17 C.F.R. § 205.2(k)(2) (2003).

\textsuperscript{86} Id. § 205.2(k)(3)(ii).

\textsuperscript{87} Id.

\textsuperscript{88} Id. § 205.2(k)(3)(i).

\textsuperscript{89} Id. § 205.2(k)(3)(i).

\textsuperscript{90} Id. § 205.2(k)(3)(ii).
to take all appropriate action needed to implement actions recommended by the QLCC about an appropriate remedial response to the report of evidence of a material violation, including the authority to notify the SEC if the issuer does not implement an appropriate response.\(^9\)

If an issuer creates a QLCC, the issuer controls the response to evidence of material violations through the corporate governance mechanism of the QLCC.\(^2\) If the issuer does not create a QLCC, attorneys have significantly more power, under § 205.3(b) as the Sarbanes-Oxley conscience of the issuer, to determine the response to evidence of material violations.\(^3\)

Section 205.3(b)(7) (for an attorney specifically working for the QLCC),\(^4\) § 205.3(c)(1) (for the reporting attorney),\(^5\) and § 205.3(c)(2) (for the CLO)\(^6\) allow these attorneys to use the QLCC as a safe-harbor by which to fulfill their Sarbanes-Oxley professional obligations. Two caveats to the QLCC as a safe-harbor for attorneys exist. First, if the CLO refers the report of evidence of a material violation to the issuer’s QLCC, the CLO must still report back this referral to the reporting attorney (but nothing more).\(^7\) Second, while the reporting attorney has no further Sarbanes-Oxley and likely no further OkRPC professional obligations once the reporting attorney knows that the QLCC has taken charge,\(^8\) the CLO and ret-dir attorney have the OkRPC obligations to act as competent advisors to the QLCC.\(^9\) The CLO and the ret-dir attorney, in contrast to the reporting attorney, likely cannot treat the QLCC as a full satisfaction of the OkRPC professional obligations.\(^10\)

The Sarbanes-Oxley subsections 205.3(a) and (b) create more demanding and more concrete professional obligations for the attorneys appearing and practicing before the SEC in the representation of an issuer than OkRPC Rule 1.13. Thus these two subsections substantially preempt OkRPC 1.13(a) and (b) when Sarbanes-Oxley applies.

90. Id. § 205.2(k)(3)(iii).
91. Id. § 205.2(k)(3)(iii) & (k)(4).
92. Id. § 205.3(c).
93. See id. § 205.3(b).
94. See id. § 205.3(b)(7).
95. See id. § 205.3(c)(1).
96. See id. § 205.3(c)(2).
97. Id.
98. See id. § 205.3(c)(1).
100. Cf. HAZARD & HODES, supra note 78, at 301-07.
However, Sarbanes-Oxley has not adopted professional obligations that should unduly alarm attorneys who represent issuers and who are "appearing and practicing before the [SEC]."\textsuperscript{101} Indeed, the American Bar Association (ABA) Task Force on Corporate Responsibility recently recommended amendments to the ABA Model RPC Rule 1.13 that have significant similarities to Sarbanes-Oxley subsections 205.3(a) and (b).\textsuperscript{102} Both the Sarbanes-Oxley regulations and the Task Force recommended amendments to MRPC Rule 1.13 are clearly meant to enhance the culture of honesty within the corporation and the commitment to honesty among the corporation’s officers and advisors—especially lawyers for the corporation.

\textbf{D. Section 205.3(d)}

Sections 205.3(a), (b), and (c) have a common perspective of the attorney for the issuer acting as the conscience of the issuer by raising and insisting upon careful consideration of evidence of a material violation within the issuer.\textsuperscript{103} For this perspective of the attorney as the conscience of the issuer, the comparable OkRPC is Rule 1.13.\textsuperscript{104}

Section 205.3(d) changes from an inward perspective to an outward perspective by addressing when the attorney may reveal issuer confidences to those outside the issuer.\textsuperscript{105} For this outward perspective of when an attorney may reveal, the comparable OkRPC is Rule 1.6 “Confidentiality of Information.”\textsuperscript{106}

Section 205.3(d)(1) permits an attorney to use any report or any response about evidence of a material violation in self-defense whenever the attorney’s compliance with Sarbanes-Oxley is questioned.\textsuperscript{107} While the precise language of § 205.3(d)(1) differs from OkRPC Rule 1.6(b)(3), these two professional obligations are effectively equivalent.\textsuperscript{108}

\begin{itemize}
\item \textsuperscript{101} 17 C.F.R. § 205.2(a).
\item \textsuperscript{103} See 17 C.F.R. § 205.3(a)-(c).
\item \textsuperscript{104} OKLA. RULES OF PROF’L CONDUCT R. 1.13 (2001).
\item \textsuperscript{105} 17 C.F.R. § 205.3(d).
\item \textsuperscript{106} OKLA. RULES OF PROF’L CONDUCT R. 1.6 (2001).
\item \textsuperscript{107} 17 C.F.R. § 205.3(d)(1).
\item \textsuperscript{108} The SEC discussion of § 205.3(d)(1) uses the phrase “effectively equivalent.” 68
\end{itemize}
As effectively equivalent provisions, the official comments to Rule 1.6(b)(3) should also be ethically instructive for attorneys who act permissively to respond in self-defense about Sarbanes-Oxley matters.

Under §§ 205.3(d)(2)(i) and (ii), any Sarbanes-Oxley attorney (the reporting attorney, the ret-dir attorney, or the CLO) may reveal to the SEC confidential client information—to the extent the attorney believes reasonably necessary—to prevent:

- a material violation likely to cause substantial financial or property injury to the issuer or investors; or
- to prevent perjury, subornation of perjury, or the perpetuation of fraud upon the SEC in its investigative or administrative procedures.

In § 205.2(i), the SEC defined "material violation" as a material violation of federal or state securities law, material breach of fiduciary duty under federal or state law, or a material violation of any similar federal or state law. While the definition of material violation in § 205.2(i) is sufficiently broad to cover conduct that would classify as civil harms (particularly civil fraud), a significant percentage of material violations will involve violations that would classify as crimes. At the same time, the § 205.3(d)(2)(ii) references to perjury, subornation of perjury, and the perpetuation of fraud are all tied specifically to criminal statutes in Title 18 of the United States Code. Hence, §§ 205.3(d)(2)(i) and (ii) can be read in their most common application as authorization for an attorney to reveal confidential information of the issuer to prevent a crime.

Reading § 205.3(d)(2)(i) and (ii) as allowing a permissive disclosure to prevent a crime makes these two sub-subsections correspond to OkRPC Rule 1.6(b)(1). From the date the Supreme Court of

---

109. 17 C.F.R. § 205.3(d)(2)(i) (2003). Section 205.3(d)(2) allows revelation to the SEC only, unlike the comparable OkRPC 1.6(b) that allows revelation to anyone as reasonably necessary to accomplish the exceptions to client confidentiality.

110. 17 C.F.R. § 205.3(d)(2)(i).

111. Id. § 205.2(i).


113. 17 C.F.R. § 205.3(d)(ii).

114. Id. § 205.3(d).

115. See OKLA. RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2003). For SEC discussion of attorneys disclosing issuer confidential information, see 68 Fed. Reg. 6296, 6310-12 (Feb. 6, 2003). In its discussion of § 205.3(d)(2), the SEC says this provision corresponds to the ABA Kutak Commission and the ABA Ethics 2000 Commission
Oklahoma promulgated the OkRPC as binding law upon Oklahoma attorneys (July 1, 1988), the OkRPC has authorized attorneys permissively to reveal "the intention of the client to commit a crime and the information necessary to prevent the crime." Consequently, with respect to criminal conduct by the issuer, the Sarbanes-Oxley and the OkRPC professional obligations are the same – an attorney permissively may reveal to prevent the client’s criminal conduct. As for non-criminal fraud that § 205.3(d)(2)(i) encompasses through the term “material violation,” the Sarbanes-Oxley professional standard would allow Oklahoma attorneys broader discretion to reveal client confidences than the OkRPC allows.

Whereas § 205.3(d)(2)(i) and (ii) are forward looking to prevent issuer conduct by revealing client confidences, § 205.3(d)(2)(iii) looks to past issuer conduct in which the attorney’s services were used to rectify the past or on-going substantial injury to the financial interest or property of the issuer or investors. Section 205.3(d)(2)(iii) with its emphasis on rectification, rather than prevention, of issuer conduct corresponds to OkRPC Rule 1.6(b)(2). Both § 205.3(d)(2) and OkRPC Rule 1.6(b)(2) authorize an attorney permissively to reveal client confidences for purposes of rectification.

While § 205.3(d)(2)(iii) and OkRPC Rule 1.6(b)(2) correspond, their individual wording likely creates overlapping but different professional obligations for Oklahoma attorneys. For example, § 205.3(d)(2)(iii) states that an attorney may reveal “[t]o rectify the consequences of a proposed Rule 1.6. The ABA MODEL RULES OF PROFESSIONAL CONDUCT initially did not accept the Kutak or Ethics 2000 proposed Rule 1.6. However, in August 2003, the ABA MODEL RULES OF PROFESSIONAL CONDUCT amended 1.6 to reflect substantially the Kutak or Ethics 2000 proposed Rule 1.6. For the new Rule 1.6, see ABA MODEL RULES OF PROF’L CONDUCT (2004), available at www.abanet.org/cpr/mrpc/new_rule1_6.pdf. The OkRPC has always been closer to the proposed Rule 1.6 of the Kutak Commission and the Ethics 2000 Commission and to what is now the post-2003 ABA MRPC Rule 1.6.

116. OKLA. STAT. tit. 5 app. 3-A (2001).
118. In his chart comparing the various state versions of the ethical rules governing lawyers concerning disclosure of client confidences, Brian Redding has seven categories. This author agrees with his analysis that the Oklahoma version either allows or mandates disclosure in six of the seven categories. The only chart category in which Oklahoma prohibits disclosure is the category for preventing “non-criminal fraud.” Redding, supra note 62, at 14 (OK chart line). It is this “non-criminal fraud” category that Sarbanes-Oxley would preempt for Oklahoma attorneys.
119. 17 C.F.R. § 205.3(d)(2)(i)-(iii).
120. 17 C.F.R. § 205.3(d)(2) (2003); OKLA. RULES OF PROF’L CONDUCT R. 1.6(b)(2) (2001). The information in note 115 supra should be read again at this point.
Sarbanes-Oxley and Oklahoma

material violation . . . that caused, or may cause, substantial injury to the financial interest or property of the issuer or investors . . . ." 121 By contrast, OkRPC Rule 1.6(b)(2) states that an attorney may reveal “to rectify the consequences of what the lawyer knows to be a client’s criminal or fraudulent act.” 122 Parsing the language, the Oklahoma rule requires a mental standard of knowledge; 123 the Sarbanes-Oxley § 205.3(d)(2)(iii) rule does not state an explicit mental standard to trigger rectification 124 but Sarbanes-Oxley § 205.3(d) uses the words “to the extent the attorney reasonably believes necessary,” 125 thereby adopting an objective standard that is a less demanding standard than knowledge. The Oklahoma rule requires the client’s act be criminal or fraudulent but without reference to substantial injury; 126 the Sarbanes-Oxley rule focuses on substantial injury to the financial interest or property of the issuer or investor which may or may not, in some instances, be criminal or fraudulent. 127

While parsing the language shows that § 205.3(d)(2)(iii) and OkRPC Rule 1.6(b)(2) apply, at times, to different circumstances, this author believes that Oklahoma attorneys should not become too fixated on these differences. Oklahoma attorneys should remember that Sarbanes-Oxley interrelates to the OkRPC by adopting the default of always-the-stricter standard of professional obligation. With this default in mind, Oklahoma attorneys should focus on the fact that in combination these two provisions give attorneys significant discretion to reveal a large universe of client acts. If Oklahoma attorneys focus on their broad, permissive discretion to rectify client conduct, the question that comes to the forefront is how to exercise that discretion.

In Oklahoma, OkRPC Rule 1.6(b)(2) gives Oklahoma lawyers permission to reveal for purposes of rectification after the attorney has contacted the client and given the client the opportunity to rectify the criminal or fraudulent act. 128 As several official comments to Rule 1.6(b)(2) imply, 129 the duty to contact the client to allow the client to rectify appears to be a practical example of OkRPC Rule 1.4

121. 17 C.F.R. § 205.3(d)(2)(iii).
122. OKLA. RULES OF PROF’L CONDUCT R. 1.6(b)(3) (2001).
123. Id.
124. 17 C.F.R. § 205.3(d)(2)(iii).
125. Id. § 205.3(d)(2).
126. OKLA. RULES OF PROF’L CONDUCT R. 1.6(b)(2) (2001).
127. 17 C.F.R. § 205.3(d)(2)(i).
128. OKLA. RULES OF PROF’L CONDUCT R. 1.6(b)(2) (2001).
Communication. Section 205.3(d)(2)(iii) does not have an explicit duty to contact the client to allow the client to rectify prior to permissively revealing the issuer's material violation. However, in light of §§ 205.3(b) and (c) setting forth alternative reporting procedures to the issuer, § 205.3(d)(2)(iii) implies that ordinarily the attorney should not invoke permissive rectification until the attorney has followed a Sarbanes-Oxley reporting procedure. Moreover, revelation to the SEC may not be necessary, under § 205.3(d)(2), if the attorney has available a Sarbanes-Oxley reporting procedure. Certainly § 205.3(d)(2)(iii), as a permissive standard, gives the attorney discretion to communicate about rectification with the client prior to revealing.

In the context of Sarbanes-Oxley, the permissive revelation to rectify client conduct will usually involve rectifying information in a document that either has been filed, submitted with a filing, or incorporated into a filing with the SEC. The attorney will be rectifying because the document contains a material violation. However, the permissive revelation to rectify also extends to attorneys "appearing and practicing before the [SEC]," including, for example, those who advised that the issuer was exempt from SEC laws but who now reasonably believe the advice was incorrect.

In Oklahoma, the OkRPC Rule 1.6(b)(2) permissive revelation to rectify a material violation in a document may become a mandatory duty to reveal when paired with OkRPC Rule 3.3 Candor Toward the Tribunal, 3.9 Advocate in Nonadjudicative Proceedings, and 4.1 Truthfulness in Statements to Others. OkRPC Rules 3.3, 3.9, and 4.1

---

130. 17 C.F.R. § 205.3(d)(2)(iii).
131. Id. § 205.3(b)-(c).
132. Id. § 205.3(d)(2)(iii).
133. Id. § 205.3(d)(2).
134. Id. § 205.3(d)(2)(iii).
135. See id. § 205.2(a)(iii)-(iv).
136. Id. § 205.2(a).
137. The SEC acts as a tribunal under OkRPC Rule 3.3 when it acts in an adjudicative capacity to render a legal judgment directly affecting a party’s interests in a particular matter. See definition of “tribunal,” ABA MODEL RULES OF PROF’L CONDUCT Rule 1.0(m) Terminology (2002). The OkRPC does not contain a definition of “tribunal” but the ABA 2002 definition is implicit in OkRPC Rule 3.3. The SEC acts as an administrative body or tribunal in a nonadjudicative capacity under OkRPC Rule 3.9 when the SEC holds hearings to adopt rules or to set agency policy. OKLA. RULES OF PROF’L CONDUCT R. 3.9 cmt. (2003).

The SEC is a third person under OkRPC Rule 4.1 when it has bilateral transactions with regulated parties such as negotiations, investigations, or in relation to reporting requirements. Id. See also MODEL RULES OF PROF’L CONDUCT R. 3.9 cmt. (2002).
each establish the following professional obligation: A lawyer shall not knowingly: (2) fail to disclose a material fact to a tribunal in a nonadjudicative proceeding third person "when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client." After the enactment of Sarbanes-Oxley Act, issuers who filed, submitted, or incorporated documents containing information that is a material violation are likely to be committing a crime or a fraud. An Oklahoma lawyer who knows of this material violation and fails to disclose it is likely assisting a criminal or fraudulent act by the client. OkRPC Rules 3.3, 3.9, and 4.1 specify that honesty trumps Rule 1.6 "Confidentiality" when necessary to avoid assisting a criminal or fraudulent act by the client. As Sarbanes-Oxley has the default of always-the-stricter standard, Oklahoma's combination of Rules 1.6(b)(2), 3.3, 3.9, and 4.1 may well mean that Oklahoma lawyers have a mandatory disclosure obligation to rectify when Sarbanes-Oxley would have permissive disclosure. What may be more surprising to Oklahoma has not adopted the expanded comments for Rule 3.9 in the ABA MRPC 2002. However, these expanded ABA 2002 comments only provide clarification about the interface between Rule 3.9 and Rule 4.1 and do not indicate any substantive change in that interface.

138. See OKLA. RULES OF PROF'L CONDUCT R. 3.3, 3.9, & 4.1 (2001). The adjective "material" is in the sentence for Rule 4.1 but is not in the sentence for Rules 3.3 or 3.9.

139. See id. Rule 3.3 uses the word "tribunal."

140. See id. Rule 3.9 would interpolate the words "administrative body or tribunal in a nonadjudicative proceeding" into the Rule 3.3(a)(2) provision to which attorneys representing clients in nonadjudicative proceedings must conform.


142. Id. at R. 1.6(b)(2), 3.3, 3.9, 4.1 (2001).

143. The definition of "material violation" in § 205.2(i) implies that in the vast majority of instances a material violation will be a crime or a fraud. 17 C.F.R. § 205.2(i) (2003). See also Russell, supra note 2.

144. If the Oklahoma lawyer assisted the initial filing knowing that the filing contained a material violation, the lawyer has most likely violated OkRPC Rule 1.2(c). OKLA. RULES OF PROF'L CONDUCT R. 1.2(c) (2001).

145. For Rules 3.3 and 3.9, honesty trumps confidentiality because Rule 3.3(b) states: "the duties . . . are continuing, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6." OKLA. RULES OF PROF'L CONDUCT R. 3.3(b) (2001). For Rule 4.1, honesty trumps confidentiality "unless disclosure is prohibited by Rule 1.6." OkRPC Rule 1.6(b)(2) permits, rather than prohibits, disclosure to rectify client crime and fraud in which the lawyer's services were used. OKLA. RULES OF PROF'L CONDUCT R. 1.6(b)(2) (2002). See supra note 62.

146. There are no Oklahoma cases interpreting the combination of OkRPC Rules 1.6(b)(2), 3.3, 3.9, and 4.1. For another discussion of the failure-to-disclose clause in these ethical rules, compare HAZARD & HODES supra note 78, at 204.
Oklahoma attorneys is that this mandatory duty to reveal and to rectify, found in the combination of Rules 1.6(b)(2), 3.3., 3.9, and 4.1, has existed since Oklahoma adopted its version of the OkRPC in 1988, long before the corporate scandals that led to the enactment of Sarbanes-Oxley.\[147\]

IV. SARBANES-OXLEY § 205.4 RESPONSIBILITIES OF SUPERVISORY ATTORNEYS

The SEC describes § 205.4 as based in part on the ABA Model Rule that is substantially equivalent to OkRPC Rule 5.1 “Responsibilities of a Partner or Supervisory Lawyer.”\[148\]

Any attorney, including the CLO of an issuer, who supervises or directs another attorney (called a subordinate attorney) who is appearing and practicing before the SEC is a supervisory attorney according to § 205.4(a).\[149\] Supervisory attorneys have additional professional obligations under Sarbanes-Oxley § 205.4 simply as supervisory attorneys whether or not the supervisory attorney alone would otherwise qualify as practicing before the SEC.\[150\]

Under § 205.4(b), supervisory attorneys must make reasonable efforts to ensure that subordinate attorneys conform to the Sarbanes-Oxley regulations.\[151\] Section 205.4(b) is the direct equivalent to OkRPC Rule 5.1(b) and compliance with one should be compliance with the other. Although the Sarbanes-Oxley regulations do not specify what constitutes “reasonable efforts,” three actions by a supervisory attorney are likely contemplated:

- to establish a procedure for the subordinate attorney to report evidence of a material violation;
- to be vigilant to the subordinate attorney’s representation of the issuer so that evidence of a material violation is not overlooked or ignored;
- to educate subordinate attorneys about Sarbanes-Oxley professional regulations and how to comply with these regulations.\[152\]

---

149. 17 C.F.R. § 205.4(a).
150. Id.
151. See id § 205.4(b).
Section 205.4 does not have any provision equivalent to OkRPC 5.1(a) which imposes upon partners in a law firm the professional obligation that the firm, not just individual supervisory attorneys, has established reasonable measures to assure compliance by all members of the firm with the OkRPC.\textsuperscript{153} Sarbanes-Oxley regulations do not address professional obligations for a law firm, as a law firm; the Sarbanes-Oxley regulations are directed towards individual attorneys (the reporting attorney, the CLO, the ret-dir attorney, the supervisory attorney, and the subordinate attorney).\textsuperscript{154} Despite this Sarbanes-Oxley focus on individual attorneys, Oklahoma law firms should act as if OkRPC Rule 5.1(a) directly applies in the Sarbanes-Oxley context.

After Sarbanes-Oxley, Oklahoma attorneys appearing and practicing before the SEC while representing issuers can only act competently if they understand and conform to Sarbanes-Oxley § 307 and the accompanying SEC regulations. Hence, OkRPC Rule 5.1(a) means that the firm must have reasonable measures to assure competence with Sarbanes-Oxley. The ethical atmosphere within a firm, as a firm, greatly affects how individual lawyers will fulfill their individual professional obligations as supervisory and subordinate attorneys under Sarbanes-Oxley § 205.4(b). Prudent law firms almost assuredly will conclude that reasonable measures also by the firm are more likely to assure Sarbanes-Oxley competence than leaving reasonable measures solely to individual lawyers.\textsuperscript{155}

Section 205.4(b), in its last sentence, also states that the supervisory attorney appears and practices before the SEC when the subordinate attorney does so.\textsuperscript{156} To this author, the interpretation of this last sentence is very importantly unclear. One possible interpretation is that the supervisory attorney has vicarious professional accountability for the actions of subordinate attorneys.\textsuperscript{157} In light of the § 205.4(b) requirement

\begin{itemize}
  \item \textsuperscript{153} OKLA. RULES OF PROF’L CONDUCT R. 5.1(a) (2001).
  \item \textsuperscript{154} See 17 C.F.R. § 205.
  \item \textsuperscript{155} Both the Attorneys’ Liability Assurance Society, Inc. and the American Corporate Counsel Association have published tips about compliance with Sarbanes-Oxley by law firms and corporate legal departments, respectively. Lundy & Gordon, \textit{supra} note 84, at 34-37; AMERICAN CORPORATE COUNSEL ASSOC., \textit{supra} note 20, at 40-43. \textit{See also} Wheeler, \textit{supra} note 7, at 486-92 (discussing a disclosure compliance policy for law firms serving as outside counsel to public corporations).
  \item \textsuperscript{156} 17 C.F.R. § 205.4(b).
  \item \textsuperscript{157} An alternative interpretation of the last sentence of § 205.4(b) is that it means nothing more than that the supervisory attorney has the duty to report evidence of a material violation when the supervisory attorney becomes aware of evidence of a material violation from one or more subordinate attorneys. In other words, the supervisory
\end{itemize}
that the supervisory attorney make reasonable efforts to assure compliance by subordinate attorneys, the section’s last sentence could mean that failure to have taken these reasonable efforts will make the supervisory attorney accountable for any resulting violations of Sarbanes-Oxley by subordinate attorneys.\textsuperscript{158} If vicarious accountability exists under § 205.4(b), Sarbanes-Oxley significantly expands supervisory attorneys professional accountability beyond OkRPC Rule 5.1(c). Under Rule 5.1(c) Oklahoma supervisory attorneys are accountable if they order, ratify with specific knowledge, or knowingly fail to avoid or mitigate a violation of professional standards by a subordinate attorney.\textsuperscript{159} OkRPC Rule 5.1 does not hold supervisory attorneys vicariously accountable for ethical violations by subordinate attorneys.\textsuperscript{160}

Under §§ 205.4(c) and (d), the supervisory attorney has the Sarbanes-Oxley duty to report after a subordinate attorney has reported evidence of a material violation to the supervisory attorney.\textsuperscript{161} As supervisory attorneys appear and practice before the SEC through the subordinate attorney under § 205.4(b), § 205.4(c) means that the supervisory attorney has this duty even if the supervisory attorney, considered in isolation as a solo attorney, would not be appearing and practicing before the SEC.\textsuperscript{162} The supervisory attorney may use either the reporting alternative of § 205.3(b) (to the CLO and CEO or to the issuer’s board or a committee of the board, when necessary) or the reporting alternative of § 205.3(c) (to the QLCC).\textsuperscript{163} By imposing the duty to report upon the supervisory attorney after receiving a report of evidence of material violation, §§ 205.4(c) and (d) has described concrete steps that the supervisory attorney must take to fulfill professional obligations under OkRPC Rule 5.1(c)(2).\textsuperscript{164} Paraphrasing Rule 5.1(c)(2), with the report from the subordinate attorney, the supervisory attorney knows of conduct - the subordinate’s report, not the attorney has the duty to pay attention to bits-and-pieces of information from subordinate attorneys that in their separate bits-and-pieces do not rise to the level of evidence of a material violation. This alternative interpretation would mean that § 205.4(b)’s last sentence is repetitive of § 205.4(c). The SEC discussion of § 205.4 could be construed to adopt this alternative interpretation. 67 Fed. Reg. 71670, 71695 (Dec. 2, 2002).

\textsuperscript{158} 17 C.F.R. § 205.4(b).

\textsuperscript{159} \textit{OKLA. RULES OF PROF’L CONDUCT} R. 5.1(c) (2001).

\textsuperscript{160} See id. R. 5.1 cmt. (2001).

\textsuperscript{161} 17 C.F.R. § 205.4(c)-(d).

\textsuperscript{162} Id.

\textsuperscript{163} Id. § 205.3(b)-(c).

\textsuperscript{164} Id. § 205(4)(c)-(d).
issuer's violation (if any)—calling for reasonable remedial action and knows that the appropriate reasonable remedial action is to follow the reporting procedures prescribed by § 205.3.  If the supervisory attorney is an outside attorney, the supervisory attorney becomes a reporting attorney under subsections 205.3(b)(1), (b)(3), (b)(4), (b)(8), and (b)(9).  If the supervisory attorney is the CLO, the CLO must fulfill the duties imposed upon a CLO by subsections 205.3(b)(2), (b)(5), and (b)(6).

V. SARBANES-OXLEY § 205.5 RESPONSIBILITIES OF A SUBORDINATE ATTORNEY

The SEC describes § 205.5 as based in part on the ABA Model Rule that is identical to OkRPC Rule 5.2 Responsibilities of a Subordinate Lawyer.

Section 205.5(a) explains who is a subordinate attorney in language worth quoting in the text to help the reader understand the analysis that follows: "An attorney who appears and practices before the [SEC] in the representation of an issuer on a matter under the supervision or direction of another attorney (other than under the direct supervision or direction of the issuer's chief legal officer (or the equivalent thereof)) is a subordinate attorney." Under this description of subordinate attorney, an associate in an outside law firm who has a supervisory attorney for the legal representation of an issuer in a matter is clearly a subordinate attorney.

As the SEC explained in discussion of the Sarbanes-Oxley regulations, subordinate attorneys are distinguished from supervisory attorneys for several reasons:

* supervisory attorneys are more likely to have appropriate experience and expertise to evaluate evidence of a material violation;
* supervisory attorneys are more likely to have the trust and the access to the issuer that will attract careful attention for the report; and

---

166. 17 C.F.R. § 205.3(b).
167. Id.
169. 17 C.F.R. § 205.5(a).
170. Id.
supervisory attorneys and issuers reasonably assume that subordinate lawyers will communicate with their supervisory attorneys about concerns of such importance as evidence of a material violation.  

Section 205.5(a) also applies its description of subordinate attorney to the hierarchical structure of a corporate legal department that has a CLO, a deputy CLO, and associate general counsels.  

The CLO is clearly a supervisory attorney due to § 205.4(a). Moreover, the parenthetical language of § 205.5(a) makes clear that deputy CLOs, directly supervised by the CLO, are not subordinate attorneys even though the CLO is a supervisory attorney. Consequently, deputy CLOs have all the Sarbanes-Oxley professional obligations of a reporting attorney set forth in § 205.3(b). Deputy CLOs must serve as a check and balance upon the Sarbanes-Oxley professional obligations of CLOs and issuers.  

To this author, however, § 205.5(a) is unclear about the proper categorization of an associate general counsel. In light of the parenthetical language, if an associate general counsel is directly supervised by a deputy CLO, the associate general counsel appears to have the same Sarbanes-Oxley status as an associate in an outside law firm, i.e., as a subordinate attorney. However, if the associate general counsel is supervised directly by the CLO, the associate general counsel has the same Sarbanes-Oxley status as the deputy CLO, i.e., as a reporting attorney under § 205.3(b). The hierarchical structure of the corporate legal department apparently determines the Sarbanes-Oxley status of associate general counsels as either subordinate attorneys (§ 205.5) or as reporting attorneys (§ 205.3).

---

172. 17 C.F.R. § 205.5(a).
173. Id. § 205.4(a).
174. Id. § 205.5(a).
175. For SEC discussion of the relationship between CLOs and Deputy CLOs, see 68 Fed. Reg. 6314 (Feb. 6, 2003).
176. 17 C.F.R. § 205.5(a).
177. The CLO may directly supervise an associate general counsel based on the lines of supervisory authority within the corporate legal department or the fact that there are no deputy CLOs in the corporate legal department.
178. 17 C.F.R. § 205.3(b).
179. An alternative interpretation of § 205.5(a) is that the CLO is not to be considered a supervisory lawyer for in-house, corporate lawyers. This alternative interpretation would mean that Sarbanes-Oxley § 205.5(a) is distinguishing in-house lawyers from outside lawyers and that only outside lawyers can classify as subordinate attorneys. With this alternate interpretation of § 205.5(a), in-house lawyers would be accountable under §
Section 205.5(b) states that subordinate attorneys must comply with Sarbanes-Oxley professional obligations notwithstanding that another person (lawyer or not) supervises or directs them in their representation of the issuer.\textsuperscript{180} Section 205.5(b) is equivalent to OkRPC Rule 5.2(a) which also says that an attorney is accountable for professional obligations even though the attorney acted at the direction of another person.\textsuperscript{181} Both § 205.5(b) and OkRPC Rule 5.2(a) effectively eliminate any defense based on following orders. Attorneys are accountable for their own professional conduct regardless of what others are telling them to do or not to do.\textsuperscript{182}

Even though § 205.5(b) makes subordinate attorneys accountable for their own professional conduct despite being a subordinate attorney, § 205.5(c) creates a safe-harbor for how a subordinate attorney fulfills Sarbanes-Oxley professional obligations.\textsuperscript{183} Section 205.5(c) states that subordinate attorneys comply with Sarbanes-Oxley if the subordinate attorney reports evidence of a material violation to the supervisory attorney.\textsuperscript{184} Once reported to the supervisory attorney, the supervisory attorney becomes the reporting attorney for purposes of § 205.3(b).\textsuperscript{185} Associate lawyers in an outside law firm representing an issuer will ordinarily be subordinate attorneys who can rely upon the § 205.5(c) safe-harbor.

As an associate attorney in an outside law firm clearly classifies as a subordinate attorney, can the entire outside law firm classify as a subordinate attorney entitled to use the § 205.5(c) safe-harbor? Ordinarily, the outside law firm will report to the CLO of the issuer and, under § 205.5(a), the CLO is not a supervisory attorney for purposes of § 205.5.\textsuperscript{186} Hence, the outside law firm would not be a subordinate attorney and the supervisory lawyer of the outside law firm would have

\textsuperscript{180} 17 C.F.R. § 205.5(b).
\textsuperscript{181} Okla. Rules of Prof’l Conduct R. 5.2(a) (2001).
\textsuperscript{183} 17 C.F.R. § 205.5(b)-(c).
\textsuperscript{184} Id. § 205.5(c).
\textsuperscript{185} Sections 205.4(c) and (d) make a supervisory attorney a reporting attorney for purposes of § 205.3. 17 C.F.R. § 205.4(c)-(3) (2003). Section 205.5(c) creates the safe-harbor for subordinate attorneys because, once the subordinate has reported to the supervisor, the reporting duty of § 205.3 then clearly and fully resides with the supervisory attorney. Id. § 205.5(c). For SEC discussion of the interrelationship between § 205.4(c) and § 205.5(c), see 67 Fed. Reg. 71670, 71696 (Dec. 2, 2002).
\textsuperscript{186} 17 C.F.R. § 205.5(a).
the duty to report. However, does the safe-harbor provision arise for an outside law firm if the firm were to report to someone other than the CLO within the corporate legal department? Does the hierarchical structure of the corporate legal department determine the Sarbanes-Oxley status of the outside law firm as either subordinate attorneys (§ 205.5) or as reporting attorneys (§ 205.3)? The author speculates that Sarbanes-Oxley should not be interpreted to allow outside law firms to classify as subordinate attorneys. The SEC justification for § 205.5 is to offer attorneys who do not have significant status, independence, experience, and trust a safe-harbor. The SEC justification would not appear to apply to a senior lawyer in an outside law firm.

The existence of the safe-harbor, by reporting to a supervisory attorney, in § 205.5(c) explains why the classification of an associate general counsel and the outside law firm under § 205.5(a) is significant. If the associate general counsel or the outside law firm classifies as a subordinate attorney, these attorneys need only report evidence of a material violation to a supervisory attorney to fulfill Sarbanes-Oxley professional obligations. By contrast, if the associate general counsel or the outside law firm does not classify as a subordinate attorney, these attorneys do not gain access to the safe-harbor of § 205.5(c). Rather, the associate general counsel and the supervisory attorney in the outside law firm become reporting attorneys under § 205.3(b) with the duties set forth in subsections (b)(1), (b)(3), (b)(4), and (b)(8).

Subordinate attorneys have a duty to report evidence of a material violation under § 205.5(b) and may fulfill that duty under § 205.5(c) by reporting to a supervisory attorney. If such a report is made to a supervisory attorney, subordinate attorneys thereafter have no additional Sarbanes-Oxley obligations to investigate or to evaluate the actions that the supervisory attorney takes in response to the subordinate attorney’s report. However, § 205.5(d) makes clear that subordinate attorneys permissively may still act as reporting attorneys under §§ 205.3(b) and

---

187. Susan Hackett, general counsel for the American Corporate Counsel Association, raised this issue about the application of § 205.5 to the entire outside law firm at a conference in July 2003. Subordinate, Supervisory Attorney, 19 ABA/BNA LAWYERS MANUAL ON PROFESSIONAL RESPONSIBILITY, July 30, 2003, at 436.
189. 17 C.F.R. § 205.5(c).
190. Id. § 205.3(b).
191. Id. § 205.5(b)-(c).
192. Id.
Section 205.5(d) resembles OkRPC Rule 5.2(b) wherein a supervisory attorney may assume responsibility for making ethical judgments. Section 205.5(d) appears to create a lower standard than OkRPC Rule 5.2(b) because § 205.5(d) is completely permissive as to whether the subordinate attorney takes any action about a supervisory attorney's response. By comparison, OkRPC Rule 5.2(b) creates some obligation for the subordinate attorney to evaluate a supervisory attorney's response. OkRPC Rule 5.2(b) says that a subordinate attorney is protected from discipline if the subordinate attorney acts in accordance with the supervisory attorney's reasonable resolution of an arguable question of professional duty. While Rule 5.2(b) allows the subordinate attorney to defer to a supervisory attorney, the question must be arguable and the resolution must be reasonable. If the supervisory attorney opts for conduct that is clearly unethical or an unreasonable response, OkRPC Rule 5.2(b) makes the subordinate attorney accountable for the violation by failing to take appropriate action.

A Sarbanes-Oxley example illustrates the difference between § 205.5(d) and OkRPC Rule 5.2(b). Using § 205.5(c) a subordinate attorney reports evidence of a material violation to a supervisory attorney. The supervisory attorney responds that he or she does not intend to do anything, regardless of Sarbanes-Oxley. In this situation under § 205.5(d), the subordinate attorney may take action to become the reporting attorney but does not have a mandatory duty to do so. By contrast, the subordinate attorney under OkRPC Rule 5.2(b) knows that the supervisory attorney's response is a violation of Sarbanes-Oxley and may arguably have accountability if the subordinate attorney does not fulfill the role of reporting attorney. Consequently, the subordinate

193. Id. § 205.5(d).
195. 17 C.F.R. § 205.5(d).
196. OKLA. RULES OF PROF'L CONDUCT R. 5.2(b) (2001).
197. Id.
198. Id.
199. 17 C.F.R. § 205.5(d).
200. For example, if the supervisory attorney's refusal to fulfill the reporting attorney role means that the supervisory attorney is assisting or counseling the issuer to commit a crime or a fraud in violation of OkRPC Rule 1.2(c), the subordinate attorney must act because the supervisory attorney would not be acting with a reasonable resolution of the professional duty. Cf. HAZARD & HODES, supra note 78, at §§ 5.2:100-303.
Oklahoma attorney could face Oklahoma discipline, but not SEC discipline.

VI. SARBANES-OXLEY § 205.6 SANCTIONS AND DISCIPLINE

Section 205.6(a) emphasizes that attorneys who violate Sarbanes-Oxley professional obligations are subject to civil penalties and remedies by the SEC just like any other person who violates federal securities laws. While an attorney who violated federal securities laws could face discipline under OkRPC Rule 8.4 "Misconduct" for having done so, the OkRPC have no direct concern with the SEC's jurisdiction and enforcement of federal securities laws against anyone, including attorneys. Thus, § 205.6(a) needs no lengthy discussion in this article. Similarly, § 205.6(d), applying to foreign attorneys who practice before the SEC, has no counterpart in the OkRPC and needs no discussion.

Sections 205.6(b) and (c) evidence the intention of the SEC to become a more active disciplinary agency of attorneys for professional misconduct. The SEC interprets the passage of Sarbanes-Oxley § 307 as indicating Congress's conclusion that professional discipline of attorneys in the securities field can no longer be left primarily to the states where attorneys are admitted to practice. Section 205.6(b) and (c) provide a schematic of how the SEC's disciplinary enforcement of the minimum professional standards of Sarbanes-Oxley interrelate to state disciplinary systems.

201. 17 C.F.R. § 205.6(a) (2003).
202. OkRPC Rule 8.4 "Misconduct" has three subsections that could be applied to attorneys for violating federal securities laws: subsection (b) for a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness; subsection (c) conduct involving dishonest, fraud, deceit or misrepresentation; and subsection (d) conduct that is prejudicial to the administration of justice. OKLA. RULES OF PROF'L CONDUCT R. 8.4 (2001). See also Oklahoma Rules Governing Disciplinary Proceedings Rule 1.3 (discipline for acts that would reasonably be found to bring discredit upon the legal profession), OKLA. STAT. tit. 5, app. 1-A (2001).
203. The SEC has enforced professional standards against attorneys under SEC Rule of Practice 102(e). See Mary Jo White, Bruce Yannett, & Jonathan Tuttle, Lawyers' Roles After Enron and Sarbanes-Oxley: Advocate, Counselors and... Gatekeepers too?, 1343 PLI/Corp 1295, 1309-14 (Nov. 2002); Lidstone, supra note 7, at 12-13; Patterson supra note 7, at 158-59. See also Wheeler, supra note 7, at 464-71 (discussing the SEC's reluctance to use Rule 102(e) to discipline attorneys and the Congressional response during debates about adopting Sarbanes-Oxley).
205. 17 C.F.R. § 205.6(b)-(c).
Under § 205.6(b), the SEC will exercise its disciplinary authority as an independent, equal disciplinary agency to that of state professional-discipline systems. The SEC will bring disciplinary action against attorneys appearing and practicing before it regardless of whether the attorney may be subject to discipline for the same conduct in a state where admitted. Consequently, Oklahoma attorneys subject to Sarbanes-Oxley § 307 could face disciplinary actions before both the SEC under the Sarbanes-Oxley professional standards and the Oklahoma Supreme Court for violations of the OkRPC. Alternatively, attorneys could face SEC discipline even if their conduct would not be an ethical violation in Oklahoma. Except for limited preemption of Oklahoma's disciplinary system in § 205.6(c), the two systems are independent systems of discipline.

Section 205.6(c) protects attorneys who appear and practice before the SEC from discipline for inconsistent standards imposed by any other disciplinary jurisdiction. The SEC discussion of the term "inconsistent" makes clear, however, that state disciplinary standards are inconsistent only when the state has lesser standards. Section 205.6(c) works in tandem with § 205.1 to protect state professional obligations that are stricter than the Sarbanes-Oxley minimum standards. Equally important, the SEC will not allow a state to discipline an attorney for having complied with any stricter obligation set forth in the Sarbanes-Oxley regulations. Therefore, § 205.6(c) preempts the Oklahoma disciplinary system only when specific OkRPC rules set a weaker standard of professional conduct and Oklahoma attempts to apply this weaker standard to an attorney in a Sarbanes-Oxley matter in a way that undermines the stricter Sarbanes-Oxley standard.

206. Id. § 205.6(b).
207. Id. For SEC discussion of its disciplinary authority, see 68 Fed. Reg. 6296, 6314 (Feb. 6, 2003).
208. 17 C.F.R. § 205.6(c).
209. Id.
210. Two examples of how § 205.6(c) functions can be found in the discussion of § 205.3(d). The Sarbanes-Oxley attorney may have the permissive authority to reveal non-criminal fraud when OkRPC Rule 1.6(a) prohibits such revelation. If Oklahoma attempted to discipline the attorney for violating Rule 1.6(a), § 205.6(c) would preempt the weaker Oklahoma standard. By contrast, the Oklahoma attorney may have a mandatory duty, among others under Rule 1.6(b)(2) combined with Rule 4.1, to rectify an issuer's past criminal or fraudulent conduct in which the attorney's services were used when Sarbanes-Oxley leaves the attorney discretion to reveal or not. If Oklahoma attempted to discipline the attorney for violating the mandatory duty to reveal, § 205.6(c) would not preempt this stricter Oklahoma standard. For discussion of § 205.3(d) in
In addition to the fact that §§ 205.6(b) and (c) signal that the SEC intends to be more active in disciplining attorneys, an active disciplinary SEC has potentially important implications also for Oklahoma disciplinary proceedings. First, the SEC may file grievances with the General Counsel of the Oklahoma Bar Association to have the Oklahoma Bar initiate disciplinary complaints against Oklahoma attorneys. In these grievances, the SEC would present information asserting that the Oklahoma attorney had violated the OkRPC. Second, if the SEC were to become a recognized disciplinary jurisdiction, an Oklahoma attorney disciplined by the SEC could face summary discipline in Oklahoma. Oklahoma attorneys who have been disciplined by another jurisdiction must self-report their discipline to the General Counsel of the Oklahoma Bar Association so that the General Counsel may consider seeking discipline in Oklahoma too. While the SEC presently does not qualify as another jurisdiction, various initiatives between the National Organization of Bar Counsel, the ABA, and the Conference of Chief Justices create the potential for the SEC to become a recognized disciplinary jurisdiction.

comparison to the OkRPC, see supra text accompanying notes 108-146.


211. The disciplinary procedures in Oklahoma are found in the Oklahoma Rules Governing Disciplinary Proceedings, OKLA. STAT. tit. 5, app. 1-A (2001).


214. Id.

215. Rule 7.7(b) defines the Rule 7.7(a) term “another jurisdiction” as the “highest court of another state or . . . Federal Court.” Id. As an administrative agency, the SEC would not qualify as a disciplinary jurisdiction under the summary disciplinary procedures of Oklahoma.

216. For discussion of these initiatives, see E. Norman Veasey, supra note 12.
VII. SARBANES-OXLEY § 205.7 - NO PRIVATE RIGHT OF ACTION

Section 205.7 expresses that the SEC has exclusive jurisdiction to enforce the Sarbanes-Oxley regulations as regulations and that there is no private right of action for civil damages directly under the Sarbanes-Oxley.\footnote{217} Section 205.7 does not address whether violations of Sarbanes-Oxley professional obligations can serve as evidence of professional malpractice by attorneys appearing and practicing before the SEC.\footnote{218}

A similar question exists about the evidentiary status of the OkRPC to establish a standard of care for professional malpractice. The introductory Scope to the OkRPC states that "violation of a Rule should not give rise to a cause of action nor should it create [any] presumption that a legal duty has been breached."\footnote{219} Despite this admonition in the Scope, the majority of jurisdictions, construing identical language, have allowed testimony about the rules of professional conduct as relevant evidence to establish the standard of care for professional malpractice.\footnote{220} Oklahoma case law has not resolved this legal issue.\footnote{221}

VIII. SARBANES-OXLEY DECEMBER 2002 PROPOSED § 205.3(D) - NOTICE TO THE COMMISSION WHERE THERE IS NO APPROPRIATE RESPONSE WITHIN A REASONABLE TIME

As adopted in February 2003, the Sarbanes-Oxley professional standards imposed upon attorneys the obligation of reporting evidence of a material violation to higher officials ("up-the-ladder" reporting) within the corporation\footnote{222} and permitted attorneys to reveal issuer confidential...
information in specified situations.\textsuperscript{223} In the original proposal of December 2002, the SEC had proposed additional mandatory duties for attorneys between the duty to report "up-the-ladder" and permissive disclosure of issuer confidences. These additional mandatory duties related to attorney obligations relating to withdrawal from representation and to disavowal of documents that the attorney had prepared during the representation.\textsuperscript{224}

Under the December § 205.3(d)(1), the SEC mandated that an attorney act when the following conditions exist:

- the attorney has reported evidence of a material violation under § 205.3(b) and has not received an appropriate response within a reasonable time;
- the attorney reasonably believes that a material violation is presently on-going or about to occur in the future; and
- the attorney reasonably believes that the on-going or about-to-occur material violation is likely to result in substantial injury to the issuer’s or investors’ financial interest or property.\textsuperscript{225}

If these three conditions exist, the December 2002 § 205.3(d)(1)(i) imposed three duties upon a retained attorney (i.e. outside counsel):

- the attorney must withdraw forthwith from representing the issuer and indicate to the issuer that the withdrawal is based on professional considerations;
- the attorney must give written notice to the SEC of the withdrawal within one business day and indicate that the withdrawal was based on professional considerations; and
- the attorney must promptly disaffirm any legal work filed or submitted to the SEC that the attorney prepared or assisted in preparing that the attorney reasonably believes is or may be materially false or misleading.\textsuperscript{226}

\textsuperscript{223} Id. § 205.3(d) (2003).

\textsuperscript{224} The SEC extended the comment period for the December 2002 proposals on attorney withdrawal and disavowal in February 2003 and simultaneously presented an alternative proposal relating to attorney withdrawal and disavowal obligations. For SEC discussion, see 68 Fed. Reg. 6324, 6326-27 (the December 2002 proposals), 6328-30 (the new alternative) (Feb. 6, 2003).


\textsuperscript{226} For SEC discussion of the outside attorney in noisy withdrawal circumstances, see 67 Fed. Reg. 71670, 71688 (Dec. 2, 2002).
The December 2002 § 205.3(d)(1)(i) obligations are called a "noisy withdrawal" obligation because the attorney must not only withdraw but inform those outside the issuer about the withdrawal.\textsuperscript{227}

The December § 205.3(d)(1)(i) is comparable to OkRPC Rule 1.16 "Declining or Terminating Representation." OkRPC Rule 1.16(a) sets forth a substantially equivalent standard of withdrawal upon Oklahoma attorneys. Under OkRPC Rule 1.16(a)(1), an Oklahoma attorney must withdraw when the representation will result in a violation of other law.\textsuperscript{228} Sarbanes-Oxley is another law that would be violated if the reporting attorney does not receive an appropriate response from the CLO or the issuer. Additionally, under OkRPC Rule 1.16(a)(3), an Oklahoma attorney must withdraw when the client persists in conduct involving the attorney’s services that the attorney reasonably believes is criminal or fraudulent.\textsuperscript{229} Although Sarbanes-Oxley focuses on reasonable belief about substantial injury to the financial interests or property of the issuer or investors, the overlap between situations of substantial injury (Sarbanes-Oxley) and situations of crime or fraud (OkRPC Rule 1.16(a)(3)) are likely to be substantial.

In one regard, OkRPC Rule 1.16(a) may set forth a stricter standard of withdrawal for Oklahoma attorneys than does December § 205.3(d)(1)(i), when the conditions for withdrawal exist. OkRPC Rule 1.16(a) requires the attorney to withdraw from the representation \textit{of the client} (emphasis added).\textsuperscript{230} Withdrawal from the representation of the client implies a total withdrawal to separate the attorney from the client’s conduct.\textsuperscript{231} The Sarbanes-Oxley regulation may not be as clear as to whether the withdrawal is from the SEC particular matter or whether the withdrawal is from the issuer in a total withdrawal from representation.\textsuperscript{232}

\textsuperscript{228} \textit{OKLA RULES OF PROF’L CONDUCT R. 1.16} (2001). For the significant impact resulting from the fact that Sarbanes-Oxley classifies as “other law” under the ethics rules, see Veasey, \textit{supra} note 12.
\textsuperscript{229} OkRPC Rule 1.16(a)(3) is a mandatory withdrawal situation that in the ABA \textit{MODEL RULES OF PROF’L CONDUCT} (2000 version) is a permissive withdrawal situation as Rule 1.16(b)(2). \textit{See OKLA. RULES OF PROF’L CONDUCT Rule 1.16}.
\textsuperscript{230} \textit{OKLA. RULES OF PROF’L CONDUCT R. 1.16(a)} (2001).
\textsuperscript{231} \textit{Id.} at cmt.
\textsuperscript{232} In the explanation to December § 205.3(d)(1)(i), the SEC wrote that an inappropriate response from the issuer’s directors requires the outside attorney “to withdraw from representing the issuer, in all matters, forthwith.” 67 Fed. Reg. 71670, 71689 (Dec. 2, 2002). In comments to the SEC, the American Bar Association (ABA) requested clarification of how broad or narrow the withdrawal obligation is. ABA Comment letter, \textit{supra} note 17, at 76.
As for the other mandatory obligations upon the retained attorney under the December § 205.3(d)(1)(i) – the noisy part of the withdrawal by giving reasons, notifying the SEC, and disaffirming legal work – the Sarbanes-Oxley professional obligations go beyond what the OkRPC require.\textsuperscript{233} The OkRPC mention noisy withdrawal in the official comments to Rule 1.6 “Confidentiality of Information” as a permissive option for attorneys who have been required to withdraw under OkRPC Rule 1.16 “Declining or Terminating Representation.”\textsuperscript{234} No Oklahoma case has ever discussed this noisy withdrawal option in the interplay between the Rule 1.6 comment and the Rule 1.16 provisions.

When the triggering conditions of the December § 205.3(d)(1) exist, § 205.3(d)(1)(ii) differentiates the issuer’s employed attorney from the issuer’s retained attorney. Under § 205.(3)(d)(1)(ii), the employed attorney does not have an obligation to withdraw (i.e. resign) from the issuer.\textsuperscript{235} But the employed attorney must notify, within one business day, the SEC that the attorney intends to disaffirm legal work filed with or submitted to the SEC and promptly disaffirm the identified legal work the employed attorney reasonably believes is or may be materially false or misleading.\textsuperscript{236}

\begin{footnotesize}
\begin{enumerate}
\item[233] Whatever the breadth of the withdrawal obligation under either OkRPC or Sarbanes-Oxley, once a single attorney must withdraw a substantial question of imputed (vicarious) disqualification arises under OkRPC Rule 1.10 “Imputed Disqualification: General Rule.” \textit{Okla. Rules of Prof’l Conduct R. 1.10 (2001)}. The SEC discussion of its Sarbanes-Oxley proposals did not address imputed disqualification. \textit{See} 67 Fed. Reg. 71670 (Dec. 2, 2002). This article does not further explore this issue of imputed disqualification except to point out that OkRPC 1.10(a) does not reference imputed disqualification for mandatory withdrawal under OkRPC 1.16. \textit{Okla. Rules of Prof’l Conduct R. 1.10 (2001)}.

\item[234] In December § 205.3(d)(3) and in the SEC discussion of noisy withdrawal, the SEC reiterates that noisy withdrawal does not involve the revelation of client confidences. 67 Fed. Reg. 71670 (Dec. 2, 2002). The SEC recognizes that noisy withdrawal signals that ethical problems exist in the relationship between the attorney and the issuer, but the SEC emphasizes that the attorney does not reveal any specific client confidences simply by withdrawing, notifying, and disaffirming. \textit{Id.} Whether the attorney decides to disclose client confidences, under Sarbanes-Oxley, is permissive under § 205.3(d) of the final (February) regulations. 67 Fed. Reg. 6296 (Feb. 6, 2003) (discussion of the noisy withdrawal concept).

\item[235] \textit{Okla. Rules of Prof’l Conduct R. 1.6 cmt. (2001)}.

\end{enumerate}
\end{footnotesize}
Whether the Sarbanes-Oxley professional regulations actually protect the Oklahoma employed attorney from the obligation to resign under the OkRPC is questionable. The OkRPC Rule 1.16(a)(1) requires an Oklahoma attorney to withdraw from representing a client when the representation will result in a violation of the Rules of Professional Conduct.\(^\text{237}\) Under OkRPC Rule 1.2(c), Oklahoma attorneys may not counsel to engage in or assist in client conduct that the lawyer knows is criminal or fraudulent.\(^\text{238}\) If OkRPC Rule 1.2(c) is violated, OkRPC Rule 1.16(a)(1) makes the withdrawal mandatory.\(^\text{239}\) Moreover, OkRPC Rule 1.16(a)(3) requires an attorney to withdraw when the client uses the lawyer’s services for conduct the lawyer reasonably believes is criminal or fraudulent.\(^\text{240}\) Consequently, an Oklahoma employed corporate attorney, with knowledge or reasonable belief, very likely has a mandatory duty to withdraw in circumstances to which the December § 205.3(d) proposal applies: specifically, evidence of an on-going or future material violation in filed or submitted documents that are or may be materially false or misleading and to which the issuer has not appropriately responded.\(^\text{241}\) These circumstances almost always involve criminal or fraudulent conduct by the issuer.

December § 205.3(d)(2) differs from December § 205.3(d)(1) with regard to the time of the issuer’s conduct. Subsection (d)(2) governs a material violation that has occurred but that is not on-going – i.e., purely past conduct.\(^\text{242}\) With regard to purely past conduct, subsection (d)(2) gives either the outside attorney or the in-house attorney discretion to perform the respective duties (withdrawal, notice, disavowal) that are otherwise mandatory for them under December § 205.3(d)(1). With regard to purely past conduct, the SEC is willing to allow the attorneys discretion as to their professional obligations because the SEC does not

\[^{237}\text{Okla. Rules of Prof’l Conduct R. 1.16(a) (2001).}\]
\[^{238}\text{Id. at 1.2(c).}\]
\[^{239}\text{Id. at 1.16(a).}\]
\[^{240}\text{Id. at 1.16(a)(3).}\]
\[^{241}\text{See id.}\]
\[^{242}\text{In the discussion of this December § 205.3(d)(2), the SEC states:}\]

Under the proposed rule, an ongoing violation includes an inaccurate disclosure in a filing with or submission to the Commission that has not been corrected and may be relied on by investors . . . . To the extent investors may continue to rely upon false or misleading statements in earlier filings or submissions, which have not been disaffirmed, the material violation would be ongoing and Section 205.3(d)(1) would apply.

consider the attorney’s silence as to purely past conduct as assisting a Sarbanes-Oxley violation.\textsuperscript{243}

With regard to withdrawal, as opposed to the noisy (notice and disavowal) aspects of withdrawal, whether December § 205.3(d)(2) actually gives Oklahoma attorneys discretion is questionable. Under OkRPC Rule 1.16(b)(4), Oklahoma attorneys must withdraw from the representation of a client when the client has used the lawyer’s services to perpetrate a crime or a fraud.\textsuperscript{244} Oklahoma imposes a professional obligation of withdrawal even for purely past conduct when the client has enmeshed the lawyer in criminal or fraudulent conduct by using the lawyer’s services. Oklahoma chose to separate its attorneys from client crime or fraud, even for past conduct, by requiring them to withdraw.\textsuperscript{245}

As for the noisy aspects of withdrawal in situations of purely past conduct, the December § 205.3(d)(2) proposal places Sarbanes-Oxley professional obligations in agreement with the Oklahoma comments about noisy withdrawal. Both § 205.3(d)(2) and Oklahoma allow silent (i.e., no notice, no disavowal) withdrawal as a permissible ethical decision by the attorney relating to purely past criminal or fraudulent conduct of the issuer.\textsuperscript{246}

In the discussion of the December § 205.3(d) proposal about noisy withdrawal and how this proposal compares to the OkRPC, it is important to remember that Sarbanes-Oxley defaults for the-always-stricter standard.\textsuperscript{247} Hence, OkRPC Rule 1.16, which has stricter standards for withdrawal than those imposed by Sarbanes-Oxley, would continue to govern Oklahoma attorneys.

Under December § 205.3(d)(1)(iii) and § 205.3(d)(2)(iii), the CLO acquires a professional obligation to inform any attorney who replaces the attorney who withdrew, either mandatorily or permissively, that the previous attorney withdrew for professional considerations.\textsuperscript{248} The

\textsuperscript{243} Id.
\textsuperscript{244} OkRPC Rule 1.16(a)(4) is a mandatory withdrawal situation that in the ABA MODEL RULES OF PROF’L CONDUCT (2000 version) is a permissive withdrawal situation as Rule 1.16(b)(3). See OKLA. RULES OF PROF’L CONDUCT Rule 1.16 (2001).
\textsuperscript{245} Id. at cmt.
\textsuperscript{248} These (iii) provisions impose this obligation upon the CLO when the retained attorney has withdrawn. As December § 205.3(d)(2) does not impose any obligation upon employed attorneys to withdraw (i.e., resign), the CLO’s (iii) obligation does not expressly apply to the in-house attorney situation. Id. However, the CLO, as a supervisory attorney under § 205.4, has the duty to insure that subordinate attorneys
purpose of requiring the CLO to inform the replacement attorney of the professional considerations is to prevent the shifting of work that may be unethical to unsuspecting attorneys.\textsuperscript{249} The OkRPC have no directly comparable professional obligation for corporate CLOs. However, OkRPC Rule 5.1(c)(2) "Responsibilities of a Partner or Supervisory Lawyer" imposes professional accountability upon the supervisory lawyer who knows of conduct that is not in conformity with professional standards and fails to take reasonable remedial measures.\textsuperscript{250} If a CLO failed to inform a successor attorney of the ethical circumstances surrounding the work the attorney was about to undertake, OkRPC Rule 5.1(c)(2) arguably makes the CLO ethically accountable for failing to take reasonable remedial actions that would avoid or mitigate conduct that may have consequences for violating Sarbanes-Oxley.\textsuperscript{251}

December § 205.3(d)(4) allows an attorney who reasonably believes that he or she was discharged for reporting evidence of a material violation under § 205.3 to notify the SEC about the discharge and, even after being discharged, to disaffirm legal work submitted or filed with the SEC that the attorney reasonably believes is or may be materially false or misleading.\textsuperscript{252} December § 205.3(d)(4) differs from the final (February) § 205.3(d)(10) precisely by extending the notification of discharge to the SEC outside the corporate structure of the issuer. Whereas final (February) § 205.3(d)(10) serves as a check and balance on retaliation by corporate management, December § 205.3(d)(4) serves as a check and balance on retaliation by the issuer itself acting through its governing board.

The OkRPC have no directly comparable ethical provision to December § 205.3(d)(4). The closest OkRPC comparison is to the OkRPC Rule 1.6 official comment permitting a noisy withdrawal and stating that noisy withdrawal does not offend OkRPC Rule 1.16(d) that requires a discharged attorney to take reasonable steps to protect a

\textsuperscript{249} For SEC discussion of the successor (replacement) attorney, see 67 Fed. Reg. 71670, 71690 (Dec. 2, 2002).

\textsuperscript{250} See id. at cmt.

As the noisy withdrawal of December § 205.3(d)(4) and the noisy withdrawal comment in the OkRPC are both permissive, this particular Sarbanes-Oxley professional obligation and the Oklahoma ethics rules are compatible. An Oklahoma attorney who complies with December § 205.3(d)(4) will also be in compliance with the OkRPC.

IX. SARBANES-OXLEY FEBRUARY ALTERNATIVE PROPOSED § 205.3(D) ACTIONS REQUIRED WHERE THERE IS NO APPROPRIATE RESPONSE WITHIN A REASONABLE TIME

The February § 205.3(d) does not impose "noisy withdrawal" obligations upon attorneys for the issuer.254 As will be explained below, the attorneys do have obligations to the issuer, if the attorney does not receive an appropriate response to a report of evidence of a material violation, but the obligations are internal to the issuer. Under the February alternative, the issuer itself has the obligation, through filings such as Form 8-K, Form 20-F, or Form 40-F, to inform the SEC and investors that an attorney has withdrawn from representation due to professional considerations.255 Hence, the February alternative has replaced the attorney's obligation of noisy withdrawal with the issuer's obligation of self-reporting as a matter of proper corporate governance.

In the December § 205.3(d), the attorney had permission to give a noisy withdrawal in circumstances of purely past conduct.256 The February § 205.3(d) does not contain any professional standards relating to purely past conduct.257 The February § 205.3(d) creates professional standards only for violations that are on-going or about to occur and that are likely to cause substantial injury to the financial interests or property of the issuer or investors.258 Whether the February alternative protects Oklahoma attorneys from professional obligations relating to an issuer's purely past conduct involving a crime or a fraud is doubtful. OkRPC

253. OKLA. RULES OF PROF'L CONDUCT R. 1.6 cmt. (2001). For discussion of the permissive noisy withdrawal in the Oklahoma comments to Rule 1.6, see text accompanying notes 233-34, 246.
255. The corporate governance self-reporting obligation is set forth in the February § 205.3(e). 68 Fed. Reg. 6324, 6336 (Feb. 6, 2003). For SEC discussion of § 205.3(e), see id. at 6329-30.
258. Id.
Rule 1.16(a)(4) mandates that Oklahoma attorneys withdraw from a client when the client has used the lawyer's services to perpetrate a crime or fraud.\textsuperscript{259} Oklahoma imposes a stricter standard for withdrawal than the February § 205.3(d).

The February § 205.3(d) narrows the circumstances which trigger professional obligations by stating that an attorney must act when the attorney “reasonably concludes that there is substantial evidence of a material violation that is ongoing or [ ] about to occur.”\textsuperscript{260} By contrast, the December § 205.3(d) triggered the professional obligations when the attorney “reasonably believes that a material violation is ongoing or is about to occur.”\textsuperscript{261} The February alternative thus heightens the standards before the attorney has to take action under Sarbanes-Oxley when the issuer has not given an appropriate response to a report of evidence of a material violation under § 205.3(b).\textsuperscript{262}

Once the February heightened standards apply, § 205.3(d)(1)(A) obligates the retained attorney to withdraw and to notify the issuer that the withdrawal was based on professional considerations.\textsuperscript{263} Under the February standards, § 205.3(d)(1)(B) obligates the employed attorney to cease participation in any matter concerning the violation and notify the issuer that the employed attorney has not received an appropriate response to a report of evidence of a material violation.\textsuperscript{264}

The heightened standards in the February alternative require attorneys to separate themselves from issuer conduct that, in light of these higher standards, is almost certainly criminal or fraudulent. These standards make it even clearer that OkRPC Rule 1.16(a)(1), Rule 1.16(a)(3), and Rule 1.2(c) would require either the retained attorney or the employed attorney to withdraw completely from representing the issuer.\textsuperscript{265} The February § 205.3(d)(1) is thus substantially equivalent to

\textsuperscript{259} OKLA. RULES OF PROF'L CONDUCT R. 1.16(a)(4) (2001).


\textsuperscript{261} Id. at 67 Fed. Reg. 71670, 71706 (Dec. 2, 2002).

\textsuperscript{262} For SEC discussion of the heightened standards in the February alternative to trigger professional obligations, see 68 Fed. Reg. 6324, 6328 (Feb. 6, 2003).


\textsuperscript{264} Id. February § 205.3(d)(2) provides an exception to the subsection (d)(1) obligations to withdraw (retained attorney) or cease participating (employed attorney). The exception arises when the attorney has sought leave of a court or administrative body to take the subsection (d)(1) action and the court or administrative body has prohibited the attorney from so acting.

\textsuperscript{265} OKLA. RULES OF PROF'L CONDUCT R. 1.16, 1.2 (2001).
OkRPC Rule 1.16(a) so that compliance with one is also compliance with the other.

Section 205.3(d)(1)(A) and § 205.3(d)(1)(B) impose obligations to give notice to the issuer as to why the attorney withdrew legal services from the issuer.266 In addition, § 205.3(d)(3) requires the retained or employed attorney who reasonably believes that he or she was discharged for Sarbanes-Oxley compliance to notify the CLO forthwith.267 Section 205.3(d)(3) makes the discharged attorney, acting upon reasonable belief, give a last warning to the CLO that Sarbanes-Oxley obligations—by the corporate officers, by the corporate CLO, and by the corporate governing body—have been ignored.268

These explicit duties to notify about why the attorney withdrew or why the attorney was discharged have no direct counterpart in the OkRPC. Under OkRPC Rule 1.16(d) Oklahoma attorneys do have a duty, even after the representation ends, to take reasonably practicable steps to protect the client’s interests.269 Whether reasonably practicable steps would include an obligation, under Rule 1.4 “Communication,” to explain the professional considerations surrounding the withdrawal or the termination to the issuer or the issuer’s CLO one more time seems highly doubtful. Failure to fulfill the explicit duties to notify, as set forth in the February § 205.3(d), is a Sarbanes-Oxley violation but most likely is not a violation of the OkRPC.

February § 205.3(d)(4) is substantially similar to December § 205.3(d)(1)(iii) and § 205.3(d)(2)(iii) by requiring the CLO to notify successor attorneys of the professional circumstances that enmeshed the previous attorney.270 The analysis of this CLO obligation compared to the OkRPC, previously presented in the discussion of the December proposal, applies as well to the February § 205.3(d)(4).271

February § 205.3(e) imposes upon the issuer the duty to self-report to the SEC on appropriate forms (Forms 8-K, 20-F, or 40-F) within two business days.272 The issuer’s duty to self-report must include notice of

267. Id.
268. Id.
269. OKLA. RULES OF PROF’L CONDUCT R. 1.16(d) (2001).
271. See supra text accompanying notes 248-51.
272. Sarbanes-Oxley Attorney Conduct Standards, 68 Fed. Reg. 6324, 6329 (Feb. 6,
the attorney’s withdrawal and the circumstances related to the withdrawal.\textsuperscript{273} Hence, the issuer’s duty of self-reporting involves reporting not just the fact of an attorney’s withdrawal, but also circumstances (i.e., additional information) about the withdrawal. By contrast in the December proposal, noisy withdrawal by an attorney was a report only of the fact of withdrawal but not of the surrounding circumstances. In the December proposal, the attorney reported surrounding circumstances only if the attorney made use of the discretion to reveal client confidences.\textsuperscript{274}

February § 205.3(f) adds a final option for attorneys representing the issuer. If the issuer does not self-report, as required by § 205.3(e), the attorney may inform the Commission that the attorney had given the issuer notice under § 205.3(d) and the issuer had ignored the notice.\textsuperscript{275} Section 205.3(f) is a variant of noisy withdrawal. As a permissive noisy withdrawal, § 205.3(f) is compatible with the OkRPC Rule 1.6 official comments about permissive noisy withdrawal.\textsuperscript{276}

X. CONCLUSION

After this section-by-section comparison of Sarbanes-Oxley professional regulations to the OkRPC, the author has several impressionistic conclusions.

- Sarbanes-Oxley imposes many additional specific obligations upon covered attorneys regarding the duty to report “up-the-ladder” and the duty to promote a culture of honesty within a corporate client. However, OkRPC Rules 1.4, 1.13, 2.1, 5.1, and 5.2 are generally compatible with these additional Sarbanes-Oxley obligations. Indeed, Sarbanes-Oxley may only be stating concrete interpretations of what OkRPC Rules 1.4, 1.13, 2.1, 5.1, and 5.2 would mean when applied to particular Oklahoma attorneys in factually similar situations.

- With regard to disclosure of client confidences and to withdrawal from clients engaged in conduct likely to be criminal or fraudulent, Sarbanes-Oxley sets professional standards that are either compatible

\textsuperscript{273} Id.

\textsuperscript{274} The SEC made this distinction between the fact of withdrawal and discretionary revelation of client confidence quite clear in its discussion of December §§ 205.3(d) and 205.3(e). 67 Fed. Reg. 71670, 71689, 71693 (Dec. 2, 2002).

\textsuperscript{275} Sarbanes-Oxley Attorney Conduct Standards, 68 Fed. Reg. at 6330 (Feb. 6, 2003).

\textsuperscript{276} OKLA. RULES OF PROF’L CONDUCT R. 1.6 cmt. (2001).
with OkRPC or weaker than comparable OkRPC. Since their adoption in 1988, OkRPC Rule 1.6, 3.3, 3.9, and 4.1 have permitted or required disclosure of client confidences in most factual situations addressed by Sarbanes-Oxley. Moreover, since 1988, OkRPC Rules 1.2(c) and 1.16(a) have required attorneys to withdraw from client representation in most factual situations that Sarbanes-Oxley addresses. While the overlap of factual situations between Sarbanes-Oxley and these Oklahoma professional conduct rules, as these relate to disclosure and withdrawal, is not identical, the overlap is substantial with the Oklahoma rules often being stricter than Sarbanes-Oxley professional obligations.

- The Sarbanes-Oxley professional standards are aggressive in demanding that attorneys serve as the conscience of their corporate clients. The Sarbanes-Oxley professional conduct regulations are relentlessly insistent that attorneys consistently and tenaciously bring evidence of material violations to the attention of the client’s upper management and governance boards. In addition, the Sarbanes-Oxley regulations are equally relentless in demanding that attorneys shape the client’s judgments towards avoiding, stopping, and correcting material violations. The OkRPC are not as aggressive nor as explicit about attorneys serving as the conscience of their clients. The Oklahoma attorney’s obligation to serve as the conscience of clients is implied in OkRPC Rules 1.1, 1.4, 1.13, and 2.1, but this obligation is often overpowered by more explicit statements about attorneys serving as amoral advocates and zealous representatives of their clients. Sarbanes-Oxley thus attempts to change the moral content of the relationship between attorneys and clients, who are public corporations or issuers claiming exemption from federal securities laws, from what has been the predominant norm in the Oklahoma Rules of Professional Conduct.

- Sarbanes-Oxley, in its professional regulations, did not create professional standards that are strikingly dissimilar to the professional standards of the Oklahoma Rules of Professional Conduct. Sarbanes-Oxley can thus be seen as shaping, while not displacing, the Oklahoma Rules. However, Sarbanes-Oxley in its vision of the professional relationship between attorneys and clients is strikingly dissimilar to the Oklahoma Rules. Sarbanes-Oxley seeks to promote and implement a professional relationship that is a major cultural change for attorneys. Focus on the Sarbanes-Oxley legal regulations themselves and the changes are significant, but incremental. Focus on the vision illuminating the Sarbanes-Oxley standards of professional conduct and the shift in cultural perspective is profound.
• Sarbanes-Oxley may have its most significant impact upon lawyers’ professional standards by the fact that the SEC will now actively discipline attorneys.\textsuperscript{277} Attorneys have been primarily self-regulated through state supreme courts and state bar associations. After the enactment of Sarbanes-Oxley, attorneys appearing and practicing before the SEC will also face discipline from the SEC, a federal regulatory agency with a commitment to protecting the investing public as strong as its commitment to the integrity of the attorneys who appear and practice before it. Furthermore, the SEC may become active in cooperating with state disciplinary authorities to increase disciplinary oversight of attorneys for public corporations and issuers claiming an exemption from federal securities law. In its disciplinary activities, the SEC will attempt to make its vision of the attorney as the conscience of the corporation into a reality in the daily lives of attorneys.

APPENDIX A: SARBANES-OXLEY REGULATIONS: FINAL, DECEMBER PROPOSED, & FEBRUARY PROPOSED

FINA"L RULES and REGULATIONS
SECURITIES AND EXCHANGE COMMISSION
Implementation of Standards of Professional Conduct for Attorneys
Thursday, February 6, 2003
68 Fed. Reg. 6296-6323

PART 205--STANDARDS OF PROFESSIONAL CONDUCT FOR ATTORNEYS APPEARING AND PRACTICING BEFORE THE COMMISSION IN THE REPRESENTATION OF AN ISSUER

Sec.
205.1 Purpose and scope.
205.2 Definitions.

\textsuperscript{277} The SEC has had disciplinary authority against attorneys through Rule 102(e) proceedings for decades. The SEC has not aggressively used the Rule 102(e) authority. See supra text accompanying notes 203-07. In light of the present climate surrounding the enactment of Sarbanes-Oxley, the SEC is expressing a more aggressive attitude towards attorney discipline using its new Part 205 regulations under Sarbanes-Oxley § 307. Moreover, other federal agencies are also becoming more active in discipline against attorneys when attorneys fail to act as the conscience of the client. See, Walsh, Machlin, & Tibbals, supra note 18. See generally The Federal Government’s Increasing Regulation of a Lawyer’s Professional Activities, 14 THE PROF. LAWYER 19-20 (Spring 2003).
205.3 Issuer as client.
205.4 Responsibilities of supervisory attorneys.
205.5 Responsibilities of a subordinate attorney.
205.6 Sanctions and discipline.
205.7 No private right of action.

§ 205.1 Purpose and scope.
This part sets forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in the representation of an issuer. These standards supplement applicable standards of any jurisdiction where an attorney is admitted or practices and are not intended to limit the ability of any jurisdiction to impose additional obligations on an attorney not inconsistent with the application of this part. Where the standards of a state or other United States jurisdiction where an attorney is admitted or practices conflict with this part, this part shall govern.

§ 205.2 Definitions.
For purposes of this part, the following definitions apply:

(a) Appearing and practicing before the Commission:
(1) Means:
(i) Transacting any business with the Commission, including communications in any form;
(ii) Representing an issuer in a Commission administrative proceeding or in connection with any Commission investigation, inquiry, information request, or subpoena;
(iii) Providing advice in respect of the United States securities laws or the Commission's rules or regulations thereunder regarding any document that the attorney has notice will be filed with or submitted to, or incorporated into any document that will be filed with or submitted to, the Commission, including the provision of such advice in the context of preparing, or participating in the preparation of, any such document; or
(iv) Advising an issuer as to whether information or a statement, opinion, or other writing is required under the United States securities laws or the Commission's rules or regulations thereunder to be filed with or submitted to, or incorporated into any document that will be filed with or submitted to, the Commission; but
(2) Does not include an attorney who:
(i) Conducts the activities in paragraphs (a)(1)(i) through (a)(1)(iv) of this section other than in the context of providing legal services to an issuer with whom the attorney has an attorney-client relationship; or
(ii) Is a non-appearing foreign attorney.

(b) Appropriate response means a response to an attorney regarding reported evidence of a material violation as a result of which the attorney reasonably believes:
(1) That no material violation, as defined in paragraph (i) of this section, has occurred, is ongoing, or is about to occur;
(2) That the issuer has, as necessary, adopted appropriate remedial measures, including appropriate steps or sanctions to stop any material violations that are ongoing, to prevent any material violation that has yet to occur, and to remedy or otherwise appropriately address any material violation that has already occurred and to minimize the likelihood of its recurrence; or
(3) That the issuer, with the consent of the issuer's board of directors, a committee thereof to whom a report could be made pursuant to § 205.3(b)(3), or a qualified legal compliance committee, has retained or directed an attorney to review the reported evidence of a material violation and either:
(i) Has substantially implemented any remedial recommendations made by such attorney after a reasonable investigation and evaluation of the reported evidence; or
(ii) Has been advised that such attorney may, consistent with his or her professional obligations, assert a colorable defense on behalf of the issuer (or the issuer's officer, director, employee, or agent, as the case may be) in any investigation or judicial or administrative proceeding relating to the reported evidence of a material violation.

(c) Attorney means any person who is admitted, licensed, or otherwise qualified to practice law in any jurisdiction, domestic or foreign, or who holds himself or herself out as admitted, licensed, or otherwise qualified to practice law.

(d) Breach of fiduciary duty refers to any breach of fiduciary or similar duty to the issuer recognized under an applicable Federal or State statute or at common law, including but not limited to misfeasance, nonfeasance, abdication of duty, abuse of trust, and approval of unlawful transactions.
(e) Evidence of a material violation means 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.


(g) In the representation of an issuer means providing legal services as an attorney for an issuer, regardless of whether the attorney is employed or retained by the issuer.

(h) Issuer means an issuer (as defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c)), the securities of which are registered under section 12 of that Act (15 U.S.C. 78l), or that is required to file reports under section 15(d) of that Act (15 U.S.C. 78o(d)), or that files or has filed a registration statement that has not yet become effective under the Securities Act of 1933 (15 U.S.C. 77a et seq.), and that it has not withdrawn, but does not include a foreign government issuer. For purposes of paragraphs (a) and (g) of this section, the term "issuer" includes any person controlled by an issuer, where an attorney provides legal services to such person on behalf of, or at the behest, or for the benefit of the issuer, regardless of whether the attorney is employed or retained by the issuer.

(i) Material violation means a material violation of an applicable United States federal or state securities law, a material breach of fiduciary duty arising under United States federal or state law, or a similar material violation of any United States federal or state law.

(j) Non-appearing foreign attorney means an attorney:
(1) Who is admitted to practice law in a jurisdiction outside the United States;
(2) Who does not hold himself or herself out as practicing, and does not give legal advice regarding, United States federal or state securities or other laws (except as provided in paragraph (j)(3)(ii) of this section); and
(3) Who:
(i) Conducts activities that would constitute appearing and practicing before the Commission only incidentally to, and in the ordinary course of, the practice of law in a jurisdiction outside the United States; or

(ii) Is appearing and practicing before the Commission only in consultation with counsel, other than a non-appearing foreign attorney, admitted or licensed to practice in a state or other United States jurisdiction.

(k) Qualified legal compliance committee means a committee of an issuer (which also may be an audit or other committee of the issuer) that:

(1) Consists of at least one member of the issuer's audit committee (or, if the issuer has no audit committee, one member from an equivalent committee of independent directors) and two or more members of the issuer's board of directors who are not employed, directly or indirectly, by the issuer and who are not, in the case of a registered investment company, "interested persons" as defined in section 2(a)(19) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(19));

(2) Has adopted written procedures for the confidential receipt, retention, and consideration of any report of evidence of a material violation under § 205.3;

(3) Has been duly established by the issuer's board of directors, with the authority and responsibility:

(i) To inform the issuer's chief legal officer and chief executive officer (or the equivalents thereof) of any report of evidence of a material violation (except in the circumstances described in § 205.3(b)(4));

(ii) To determine whether an investigation is necessary regarding any report of evidence of a material violation by the issuer, its officers, directors, employees or agents and, if it determines an investigation is necessary or appropriate, to:

(A) Notify the audit committee or the full board of directors;

(B) Initiate an investigation, which may be conducted either by the chief legal officer (or the equivalent thereof) or by outside attorneys; and

(C) Retain such additional expert personnel as the committee deems necessary; and

(iii) At the conclusion of any such investigation, to:

(A) Recommend, by majority vote, that the issuer implement an appropriate response to evidence of a material violation; and

(B) Inform the chief legal officer and the chief executive officer (or the equivalents thereof) and the board of directors of the results of any such investigation under this section and the appropriate remedial measures to be adopted; and
(4) Has the authority and responsibility, acting by majority vote, to take all other appropriate action, including the authority to notify the Commission in the event that the issuer fails in any material respect to implement an appropriate response that the qualified legal compliance committee has recommended the issuer to take.

(1) Reasonable or reasonably denotes, with respect to the actions of an attorney, conduct that would not be unreasonable for a prudent and competent attorney.

(m) Reasonably believes means that an attorney believes the matter in question and that the circumstances are such that the belief is not unreasonable.

(n) Report means to make known to directly, either in person, by telephone, by e-mail, electronically, or in writing.

§ 205.3 Issuer as client.

(a) Representing an issuer. An attorney appearing and practicing before the Commission in the representation of an issuer owes his or her professional and ethical duties to the issuer as an organization. That the attorney may work with and advise the issuer's officers, directors, or employees in the course of representing the issuer does not make such individuals the attorney's clients.

(b) Duty to report evidence of a material violation.

(1) If an attorney, appearing and practicing before the Commission in the representation of an issuer, becomes aware of evidence of a material violation by the issuer or by any officer, director, employee, or agent of the issuer, the attorney shall report such evidence to the issuer's chief legal officer (or the equivalent thereof) or to both the issuer's chief legal officer and its chief executive officer (or the equivalents thereof) forthwith. By communicating such information to the issuer's officers or directors, an attorney does not reveal client confidences or secrets or privileged or otherwise protected information related to the attorney's representation of an issuer.

(2) The chief legal officer (or the equivalent thereof) shall cause such inquiry into the evidence of a material violation as he or she reasonably believes is appropriate to determine whether the material violation described in the report has occurred, is ongoing, or is about to occur. If
the chief legal officer (or the equivalent thereof) determines no material violation has occurred, is ongoing, or is about to occur, he or she shall notify the reporting attorney and advise the reporting attorney of the basis for such determination. Unless the chief legal officer (or the equivalent thereof) reasonably believes that no material violation has occurred, is ongoing, or is about to occur, he or she shall take all reasonable steps to cause the issuer to adopt an appropriate response, and shall advise the reporting attorney thereof. In lieu of causing an inquiry under this paragraph (b), a chief legal officer (or the equivalent thereof) may refer a report of evidence of a material violation to a qualified legal compliance committee under paragraph (c)(2) of this section if the issuer has duly established a qualified legal compliance committee prior to the report of evidence of a material violation.

(3) Unless an attorney who has made a report under paragraph (b)(1) of this section reasonably believes that the chief legal officer or the chief executive officer of the issuer (or the equivalent thereof) has provided an appropriate response within a reasonable time, the attorney shall report the evidence of a material violation to:

(i) The audit committee of the issuer's board of directors;

(ii) Another committee of the issuer's board of directors consisting solely of directors who are not employed, directly or indirectly, by the issuer and are not, in the case of a registered investment company, "interested persons" as defined in section 2(a)(19) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(19)) (if the issuer's board of directors has no audit committee); or

(iii) The issuer's board of directors (if the issuer's board of directors has no committee consisting solely of directors who are not employed, directly or indirectly, by the issuer and are not, in the case of a registered investment company, "interested persons" as defined in section 2(a)(19) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(19))).

(4) If an attorney reasonably believes that it would be futile to report evidence of a material violation to the issuer's chief legal officer and chief executive officer (or the equivalents thereof) under paragraph (b)(1) of this section, the attorney may report such evidence as provided under paragraph (b)(3) of this section.

(5) An attorney retained or directed by an issuer to investigate evidence of a material violation reported under paragraph (b)(1), (b)(3), or (b)(4) of this section shall be deemed to be appearing and practicing before the Commission. Directing or retaining an attorney to investigate reported evidence of a material violation does not relieve an officer or director of the issuer to whom such evidence has been reported under paragraph
(b)(1), (b)(3), or (b)(4) of this section from a duty to respond to the reporting attorney.

(6) An attorney shall not have any obligation to report evidence of a material violation under this paragraph (b) if:

(i) The attorney was retained or directed by the issuer's chief legal officer (or the equivalent thereof) to investigate such evidence of a material violation and:
(A) The attorney reports the results of such investigation to the chief legal officer (or the equivalent thereof); and
(B) Except where the attorney and the chief legal officer (or the equivalent thereof) each reasonably believes that no material violation has occurred, is ongoing, or is about to occur, the chief legal officer (or the equivalent thereof) reports the results of the investigation to the issuer's board of directors, a committee thereof to whom a report could be made pursuant to paragraph (b)(3) of this section, or a qualified legal compliance committee; or
(ii) The attorney was retained or directed by the chief legal officer (or the equivalent thereof) to assert, consistent with his or her professional obligations, a colorable defense on behalf of the issuer (or the issuer's officer, director, employee, or agent, as the case may be) in any investigation or judicial or administrative proceeding relating to such evidence of a material violation, and the chief legal officer (or the equivalent thereof) provides reasonable and timely reports on the progress and outcome of such proceeding to the issuer's board of directors, a committee thereof to whom a report could be made pursuant to paragraph (b)(3) of this section, or a qualified legal compliance committee.

(7) An attorney shall not have any obligation to report evidence of a material violation under this paragraph (b) if such attorney was retained or directed by a qualified legal compliance committee:

(i) To investigate such evidence of a material violation; or
(ii) To assert, consistent with his or her professional obligations, a colorable defense on behalf of the issuer (or the issuer's officer, director, employee, or agent, as the case may be) in any investigation or judicial or administrative proceeding relating to such evidence of a material violation.

(8) An attorney who receives what he or she reasonably believes is an appropriate and timely response to a report he or she has made pursuant to paragraph (b)(1), (b)(3), or (b)(4) of this section need do nothing more under this section with respect to his or her report.
(9) An attorney who does not reasonably believe that the issuer has made an appropriate response within a reasonable time to the report or reports made pursuant to paragraph (b)(1), (b)(3), or (b)(4) of this section shall explain his or her reasons therefor to the chief legal officer (or the equivalent thereof), the chief executive officer (or the equivalent thereof), and directors to whom the attorney reported the evidence of a material violation pursuant to paragraph (b)(1), (b)(3), or (b)(4) of this section.

(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.

(c) Alternative reporting procedures for attorneys retained or employed by an issuer that has established a qualified legal compliance committee.

(1) If an attorney, appearing and practicing before the Commission in the representation of an issuer, becomes aware of evidence of a material violation by the issuer or by any officer, director, employee, or agent of the issuer, the attorney may, as an alternative to the reporting requirements of paragraph (b) of this section, report such evidence to a qualified legal compliance committee, if the issuer has previously formed such a committee. An attorney who reports evidence of a material violation to such a qualified legal compliance committee has satisfied his or her obligation to report such evidence and is not required to assess the issuer's response to the reported evidence of a material violation.

(2) A chief legal officer (or the equivalent thereof) may refer a report of evidence of a material violation to a previously established qualified legal compliance committee in lieu of causing an inquiry to be conducted under paragraph (b)(2) of this section. The chief legal officer (or the equivalent thereof) shall inform the reporting attorney that the report has been referred to a qualified legal compliance committee. Thereafter, pursuant to the requirements under § 205.2(k), the qualified legal compliance committee shall be responsible for responding to the evidence of a material violation reported to it under this paragraph (c).

(d) Issuer confidences.

(1) Any report under this section (or the contemporaneous record thereof) or any response thereto (or the contemporaneous record thereof) may be used by an attorney in connection with any investigation,
proceeding, or litigation in which the attorney's compliance with this part is in issue.

(2) An attorney appearing and practicing before the Commission in the representation of an issuer may reveal to the Commission, without the issuer's consent, confidential information related to the representation to the extent the attorney reasonably believes necessary:

(i) To prevent the issuer from committing a material violation that is likely to cause substantial injury to the financial interest or property of the issuer or investors;

(ii) To prevent the issuer, in a Commission investigation or administrative proceeding from committing perjury, proscribed in 18 U.S.C. 1621; suborning perjury, proscribed in 18 U.S.C. 1622; or committing any act proscribed in 18 U.S.C. 1001 that is likely to perpetrate a fraud upon the Commission; or

(iii) To rectify the consequences of a material violation by the issuer that caused, or may cause, substantial injury to the financial interest or property of the issuer or investors in the furtherance of which the attorney's services were used.

§ 205.4 Responsibilities of supervisory attorneys.

(a) An attorney supervising or directing another attorney who is appearing and practicing before the Commission in the representation of an issuer is a supervisory attorney. An issuer's chief legal officer (or the equivalent thereof) is a supervisory attorney under this section.

(b) A supervisory attorney shall make reasonable efforts to ensure that a subordinate attorney, as defined in § 205.5(a), that he or she supervises or directs conforms to this part. To the extent a subordinate attorney appears and practices before the Commission in the representation of an issuer, that subordinate attorney's supervisory attorneys also appear and practice before the Commission.

(c) A supervisory attorney is responsible for complying with the reporting requirements in § 205.3 when a subordinate attorney has reported to the supervisory attorney evidence of a material violation.

(d) A supervisory attorney who has received a report of evidence of a material violation from a subordinate attorney under § 205.3 may report such evidence to the issuer's qualified legal compliance committee if the issuer has duly formed such a committee.
§ 205.5 Responsibilities of a subordinate attorney.
(a) An attorney who appears and practices before the Commission in the representation of an issuer on a matter under the supervision or direction of another attorney (other than under the direct supervision or direction of the issuer's chief legal officer (or the equivalent thereof)) is a subordinate attorney.

(b) A subordinate attorney shall comply with this part notwithstanding that the subordinate attorney acted at the direction of or under the supervision of another person.

(c) A subordinate attorney complies with § 205.3 if the subordinate attorney reports to his or her supervising attorney under § 205.3(b) evidence of a material violation of which the subordinate attorney has become aware in appearing and practicing before the Commission.

(d) A subordinate attorney may take the steps permitted or required by § 205.3(b) or (c) if the subordinate attorney reasonably believes that a supervisory attorney to whom he or she has reported evidence of a material violation under § 205.3(b) has failed to comply with § 205.3.

§ 205.6 Sanctions and discipline.
(a) A violation of this part by any attorney appearing and practicing before the Commission in the representation of an issuer shall subject such attorney to the civil penalties and remedies for a violation of the federal securities laws available to the Commission in an action brought by the Commission thereunder.

(b) An attorney appearing and practicing before the Commission who violates any provision of this part is subject to the disciplinary authority of the Commission, regardless of whether the attorney may also be subject to discipline for the same conduct in a jurisdiction where the attorney is admitted or practices. An administrative disciplinary proceeding initiated by the Commission for violation of this part may result in an attorney being censured, or being temporarily or permanently denied the privilege of appearing or practicing before the Commission.
(c) An attorney who complies in good faith with the provisions of this part shall not be subject to discipline or otherwise liable under inconsistent standards imposed by any state or other United States jurisdiction where the attorney is admitted or practices.

(d) An attorney practicing outside the United States shall not be required to comply with the requirements of this part to the extent that such compliance is prohibited by applicable foreign law.

§ 205.7 No private right of action.
(a) Nothing in this part is intended to, or does, create a private right of action against any attorney, law firm, or issuer based upon compliance or noncompliance with its provisions.

(b) Authority to enforce compliance with this part is vested exclusively in the Commission.


************

DECEMBER PROPOSED RULES
SECURITIES AND EXCHANGE COMMISSION
Implementation of Standards of Professional Conduct for Attorneys
Monday, December 2, 2002
67 Fed. Reg. 71670-71707

PART 205--STANDARDS OF PROFESSIONAL CONDUCT FOR ATTORNEYS APPEARING AND PRACTICING BEFORE THE COMMISSION IN THE REPRESENTATION OF AN ISSUER

Sec.
205.3(d) Issuer as client.

§ 205.3 Issuer as client.

... (d) Notice to the Commission where there is no appropriate response within a reasonable time. (1) Where an attorney who has reported evidence of a material violation under paragraph 3(b) of this section
rather than paragraph 3(c) of this section does not receive an appropriate response, or has not received a response in a reasonable time, to his or her report, and the attorney reasonably believes that a material violation is ongoing or is about to occur and is likely to result in substantial injury to the financial interest or property of the issuer or of investors:

(i) An attorney retained by the issuer shall:

(A) Withdraw forthwith from representing the issuer, indicating that the withdrawal is based on professional considerations;

(B) Within one business day of withdrawing, give written notice to the Commission of the attorney's withdrawal, indicating that the withdrawal was based on professional considerations; and

(C) Promptly disaffirm to the Commission any opinion, document, affirmation, representation, characterization, or the like in a document filed with or submitted to the Commission, or incorporated into such a document, that the attorney has prepared or assisted in preparing and that the attorney reasonably believes is or may be materially false or misleading;

(ii) An attorney employed by the issuer shall:

(A) Within one business day, notify the Commission in writing that he or she intends to disaffirm some opinion, document, affirmation, representation, characterization, or the like in a document filed with or submitted to the Commission, or incorporated into such a document, that the attorney has prepared or assisted in preparing and that the attorney reasonably believes is or may be materially false or misleading; and

(B) Promptly disaffirm to the Commission, in writing, any such opinion, document, affirmation, representation, characterization, or the like; and

(iii) The issuer's chief legal officer (or the equivalent) shall inform any attorney retained or employed to replace the attorney who has so withdrawn that the previous attorney's withdrawal was based on professional considerations.

(2) Where an attorney who has reported evidence of a material violation under paragraph (b) rather than paragraph (c) of this section does not receive an appropriate response, or has not received a response in a reasonable time, to his or her report under paragraph (b) of this section, and the attorney reasonably believes that a material violation has occurred and is likely to have resulted in substantial injury to the financial interest or property of the issuer or of investors but is not ongoing:

(i) An attorney retained by the issuer may:

(A) Withdraw forthwith from representing the issuer, indicating that the withdrawal is based on professional considerations;
(B) Give written notice to the Commission of the attorney's withdrawal, indicating that the withdrawal was based on professional considerations; and

(C) Disaffirm to the Commission, in writing, any opinion, document, affirmation, representation, characterization, or the like in a document filed with or submitted to the Commission, or incorporated into such a document, that the attorney has prepared or assisted in preparing and that the attorney reasonably believes is or may be materially false or misleading;

(ii) An attorney employed by the issuer may:

(A) Notify the Commission in writing that he or she intends to disaffirm some opinion, document, affirmation, representation, characterization, or the like in a document filed with or submitted to the Commission, or incorporated into such a document, that the attorney has prepared or assisted in preparing and that the attorney reasonably believes is or may be materially false or misleading; and

(B) Disaffirm to the Commission, in writing, any such opinion, document, affirmation, representation, characterization, or the like; and

(iii) The issuer's chief legal officer (or the equivalent) shall inform any attorney retained or employed to replace the attorney who has so withdrawn that the previous attorney's withdrawal was based on professional considerations.

(3) The notification to the Commission prescribed by this paragraph (d) does not breach the attorney-client privilege.

(4) An attorney formerly employed or retained by an issuer who has reported evidence of a material violation under this section and reasonably believes that he or she has been discharged for so doing may notify the Commission that he or she believes that he or she has been discharged for reporting evidence of a material violation under this section and may disaffirm in writing to the Commission any opinion, document, affirmation, representation, characterization, or the like in a document filed with or submitted to the Commission, or incorporated into such a document, that the attorney has prepared or assisted in preparing and that the attorney reasonably believes is or may be materially false or misleading.

Dated: November 21, 2002.
PART 205--STANDARDS OF PROFESSIONAL CONDUCT FOR ATTORNEYS APPEARING AND PRACTICING BEFORE THE COMMISSION IN THE REPRESENTATION OF AN ISSUER

§ 205.3 Issuer as client.

...  
(d) Actions required where there is no appropriate response within a reasonable time.

(1) Where an attorney who has reported evidence of a material violation under paragraph (b) of this section rather than paragraph (c) of this section:

(i) Does not receive an appropriate response, or has not received a response in a reasonable time,

(ii) Has followed the procedures set forth in paragraph (b)(3) of this section, and

(iii) Reasonably concludes that there is substantial evidence of a material violation that is ongoing or is about to occur and is likely to cause substantial injury to the financial interest or property of the issuer or of investors:

(A) An attorney retained by the issuer shall withdraw from representing the issuer, and shall notify the issuer, in writing, that the withdrawal is based on professional considerations.

(B) An attorney employed by the issuer shall cease forthwith any participation or assistance in any matter concerning the violation and shall notify the issuer, in writing, that he or she believes that the issuer has not provided an appropriate response in a reasonable time to his or her report of evidence of a material violation under paragraph (b) of this section.

(2) An attorney shall not be required to take any action pursuant to paragraph (d)(1) of this section if the attorney would be prohibited from doing so by order or rule of any court, administrative body or other authority with jurisdiction over the attorney, after having sought leave to
withdraw from representation or to cease participation or assistance in a matter. An attorney shall give notice to the issuer that, but for such prohibition, he or she would have taken such action pursuant to this paragraph (d)(1) or (d)(2), and such notice shall be deemed the equivalent of such action for purposes of this part.

(3) An attorney 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 shall notify the issuer's chief legal officer (or the equivalent thereof) forthwith.

(4) The issuer's chief legal officer (or the equivalent thereof) shall notify any attorney retained or employed to replace an attorney who has given notice to an issuer pursuant to paragraph (d)(1), (d)(2) or (d)(3) of this section that the previous attorney has withdrawn, ceased to participate or assist or has been discharged, as the case may be, pursuant to the provisions of this paragraph.

(e) Duties of an issuer where an attorney has given notice pursuant to paragraph (d). Where an attorney has provided an issuer with a written notice pursuant to paragraph (d)(1), (d)(2) or (d)(3) of this section, the issuer shall, within two business days of receipt of such written notice, report such notice and the circumstances related thereto on Form 8-K, 20-F, or 40-F (§§ 249.308, 220f or 240f of this chapter), as applicable.

(f) Additional actions by an attorney. An attorney retained or employed by the issuer may, if an issuer does not comply with paragraph (e) of this section, inform the Commission that the attorney has provided the issuer with notice pursuant to paragraph (d)(1), (d)(2), or (d)(3) of this section, indicating that such action was based on professional considerations.

Appendix B

OKLAHOMA RULES OF PROFESSIONAL CONDUCT
OKLA. STAT. TITLE 5, APPENDIX 3-A (2001)
adopted July 1, 1988; as amended through July 1, 2003

SCOPE

¶ 6 Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.

¶ 7 Moreover, these Rules are not intended to govern or affect judicial application of either the attorney-client or work product privilege. Those privileges were developed to promote compliance with law and fairness in litigation. In reliance on the attorney-client privilege, clients are entitled to expect that communications within the scope of the privilege will be protected against compelled disclosure. The attorney-client privilege is that of the client and not of the lawyer. The fact that in exceptional situations the lawyer under the Rules has a limited discretion to disclose a client confidence does not vitiate the proposition that, as a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be judicially compelled only in accordance with recognized exceptions to the attorney-client and work product privileges.
RULE 1.1 COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

COMMENT:
Legal Knowledge and Skill

In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill
considered action under emergency conditions can jeopardize the client's interest.

A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Thoroughness and Preparation

Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.

Maintaining Competence

To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances.

OKLAHOMA MODIFICATION: None

RULE 1.2 SCOPE OF REPRESENTATION

... (c) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

... COMMENT:
Criminal, Fraudulent and Prohibited Transactions

¶ 6 A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

¶ 7 When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is not permitted to reveal the client's wrongdoing, except where permitted by Rule 1.6. However, the lawyer is required to avoid furthering the purpose, for example, by suggesting how it might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent. Withdrawal from the representation, therefore, may be required.

¶ 8 Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

¶ 9 Paragraph (c) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer should not participate in a sham transaction; for example, a transaction to effectuate criminal or fraudulent escape of tax liability. Paragraph (c) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (c) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

OKLAHOMA MODIFICATION: Paragraph (b) of the ABA Model Rule was deleted and the remaining paragraphs were re-lettered. The substance of Paragraph (b) was incorporated into the Comments under
the heading "Independence From Client's Views or Activities," as more appropriate for a Comment than a Rule.

**RULE 1.4 COMMUNICATION**

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

**COMMENT:**

The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party and take other reasonable steps that permit the client to make a decision regarding a serious offer from another party. A lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable. See Rule 1.2(a). Even when a client delegates authority to the lawyer, the client should be kept advised of the status of the matter.

Adequacy of communication depends in part on the kind of advice or assistance involved. For example, in negotiations where there is time to explain a proposal, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that might injure or coerce others. On the other hand, a lawyer ordinarily cannot be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation.
Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from mental disability. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client. Practical exigency may also require a lawyer to act for a client without prior consultation.

Withholding Information

In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

OKLAHOMA MODIFICATION: None

RULE 1.6 CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

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

(1) to disclose the intention of the client to commit a crime and the information necessary to prevent the crime.
(2) to rectify the consequences of what the lawyer knows to be a client's criminal or fraudulent act in the commission of which the lawyer's services had been used, provided that the lawyer has first
made reasonable efforts to contact the client but has been unable to do so, or that the lawyer has contacted and called upon the client to rectify such criminal or fraudulent act but the client has refused or is unable to do so.

(3) 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;

(4) or as otherwise permitted under these rules.

(c) A lawyer shall reveal such information when required by law or court order.

COMMENT:

The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.

The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.

Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. The common law recognizes that the client's confidences must be protected from disclosure. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product
doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies 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 applies not merely 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.

The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

Authorized Disclosure

A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

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

The confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends serious harm to another person. However, to the extent a lawyer is required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. Since lawyers must advise against the commission of deliberately wrong acts, the public is better
protected if full and open communication by the client is encouraged than if it is inhibited.

Several situations must be distinguished.

First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See Rule 1.2(d)(c). Similarly, a lawyer has a duty under Rule 3.3(a)(4) not to use false evidence. This duty is essentially a special instance of the duty prescribed in Rule 1.2(c) to avoid assisting a client in criminal or fraudulent conduct.

Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated Rule 1.2(d)(e), because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character. Even if the involvement was innocent however, the fact remains that the lawyer's professional services were made the instrument of the client's crime or fraud. The lawyer, therefore, has a legitimate interest in being able to rectify the consequences of such conduct, and has the professional right, although not a professional duty to rectify the situation. Exercising that right may require revealing information relating to the representation. Paragraph (b)(2) gives the lawyer professional discretion to reveal such information to the extent necessary to accomplish rectification, provided that the lawyer first makes reasonable efforts to contact the client but is unable to do so, or if the lawyer is able to contact the client, the lawyer calls upon the client to rectify the criminal or fraudulent act and the client refuses or is unable to do so. However, the exercise of the lawyer's discretion in this regard must be guided by the potential for rectification of the consequences of the client's criminal or fraudulent conduct and not considerations relating to the lawyer's own personal or professional reputation.

Third, the lawyer may learn that a client intends prospective conduct that is criminal. As stated in paragraph (b)(1), the lawyer has professional discretion to reveal information in order to prevent a crime. The lawyer's exercise of discretion requires consideration of such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the severity and likelihood of harm, whether the harm is physical or financial, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. Where practical, the lawyer should seek to persuade the client to take
suitable action. Where the conduct is likely to result in imminent death or substantial harm to the person or financial interests of another, doubts should be resolved in favor of disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose. A lawyer's decision not to make the disclosures permitted by paragraph (b)(1) and (b)(2) does not violate this Rule.

Withdrawal

If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1).

15 After withdrawal the lawyer is required to refrain from making disclosure of the clients' confidences, except as otherwise provided in Rule 1.6. Neither this Rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).

Paragraph (b)(2) does not apply where a lawyer is employed after a crime or fraud has been committed to represent the client in matters ensuing therefrom.

Dispute Concerning Lawyer's Conduct

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. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(2) 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 assertion. The right to defend, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective order or other arrangements should be sought by the lawyer to the fullest extent practicable.

If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. Such a charge can arise in a civil, criminal or professional disciplinary 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. A lawyer entitled to a fee is permitted by paragraph (b)(2) 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. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

Disclosures Otherwise Required or Authorized

The attorney-client privilege is differently defined in various jurisdictions. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, Rule 1.6(a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring a lawyer to give information about the client.

The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See Rules 2.2, 2.3, 3.3 and 4.1. In addition to these provisions, a lawyer
may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such supersession.

Former Client

The duty of confidentiality continues after the client-lawyer relationship has terminated.

OKLAHOMA MODIFICATION: Oklahoma broadened the ABA standard to allow a lawyer to reveal information pertaining to the intent of a client to commit any crime as opposed to a crime in which death or substantial bodily harm is likely to result, and the information necessary to prevent the crime. Oklahoma subsequently added 1.6(b)(2) to retain the substance of Oklahoma DR 7-102(B) governing rectification of fraudulent conduct in which the lawyer's services were used.

Further, Oklahoma added a provision to clearly show that a lawyer shall reveal information when required by law or Court order. This continues the present Oklahoma rule.

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 is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, 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. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing.
information relating to the representation to persons outside the organization. Such measures may include among others:

(1) asking reconsideration of the matter;
(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and
(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with Rule 1.16.

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

(e) 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

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.

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.

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. However, different considerations arise when the lawyer knows that the organization may be substantially injured by action of [a] constituent that is in violation of law. In such a circumstance, it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. Clear justification should exist for seeking review over the head of the constituent normally responsible for it. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest. Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority. At some point it may be useful or essential to obtain an independent legal opinion.
In an extreme case, it may be reasonably necessary for the lawyer to refer the matter to the organization's highest authority. Ordinarily, that is the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions highest authority reposes elsewhere; for example, in the independent directors of a corporation.

Relation to Other Rules

The authority and responsibility provided in paragraph (b) 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 Rules 1.6, 1.8, and 1.16, 3.3 or 4.1. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.2(c) can be applicable.

Government Agency

The duty defined in this Rule applies to governmental organizations. However, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official 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. Therefore, defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Although in some circumstances the client may be a specific agency, it is generally 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 government as a whole may be the client for purpose of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. This Rule does not limit that authority. See note on Scope.

Clarifying the Lawyer's Role

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.

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.

Dual Representation

Paragraph (e) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

Derivative Actions

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.

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.

OKLAHOMA MODIFICATION: None
RULE 1.16 DECLINING OR TERMINATING REPRESENTATION

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;
(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client;
(3) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
(4) the client has used the lawyer's services to perpetrate a crime or fraud;
(5) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

(1) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent to the extent that it is likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.
(2) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
(3) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
(4) other good cause for withdrawal exists.

(c) When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been
earned. The lawyer may retain papers relating to the client to the extent permitted by other law.

COMMENT:

A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion.

Mandatory Withdrawal

A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such suggestion in the hope that a lawyer will not be constrained by a professional obligation.

Withdrawal is also required if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also required if the lawyer's services were misused in the past even if that would materially prejudice the client.

When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may wish an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.

Discharge

A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.
Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring the client to represent himself.

If the client is mentally incompetent, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and, in an extreme case, may initiate proceedings for a conservatorship or similar protection of the client. See Rule 1.14.

Optional Withdrawal

A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests.

A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client Upon Withdrawal

Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law.

Whether or not a lawyer for an organization may under certain unusual circumstances have a legal obligation to the organization after withdrawing or being discharged by the organization's highest authority is beyond the scope of these Rules.

OKLAHOMA MODIFICATION: Rule 1.16(a) has been modified to require mandatory withdrawal from representation of a client upon two additional grounds formerly listed as permissive under subparagraphs (b)(1) and (2). The remaining provisions of subparagraph (b) have been
correspondingly renumbered. Subparagraph (b) (1) has been modified by delineating the [impact] upon the client-lawyer relationship.

RULE 2.1 ADVISOR

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

COMMENT:

Scope of Advice

A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems
within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice

In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, duty to the client under Rule 1.4 may require that the lawyer act if the client's course of action is related to the representation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

OKLAHOMA MODIFICATION: None

RULE 3.1 MERITORIOUS CLAIMS AND CONTENTIONS

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

COMMENT:

The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of
advocacy, account must be taken of the law's ambiguities and potential for change.

The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person or if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

OKLAHOMA MODIFICATION: None

RULE 3.3 CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:
   (1) make a false statement of fact or law to a tribunal;
   (2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
   (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
   (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take the following remedial measures:
      (A) When a client has offered false evidence, the lawyer shall promptly call upon the client to rectify the same; if the client refuses or is unable to do so, the lawyer shall promptly reveal its false character to the tribunal.
      (B) When a person other than a client has offered false evidence, the lawyer shall promptly reveal its false character to the tribunal.

(b) the duties stated in paragraph (a) are continuing, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.
COMMENT:

The advocate's task is to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate's duty of candor to the tribunal. However, an advocate does not vouch for the evidence submitted in a cause; the tribunal is responsible for assessing its probative value.

Representations by a Lawyer

An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(c) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(c), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

Misleading Legal Argument

False Evidence

When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes.

When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its
false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.

Except in the defense of a criminal accused, the rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the court or to the other party. Such a disclosure can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(c). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Perjury by a Criminal Defendant

Whether an advocate for a criminally accused has the same duty of disclosure has been intensely debated. While it is agreed that the lawyer should seek to persuade the client to refrain from perjurious testimony, there has been dispute concerning the lawyer's duty when that persuasion fails. If the confrontation with the client occurs before trial, the lawyer ordinarily can withdraw. Withdrawal before trial may not be possible, however, either because trial is imminent, or because the confrontation with the client does not take place until the trial itself, or because no other counsel is available.

The most difficult situation, therefore, arises in a criminal case where the accused insists on testifying when the lawyer knows that the testimony is perjurious. The lawyer's effort to rectify the situation can increase the likelihood of the client's being convicted as well as opening the possibility of a prosecution for perjury. On the other hand, if the lawyer does not exercise control over the proof, the lawyer participates, although in a merely passive way, in deception of the court.

Three resolutions of this dilemma have been proposed. One is to permit the accused to testify by a narrative without guidance through the lawyer's questioning. This compromises both contending principles; it exempts the lawyer from the duty to disclose false evidence but subjects
the client to an implicit disclosure of information imparted to counsel. Another suggested resolution, of relatively recent origin, is that the advocate be entirely excused from the duty to reveal perjury if the perjury is that of the client. This is a coherent solution but makes the advocate a knowing instrument of perjury.

The other resolution of the dilemma is that the lawyer must reveal the client's perjury if necessary to rectify the situation. A criminal accused has a right to the assistance of an advocate, a right to testify and a right of confidential communication with counsel. However, an accused should not have a right to assistance of counsel in committing perjury. Furthermore, an advocate has an obligation, not only in professional ethics but under the law as well, to avoid implication in the commission of perjury or other falsification of evidence. See Rule 1.2(c).

Remedial Measures

If perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to remonstrate with the client confidentially. If that fails, the advocate should seek to withdraw if that will remedy the situation. If withdrawal will not remedy the situation or is impossible, the advocate should make disclosure to the court. It is for the court then to determine what should be done--making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing. If the false testimony was that of the client, the client may controvert the lawyer's version of their communication when the lawyer discloses the situation to the court. If there is an issue whether the client has committed perjury, the lawyer cannot represent the client in resolution of the issue, and a mistrial may be unavoidable. An unscrupulous client might in this way attempt to produce a series of mistrials and thus escape prosecution. However, a second such encounter could be construed as a deliberate abuse of the right to counsel and as such a waiver of the right to further representation.

Constitutional Requirements

The general rule—that an advocate must disclose the existence of perjury with respect to a material fact, even that of a client—applies to defense counsel in criminal cases, as well as in other instances. However, the definition of the lawyer's ethical duty in such a situation
may be qualified by constitutional provisions for due process and the
right to counsel in criminal cases. In some jurisdictions these provisions
have been construed to require that counsel present an accused as a
witness if the accused wishes to testify, even if counsel knows the
testimony will be false. The obligation of the advocate under these Rules
is subordinate to such a constitutional requirement.

Refusing to Offer Proof Believed to be False

Generally speaking, a lawyer has authority to refuse to offer
testimony or other proof that the lawyer knows is untrustworthy.
Offering such proof may reflect adversely on the lawyer's ability to
discriminate in the quality of evidence and thus impair the lawyer's
effectiveness as an advocate. In criminal cases, however, a lawyer may,
in some jurisdictions, be denied this authority by constitutional
requirements governing the right to counsel.

Ex Parte Proceedings

... OKLAHOMA MODIFICATION: Rule 3.3(a)(1) has been modified to
eliminate the word "material" preceding the word "fact". Rule 3.3(a)(2)
has been modified to eliminate the word "material" preceding the word
"fact". These modifications eliminate the need for a determination that a
fact or law stated, or fact not disclosed, is material.

These modifications are also in conformance to an attorney's oath of
office required by Title 5 O.S. 1981, Sec. 2.

Rule 3.3(a)(4)(A) has been enlarged to continue the provisions of
present Oklahoma Code of Professional Responsibility, DR 7-102(B)(1).

Rule 3.3(a)(4)(B) has been enlarged to continue the provisions of
present Oklahoma Code of Professional Responsibility, DR 7-102(B)(2).

Rule 3.3(b) has been modified to require the duties stated in
paragraph (a) to be ongoing, rather than terminating at the conclusion of
the proceeding.
RULE 3.9 ADVOCATE IN NONADJUDICATIVE PROCEEDINGS

A lawyer representing a client before a legislative or administrative body or tribunal in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.

COMMENT

In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, formulate issues and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body should deal with the tribunal honestly and in conformity with applicable rules of procedure.

Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court. The requirements of this Rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers. However, legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.

This Rule does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency; representation in such a transaction is governed by Rules 4.1 through 4.4.

OKLAHOMA MODIFICATION: Oklahoma added the language "body or" to Rule 3.9 to expand the class of entities to whom the lawyer must disclose representative conflicts.

RULE 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.
COMMENT:

Misrepresentation

A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by failure to act.

Statements of Fact

This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.

Fraud by Client

Paragraph (b) recognizes that substantive law may require a lawyer to disclose certain information to avoid being deemed to have assisted the client's crime or fraud. The requirement of disclosure created by this paragraph is, however, subject to the obligations created by Rule 1.6.

OKLAHOMA MODIFICATION: None

RULE 5.1 RESPONSIBILITIES OF A PARTNER OR SUPERVISORY LAWYER

(a) A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the rules of professional conduct.
(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the rules of professional conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the rules of professional conduct if:

1. the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

2. the lawyer is a partner in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

COMMENT:

Paragraphs (a) and (b) refer to lawyers who have supervisory authority over the professional work of a firm or legal department of a government agency. This includes members of a partnership and the shareholders in a law firm organized as a professional corporation; lawyers having supervisory authority in the law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm.

The measure required to fulfill the responsibility prescribed in paragraphs (a) and (b) can depend on the firm's structure and the nature of its practice. In a small firm, informal supervision and occasional admonition ordinarily might be sufficient. In a large firm, or in practice situations in which intensely difficult ethical problems frequently arise, more elaborate procedures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members.

Paragraph (c)(1) expresses a general principle of responsibility for acts of another. See also Rule 8.4(a).
Paragraph (c)(2) defines the duty of a lawyer having direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has such supervisory authority in particular circumstances is a question of fact. Partners of a private firm have at least indirect responsibility for all work being done by the firm, while a partner in charge of a particular matter ordinarily has direct authority over other firm lawyers engaged in the matter. Appropriate remedial action by a partner would depend on the immediacy of the partner's involvement and the seriousness of the misconduct. The supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.

Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

OKLAHOMA MODIFICATION: Oklahoma deleted language contained in the ABA Model Rules Comment on this Rule, to-wit "and a lawyer having authority over the work of another may not assume that the subordinate lawyer will inevitably conform to the rules".

RULE 5.2 RESPONSIBILITIES OF A SUBORDINATE LAWYER

(a) A lawyer is bound by the rules of professional conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the rules of professional conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.
COMMENT:

Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the Rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

OKLAHOMA MODIFICATION: None

RULE 8.4 MISCONDUCT

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;
(e) state or imply an ability to influence improperly a government agency or official; or

(f) ...

COMMENT:

Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offense carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, or breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

A lawyer may refuse to comply with an obligation imposed by law upon good faith belief that no valid obligation exists. The provisions of Rule 1.2(c) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of attorney. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

OKLAHOMA MODIFICATION: None.
1.1. Declaration of jurisdiction

This Court declares that it possesses original and exclusive jurisdiction in all matters involving admission of persons to practice law in this state, and to discipline for cause, any and all persons licensed to practice law in Oklahoma, hereafter referred to as lawyers, and any other persons, corporations, partnerships, or any other entities (hereinafter collectively referred to as "persons") engaged in the unauthorized practice of law. This Court further declares that a member of the Bar of this state may not take unto himself any office or position or shroud himself in any official title which will place him beyond the power of this Court to keep its roster of attorneys clean. In the exercise of the foregoing jurisdiction, this Court adopts and promulgates the following rules which shall govern disciplinary and unauthorized practice of law proceedings.

1.3. Discipline for acts contrary to prescribed standards of conduct

The commission by any lawyer of any act contrary to prescribed standards of conduct, whether in the course of his professional capacity, or otherwise, which act would reasonably be found to bring discredit upon the legal profession, shall be grounds for disciplinary action, whether or not the act is a felony or misdemeanor, or a crime at all. Conviction in a criminal proceedings is not a condition precedent to the imposition of discipline.

RULE 3. GENERAL COUNSEL

3.2. Duties

The General Counsel of the Oklahoma Bar Association shall have the following powers and duties in the area of discipline under these Rules:
(a) With the approval of the Commission, to employ and supervise staff needed for the performance of the duties of the office;

(b) To investigate all matters involving possible misconduct or alleged incapacity of any lawyer, or the unauthorized practice of law, called to the General Counsel's attention by complaint or otherwise;

(c) To report to the Commission the results of investigations made by or at the direction of the General Counsel, and to make recommendations to the Commission concerning the institution of formal complaints for alleged misconduct or personal incapacity of lawyers;

(d) To prosecute all proceedings under these Rules;

(e) To appear at hearings conducted with respect to petitions for reinstatement of suspended or disbarred lawyers or lawyers suspended for incapacity to practice law, to cross-examine witnesses testifying in support of such petitions, and to marshal and present available evidence, if any, in opposition thereto;

(f) To file with the Supreme Court certificates of conviction of lawyers for crimes;

(g) ...

RULE 5. FILING AND PROCESSING OF GRIEVANCES AND REQUESTS FOR INVESTIGATION

5.1. Form of grievances and requests for investigation

(a) Each grievance or request for investigation (grievances and requests for investigation both being hereinafter referred to as a "grievance") involving a lawyer or involving the unauthorized practice of law shall be in writing and signed by the person filing the same, except that the General Counsel or the Commission may, in their discretion, institute an investigation on the basis of facts or allegations involving a lawyer or the unauthorized practice of law brought to their attention in any manner whatsoever. A lawyer or any other person will be immediately notified of the receipt of a grievance and furnished a copy thereof.
RULE 7. SUMMARY DISCIPLINARY PROCEEDINGS BEFORE SUPREME COURT

7.1. Criminal conviction of lawyer

A lawyer who has been convicted in any jurisdiction of a crime which demonstrates such lawyer's unfitness to practice law, regardless of whether the conviction resulted from a plea of guilty or nolo contendere or from a verdict after trial, shall be subject to discipline as herein provided, regardless of the pendency of an appeal.

7.6. Disciplinary proceedings based upon same facts as criminal proceeding

Nothing contained herein shall prevent the Professional Responsibility Commission from initiating and conducting disciplinary proceedings upon charges identical to those set forth in a criminal complaint, indictment, or information, notwithstanding the pendency or final disposition of the criminal action. In such event, certified or authenticated copies of the record and transcripts of testimony and evidence from the criminal action will be admissible in the disciplinary proceeding whether for or against the lawyer.

7.7. Disciplinary action in other jurisdictions, as basis for discipline

(a) It is the duty of a lawyer licensed in Oklahoma to notify the General Counsel whenever discipline for lawyer misconduct has been imposed upon him/her in another jurisdiction, within twenty (20) days of the final order of discipline, and failure to report shall itself be grounds for discipline.

(b) When a lawyer has been adjudged guilty of misconduct in a disciplinary proceeding, except contempt proceedings, by the highest court of another state or by a Federal Court, the General Counsel of the Oklahoma Bar Association may cause to be transmitted to the Chief Justice a certified copy of such adjudication and the Chief Justice shall direct the lawyer to appear before the Supreme Court at a time certain,
not less than ten (10) days after mailing of notice, and show cause, if any he/she has, why he/she should not be disciplined. The documents shall constitute the charge and shall be prima facie evidence the lawyer committed the acts therein described. The lawyer may submit a certified copy of the transcript of the evidence taken in the trial tribunal of the other jurisdiction to support his/her claim that the finding therein was not supported by the evidence or that it does not furnish sufficient grounds for discipline in Oklahoma. The lawyer may also submit, in the interest of explaining his/her conduct or by way of mitigating the discipline which may be imposed upon him/her, a brief and/or any evidence tending to mitigate the severity of discipline. The General Counsel may respond by submission of a brief and/or any evidence supporting a recommendation of discipline.