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April 29, 2005

Clerk of the Washington State Supreme Court  
Temple of Justice  
P.O. Box 40929  
Olympia, WA 98504-0929

Re: Comments on Proposed Amendments to Rules of Professional Conduct (RPC)

Greetings:

I offer the following comments on the proposed amendments to the RPC as proposed by the Board of Governors of the Washington State Bar Association (WSBA) and published for comment by the Court. References below to a "Rule" or a "Comment" refer to those as proposed by WSBA unless otherwise stated. The GR9 cover sheet to the proposed amendments notes that they arise due to changes in the American Bar Association's Model Rules of Professional Conduct (Model Rules or MRPC) that resulted from recommendations by ABA's Ethics 2000 Commission, the ABA Commission on Multijurisdictional Practice, and the ABA Task Force on Corporate Responsibility.

It is widely recognized that lawyers, clients, and society will benefit from making the lawyer conduct rules more consistent among our nation's jurisdictions. That may also have the effect of fending off threatened federalization of lawyer conduct rules, which most lawyers oppose. Considering that, I was disappointed that the WSBA failed to publish a marked-up edition of its finally proposed amended RPC that indicates how it will vary from the Model Rules. Recognizing the value of such a mark-up, I prepared one and have made it available for use by others at [http://www.evergreenethics.com/E2K/Redlined\\_RPC\\_Proposal.pdf](http://www.evergreenethics.com/E2K/Redlined_RPC_Proposal.pdf). I have also posted at <http://www.evergreenethics.com/E2K/> links to many of the ABA reference materials concerning the development of the Model Rules.

My comments on the specific portions of the proposed RCP follow.

### **Fundamental Principles of Professional Conduct.**

This statement introduced the 1969 ABA Code of Professional Responsibility (1969 Code) which emphasized that the duty of lawyers to serve and protect society and to uphold the law outweighed their duty to clients. (*e.g.*, DR 7-102(B)) The statement was dropped from the 1983 version of the Model Rules, for that version generally elevated lawyers' duties to clients

over any duties to society. (*e.g.*, MRPC 1.6) While the ABA has now revised the Model Rule so as to permit lawyers to fulfill any recognized moral duty to nonclient members of society (*e.g.*, MRPC 1.6(b)(1), (2), and (3)), the statement from the 1969 Code has not been restored to the Model Rules. Because I believe the lofty language of the statement—“Lawyers, as guardians of the law, play a vital role in the preservation of society.—is more likely to cause a lawyer reading it to exceed the constraints of the RPC than to comply with them (*e.g.*, by exposing a corrupt judge), I suggest that the statement be abandoned.

**Rule 1.6(b)(1),(2) and (3).**

As a result of the work of many scholars, jurists, and other leaders, including the ABA groups noted in the first paragraph, the ABA has restored to its lawyer ethics rules the concepts that (1) protecting innocent human life and health is more important than protecting client secrets, and (2) clients who use lawyers to further crime or fraud deserve no confidentiality from them. Those two concepts are now reflected in Model Rule 1.6(b)(1), (2), and (3), as follows:

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

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services;

The WSBA proposal would adopt clause (b)(1), adopt a variation of clause (b)(2), but *not* adopt clause (b)(3). Rule 1.6(b)(2) as proposed would continue to permit a lawyer to reveal client information “to prevent the client from committing a crime” whether or not the client had abused the lawyer-client relationship by using the lawyer’s services to further the crime. Because clause (b)(1) addresses crimes causing bodily harm, I submit that the WSBA variation from Model Rule 1.6(b)(2) is unnecessary. I believe that, consistent with the public’s expectations of lawyers, the confidentiality exception as to purely economic crimes (*e.g.*, tax evasion) should apply only if the client has impermissibly used the lawyer’s services to further the crime.

Lawyers may not knowingly assist a client in crime or fraud. The concept that a client who uses a lawyer’s services to further fraud or crime is abusing the lawyer-client relationship

and forfeits any right to confidentiality is a readily understandable concept. And it is sound public policy. That policy has long been a part of the ethics rules of lawyers. Appended to this letter is a compilation of historic lawyer ethics rules that have recognized that policy. (*e.g.*, ABA Canons 37 and 40 (1928); 1969 Code DR 7-102(B)) The crime-fraud exception to attorney-client privilege—which evolved before the duty of confidentiality came to be viewed as distinct from the privilege—has long rested on that policy, as noted in James A Gardner, “*The Crime or Fraud Exception to the Attorney-Client Privilege*,” 47 ABAJ 708, 713 (1961):

“To sum up, when it appears to an attorney that his client has abused the professional confidence by seeking advice for the purpose of committing a wrong in the future, it is proper for the attorney to come forward and disclose the content of the communications between the parties. Generally, there would be an ethical duty to do this . . . .”

The WSBA proposal would not adopt Model Rule 1.6(b)(3), which permits lawyers to reveal client information to rectify the harm from a client’s crime or fraud unwittingly furthered by the lawyer’s services. I am profoundly disappointed by the Bar’s rejection of that policy position. After three decades of national debate, the clear majority of the bodies that have considered the issue have adopted the position now stated in Model Rule 1.6(b)(3). In addition to those ABA groups noted in the first paragraph of this letter, that position is reflected in Section 67 of the American Law Institute’s Restatement Third, The Law Governing Lawyers (2000), a copy of which is appended to this letter.

In August of 2002, the Conference of Chief Justices, representing the highest courts of each jurisdiction in our nation, adopted a resolution specifically urging adoption of then proposed Model Rule 1.6(b)(2) and (3). A copy of that resolution is appended to this letter and it remains available on-line at <http://ccj.ncsc.dni.us/resol35RuleOneptSixEthics2000.html>.

In August of 2003, a formal report proposing adoption of Model Rule 1.6(b)(2) and (3) was presented to the ABA House of Delegates with the sponsorship of the following groups:

- Task Force on Corporate Responsibility
- Section of Business Law
- Section of Taxation
- Section of Tort Trial and Insurance Practice
- Standing Committee on Ethics and Professional Responsibility
- Young Lawyers Division
- Section of Real Property, Probate and Trust Law
- Task Force on Implementation of Section 307 of the Sarbanes-Oxley Act of 2002

That report remains on-line at <http://www.abanet.org/leadership/2003/summary/119a.pdf> and a copy of it is appended to this letter. The 2003 ABA House of Delegates approved the proposals.

Because I have had a long interest in the subject, I have attempted to stay abreast of national developments in the adoption of Model Rule 1.6(b)(1), (2), and (3)—what I refer to as the “public interest exceptions” to confidentiality. I and others refer to clause (b)(3) as the “rectify fraud” exception to confidentiality. By my count, there are now **twenty-seven (27) states** that have adopted lawyer conduct rules permitting revelations of client information to rectify fraud or crime unwittingly furthered by the lawyer’s services. A compilation of the applicable rules of those states is on-line at <http://www.evergreenethics.com/RectifyStates.html> and a copy of it is appended to this letter.

I most strongly urge the Court to join with the ABA and the majority of the high courts of other states in re-instating (*e.g.*, Washington’s 1972 CPR DR 7-102(B)) the rectify fraud exception by adopting Model Rule 1.6(b)(3). If the Court does so, then it should restore Comments 7 and 8 as they are in the Model Rules:

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

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

If the Court approves Rule 1.6(b)(1),(2) and (3) as proposed by the WSBA, then it ought

to strike from Comment 21 its fourth sentence, or else edit it to refer only to (b)(3). The sentence asserts as justification for lawyer revelations under both (b)(2) and (3) that “such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule.” However, a client planning a crime (*e.g.*, tax evasion, preventable by a noisy lawyer under (b)(2)) without aid of their lawyer would not be abusing the client-lawyer relationship.

Similarly, if the Court approves proposed Rule 1.6(b)(2) and (3), I submit that it should strike from Comment 22 its sentence that reads, “If a crime or fraud is still ongoing, a lawyer is permitted to disclose under Rule 1.6(b)(2) or (b)(3).” A crime or fraud that is *ongoing* cannot still be *prevented*, for it has already occurred. If the rule as adopted only permits disclosures to *prevent* a crime or fraud—not to mitigate or rectify their harm—then a lawyer must mutely observe the ongoing crime or fraud, or else risk disciplinary exposure. That, at least, is the position that the WSBA staff clearly stated in a recent case with which I am quite familiar.

### **Rule 1.6 Mandatory Reporting of True Threats.**

Recognizing the sanctity of human life, many states require lawyers to reveal client information when necessary to protect innocent persons from death or serious bodily harm. Quite recently, the Iowa Supreme Court adopted the Model Rules with the following added to Rule 1.6:

(c) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent imminent death or substantial bodily harm.

And the Iowa high court adopted the following as an additional comment to its Rule 32:1.6:

[19] Rule 32:1.6(c) requires a lawyer to reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent imminent death or substantial bodily harm. Rule 32:1.6(c) differs from rule 32:1.6(b)(1) in that rule 32:1.6(b)(1) permits, but does not require, disclosure in situations where death or substantial bodily harm is deemed to be reasonably certain rather than imminent. For purposes of rule 32:1.6, “reasonably certain” includes situations where the lawyer knows or reasonably believes the harm will occur, but there is still time for independent discovery and prevention of the harm without the lawyer’s disclosure. For purposes of this rule, death or substantial bodily harm is “imminent” if the lawyer knows or reasonably believes it is unlikely that the death or harm can be prevented unless the lawyer immediately discloses the information.

I urge the Court to follow the path taken by the Iowa court (as well as many other high courts) or else to make mandatory, under clause (b)(1), revelations whenever an innocent person’s death or

serious bodily injury is “reasonably certain.”

I note that the Court, in 1993, declared lawyers as having a duty to warn judicial officers of true threats. In *State v. Hansen*, 122 Wn.2d 712, 862 P.2d 117 (1993), the Court said, at 721:

“We conclude that attorneys, as officers of the court, have a duty to warn of true threats to harm a judge made by a client or a third party when the attorney has a reasonable belief that such threats are real.”

It seems to me that the duty expressed in *Hansen* should be codified in the new RPC, if not in the text of Rule 1.6 then at least in a comment to it.

### **Rule 1.6 Permissive Reporting of Government Corruption.**

The state of Hawaii includes the following addition exceptions under its Rule 1.6(b):

(4) to prevent a public official or public agency from committing a criminal or illegal act that a government lawyer reasonably believes is likely to result in harm to the public good;

(5) to rectify the consequences of a public official’s or a public agency’s act which the government lawyer reasonably believes to have been criminal or illegal and harmful to the public good;

The California General Assembly recently approved a similar provision (though former Governor Gray Davis vetoed it). I urge the Court to consider adding such exceptions.

### **Rule 1.6(b)(6) Permissive Revelations to Comply With Law.**

Model Rule 1.6(b)(6) permits lawyer revelations of client information “to comply with other law or a court order;” the WSBA proposal reads only “to comply with a court order.” I am not aware of any other state that has rejected the concept that lawyers should comply with the law when it requires their revelation of client information. While Washington’s Code of Professional Responsibility (modeled after the 1969 Code) was in effect through 1984, its DR 4-101(C)(2) provided that a lawyer could reveal confidences and secrets when “required by law or court order.” That DR is reprinted in *Seventh Elect Church v. Rogers*, 102 Wn.2d 527, 688 P.2d 506 (1984).

I urge the Court to restore the “required-by-law” exemption to clause (b)(6). It is disrespectful to the rule of law and harmful to individual lawyers to compel them to defy the law when they have no nonfrivolous basis for doing so. Rule 3.1 bars a lawyer from asserting a frivolous position. When courts have clearly established the validity of an agency rule that requires a lawyer to reveal client information, such as the information on IRS Form 8300 (large

currency transactions), it is irresponsible for the WSBA or the Court to insist that lawyers defy that agency. (E.g., WSBA Formal Ethics Opinion 194 *Disclosure of Client Information to Treasury Department on IRS Form 8300* (1997), at <http://www.wsba.org/lawyers/ethics/formalopinions/194.htm>)

Proposed Comment 26 directs attention to Enforcement of Lawyer Conduct (ELC) Rule 5.4 which requires all lawyers to provide requested client information to WSBA disciplinary staff without insisting on a court order. It is difficult of square that position with denying such compliance by lawyers when information is requested, such as by subpoena, from the Commission on Judicial Conduct or another state or federal agency or official. And the problem is further compounded by the fact that some case law recognizes that a subpoena, at least of a federal grand jury, is a “court order.” A lawyer ought to be permitted to determine if the client has a nonfrivolous claim that the information being demanded of the lawyer “to comply with law” is protected by the client’s attorney-client privilege.

If the Court restores the required-by-law provision to Rule 1.6(b)(6), it should restore the phrase “by law” to paragraph 4 of the Preamble and should restore Comments 13 and 14 to read as they appear in the Model Rules:

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

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

#### **Rule 1.6(b)(7) Permissive Reporting of a Fiduciary Client’s Breach.**

The exception proposed as Rule 1.6(b)(7), that presently is RPC 1.6(c), is, I believe, unique to Washington state. It was adopted in 1990 after it was recognized that the particular

version of Rule 3.3 that our state adopted in 1985—a version which elevated lawyer confidentiality over candor to the judiciary, and which version had been rejected by the 1983 ABA House of Delegates and (I believe) all other states—forbade lawyer revelation of a breach of duty by a court-appointed fiduciary client. Since the now proposed Rule 3.3 properly elevates candor to the judiciary over client confidentiality, and since new Rule 3.3(b) permits or requires a lawyer to report a fraud on the tribunal (and a knowing breach of fiduciary duty is a form of fraud), it appears to me that the provision proposed as Rule 1.6(b)(7) is not needed.

If the Court, as I suggest, declines to adopt proposed Rule 1.6(b)(7), then all references to it in the comments should be changed to refer to Rule 3.3(b). For example, in Comment 4 to Rule 1.14.

#### **Rule 1.7 Comment 40 and Rule 1.2 Comment 11.**

These comments deal with the question of whether a lawyer for a fiduciary owes a duty to beneficiaries of the fiduciary relationship. I submit that such questions ought to be left to statutory and case law. This remark applies also to the last sentence in Comment 4 to Rule 1.14.

#### **Rule 3.3 Candor Toward the Tribunal.**

The WSBA proposed version of Rule 3.3(b) alters the Model Rule by inserting the underlined words, below:

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, withdrawal or disclosure to the tribunal.

I submit that mere withdrawal is not an adequate measure to address a person's criminal or fraudulent conduct related to a judicial proceeding, particularly if the conduct has already commenced or been completed.

#### **Rule 8.1 Bar Admission and Disciplinary Matters.**

Paragraph (b) of Model Rule 8.1, proposed for adoption, elevates client confidentiality under Rule 1.6 over a lawyer's duty to provide information demanded by bar disciplinary authorities. That is inconsistent with ELC 5.4, as noted in Comment 26 to Rule 1.6. That inconsistency is not cured by Comment 4 to Rule 8.1.

### **Rule 8.3 Reporting of Professional Misconduct.**

I agree with the WSBA Board of Governors decision, made shortly before submission, that Rule 8.3 ought to *require* lawyers to report serious professional misconduct, as provided in the Model Rules. It appears to me that conforming changes were overlooked at Comment 15 to Rule 1.6 and at Comment 5 to Rule 1.8., and that the Model Rules versions of those comments should be restored.

### **Rule 8.3(c) Reporting of Judicial Unfitness to Appropriate Authority.**

I feel that Model Rule 8.3(c) unwisely elevates client confidentiality over legal and judicial system integrity, particularly if the client has acted wrongfully. I feel more weight should be given to the policy articulated at Comment 12 to Rule 3.3, titled "Preserving Integrity of Adjudicative Process":

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Accordingly, I suggest that Rule 8.3(c) be re-worded with the insertion of the underlined words added to read as follows:

(c) This Rule does not require disclosure of the professional misconduct of another lawyer or a judge to the appropriate authority if doing so would require the lawyer to disclose information otherwise protected by Rule 1.6 except in the case of a client or former client who participated with the other lawyer or judge in a crime or fraud.

Such a rule not only would permit a lawyer to report the bribing of a judge by a client but would empower lawyers who discover that a firm lawyer has engaged in crime or fraud with a client to expose the wrongdoing.

### **Rule 8.4 Misconduct, Comment 2.**

For some reason, the WSBA recommends against adoption of Comment 2 to Model Rule

8.4. I suggest its adoption. It reads as follows:

[2] 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 offenses 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, 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.

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Thank you for considering these comments. Should there be any questions about them, please contact me.

Very truly yours,

Douglas A. Schafer

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## Compilation of Historic Lawyer "Ethics" Rules on Acting to Prevent or Rectify Client Crime or Fraud

(The bold/italic attributes below were added here to emphasize selected items.)

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### 1908 American Bar Association ("ABA") Canons of Professional Ethics

(as amended in 1928 to add Canons 33 to 45)

**Canon 37. Confidences of a Client.** It is the duty of a lawyer to preserve his client's confidences. ... The announced intention of a client to commit a **crime** is not included within the confidences which he is bound to respect. He **may** properly make such disclosures as may be necessary to **prevent** the act or protect those against whom it is threatened.

**Canon 41. Discovery of Imposition and Deception.** When a lawyer discovers that some **fraud** or deception has been practiced, which has unjustly imposed upon the court or a party, he should endeavor to rectify it at first by advising his client, and if his client refuses to forego the advantage thus unjustly gained, he **should** promptly **inform** the **injured person** or his counsel, so that they may take appropriate steps.

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**1961 ABA Journal.** James A. Gardner, ["The Crime or Fraud Exception to the Attorney-Client Privilege."](#) (47 ABAJ 708 (1961)).

At page 713 -- "To sum up, **when it appears to an attorney that his client has abused the professional confidence by seeking advice for the purpose of committing a wrong in the future, it is proper for the attorney to come forward and disclose** the content of the communications between the parties. Generally, there would be **an ethical duty to do this**, but the writer has found no recognition of a *legal* duty to come forward and testify when the attorney is not a party to the wrongdoing. There would be serious difficulties by imposing a *legal* duty, and the matter is probably best regulated by being left to the conscience of the individual lawyer. ¶ With due weight being given to the lawyer's duty of devotion to the client's cause, **the ethical duty to come forward is clear**. When the attorney does not come forward, the question arises as to whether disclosure can be compelled." [Emphasis added.]

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### 1969 ABA Code of Professional Responsibility

(as quickly adopted without significant change by substantially all the states)

**Disciplinary Rule 4-101(C).** A lawyer **may** reveal: ... (3) The intention of his client to commit a crime and the information necessary to **prevent the crime**.

**Disciplinary Rule 7-102(B).** A lawyer who receives information clearly establishing that: (1) His client has, in the course of representation, perpetrated a fraud upon a person or tribunal shall promptly call upon the client to rectify the

same, and if his client refuses or is unable to do so, he **shall reveal the fraud** to the affected tribunal or person.

Note: A 1974 ABA housekeeping amendment added to DR 7-102(B)(1) the clause "except when the information is protected as a privileged communication" but only about 12 states added that. The crime-fraud exception to attorney-client privilege likely would apply to the client-fraud information.

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### **January 1980 Discussion Draft by the ABA's 1977-83 Kutak Commission** (formally named "ABA Commission on Evaluation of Professional Standards")

#### **Rule 1.7 Confidential Information.**

(b) A lawyer **shall** disclose information about a client to the extent it appears necessary to **prevent** the client from committing an act that would result in **death or serious bodily harm** to another person, and to the extent required by law or the rules of professional conduct.

(c) A lawyer **may** disclose information about a client only:

(2) to the extent it appears necessary to **prevent or rectify** the consequences of a **deliberately wrongful act** by the client, *except when the lawyer has been employed after the commission of such an act to represent the client concerning the act or its consequences*;

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### **May 1981 Proposed Final Draft by the Kutak Commission** (a published booklet)

#### **Rule 1.6 Confidentiality of Information**

(b) A lawyer **may** reveal such information to the extent the lawyer believes necessary:

(2) to **prevent** the client from committing a **criminal or fraudulent act** that the lawyer believes is **likely** to result in **death or substantial bodily harm**, or substantial injury to the financial interest or property of another;

(3) to **rectify** the consequences of a client's **criminal or fraudulent act** in the commission of which the lawyer's services had been used;

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### **November 1982 Final Draft by the Kutak Commission**

(pullout supplement to the November 1982 issue of the American Bar Association Journal)

#### **Rule 1.6 Confidentiality of Information**

(b) A lawyer **may** reveal such information to the extent the lawyer reasonably believes necessary:

(2) to **prevent** the *client* from committing a **criminal or fraudulent act** that the lawyer reasonably believes is **likely** to result in **death or substantial bodily harm**, or in substantial injury to the financial interests or property of another;

(3) to **rectify** the consequences of a client's **criminal or fraudulent act** in the furtherance of which the lawyer's services had been used;

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### **1983 ABA Rules of Professional Conduct (as adopted)**

(As adopted after the ABA Convention Delegates rejected the Kutak Commission's

proposal.)

### **Rule 1.6 Confidentiality of Information**

(b) A lawyer **may** reveal such information to the extent the lawyer reasonably believes necessary:

(2) to **prevent** the *client* from committing a **criminal act** that the lawyer believes is **likely** to result in **imminent death or substantial bodily harm**;

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### **ABA Ethics 2000 Commission July 9, 1998 Working Draft**

Source: <http://www.bhba.org/ethics2000/Downloads/8.pdf>

### **Rule 1.6 Confidentiality of Information**

(b) A lawyer **may** reveal or use information relating to the representation of a client to the extent the lawyer reasonably believes is necessary to--

- (1) **prevent death or substantial bodily harm**;
  - (2) **prevent** the *client* from engaging in conduct that the lawyer knows is criminal or fraudulent and that the lawyer reasonably believes is **likely** to result in **substantial injury to the financial interests** or property of another;
  - (3) **rectify** or mitigate **substantial injury to the financial interests** or property of another that the lawyer comes to know has resulted from a client's crime or fraud in the furtherance of which the lawyer's services had been used;
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### **Ethics 2000 Commission March 23, 1999 Public Discussion Draft**

Source: <http://www.abanet.org/cpr/e2k/rule16draft.html>

### **Rule 1.6 Confidentiality of Information**

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

- (1) to **prevent reasonably certain death or substantial bodily harm**;
  - (2) to **prevent** the client from committing a crime or fraud that is **likely** to result in **substantial injury to the financial interests** or property of another and in furtherance of which the client has used or is using the lawyer's services;
  - (3) to **rectify** or mitigate **substantial injury to the financial interests** or property of another resulting from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
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### **Ethics 2000 Commission Final Draft (August 2001)**

Source: <http://www.abanet.org/cpr/e2k-rule16.html>

### **Rule 1.6 Confidentiality of Information**

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

- (1) to **prevent reasonably certain death or substantial bodily harm**;
- (2) to **prevent** the client from committing a crime or fraud that is **reasonably certain** to result in **substantial injury to the financial interests** or property of another and in furtherance of which the client has used or is using the lawyer's services;
- (3) to **prevent, mitigate or rectify substantial injury to the financial interests** or property of another that is **reasonably certain** to result or has resulted from the

client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

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### **2001 ABA Convention Rejects Ethics 2000 Commission's Public Interest Exceptions**

(House of Delegates approved an amended (b)(1) but rejected (b)(2), so (b)(3) was withdrawn.)

Source: <http://www.abanet.org/cpr/e2k-rule16h.html>

### **Rule 1.6 Confidentiality of Information (as adopted)**

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

(1) to ~~prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent~~ **reasonably certain death or substantial bodily harm**;

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### **The American Law Institute, Restatement Third, The Law Governing Lawyers (2000)**

(A respected body's treatise stating the law governing lawyers as applied in court rulings.)

### **§ 66. Using or Disclosing Information to Prevent Death or Serious Bodily Harm**

(1) A lawyer **may** use or disclose confidential client information when the lawyer reasonably believes that its use or disclosure is necessary to **prevent reasonably certain death or serious bodily harm** to a person.

[(2) and (3) omitted here]

### **§ 67. Using or Disclosing Information to Prevent, Rectify, or Mitigate Substantial Financial Loss**

(1) A lawyer **may** use or disclose confidential client information when the lawyer reasonably believes that its use or disclosure is necessary to **prevent** a crime or fraud, and:

(a) the **crime or fraud threatens substantial financial loss**;

(b) the loss has not yet occurred;

(c) the lawyer's client intends to commit the crime or fraud either personally or through a third person; and

(d) the client has employed or is employing the **lawyer's services** in the matter in which the crime or fraud is committed.

(2) **If a crime or fraud** described in Subsection (1) has **already occurred**, a lawyer **may** use or disclose confidential client information when the lawyer reasonably believes its use or disclosure is necessary to **prevent, rectify, or mitigate the loss**.

[(3) and (4) omitted here]

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**The American Law Institute,  
Restatement Third, The Law Governing Lawyers (2000)**

**§ 67. Using or Disclosing Information to Prevent,  
Rectify, or Mitigate Substantial Financial Loss**

(1) A lawyer may use or disclose confidential client information when the lawyer reasonably believes that its use or disclosure is necessary to prevent a crime or fraud, and:

(a) the crime or fraud threatens substantial financial loss;

(b) the loss has not yet occurred;

(c) the lawyer's client intends to commit the crime or fraud either personally or through a third person; and

(d) the client has employed or is employing the lawyer's services in the matter in which the crime or fraud is committed.

(2) If a crime or fraud described in Subsection (1) has already occurred, a lawyer may use or disclose confidential client information when the lawyer reasonably believes its use or disclosure is necessary to prevent, rectify, or mitigate the loss.

(3) Before using or disclosing information under this Section, the lawyer must, if feasible, make a good-faith effort to persuade the client not to act. If the client or another person has already acted the lawyer must, if feasible, advise the client to warn the victim or to take other action to prevent, rectify, or mitigate the loss. The lawyer must, if feasible, also advise the client of the lawyer's ability to use or disclose information as provided in this Section and the consequences thereof.

(4) A lawyer who takes action or decides not to take action permitted under this Section is not, solely by reason of such action or inaction, subject to professional discipline, liable for damages to the lawyer's client or any third person, or barred from recovery against a client or third person.

\* \* \*



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### Resolution 35

#### In Support of Rule 1.6(b)(2) and 1.6(b)(3) of Ethics 2000

WHEREAS, there is national concern for the need to incorporate integrity, public trust and responsibility in the conduct of agents and advisors of corporations and other organizations in the light of the unexpected and traumatic failures in recent months of several large American corporations; and

WHEREAS, the adoption by state courts and by the American Bar Association (ABA) of clear and firm ethical principles and Model Rules of Professional Conduct governing the role of lawyers as advisors to corporations will strengthen the public's confidence in corporate integrity;

NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices expresses its support of the recommendation of the ABA Commission on Evaluation of the Model Rules of Professional Conduct (Ethics 2000) in its Report 401 submitted to the ABA House of Delegates with respect to Rule 1.6(b)(2) rejected by the ABA House in August 2001, that would permit the lawyer to reveal "information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyers services;" and

BE IT FURTHER RESOLVED that the Conference likewise supports the recommendation of Ethics 2000 in its proposed Rule 1.6(b)(3) that would similarly permit the lawyer to "reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services."

*Adopted as proposed by the Professionalism and Competence of the Bar Committee of the Conference of Chief Justices in Rockport, Maine at its 54th Annual Meeting on August 1, 2002.*

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**AMERICAN BAR ASSOCIATION**  
**TASK FORCE ON CORPORATE RESPONSIBILITY**  
**SECTION OF BUSINESS LAW**  
**SECTION OF TAXATION**  
**SECTION OF TORT TRIAL AND INSURANCE PRACTICE**  
**STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY**  
**YOUNG LAWYERS DIVISION**  
**SECTION OF REAL PROPERTY, PROBATE AND TRUST LAW**  
**TASK FORCE ON IMPLEMENTATION OF SECTION 307 OF THE**  
**SARBANES-OXLEY ACT OF 2002**

**REPORT TO THE HOUSE OF DELEGATES**

**RECOMMENDATION**

1 **RESOLVED**, That Rule 1.6 of the Model Rules of Professional Conduct and its  
2 Comment be amended as follows:

**RULE 1.6: CONFIDENTIALITY OF INFORMATION**

(Proposed additions are underlined; stricken text indicates proposed deletions.)

- 3  
4  
5  
6  
7 (a) A lawyer shall not reveal information relating to the representation of a  
8 client unless the client gives informed consent, the disclosure is impliedly  
9 authorized in order to carry out the representation or the disclosure is  
10 permitted by paragraph (b).  
11  
12 (b) A lawyer may reveal information relating to the representation of a client to  
13 the extent the lawyer reasonably believes necessary:  
14  
15 (1) to prevent reasonably certain death or substantial bodily harm;  
16  
17 (2) to prevent the client from committing a crime or  
18 fraud that is reasonably certain to result in  
19 substantial injury to the financial interests or  
20 property of another and in furtherance of which the  
21 client has used or is using the lawyer's services;  
22  
23 (3) to prevent, mitigate or rectify substantial injury to the financial  
24 interests or property of another that is reasonably certain to  
25 result or has resulted from the client's commission of a crime or

26 fraud in furtherance of which the client has used the lawyer's  
27 services;

28  
29 (42) to secure legal advice about the lawyer's compliance with  
30 these Rules;

31  
32 (53) to establish a claim or defense on behalf of the lawyer in a  
33 controversy between the lawyer and the client, to establish a defense  
34 to a criminal charge or civil claim against the lawyer based upon  
35 conduct in which the client was involved, or to respond to allegations in  
36 any proceeding concerning the lawyer's representation of the client; or

37  
38 (64) to comply with other law or a court order.

### 39 40 **Commentary**

41  
42 [1] This Rule governs the disclosure by a lawyer of information relating to the  
43 representation of a client during the lawyer's representation of the client. See Rule 1.18  
44 for the lawyer's duties with respect to information provided to the lawyer by a  
45 prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating  
46 to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for  
47 the lawyer's duties with respect to the use of such information to the disadvantage of  
48 clients and former clients.

49  
50 [2] A fundamental principle in the client-lawyer relationship is that, in the  
51 absence of the client's informed consent, the lawyer must not reveal information relating  
52 to the representation. See Rule 1.0(e) for the definition of informed consent. This  
53 contributes to the trust that is the hallmark of the client-lawyer relationship. The client is  
54 thereby encouraged to seek legal assistance and to communicate fully and frankly with  
55 the lawyer even as to embarrassing or legally damaging subject matter. The lawyer  
56 needs this information to represent the client effectively and, if necessary, to advise the  
57 client to refrain from wrongful conduct. Almost without exception, clients come to  
58 lawyers in order to determine their rights and what is, in the complex of laws and  
59 regulations, deemed to be legal and correct. Based upon experience, lawyers know that  
60 almost all clients follow the advice given, and the law is upheld.

61  
62 [3] The principle of client-lawyer confidentiality is given effect by related bodies  
63 of law: the attorney-client privilege, the work product doctrine and the rule of  
64 confidentiality established in professional ethics. The attorney-client privilege and work-  
65 product doctrine apply in judicial and other proceedings in which a lawyer may be called  
66 as a witness or otherwise required to produce evidence concerning a client. The rule of  
67 client-lawyer confidentiality applies in situations other than those where evidence is  
68 sought from the lawyer through compulsion of law. The confidentiality rule, for example,  
69 applies not only to matters communicated in confidence by the client but also to all  
70 information relating to the representation, whatever its source. A lawyer may not

71 disclose such information except as authorized or required by the Rules of Professional  
72 Conduct or other law. See also Scope.

73  
74 [4] Paragraph (a) prohibits a lawyer from revealing information relating to the  
75 representation of a client. This prohibition also applies to disclosures by a lawyer that do  
76 not in themselves reveal protected information but could reasonably lead to the  
77 discovery of such information by a third person. A lawyer's use of a hypothetical to  
78 discuss issues relating to the representation is permissible so long as there is no  
79 reasonable likelihood that the listener will be able to ascertain the identity of the client or  
80 the situation involved.

### 81 **Authorized Disclosure**

82  
83  
84 [5] Except to the extent that the client's instructions or special circumstances limit  
85 that authority, a lawyer is impliedly authorized to make disclosures about a client  
86 when appropriate in carrying out the representation. In some situations, for example, a  
87 lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to  
88 make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm  
89 may, in the course of the firm's practice, disclose to each other information relating to a  
90 client of the firm, unless the client has instructed that particular information be confined  
91 to specified lawyers.

### 92 **Disclosure Adverse to Client**

93  
94  
95 [6] Although the public interest is usually best served by a strict rule requiring  
96 lawyers to preserve the confidentiality of information relating to the representation of  
97 their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1)  
98 recognizes the overriding value of life and physical integrity and permits disclosure  
99 reasonably necessary to prevent reasonably certain death or substantial bodily harm.  
100 Such harm is reasonably certain to occur if it will be suffered imminently or if there is a  
101 present and substantial threat that a person will suffer such harm at a later date if the  
102 lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows  
103 that a client has accidentally discharged toxic waste into a town's water supply may  
104 reveal this information to the authorities if there is a present and substantial risk that a  
105 person who drinks the water will contract a life-threatening or debilitating disease and  
106 the lawyer's disclosure is necessary to eliminate the threat or reduce the number of  
107 victims.

108  
109 [7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that  
110 permits the lawyer to reveal information to the extent necessary to enable affected  
111 persons or appropriate authorities to prevent the client from committing a crime or fraud,  
112 as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the  
113 financial or property interests of another and in furtherance of which the client has used  
114 or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship  
115 by the client forfeits the protection of this Rule. The client can, of course, prevent such  
116 disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not

117 require the lawyer to reveal the client's misconduct, the lawyer may not counsel or  
118 assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d).  
119 See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the  
120 representation of the client in such circumstances, and Rule 1.13(c) which permits the  
121 lawyer, where the client is an organization, to reveal information relating to the  
122 representation in limited circumstances.

123  
124 [8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn  
125 of the client's crime or fraud until after it has been consummated. Although the client no  
126 longer has the option of preventing disclosure by refraining from the wrongful conduct,  
127 there will be situations in which the loss suffered by the affected person can be  
128 prevented, rectified or mitigated. In such situations, the lawyer may disclose information  
129 relating to the representation to the extent necessary to enable the affected persons to  
130 prevent or mitigate reasonably certain losses or to attempt to recoup their losses.  
131 Paragraph (b)(3) does not apply when a person who has committed a crime or fraud  
132 thereafter employs a lawyer for representation concerning that offense.

133  
134 [97] A lawyer's confidentiality obligations do not preclude a lawyer from securing  
135 confidential legal advice about the lawyer's personal responsibility to comply with these  
136 Rules. In most situations, disclosing information to secure such advice will be impliedly  
137 authorized for the lawyer to carry out the representation. Even when the disclosure is  
138 not impliedly authorized, paragraph (b)(2) permits such disclosure because of the  
139 importance of a lawyer's compliance with the Rules of Professional Conduct.

140  
141 [108] Where a legal claim or disciplinary charge alleges complicity of the lawyer  
142 in a client's conduct or other misconduct of the lawyer involving representation of the  
143 client, the lawyer may respond to the extent the lawyer reasonably believes necessary  
144 to establish a defense. The same is true with respect to a claim involving the conduct or  
145 representation of a former client. Such a charge can arise in a civil, criminal, disciplinary  
146 or other proceeding and can be based on a wrong allegedly committed by the lawyer  
147 against the client or on a wrong alleged by a third person, for example, a person  
148 claiming to have been defrauded by the lawyer and client acting together. The lawyer's  
149 right to respond arises when an assertion of such complicity has been made. Paragraph  
150 (b)(53) does not require the lawyer to await the commencement of an action or  
151 proceeding that charges such complicity, so that the defense may be established by  
152 responding directly to a third party who has made such an assertion. The right to defend  
153 also applies, of course, where a proceeding has been commenced.

154  
155 [119] A lawyer entitled to a fee is permitted by paragraph (b)(53) to prove the  
156 services rendered in an action to collect it. This aspect of the rule expresses the  
157 principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment  
158 of the fiduciary.

159  
160 [1240] Other law may require that a lawyer disclose information about a client.  
161 Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of  
162 these Rules. When disclosure of information relating to the representation appears to be

163 required by other law, the lawyer must discuss the matter with the client to the extent  
164 required by Rule 1.4. If, however, the other law supersedes this Rule and requires  
165 disclosure, paragraph (b)(64) permits the lawyer to make such disclosures as are  
166 necessary to comply with the law.

167  
168 [1311] A lawyer may be ordered to reveal information relating to the  
169 representation of a client by a court or by another tribunal or governmental entity  
170 claiming authority pursuant to other law to compel the disclosure. Absent informed  
171 consent of the client to do otherwise, the lawyer should assert on behalf of the client all  
172 nonfrivolous claims that the order is not authorized by other law or that the information  
173 sought is protected against disclosure by the attorney-client privilege or other applicable  
174 law. In the event of an adverse ruling, the lawyer must consult with the client about the  
175 possibility of appeal to the extent required by Rule 1.4. Unless review is sought,  
176 however, paragraph (b)(64) permits the lawyer to comply with the court's order.

177  
178 [1412] Paragraph (b) permits disclosure only to the extent the lawyer reasonably  
179 believes the disclosure is necessary to accomplish one of the purposes specified.  
180 Where practicable, the lawyer should first seek to persuade the client to take suitable  
181 action to obviate the need for disclosure. In any case, a disclosure adverse to the  
182 client's interest should be no greater than the lawyer reasonably believes necessary to  
183 accomplish the purpose. If the disclosure will be made in connection with a judicial  
184 proceeding, the disclosure should be made in a manner that limits access to the  
185 information to the tribunal or other persons having a need to know it and appropriate  
186 protective orders or other arrangements should be sought by the lawyer to the fullest  
187 extent practicable.

188  
189 [1513] Paragraph (b) permits but does not require the disclosure of information  
190 relating to a client's representation to accomplish the purposes specified in paragraphs  
191 (b)(1) through (b)(64). In exercising the discretion conferred by this Rule, the lawyer  
192 may consider such factors as the nature of the lawyer's relationship with the client and  
193 with those who might be injured by the client, the lawyer's own involvement in the  
194 transaction and factors that may extenuate the conduct in question. A lawyer's decision  
195 not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may  
196 be required, however, by other Rules. Some Rules require disclosure only if such  
197 disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3.  
198 Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of  
199 whether such disclosure is permitted by this Rule. See Rule 3.3(c).

## 200 201 **Withdrawal**

202  
203 ~~[14] If the lawyer's services will be used by the client in materially furthering a~~  
204 ~~course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule~~  
205 ~~1.16(a)(1). After withdrawal the lawyer is required to refrain from making disclosure of~~  
206 ~~the client's confidences, except as otherwise permitted by Rule 1.6. Neither this Rule~~  
207 ~~nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of~~  
208 ~~withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document,~~

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

213  
214 **Acting Competently to Preserve Confidentiality**

215  
216 [1645] A lawyer must act competently to safeguard information relating to the  
217 representation of a client against inadvertent or unauthorized disclosure by the lawyer  
218 or other persons who are participating in the representation of the client or who are  
219 subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

220  
221 [1746] When transmitting a communication that includes information relating to  
222 the representation of a client, the lawyer must take reasonable precautions to prevent  
223 the information from coming into the hands of unintended recipients. This duty,  
224 however, does not require that the lawyer use special security measures if the method  
225 of communication affords a reasonable expectation of privacy. Special circumstances,  
226 however, may warrant special precautions. Factors to be considered in determining the  
227 reasonableness of the lawyer's expectation of confidentiality include the sensitivity of  
228 the information and the extent to which the privacy of the communication is protected by  
229 law or by a confidentiality agreement. A client may require the lawyer to implement  
230 special security measures not required by this Rule or may give informed consent to the  
231 use of a means of communication that would otherwise be prohibited by this Rule.

232  
233 **Former Client**

234  
235 [1847] The duty of confidentiality continues after the client-lawyer relationship has  
236 terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such  
237 information to the disadvantage of the former client.

238

## REPORT

### I. BACKGROUND OF THE RECOMMENDATION

On March 28, 2002, Robert Hirshon, President of the American Bar Association (“ABA”), appointed a task force with the following charge:

The Task Force on Corporate Responsibility shall examine systemic issues relating to corporate responsibility arising out of the unexpected and traumatic bankruptcy of Enron and other Enron-like situations which have shaken confidence in the effectiveness of the governance and disclosure systems applicable to public companies in the United States. The Task Force will examine the framework of laws and regulations and ethical principles governing the roles of lawyers, executive officers, directors, and other key participants. The issues will be studied in the context of the system of checks and balances designed to enhance the public trust in corporate integrity and responsibility. The Task Force will allow the ABA to contribute its perspectives to the dialogue now occurring among regulators, legislators, major financial markets and other organizations focusing on legislative and regulatory reform to improve corporate responsibility.

On July 16, 2002, the Task Force submitted its Preliminary Report in response to this charge.<sup>1</sup> That Report preliminarily recommended reforms in two principal areas: internal corporate governance (relating to the composition, conduct and responsibilities of the public corporation’s board of directors and its committees) and the professional conduct of lawyers. During the months following release of the Preliminary Report, the Task Force convened public hearings on its preliminary recommendations in Chicago, New York City and Palo Alto, California and received a variety of written and oral comments on its Preliminary Report.<sup>2</sup>

After succeeding Robert Hirshon as President of the ABA, Alfred P. Carlton, Jr. reappointed the Task Force and, in his testimony to the Task Force in Chicago, encouraged the Task Force to draw “broad public policy conclusions which lead to policy recommendations for the ABA House of Delegates ... that go beyond the technical aspects of corporate securities law and the ABA’s model rules of professional conduct.”<sup>3</sup> The Final Report of the Task Force, from which this statement in support of proposed changes to Rule 1.6 of the Model Rules of

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<sup>1</sup> The Preliminary Report of the Task Force is published at 58 BUS. LAW. 189 (2002), and is available at <http://www.abanet.org/buslaw/corporateresponsibility/home.html> (the “Task Force Web Site”).

<sup>2</sup> The written and oral testimony submitted at these hearings is available on the Task Force Web Site.

<sup>3</sup> Testimony of Alfred P. Carlton, Jr., at 91, available on the Task Force Web Site.

271 Professional Conduct<sup>4</sup> is largely drawn, responds to the Task Force’s founding charge from  
272 Robert Hirshon and to President Carlton’s call for broad policy conclusions.<sup>5</sup>

273  
274 The recommendations of the Task Force have not been developed in a static environment.  
275 Since the Task Force was appointed, many reforms significantly affecting corporate  
276 responsibility have been effected or proposed:  
277

- 278 • The Sarbanes-Oxley Act of 2002<sup>6</sup> has brought about, among many other things, extensive  
279 federal regulation of the accounting profession, including the creation of an external  
280 regulatory organization (the Public Company Accounting Oversight Board), detailed  
281 prescriptions governing the auditing work of the firms that certify the financial statements  
282 of public corporations, and limits on the scope of non-auditing services that such firms  
283 may supply.
- 284
- 285 • In response to concern that existing rules of professional conduct did not sufficiently  
286 direct the lawyer for the corporation to report illegal conduct to the corporation’s board of  
287 directors,<sup>7</sup> Congress adopted Section 307 of the Sarbanes-Oxley Act of 2002,<sup>8</sup> requiring  
288 the SEC to promulgate rules of professional conduct for lawyers “appearing and  
289 practicing”<sup>9</sup> before the SEC. The SEC adopted these rules (the “Part 205 Rules”)<sup>10</sup> on

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<sup>4</sup> Referred to in the Task Force Report as “Model Rules” or “Rules.” These rules are the template used by most state authorities in formulating and promulgating the rules that bind the lawyers admitted to practice in those states. The Model Rules are available at [http://www.abanet.org/cpr/mrpc/mrpc\\_toc.html](http://www.abanet.org/cpr/mrpc/mrpc_toc.html).

<sup>5</sup> Not all members of the Task Force endorse each recommendation and every view expressed in the Report, but the Report taken as a whole reflects a consensus of the members of the Task Force. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be considered as representing the policy of the American Bar Association.

<sup>6</sup> P.L. 107-204, 107<sup>th</sup> Cong., 2d sess. (July 30, 2002).

<sup>7</sup> *E.g.*, letter of Professors Richard W. Painter, *et al.*, to SEC Chairman Harvey Pitt, dated March 7, 2002, available at <http://www.abanet.org/buslaw/corporateresponsibility/pitt.pdf>.

<sup>8</sup> Section 307 requires the SEC to issue rules:

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.

<sup>9</sup> The term “appearing and practicing” before the SEC is defined for purposes of the SEC’s new rules of professional conduct to include “providing advice in respect of the United States securities laws or

290 January 29, 2003 to be effective on August 5, 2003. In specified circumstances, those  
291 rules will require lawyers to report to the highest levels of corporate authority material  
292 violations of the securities laws and other failures of legal compliance and permit  
293 disclosure to third parties to prevent substantial injury to the corporation or investors.  
294

- 295 • At the same time, the SEC proposed additional rules of conduct that in some  
296 circumstances would require a lawyer to withdraw as counsel and to have that withdrawal  
297 reported outside the company by the lawyer or, alternatively, by the company.<sup>11</sup> In  
298 describing these proposed rules, the SEC noted with approval the Task Force's  
299 Preliminary Report, and its Chairman at the same time indicated that further rulemaking  
300 would be influenced by action taken by the ABA.<sup>12</sup>  
301

302 The Task Force's recommendations, including the proposal to amend Model Rule 1.6,  
303 complement and supplement these initiatives. The Task Force believes that implementation of  
304 its recommendations would significantly enhance the effectiveness of lawyers in the system of  
305 checks and balances necessary to restore public trust in corporate responsibility.  
306

## 307 II. THE ROLE OF THE LAWYER REPRESENTING THE CORPORATION

308

309 The concentration of day to day managerial control in the senior executive officers may  
310 give rise to potential conflicts of interest and other motivational problems that present persistent  
311 challenges for effective corporate governance. First, senior executive officers of public  
312 companies may sometimes succumb to the temptation to serve personal interests by maximizing  
313 their own wealth or control through manipulation or misreporting of corporate information, at the  
314 expense of long-term corporate well-being.<sup>13</sup> Second, senior executive officers are often  
315 motivated to report good news, and are averse to reporting news of business setbacks, mistakes,

---

the Commission's rules or regulations thereunder regarding any document that the attorney has notice will be filed with or submitted to" the SEC. 17 CFR §205.2(a).

<sup>10</sup> 17 CFR Part 205, effective Aug. 5, 2003.

<sup>11</sup> Release Nos. 33-8186; 34-47282; IC-25920, available at <http://www.sec.gov/rules/proposed/33-8186.htm>. The ABA's comments on these proposals are available at <http://www.sec.gov/rules/proposed/s74502/aba040203.htm>.

<sup>12</sup> *Id.*; speech by former SEC Chairman Harvey Pitt, Jan. 29, 2003, available at <http://www.sec.gov/news/speech/spch012903hlp.htm>.

<sup>13</sup> For example, it has been suggested that increased reliance on stock options in executive compensation packages during the 1990's encouraged senior executive officers to promote short term stock price performance through accounting maneuvers, at the expense of long term growth and stability. See The Conference Board Commission on Public Trust and Private Enterprise Findings and Recommendations, Part I: Executive Compensation (Sep.17, 2002) available at <http://www.conference-board.org/knowledge/governCommission.cfm>, at 4. It may be that executive compensation packages that are structured more carefully to reward long term performance would more closely align the interests of senior executive officers with corporate and investor interests. See *id.* at 5; Business Roundtable, Principles of Corporate Governance (May 2002), available at <http://www.brtable.org/pdf/704.pdf>, at 19.

316 or worse, out of selfish concern that such reports might adversely reflect on them.<sup>14</sup> Third,  
317 senior executive officers may also be motivated to report information and analysis incorrectly or  
318 incompletely to the board of directors out of concern that individual directors might pursue  
319 unproductive or even disruptive inquiries or initiatives of their own. And finally, senior  
320 executive officers may be motivated to report information and analysis incorrectly or  
321 incompletely to the public out of a concern about harming shareholder interests by reporting  
322 news that may adversely affect the corporation's stock price. Unchecked, these various  
323 motivations on the part of senior executive officers can significantly harm the interests of the  
324 corporation and the investors, employees, customers and other constituencies affected by the  
325 corporation's business.

326  
327 To check such potentially harmful motivations, and to focus the attention of senior  
328 executive officers on the interests of the corporation and its shareholders, our system of  
329 corporate governance has long relied upon the active oversight and advice of the key participants  
330 in the corporate governance process, including the counsel to the corporation.<sup>15</sup> Corporate  
331 responsibility and sound corporate governance thus depend upon the active and informed  
332 participation of independent advisers who act vigorously in the best interest of the corporation  
333 and are empowered to exercise their responsibilities effectively.

334  
335 Despite the range of participants who have been in a position to contribute to public  
336 corporation governance, the last several years have witnessed spectacular failures of corporate  
337 responsibility. Knowledgeable observers have asserted that through inaction, inattention,  
338 indifference or, in some cases, conflicting personal interests or loyalties, some of these  
339 participants bear significant responsibility for these failures, and lawyers have not been excluded  
340 from such assertions.<sup>16</sup>

341  
342 Lawyers are and should be important participants in corporate governance and important  
343 contributors to corporate responsibility. Lawyers employed by the corporation and outside  
344 lawyers retained by the corporation often serve as key advisers to senior management and  
345 usually participate in the negotiation, structuring and documentation of the corporation's

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<sup>14</sup> See, e.g., Donald C. Langevoort, *Organized Illusions: A Behavioral Theory Of Why Corporations Mislead Stock Market Investors (And Cause Other Social Harms)*, 146 U. PA. L. REV. 101, 130-146 (1997).

<sup>15</sup> See M. EISENBERG, *THE STRUCTURE OF THE CORPORATION* (1976); Noyes E. Leech & Robert H. Mundheim, *The Outside Director of the Publicly Held Corporation*, 31 BUS. LAW. 1799 (1976)

<sup>16</sup> With respect to the conduct of lawyers, see Roger C. Cramton, *Enron and the Corporate Lawyer: A Primer on Legal and Ethical Issues*, 58 BUS. LAW. 143 (2002); Report of Investigation by the Special Investigative Committee of the Board of Directors of Enron Corp. by William C. Powers, Jr., Chair, dated February 1, 2002, available at <http://news.findlaw.com/hdocs/docs/enron/sicreport/>; *In re Enron Corp. Securities, Derivative & ERISA Lit.*, 235 F.Supp.2d 549, 704-05 (S.D.Tex. 2002) (denying motion to dismiss securities law claims against Vinson & Elkins arising out of its representation of Enron); Dennis K. Berman, "Global Crossing Board Report Rebukes Counsel," Wall Street Journal, Mar. 11, 2003, at B9; Mike France, "What About the Lawyers?," Business Week, Dec. 23, 2002 at 58-62; Matthew Brellis and Jeffrey Krasner, "Auditor Knew of Tyco Deals, Prosecutor Says PWC Says It Didn't Know Loans Hadn't Been OK'd," Boston Globe, Feb. 8, 2003, at E-1 (reviewing criminal charges against Mark Belnick, former general counsel of Tyco International, Ltd.).

346 significant business transactions. Additionally, lawyers often serve as counselors to the board to  
347 assist it in performing its oversight function. In such roles, lawyers obviously do and should play  
348 a critical role in helping the corporation recognize, understand and comply with applicable laws  
349 and regulations, as well as to identify and evaluate business risks associated with legal issues.  
350 The Task Force believes that a prudent corporate governance program should call upon lawyers  
351 – notably the corporation’s general counsel<sup>17</sup> – to assist in the design and maintenance of the  
352 corporation’s procedures for promoting legal compliance.

353  
354 This conception of the lawyer as a promoter of corporate compliance with law emanates  
355 from the basic values of the legal profession. It follows naturally from the ABA’s goal “to  
356 increase public understanding of and respect for the law, the legal process, and the role of the  
357 legal profession.”<sup>18</sup> It is also in keeping with the ABA’s Model Rules of Professional Conduct,  
358 which emphasize the lawyer’s responsibility “[a]s advisor [to] provide[] a client with an  
359 informed understanding of the client’s legal rights and obligations and explain[] their practical  
360 implications.”<sup>19</sup>

361  
362 The Model Rules reinforce this positive relationship between lawyers and their clients in  
363 a number of other ways. They require the lawyer to be competent and diligent in rendering legal  
364 services;<sup>20</sup> to respect the client’s right to decide on objectives;<sup>21</sup> to consult with the client about  
365 the means by which the client’s objectives are to be accomplished;<sup>22</sup> to protect the client’s  
366 information; and to avoid conflicts of interest. The obligations of confidentiality and loyalty,  
367 however, never permit the lawyer to “counsel a client to engage, or assist a client, in conduct that  
368 the lawyer knows is criminal or fraudulent.”<sup>23</sup> To the contrary, the lawyer is not permitted to  
369 “continue assisting a client in conduct that the lawyer originally supposed was legally proper but  
370 then discovers is criminal or fraudulent.”<sup>24</sup>

371  
372 The Task Force acknowledges that lawyers for the corporation – whether employed by  
373 the corporation or specially retained -- are not “gatekeepers” of corporate responsibility in the  
374 same fashion as public accounting firms. Accounting firms’ responsibilities require them to  
375 express a formal public opinion, based upon an independent audit, that the corporation’s

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17 As used in the Task Force Report, the term “general counsel” refers to the lawyer having general supervisory responsibility for the legal affairs of the corporation.

18 ABA Goals and mission statement, Goal IV, available at <http://www.abanet.org/about/goals.html>.

19 Model Rules Preamble ¶[2].

20 Model Rules 1.1, 1.3.

21 Model Rule 1.2.

22 Model Rule 1.4(a)(2).

23 Model Rule 1.2(d). One of the witnesses in the Task Force hearings usefully suggested that this aspect of Model Rule 1.2 deserved to be expressed in a separate rule. Statement of Mark L. Tuft on behalf of the Bar Association of San Francisco, at 12.

24 Model Rule 1.2, Comment [10].

376 financial statements fairly present the corporation's financial condition and results of operations  
377 in conformity with generally accepted accounting principles.<sup>25</sup> The auditor is subject to  
378 standards designed to assure an arm's length perspective relative to the firms they audit. In  
379 contrast, as several commentators pointed out in the public hearings on the Preliminary Report,  
380 corporate lawyers are first and foremost counselors to their clients.<sup>26</sup> Except in clearly defined  
381 circumstances in which other considerations take precedence, an alternative view of the lawyer  
382 as an enforcer of law may tend to create an atmosphere of adversity, or at least arm's length  
383 dealing, between the lawyer and the corporate client's senior executive officers that is inimical to  
384 the lawyer's essential role as a counselor promoting the corporation's compliance with law.

385  
386 Nevertheless, lawyers for the public corporation must bear in mind that their  
387 responsibility is to the corporation, and not to the corporate directors, officers or other  
388 corporate agents with whom they necessarily communicate in representing the  
389 corporation. This is the bedrock principle recognized in Rule 1.13(a) of the Model Rules.  
390 Outside lawyers retained by the corporation and lawyers employed by the corporation  
391 both must exercise professional judgment in the interests of the corporate client,  
392 independent of the personal interests of the corporation's officers and employees.

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394 **III. PROPOSED AMENDMENTS TO MODEL RULE 1.6**

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396 The recommendations in the Task Force's Report relating to lawyers are intended to  
397 enhance the lawyer's ability to exercise and bring to bear independent professional judgment,  
398 and thereby enhance the lawyer's ability to contribute to corporate responsibility without  
399 undermining the constructive and collaborative relationship that must exist with the executive  
400 officers of the corporate client so that compliance with law can be most effectively promoted.

401  
402 The Task Force recognizes that even where the practices it has recommended  
403 are applied, corporate officers and employees may take actions that involve the  
404 corporation in material violations of law or of a legal obligation to the corporation. Such  
405 actions may occur where officers or employees reject legal advice, or where they fail to  
406 consult a lawyer. The Task Force believes that the Model Rules (particularly Rules 1.13  
407 and 1.6) that address the professional responsibility of lawyers when such  
408 circumstances arise should be revised to more effectively protect the interests of  
409 corporate client and to protect the professional integrity of the lawyer from a client using  
410 his or her services to further a crime or fraud.<sup>27</sup>

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<sup>25</sup> E.g., R. William Ide, *Post-Enron Corporate Governance Opportunities: Creating a Culture of Greater Board Collaboration and Oversight*, 54 MERC. L. REV. 829, 841-843 (2003); Coffee, *supra* note 29, at 1405 ("Characteristically, the gatekeeper essentially assesses or vouches for the corporate client's own statements about itself or a specific transaction"); see Regulation S-X Rule 2-02, 17 CFR §210.2-02.

<sup>26</sup> See, e.g., testimony of Hon. Charles B. Renfrew on behalf of the American College of Trial Lawyers; Preliminary Statement of Attorneys' Liability Assurance Society, Inc., at 6-7; testimony of Patricia Lee Refo on behalf of the ABA Section of Litigation, at 11-12; letter of Oct. 30, 2002 on behalf of the Los Angeles County Bar Association; testimony of the State Bar of California Committee on Professional Responsibility, at 7-10. All of these submissions are available at the Task Force Web Site.

<sup>27</sup> The Task Force Report continues the practice traditionally used in the Model Rules of speaking about the responsibilities of individual lawyers. However, in many cases involving representation of

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**A. Confidentiality and its Limitations – Existing Law and Policy**

As many of those commenting on the Task Force’s Preliminary Report emphasized, the attorney-client relationship is one of trust and confidence, dependent upon strong recognition of the lawyer’s general duty to maintain the confidence of client information.<sup>28</sup> It is a fundamental principle of the client-lawyer relationship that, except with the client’s informed consent, the lawyer must not reveal to third parties information relating to the representation.<sup>29</sup> This principle underlies the trust that should be the keystone of the client-lawyer relationship. A client must feel free to seek legal assistance and to communicate fully and frankly with the client’s lawyer. Without such full and frank communication the lawyer will be unable to represent the client effectively. Many legal rules are complex and most are fact-specific in their application. Lawyers are better situated than non-lawyers to appreciate the effect of legal rules and to identify facts that determine whether a legal rule is applicable. Full disclosure by clients facilitates efficient presentation at trials and other proceedings and in a lawyer’s advising functions.

In the view of the Task Force, however, some commentators who emphasized the importance of trust and confidence in the attorney-client relationship have ignored exceptions to confidentiality principles that have developed to serve other policy purposes. Such exceptions are already well established in the Model Rules and in the lawyer disciplinary rules of most states. For example:

- Where a lawyer’s withdrawal from representation will not avoid continued assistance to a client’s crime or fraud, the lawyer may be required under the existing Model Rules to “disaffirm an opinion, document or affirmation or the like” previously given by the lawyer.<sup>30</sup>

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publicly held corporations, the corporate client is advised by a law firm. The interplay of lawyer obligations to the corporation and lawyer obligations to each other in the context of law firm practice are generally addressed in Model Rules 5.1 and 5.2. A direct, detailed analysis of the responsibilities of a law firm and the lawyers within the firm and the procedures that would facilitate discharge of their responsibilities would be a useful addition to the literature on professional responsibilities, and the Task Force recommends that an appropriate committee of the ABA undertake such an analysis.

<sup>28</sup> *E.g.*, testimony of Hon. Charles B. Renfrew on behalf of the American College of Trial Lawyers; Preliminary Statement of Attorneys’ Liability Assurance Society, Inc., at 6-7; testimony of Patricia Lee Refo on behalf of the ABA Section of Litigation, at 11-12; letter of Oct. 30, 2002 on behalf of the Los Angeles County Bar Association; testimony of the State Bar of California Committee on Professional Responsibility, at 7-10. All of these submissions are available at the Task Force Web Site. *See also* Comment c to RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §68 (2000) (discussing the rationale for the attorney-client privilege, including the view that “clients would be unwilling to disclose personal, embarrassing, or unpleasant facts unless they could be assured that neither they nor their lawyers could be called later to testify to the communication.”).

<sup>29</sup> This paragraph paraphrases Comment [2] to Model Rule 1.6.

<sup>30</sup> Model Rule 4.1(b), and Comment [3]. As that comment explains, Model Rule 4.1(b)’s duty to disclose is simply “a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client’s crime or fraud takes the form of a lie or misrepresentation.”

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- Where a lawyer representing a client in an adjudicative proceeding knows that the client has testified falsely, the lawyer may be required, not merely permitted, to disclose the falsity to the tribunal, even if the result is the client’s loss of the case and a prosecution for perjury.<sup>31</sup>
- To the extent reasonably believed to be necessary, the lawyer is allowed to disclose information relating to the representation of a client in order to establish a claim or defense in a case against the client, including an action seeking recovery of legal fees.<sup>32</sup>
- The lawyer disciplinary rules of forty-two states permit a lawyer to disclose client information in order to prevent a client from perpetrating a fraud that constitutes a crime, and nineteen states permit such disclosure to rectify substantial loss resulting from client crime or fraud in which the client used the lawyer’s services.<sup>33</sup>

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<sup>31</sup> Model Rule 3.3(b), and Comments [10] – [11].

<sup>32</sup> Model Rule 1.6(b)(3), and Comment [9].

<sup>33</sup> States that permit disclosure to prevent crime: Alaska (Alaska Rules of Prof’l Conduct R. 1.6 (2001)); Arizona (Ariz. Rules of Prof’l Conduct ER 1.6 (2002)); Arkansas (Ark. Rules of Prof’l Conduct R. 1.6 (2002)); Colorado (Colo. Rules of Prof’l Conduct R 1.6 (2002)); Connecticut (Conn. Rules of Prof’l Conduct R. 1.6 (2002)); Florida (Fla. Rules of Prof’l Conduct R. 1.6(2002)); Georgia (Ga. State Bar R. 1.6 (2002)); Hawaii (Haw. Rules of Prof’l Conduct R.1.6 (2002)); Idaho (Idaho Rules of Prof’l Conduct. R. 1.6 (2002)); Illinois (Ill. Rules of Prof’l Conduct R.1.6 (2002)); Indiana (Ind. Rules of Prof’l Conduct R.1.6 (2002)); Iowa (Iowa Code or Prof’l Responsibility DR 4-101(2002)); Kansas (Kan. Sup. Ct. Rules R. 1.6 (2001)); Massachusetts (Mass. Rules of Prof’l Conduct R. 1.6 (2002)); Maryland (Md. Rules of Prof’l Conduct R. 1.6 (2002)); Maine (Me. R. Bar 3.6 (2002)); Michigan (Mich. Rules of Prof’l Conduct R 1.6 (2002)); Minnesota (Minn. Rules of Prof’l Conduct R. 1.6 (2001)); Mississippi (Miss. Rules of Prof’l Conduct R. 1.6 (2002)); Nebraska (Neb. Code of Prof’l Responsibility DR 4-101 (2002)); Nevada (Nev. Rules of Prof’l Conduct R. 156(2002)); New Hampshire (N.H. Rules of Prof’l Conduct R. 1.6 (2002)); New Jersey (N.J. Rules of Prof’l Conduct R. 1.6 (2002)); New Mexico (N.M Rules of Prof’l Conduct R.16-106 (2002)); New York (N.Y. Code of Prof’l Responsibility DR 4-101(2002)); North Carolina (N.C. Rules of Prof’l Conduct R. 1.6 (2002)); North Dakota (N.D. Rules of Prof’l Conduct R. 1.6 (2002)); Ohio (Ohio Code of Responsibility DR4-101) (2002)); Oklahoma (Okla. Rules of Prof’l Conduct R.1.6 (2002)); Oregon (Or. Code of Prof’l Responsibility DR 4-101(2002)); Pennsylvania (Pa. Rules of Prof’l Conduct R.1.6 (2002)); South Carolina (S.C. Rules of Prof’l Conduct R. 1.6 (2001)); Tennessee (Tenn. Rules of Prof’l Conduct R. 1.6 (2003)); Texas (Tex. Rules of Prof’l Conduct R. 1.05(2002)), Utah (Utah Rules of Prof’l Conduct R. 1.6 (2002)); Vermont (Vt. Rules of Prof’l Conduct R. 1.6(2001)); Virginia (Va. Rules of Prof’l Conduct R. 1.6 (2002)); Washington (Wash. Rules of Prof’l Conduct R. 1.6 (2002)); Wisconsin(Wis. Rules of Prof’l Conduct R. 1.6 (2002)); West Virginia (W. Va Rules of Prof’l Conduct R. 1.6 (2002)); Wyoming (Wyo. Rules of Prof’l Conduct R. 1.6(2002)).

States that require such disclosure: Florida (Fla. Rules of Prof’l Conduct R. 1.6(2002)); New Jersey (N.J. Rules of Prof’l Conduct R. 1.6 (2002)); Virginia (Va. Rules of Prof’l Conduct R. 1.6(2002)); Wisconsin (Wis. Rules of Prof’l Conduct R. 1.6(2002)).

States that permit disclosure to rectify substantial loss resulting from client crime or fraud using the lawyer’s services: Connecticut (Conn. Rules of Prof’l Conduct R. 1.6 (2002)); Hawaii (Haw. Rules of Prof’l Conduct R.1.6 (2002)); Massachusetts (Mass. Rules of Prof’l Conduct R. 1.6 (2002)); Maryland (Md. Rules of Prof’l Conduct R. 1.6 (2002)); Michigan (Mich. Rules of Prof’l Conduct R. 1.6 (2002)); Minnesota (Minn. Rules of Prof’l Conduct R. 1.6 (2001)); Nevada (Nev. Rules of Prof’l Conduct R. 156 (2002)); New Jersey (N.J. Rules of Prof’l Conduct R 1.6 (2002)); North Carolina (N.C. Rules of Prof’l Conduct R. 1.6 (2002)); North Dakota (N.D. Rules of Prof’l Conduct R. 1.6 (2002)); Ohio (Ohio Code of Prof’l Responsibility DR 7-102(B)(1) (2002)); Oklahoma (Okla. Rules of Prof’l

452 All of these exceptions could be said to detract from the atmosphere of confidentiality  
453 conducive to clients' disclosure of important information to their lawyers, yet these limitations  
454 exist and serve similarly important policy purposes, including the protection of the ultimate  
455 client or third parties, and the protection of the professional integrity of the lawyer. This  
456 balancing of competing policy interests represents a carefully developed system of lawyer  
457 regulation. The Task Force believes that the ABA and the legal profession must be mindful of  
458 these competing policies in reviewing the Model Rules as applicable to the lawyer for the  
459 organizational client as well as mindful of the potential for further regulatory intrusion into the  
460 critical domain of the attorney-client relationship.<sup>34</sup>

461  
462 The Model Rules' treatment of the lawyer's obligation of confidentiality is significantly out  
463 of step with the policy balance reflected in the rules of professional conduct in most of the states,  
464 in Section 67 of the RESTATEMENT THIRD, THE LAW GOVERNING LAWYERS,<sup>35</sup> and in the  
465 recommendations of the ABA Commission on Evaluation of the Rules of Professional Conduct  
466 ("Ethics 2000 Commission").<sup>36</sup> The Task Force believes that this inconsistency has become  
467 increasingly dissonant in the last year, as public opinion and Congressional legislative action has  
468 demanded that lawyers play a greater role in promoting corporate responsibility.<sup>37</sup>

## 469 **B. Conforming Model Rule 1.6 to Existing Law and Policy**

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472 The Task Force therefore recommends that Model Rule 1.6(b) be amended, as proposed  
473 by the Ethics 2000 Commission, to provide that:

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Conduct R. 1.6(2002)); Oklahoma (Okla. Rules of Prof'l Conduct R. 1.6 (2002)); Pennsylvania (Pa. Rules of Prof'l  
Conduct R. 1.6(2002)); South Dakota (S.D. Rules of Prof'l Conduct R. 1.6 (2002)); Texas (Tex. Rules of Prof'l  
Conduct R. 105 (2002)); Utah (Utah Rules of Prof'l Conduct (2002)); Virginia (Va. Rules of Prof'l Conduct R.  
1.6(2002)); Wisconsin (Wis. Rules of Prof'l Conduct R. 1.6 (2002)).

States that require such disclosure: Hawaii (Haw. Rules of Prof'l Conduct R. 1.6 (2002)); Ohio (Ohio Code of Prof'l  
Responsibility DR 4-101(2002)); Oklahoma (Okla. Rules of Prof'l Conduct R. 1.6 (2002)).

Delaware in April 2003 joined this list of states adopting the permissive disclosure rule to be effective July 1, 2003.

<sup>34</sup> As noted above, the SEC has deferred action on a proposal to require the lawyer to report illegal  
conduct to the SEC in order to permit further public comment and consideration of a company reporting  
alternative. Commenting on that action, former SEC Chairman Arthur Levitt noted: "The Commission  
wisely delayed action requiring lawyers who uncover securities law violations to resign and notify the SEC  
if the company does not take appropriate action. This does not mean the issue should die. The legal  
community and the SEC have a duty to find a creative solution that doesn't pierce attorney-client  
confidentiality yet sends a strong message to investors that their ultimate ownership will be honored."  
Arthur Levitt, Jr., "The SEC's Repair Job," Wall Street Journal, Feb. 10, 2003.

<sup>35</sup> The "RESTATEMENT."

<sup>36</sup> Ethics 2000 Report with Recommendation to the House of Delegates (August 2001), available at  
[http://www.abanet.org/cpr/e2k-report\\_home.html](http://www.abanet.org/cpr/e2k-report_home.html).

<sup>37</sup> See Lisa H. Nicholson, *A Hobson's Choice for Securities Lawyers in the Post-Enron Environment: Striking a Balance Between the Obligation of Client Loyalty and Market Gatekeeper*, 16 GEO. J. LEGAL ETHICS 91 (2002).

474  
475 (b) A lawyer may reveal information relating to the representation of  
476 a client to the extent the lawyer reasonably believes necessary: ...  
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478 (2) to prevent the client from committing a crime or  
479 fraud that is reasonably certain to result in substantial injury  
480 to the financial interests or property of another and in  
481 furtherance of which the client has used or is using the  
482 lawyer's services; [and]  
483

484 (3) to prevent, mitigate or rectify substantial injury to the  
485 financial interests or property of another that is reasonably certain  
486 to result or has resulted from the client's commission of a crime or  
487 fraud in furtherance of which the client has used the lawyer's  
488 services; ... .  
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490 The Task Force believes that the interest of society, and the bar, in assuring that a  
491 lawyer's services are not used by a client in the furtherance of a crime or a fraud creates a  
492 demanding need for an exception to the important principle of confidentiality, as most states  
493 have recognized. The importance of protecting both society and the bar from the consequences  
494 of a client's misuse of the lawyer's services in the furtherance of a serious crime or fraud must be  
495 balanced against the importance to the client-lawyer relationship of the principle of  
496 confidentiality.<sup>38</sup>

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<sup>38</sup> The Task Force's Preliminary Report (at 32) proposed a balance in which the lawyer would be required, not just permitted, to disclose client information "in order to prevent client conduct known to the lawyer to involve a crime, including violations of federal securities laws and regulations, in furtherance of which the client has used or is using the lawyer's services, and which is reasonably certain to result in substantial injury to the financial interests or property of another." This proposal engendered strong criticism (see note 28, *supra*), and the Task Force has determined to modify that recommendation. The ABA's comment letter to the SEC on the proposed Part 205 Rules (available at <http://www.sec.gov/rules/proposed/s74502/apcarlton1.htm>) explains the reasons for that modification in the following passage commenting on the proposal to require lawyers to report to the SEC:

We believe that the proposed Section 307 rules that mandate withdrawal from representation, notice to the SEC and disaffirmance risk destroying the trust and confidence many issuers have up to now placed in their legal counsel, creating divided loyalties and driving a wedge into the attorney-client relationship. Providing notice to the SEC that the attorney has withdrawn "for professional considerations" and disaffirming specific documents will have a similar effect as a violation of client confidences, and may itself be a violation of the attorney's duties to the client under state court rules, because it will promptly trigger an enforcement investigation and potentially civil lawsuits. As a consequence, some issuers might not even consult qualified attorneys regarding close issues of whether or not to disclose information in a filing or otherwise because the attorney might engage in a noisy withdrawal even though all that may have been involved was a matter of business judgment as to the materiality of certain information.

Moreover, mandating withdrawal and disaffirmance removes the flexibility that lawyers need in order to have time to counsel their corporate clients effectively. In some instances, premature withdrawal and disaffirmance of documents might seriously and unfairly harm the issuer and its shareholders or create disruption in the market for issuer's securities, when more time spent with managers or expert advisers might have avoided the need for the attorney to employ so extreme

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The Model Rules leave no room for doubt as to whether a lawyer may permit his services to be used by a client for criminal or fraudulent activity. Model Rule 1.2(d) provides that a lawyer “shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent.” And Model Rule 4.1 provides that, in the course of representing a client, a lawyer “shall not knowingly . . . make a false statement of material fact or law to a third person,” and that a lawyer shall not knowingly “fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.” But what if the client has misled the lawyer, leading the lawyer to believe that the client is pursuing a lawful and honest purpose while in fact using the lawyer’s work product to perpetrate a crime or fraud? In such circumstances should the lawyer be prohibited from taking action to prevent or rectify such misuse of the lawyer’s services?

The Task Force believes, as did the Ethics 2000 Commission, that the use of the lawyer’s services for such improper ends constitutes an abuse by the client of the client-lawyer relationship, forfeiting the client’s absolute entitlement to the protection of Model Rule 1.6. In such circumstances, the Task Force believes that the lawyer must be permitted, where the crime or fraud has resulted or is reasonably certain to result in substantial injury to the financial interests or property of third parties, to reveal information relating to the representation as reasonably believed necessary to prevent the commission of, or to prevent or rectify the consequences of, the crime or fraud.<sup>39</sup>

As noted earlier, there is a long-standing exception to Model Rule 1.6 that permits a lawyer to reveal information relating to a representation “to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client.” We believe that it is at least as important to society, and to the integrity of the profession, to permit disclosure in order to prevent the lawyer’s services from being used in the commission of a crime or fraud as it is to permit disclosure in order to collect the lawyer’s fee or to protect the lawyer from a client’s unmeritorious civil claim.

In opposition to the proposal to amend Model Rule 1.6, it has been suggested that the disclosure to third parties permitted under the laws of most states is “rarely if ever employed,”

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a measure. Such consultations also may prove the attorney to be wrong in believing any material violation will occur.

<sup>39</sup> Comment f to RESTATEMENT §67 further explains:

Once use or disclosure of information has been made to prevent, rectify, or mitigate loss under Subsection (2), the lawyer is not further warranted in actively assisting the victim on an ongoing basis in pursuing a remedy against the lawyer’s client or in any similar manner aiding the victim or harming the client. Thus, a lawyer is not warranted under this Section in serving as legal counsel for a victim . . . , volunteering to serve as witness in a proceeding by the victim, or cooperating with an administrative agency in obtaining compensation for victims. The lawyer also may not use or disclose information for the purpose of voluntarily assisting a law-enforcement agency to apprehend and prosecute the client, unless the lawyer reasonably believes that such disclosure would be necessary to prevent, rectify, or mitigate the victim’s loss.

529 and there is therefore no need to amend Rule 1.6.<sup>40</sup> The Task Force is not persuaded by this  
530 suggestion. Even if the authorization to disclose afforded by most states' disciplinary rules is not  
531 often used, the existence of such authority gives lawyers the opportunity to use that power to  
532 encourage the client to remediate or refrain from unlawful conduct.

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#### 534 **IV. CONCLUSION**

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536 For the reasons set forth above in and its Report, the Task Force urges that the House of  
537 Delegates approve the recommended changes to Rule 1.6 of the Model Rules of Professional  
538 Conduct.

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540 Respectfully submitted,

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542 The Task Force on Corporate Responsibility

543 James H. Cheek, III, Chair

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Statement of Patricia Lee Refo on behalf of the ABA Section of Litigation, Nov. 11, 2002, at 11.

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**GENERAL INFORMATION FORM**

Submitting Entity: Task Force on Corporate Responsibility

Submitted By: James H. Cheek, III, Chair

1. Summary of Recommendation(s): The recommendation is to amend Rule 1.6(b) of the ABA Model Rules of Professional Conduct to permit the lawyer to reveal client information and to amend the related Comment to Rule 1.6.

2. Approval by Submitting Entity: The recommendation as submitted was approved by the Task Force through its adoption of its Report dated March 31, 2003.

3. Has this or a similar recommendation been submitted to the House or Board previously?

Yes. The recommendation is identical to the proposal by the ABA Commission on Evaluation of the Rules of Professional Conduct (“Ethics 2000 Commission”) to amend Rule 1.6 by adding subsections (b)(2) and (b)(3). The proposal to add subsection (b)(2) was defeated in the House of Delegates at the August 2001 Annual Meeting, and the Ethics 2000 Commission thereupon withdrew its proposal to add subsection (b)(3). In addition, a proposal similar to an element of the proposed amendments to Rule 1.6 was presented to the House of Delegates at the 1991 Annual Meeting and defeated.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

The recommendation addresses core areas of concern in relation to the professional responsibilities of lawyers to their clients and to the public.

5. What urgency exists which requires action at this meeting of the House?

The Task Force was directed by the President of the ABA in March 2002 to evaluate “systemic issues relating to corporate responsibility” in relation to, among other things, “the framework of laws and regulations and ethical principles governing the roles of lawyers.” The Task Force believes that its recommendations merit prompt attention by the House of Delegates in light of recent changes in applicable law, including new federal legislation and related proposed and final rules regulating lawyer professional conduct by the Securities and Exchange Commission.

6. Status of legislation (if applicable): Not applicable.

7. Cost to the Association (both direct and indirect costs): None.

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8. Disclosure of Interest (if applicable): None.

9. Referrals: The Task Force's Report is expected to be distributed to each of the Sections and Divisions and Standing Committees of the ABA.

10. Contact Person (prior to the meeting): James H. Cheek, III, Chair, Task Force on Corporate Responsibility, Bass Berry Sims, PLC, Suite 2700, 315 Deaderick St., Nashville, TN 37238-3001, business: (615) 742-6223, fax: (615) 742-6298, email [jcheek@bassberry.com](mailto:jcheek@bassberry.com).

11. Contact Person (who will present the report to the House): James H. Cheek, III, Chair, Task Force on Corporate Responsibility, Bass Berry Sims, PLC, Suite 2700, 315 Deaderick St., Nashville, TN 37238-3001, business: (615) 742-6223, fax: (615) 742-6298, email [jcheek@bassberry.com](mailto:jcheek@bassberry.com).

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**The "Rectify Fraud" States, their RPC 1.6 or equivalent.**  
(Extracts of the public interest exceptions to the duty of confidentiality in the  
Rules of Professional Conduct or the Code of Professional Responsibility of those **27 states**.)

**Arizona** <http://www.supreme.state.az.us/media/pdf/test%20ule%2042%20%2043.pdf>

Supreme Court Rule 42, ER 1.6

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

(1) **to prevent** the client from committing a **crime or fraud** that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(2) **to mitigate or rectify substantial injury to the financial interests** or property of another that is reasonably certain to result or has resulted from the client's commission of a **crime or fraud in furtherance of which the client has used the lawyer's services**;

**Arkansas** <http://courts.state.ar.us/opinions/2005a/20050303/arpc2005.html>

Supreme Court on March 3, 2005, adopted new RPCs, effective **May 1, 2005**, including new RPC 1.6:

(b) A lawyer **may reveal** such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the commission of a criminal act;

(2) to **prevent** the client from committing a **fraud** that is reasonably certain to result in injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to **prevent, mitigate or rectify injury** to the financial interest or property of another that is reasonably certain to result or has resulted from the client's commission of a **crime or fraud in furtherance of which the client has used the lawyer's services**; [clauses 4 and 5 omitted here]

(6) to **comply with other law** or a court order.

**Connecticut** <http://www.jud.state.ct.us/Publications/PracticeBook/pb2003part1.pdf>

Rule 1.6

(b) A lawyer **shall** reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer **believes is likely to result in death or substantial bodily harm**.

(c) A lawyer **may** reveal such information to the extent the lawyer reasonably believes necessary to:

(1) Prevent the client from committing a criminal act that the lawyer **believes is likely to result** in substantial injury to the financial interest or property of another;

(2) **Rectify the consequence of a client's criminal or fraudulent act in** the commission of **which the lawyer's services had been used**.

**Delaware** <http://courts.state.de.us/supreme/pdf/FinalDLRPCclean.pdf>

Rule 1.6 (effective 7/1/2003)

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

(1) **to prevent** reasonably certain **death or substantial bodily harm**;

(2) **to prevent** the client from committing a **crime or fraud** that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) **to prevent, mitigate, or rectify substantial injury to the financial interests** or property of another that is reasonably certain to result or has resulted from the client's commission of a **crime or fraud in furtherance of which the client has used the lawyer's services**;

**Hawaii** <http://www.hawaii.gov/jud/hrpcond.htm#Rule 1.6> [With a **corrupt government** exception -- see (c)(4).]

Rule 1.6

(b) A lawyer **shall** reveal information which **clearly establishes** a criminal or fraudulent act of the client in the furtherance of which the lawyer's services had been used, to the extent reasonably necessary to rectify the consequences of such act, where the act has resulted in substantial injury to the financial interests or property of another.

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

(1) to prevent the client from committing a criminal or fraudulent act that the lawyer **reasonably believes is likely to result** in death or substantial bodily harm, or in substantial injury to the financial interests or property of another;

(2) to rectify the consequences of a client's act which the lawyer reasonably believes to have been criminal or fraudulent and in the furtherance of which the lawyer's services had been used;

(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, civil claim, or disciplinary complaint against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(4) **to prevent a public official or public agency from committing a criminal or illegal act** that a government lawyer reasonably believes is likely to result in harm to the public good;

(5) **to rectify the consequences of a public official's or a public agency's act** which the government lawyer reasonably

believes to have been **criminal or illegal and harmful to the public good**; or  
(6) to comply with other law or court order.

**Idaho** <http://www2.state.id.us/isb/rules/irpc.htm> (effective 7/1/2004)

Rule 1.6

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

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

**Indiana** <http://www.in.gov/judiciary/orders/rule-amendments/2004/0904-prof-conduct.pdf> (effective 1/1/2005)

Rule 1.6

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

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

**Iowa** <http://www.judicial.state.ia.us/rules/amendments/> (effective 7/1/2005)

Rule 32:1.6

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

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

(c) A lawyer **shall reveal** information relating to the representation of a client to the extent the lawyer reasonably believes necessary to **prevent imminent death or substantial bodily harm**.

**Louisiana** <http://www.lsba.org/> and <http://www.lsba.org/Rpc2004.pdf> (effective 3/1/2004)

Rule 1.6

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

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

(6) to **comply with other law** or a court order.

**Maryland** <http://www.courts.state.md.us/rules/153ro.pdf> (adopted ABA Model Rule language on 2/8/05, effective 7/1/05)

Rule 1.6

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

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

**Massachusetts** <http://www.state.ma.us/obcbbo/rpc1.htm#Rule 1.6>

Rule 1.6

(b) A lawyer **may** reveal, and to the extent required by Rule 3.3, Rule 4.1(b), or Rule 8.3 must reveal, such information:

- (1) to **prevent** the commission of a criminal or fraudulent act that the lawyer **reasonably believes is likely** to result in death or substantial bodily harm, or in substantial injury to the financial interests or property of another, or to prevent the wrongful execution or incarceration of another;
- (2) to the extent the lawyer reasonably believes necessary 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;
- (3) to the extent the lawyer reasonably believes necessary to **rectify client fraud** in which the lawyer's services have been used, subject to Rule 3.3 (e);
- (4) when permitted under these rules or required by law or court order.

**Michigan** <http://courtofappeals.mjud.net/rules/public/default.asp>

Rule 1.6

(c) A lawyer **may** reveal:

- (1) confidences or secrets with the consent of the client or clients affected, but only after full disclosure to them;
- (2) confidences or secrets when permitted or required by these rules, or when required by law or by court order;
- (3) confidences and secrets to the extent **reasonably necessary to rectify** the consequences of a client's illegal or fraudulent act in the furtherance of which the lawyer's services have been used;
- (4) the intention of a client to commit a crime and the information **necessary to prevent** the crime; and
- (5) confidences or secrets necessary to establish or collect a fee, or to defend the lawyer or the lawyer's employees or associates against an accusation of wrongful conduct.

**Minnesota** <http://www.courts.state.mn.us/lprb/conduct.html#o6>

Rule 1.6

(b) A lawyer **may** reveal:

- (1) confidences or secrets with the consent of the client or clients affected, but only after consultation with them;
- (2) confidences or secrets when permitted under the Rules of Professional Conduct or required by law or court order;
- (3) the intention of a client to commit a crime and the information **necessary to prevent** a crime;
- (4) confidences and secrets **necessary to rectify** the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services were used;
- (5) confidences or secrets necessary to establish or collect a fee or to defend the lawyer or employees or associates against an accusation of wrongful conduct;
- (6) secrets necessary to inform the Office of Lawyers Professional Responsibility of knowledge of another lawyer's violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects. See Rule 8.3.

**Nevada** <http://www.leg.state.nv.us/CourtRules/SCR.html> RPCs begin at Rule 150.

Rule 156. Confidentiality of information.

1. 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 subsections 2 and 3.
2. A **lawyer shall reveal** such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer **believes is likely** to result in imminent **death or substantial bodily harm**.
3. A lawyer **may reveal** such information to the extent the lawyer reasonably believes necessary:
  - (a) To **prevent or rectify** the consequences of a client's criminal or fraudulent act in the commission of which the

lawyer's services have been used, but the lawyer shall, where practicable, first make reasonable effort to persuade the client to take corrective action; or

(b) 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.

[Added; effective March 28, 1986.]

### **New Jersey** <http://njlawnet.com/nj-rpc/rpc1-6.html>

#### Rule 1.6

(b) A **lawyer shall reveal** such information to the proper authorities, as soon as, and to the extent the lawyer reasonably believes necessary, **to prevent** the client:

(1) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is **likely to result** in death or substantial bodily harm or substantial injury to the financial interest or property of another;

(2) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is **likely to perpetrate** a fraud upon a tribunal.

(c) A lawyer **may reveal** such information to the extent the lawyer reasonably believes necessary:

(1) to **rectify** the consequences of a client's criminal, illegal or fraudulent act in the furtherance of which the lawyer's services had been used;

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, or to establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer based upon the conduct in which the client was involved; or

(3) to comply with other law.

### **New York**

[http://www.nysba.org/Content/NavigationMenu/Attorney\\_Resources/Lawyers\\_Code\\_of\\_Professional\\_Responsibility/CodeofResponsibility.pdf](http://www.nysba.org/Content/NavigationMenu/Attorney_Resources/Lawyers_Code_of_Professional_Responsibility/CodeofResponsibility.pdf)

#### Disciplinary Rule 4-101

C. A lawyer **may** reveal:

3. The intention of a client to commit a crime and the information **necessary to prevent** the crime.

#### Disciplinary Rule 7-102

B. A lawyer who receives information clearly establishing that:

1. The client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon the client to rectify the same, and if the client refuses or is unable to do so, the lawyer **shall reveal the fraud** to the affected person or tribunal, *except when the information is protected as a confidence or secret*. [The last clause was nullified by *People v. DePallo*, 96 N.Y.2d 437, 729 N.Y.S.2d 649, 754 N.E. 2d 751 (2001)(The Court there said, "The intent to commit a crime is not a protected confidence or secret.")]

### **North Carolina** [http://www.ncbar.com/home/clean\\_rules.asp](http://www.ncbar.com/home/clean_rules.asp)

#### Rule 1.6

(b) A lawyer **may** reveal information protected from disclosure by paragraph (a) to the extent the lawyer reasonably believes necessary:

(2) to prevent the commission of a crime by the client;

(3) to prevent reasonably certain death or bodily harm;

(4) to prevent, mitigate, or **rectify** the consequences of a client's **criminal or fraudulent act** in the commission of which the lawyer's services were used;

### **North Dakota** <http://www.court.state.nd.us/court/rules/Conduct/Rule1.6.htm>

#### Rule 1.6

Such revelation or use is:

(a) **required** to the extent the lawyer **believes necessary to prevent** the client from committing an act that the lawyer believes is likely to result in imminent death or imminent substantial bodily harm;

(d) **permitted** to the extent the lawyer **reasonably believes necessary to prevent** the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in non-imminent death, non-imminent substantial bodily harm, or substantial injury or harm to the financial interests or property of another;

(f) **permitted**, except as limited by Rule 3.3(c), **to prevent or to rectify** the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services had been used without the lawyer's knowledge;

(h) permitted when information has become generally known.

### **Ohio** <http://www.sconet.state.oh.us/Rules/professional/>

#### Disciplinary Rule 4-101

C. A lawyer **may** reveal:

3. The intention of his client to commit a crime and the information **necessary to prevent** the crime.

#### Disciplinary Rule 7-102

B. A lawyer who receives information clearly establishing that:

1. His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal, shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he **shall reveal the fraud** to the affected person or tribunal.

**Oklahoma** <http://www.oscn.net/applications/oscn/index.asp?ftdb=STOKRUPR>

Rule 1.6

(b) A lawyer **may** reveal, to the extent the lawyer **reasonably believes necessary**, information relating to 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.

**Pennsylvania** <http://www.courts.state.pa.us/OpPosting/Supreme/out/30drd.1attach.pdf> (effective 1/1/2005, minor changes to Rule 1.6) <http://www.courts.state.pa.us/Index/aopc/pressreleases/prrel04823.asp> (press release of Aug. 23, 2004)

Rule 1.6

- (c) A lawyer **may** reveal such information to the extent that the lawyer reasonably believes necessary:
- (1) to prevent reasonably certain death or substantial bodily harm;
  - (2) **to prevent** the client from committing a criminal act that the lawyer **believes is likely** to result in substantial injury to the financial interests or property of another;
  - (2) **to prevent, mitigate or rectify** the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services are being or had been used;

**South Dakota** <http://www.sdbar.org/members/ethics/rules/default.htm>

Rule 1.6

- (b) A lawyer **may** reveal such information to the extent the lawyer reasonably believes necessary:
- (1) **to prevent** the client from committing a criminal act that the lawyer **believes is likely to result** in imminent death or substantial bodily harm; or
  - (3) to the extent that revelation **appears to be necessary to rectify** the consequences of a client's criminal or fraudulent act in which the lawyer's services had been used.

**Tennessee** <http://www.tba.org/ethics/index.html>

Rule 1.6 (Adopted Aug. 27, 2002)

- (b) A lawyer **may reveal** information relating to the representation of a client to the extent the lawyer **reasonably believes** disclosure is necessary:
- (1) **to prevent** the client or another person from committing **a crime**, including a crime that is reasonably certain to result in substantial injury to the financial interest or property of another, unless disclosure is prohibited or restricted by Rule 3.3;
- (c) A lawyer **shall reveal** information relating to the representation of a client to the extent the lawyer reasonably believes disclosure is necessary:
- (1) **to prevent reasonably certain death** or substantial bodily harm;
  - (2) to comply with an order of a tribunal requiring disclosure, but only if ordered to do so by the tribunal after the lawyer has asserted on behalf of the client all non-frivolous claims that the information sought by the tribunal is protected against disclosure by the attorney-client privilege or other applicable law; or
  - (3) to comply with Rules 3.3, 4.1, or other law.

**Rule 4.1 [webnote: making a noisy withdrawal to mitigate or rectify client's criminal or fraudulent conduct]**

- (c) If a lawyer who is representing or has represented a client in a non-adjudicative matter comes to know, prior to the conclusion of the matter, that the client has, during the course of the lawyer's representation of the client, perpetrated a crime or fraud, the lawyer shall promptly advise the client to rectify the crime or fraud and consult with the client about the consequences of the client's failure to do so. If the client refuses or is unable to rectify the crime or fraud, the lawyer **shall**:
- (1) if currently representing the client in the matter, withdraw from the representation and **give notice of the withdrawal** to any person whom the lawyer knows is aware of the lawyer's representation of the client in the matter and whose financial or property interests are likely to be injured by the client's criminal or fraudulent conduct; and
  - (2) **give notice** to any such person **of** the lawyer's **disaffirmance** of any written statements, opinions, or other material prepared by the lawyer on behalf of the client and that the lawyer reasonably believes may be used by the client in furtherance of the crime or fraud.

**Texas** [http://www.txethics.org/reference\\_rules.asp?view=conduct&num=1.05](http://www.txethics.org/reference_rules.asp?view=conduct&num=1.05)

Rule 1.5

- (c) A lawyer **may** reveal confidential information:
- (7) When the lawyer **has reason to believe it is necessary** to do so in order to prevent the client from committing a criminal or fraudulent act.
  - (8) To the extent revelation **reasonably appears necessary to rectify** the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used.

**Utah** [http://www.utahbar.org/rules/html/professional\\_conduct.html](http://www.utahbar.org/rules/html/professional_conduct.html)

Rule 1.6

- (b) A lawyer **may** reveal such information to the extent the lawyer believes necessary:

(1) **To prevent** the client from committing a criminal or fraudulent act that the lawyer **believes is likely to result** in death or substantial bodily harm, or substantial injury to the financial interest or property of another;

(2) **To rectify** the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used;

**Virginia** <http://members.aol.com/jmccauesq/ethics/VARULES.htm> or <http://www.vsb.org/profguides/rules.pdf>

Rule 1.6

(b) To the extent a lawyer reasonably believes necessary, the lawyer **may reveal**:

(3) such **information** which clearly establishes **that the client has**, in the course of the representation, **perpetrated** upon a third party a **fraud related to** the subject matter of **the representation**;

(c) A lawyer **shall promptly reveal**:

(1) the intention of a client, as stated by the client, to commit a crime and the **information necessary to prevent the crime**, but before revealing such information, the attorney shall, where feasible, advise the client of the possible legal consequences of the action, urge the client not to commit the crime, and advise the client that the attorney must reveal the client's criminal intention unless thereupon abandoned, and, if the crime involves perjury by the client, that the attorney shall seek to withdraw as counsel;

(2) **information** which clearly establishes **that the client has**, in the course of the representation, **perpetrated a fraud** related to the subject matter of the representation **upon a tribunal**. Before revealing such information, however, the lawyer shall request that the client advise the tribunal of the fraud. For the purposes of this paragraph and paragraph (b)(3), information is clearly established when the client acknowledges to the attorney that the client has perpetrated a fraud;

**Wisconsin** [http://www.courts.state.wi.us/supreme/sc\\_rules.asp](http://www.courts.state.wi.us/supreme/sc_rules.asp)

SCR 20:1.6

(b) A lawyer **shall reveal** such information to the extent the lawyer reasonably believes necessary **to prevent** the client from committing a **criminal or fraudulent act** that the lawyer reasonably believes is likely to result in death or substantial bodily harm or in substantial injury to the financial interest or property of another.

(c) A lawyer **may reveal** such information to the extent the lawyer reasonably believes necessary:

(1) **to rectify** the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services had been used;

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