

December 17, 2002

Transmitted by email on December 17, 2002, to: rule-comments@sec.gov

Jonathan G. Katz, Secretary
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, DC 20549-0609

Re: Implementation of Standards of Professional Conduct for Attorneys,
File No. 33-8150.wp

Dear Mr. Katz:

Reference is made to Release Nos. 33-8150, 34-46868, IC-25829 (File No. S7-45-02) (the "Proposing Release") issued by the Securities and Exchange Commission on November 21, 2002, proposing a Rule, to be included as Part 205 in 17 CFR (hereinafter referred to as the "Proposed Rule", or, as finally adopted, the "Rule"), on Implementation of Standards of Professional Conduct for Attorneys, pursuant to Section 307 of the Sarbanes-Oxley Act of 2002 (hereinafter referred to as the "S/O Act").

In response to the Commission's invitation for comments on the Proposed Rule, the nine law firms that have signed this letter are jointly filing the comments set forth below. In making these comments, we acknowledge the task faced by the Commission and its staff in addressing a complex and controversial subject with limited resources and a short time deadline for meeting its mandated responsibility to issue a final rule. We commend the Commission and its staff for their efforts, and offer comments on the following four issues raised by the Proposed Rule,^{*} clarification of which we believe

^{*} These are by no means the only issues that the firms signing this letter believe are presented by the Proposed Rule, nor are the comments in this letter the only comments that the signatory firms might have relating to the four issues commented upon. However, we have concluded that we can be most helpful in this letter by assisting the Commission and its staff in making the Rule as finally adopted workable, in order to carry out the Commission's statutory mandate under Section 307 of the S/O Act. While we have substantial reservations as to whether the Commission should go beyond that mandate and require withdrawal and disaffirmance under

will give necessary guidance to the bar, assist the Commission and its staff in its administration of the Rule, and avoid diversion of limited Commission resources required to defend the Rule against litigation challenges, either directly or, more likely, through attempts in securities class actions to claim that mandatory disaffirmance of filings with the Commission constitutes a waiver of the attorney-client privilege:

1. What attorneys will be subject to the Rule?
2. Does the Proposed Rule indirectly expand the scope of disclosure obligations currently imposed on a reporting company by the Federal securities laws and the rules of the Commission adopted pursuant thereto and thereby expand the obligation of attorneys to report material violations?
3. When should an attorney be obligated under the Proposed Rule to withdraw from representation of an issuer, and what should be the extent of the attorney's obligation to disaffirm public filings made with the Commission?
4. What standards govern disciplinary actions by the Commission for violation of the Rule, and actions by third parties claiming damages as a result of compliance or noncompliance by attorneys with the Rule?

I.

WHAT ATTORNEYS WILL BE SUBJECT TO THE RULE?

Section 205.3(b) of the Proposed Rule deals with the responsibility of an attorney "appearing and practicing before the Commission" "in the representation of an issuer...".

Section 205.2(f) of the Proposed Rule broadly defines "in the representation of an issuer" to mean "acting *in any way* on behalf, at the behest or for the benefit of an issuer, *whether or not employed or retained by the issuer*" [emphasis added].

the circumstances described in Section 205.3(d) of the Proposed Rule, our comments in Part III of this letter are similarly designed to assist the Commission and its staff should it retain such concepts to design a rule that would minimize damage to the policy underlying the attorney-client privilege of encouraging clients to consult with counsel concerning their legal affairs. The firms signing this letter may also be submitting individually, or with others, additional letters addressing the Proposed Rule.

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Section 205.2(a)(4) of the Proposed Rule broadly defines “appearing and practicing before the Commission” to include, *but not be limited to*, an attorney’s “preparing, or participating in the process of preparing, any statement, opinion, or other writing which the attorney has reason to believe will be filed with or incorporated into any registration statement, notification, application, report, communication or other document filed with or submitted to the Commissioners, the Commission or its staff”.

The definition set forth in Section 205.2(a)(4) is, by its terms, not exclusive in describing activities that may constitute practice before the Commission. Taken together with the broad wording of Section 205.2(f), it raises a number of troublesome questions as to the persons to whom the Proposed Rule is meant to be applicable.¹ While we do not profess to have identified all of the potential issues presented by these broad definitions in the brief time we have had available to study the Proposed Rule and prepare this letter of comments, we are setting forth the following categories for your consideration:

(1) Attorneys who are not retained (as outside counsel) or employed (as inside counsel) by the issuer to provide the legal services described in Section 205.2(a)(4). Such attorneys could arguably include attorneys for other parties to a transaction, such as counsel for underwriters or a placement agent in a public offering or private placement of securities, or attorneys representing the other party to a merger or tender offer transaction where they are collaborating on a joint proxy statement prospectus or other collaborative document. Such attorneys would also include an attorney who serves on an issuer’s board of directors but who is not retained to render legal advice to the issuer, as well as persons who are licensed as attorneys in some jurisdiction but who serve an issuer in a business capacity and do not render legal services to the issuer. To avoid these problems, we believe that the definition of the phrase “in the representation of an issuer” in Section 205.2(f) should be changed to read as follows: “In the representation of an issuer means acting as an attorney retained or

¹ The Commission tacitly recognizes in the Proposed Rule that the broad sweep of the Proposed Rule will require different standards of awareness as to the existence of a material violation that would trigger a reporting obligation, since an unseasoned attorney with no securities law experience may not be aware that information in his or her possession might constitute evidence of a material violation. Rather than impose a reporting obligation on such an attorney, it would appear preferable for issuers to develop disclosure controls and procedures that place reporting responsibility where it belongs — on the securities lawyer retained or employed by the issuer to handle filings with the Commission. For that reason, we suggest that the definition of “attorney” in Section 205.2(c) be revised to add at the end thereof the phrase “and who is retained or employed by the issuer for the purpose of appearing and practicing before the Commission.” See *infra*, paragraph (2) of this Part I.

employed by the issuer to provide legal services to an issuer”. We believe such a clarification reflects the approach taken by the Commission itself in Section 205.3(d)(i) and (ii), which deals only with withdrawal and disaffirmance by attorneys either *retained* or *employed* by the issuer.

(2) Attorneys who are retained or employed by an issuer to provide legal services of a type other than that contemplated by Section 205.2(a)(4), but who in the course of their retention or employment become aware of facts that might otherwise trigger an obligation to report under Section 205.3(b) and (d). Such attorneys would include attorneys who are retained or employed to handle litigation for the issuer which may or may not be related to a “material violation” as defined in Section 205.2(i). Such attorneys would in the normal course of events, upon request by the issuer, furnish audit response letters to the issuer’s outside auditors, commenting on the status of pending or threatened litigation, or the existence of other loss contingencies with respect to which the attorney has furnished substantive advice to the issuer. If such attorneys do more than simply furnish audit response letters and actually assist the issuer in the preparation of a document filed with the Commission, then they may properly fall within the definition of Section 205.2(a)(4). However, if the attorney does no more than furnish an audit response letter to an outside auditor or a litigation status report to the issuer without being involved in the process of giving advice to the issuer on a publicly filed document, particularly if the attorney is not otherwise responsible for handling the issuer’s filing obligations with the Commission, it is not appropriate for the attorney to be covered by Section 205.2(a)(4). Similarly, if an attorney works on a contract on other document that is later attached as an exhibit to an SEC filing (such as a lease or credit facility), such attorney should not be covered by Section 205.2(a)(4) unless the attorney also worked on the SEC filing. If another attorney in the same outside law firm or inside law department is involved in handling the issuer’s filings with the Commission, then the attorney responsible for handling the filings should be recognized as having the obligation to comply with Sections 205.3(b) and (d), but not the attorney who has no responsibility for dealing with the filings.² A similar problem is presented by Section 205.2(a)(4) with respect to foreign attorneys who do not practice before the Commission or participate in the actual preparation of filings with the Commission. To address these issues, as well as those discussed in paragraph (1) above, we suggest that Section 205.2(a)(4) be revised to state: “(4) preparing, or participating in the process of preparing, when retained or employed by the issuer for such purpose...”, and that commentary be added by note to Section 205.2 or by Introductory Note to Part 205 to indicate that the Commission expects that, in fulfilling their obligations to maintain disclosure controls and procedures, issuers will retain or employ attorneys experienced

² There also should be no imputation of knowledge from such other attorneys to the attorney who has Section 205.2(a)(4) responsibilities. See *infra*, paragraph (4) of this Part I.

in dealing with the disclosure requirements of the federal securities laws, and will institute procedures reasonably designed to provide that the issuer's employees will keep the attorney or attorneys responsible for Section 205.2(a)(4) activity informed of litigation or other loss contingencies or other disclosure issues that should be considered in carrying out the responsibilities contemplated in Section 205.2(a)(4).³ We also suggest that a Scope Note to Section 205.2(a)(4) make clear that an attorney otherwise subject to the Rule will not be responsible for reporting under the Rule with respect to matters relating to financial statements and financial data derived therefrom on which the attorney has not been specifically retained or employed to give advice.

(3) Attorneys who defend issuers in Commission enforcement proceedings or suits brought by the Commission for injunctive relief. Sections 205.2(a)(1), (2) and (3) would broadly include within the definition of "appearing and practicing before the Commission" the defense of a party in a Commission administrative proceeding or investigation, or, presumably, in an action brought by the Commission for injunctive relief. Literally read, Section 205.3(b) and (d) would then require the attorney to ask the issuer to publicly correct the defective filing that is the subject of the investigation, administrative proceeding or lawsuit, failing which the attorney would be required to withdraw from the representation and disaffirm the defective filing the attorney is attempting to defend. Such a result directly contradicts the desire expressed by the Commission in the Proposing Release that "the Commission does not want the rule to impair zealous advocacy, which is essential to the Commission's processes". We therefore suggest that the definition of "appearing and practicing before the Commission" in Section 205.2(a) be revised to provide a specific exclusion for attorneys and their law firms who represent parties in a proceeding, investigation or action that would otherwise fall within Sections 205.2(a)(1), (2) or (3) or who, in connection with such representation, would otherwise be covered by Section 205.2(a)(4) (e.g., by reviewing the disclosure of such proceeding for an SEC filing) and from Sections 205.2(b) and (d) if the operation of those Sections would, in the attorney's judgment, interfere with the ability of the attorney to defend his or her client. Similarly, Section 205.2(j)(5) should be revised to make clear that a qualified legal compliance committee has no obligation to notify the Commission that a material violation has occurred if the QLCC determines that such action would impair the ability of the issuer to defend itself

³ It would appear appropriate to integrate such reporting responsibility with the obligation to maintain the disclosure controls and procedures contemplated by Rules 13a-14, 13a-15, 15d-14 and 15d-15, which were recently adopted pursuant to Section 302(a) of the S/O Act. The Commission should also indicate that current protocols between the legal and counseling professions for responding to auditors' requests for information on loss contingencies, if followed, would assist in satisfying the requirement for maintenance of disclosure controls and procedures insofar as they relate to disclosure of loss contingencies.

in a Commission administrative proceeding or lawsuit or in a lawsuit brought by a third party.

(4) Law firms that are retained to carry out the activities described in Section 205.2(a). The Proposed Rule has been drafted to address the duties of individual attorneys, and not the outside law firms of which they are partners or by whom they are employed. However, the Proposed Rule leaves unclear its application to law firms. If the outside law firm does not have responsibility for the activities described in Section 205.2(a)(4), then the clarification suggested in paragraph 2 above may adequately deal with any question of which attorneys in that law firm are responsible for compliance with the Rule, as no attorney in the law firm will in that case be subject to the Rule. However, if a law firm has been retained to handle both litigation (which may or may not be related to matters within the Commission's jurisdiction) and responsibility for preparing documents falling within Section 205.2(a)(4), there is the possibility that the corporate attorney in the firm responsible for preparing SEC documents might be obligated to withdraw from representation under Section 205.3(d). In many such cases the attorney in the law firm who is handling the litigation would not be able under applicable rules of professional conduct to withdraw from representation without permission of a Federal or state court over which the Commission has no jurisdiction, and the court may refuse to permit withdrawal, particularly if it would prejudice the client. Under such circumstances, what is the obligation of the law firm itself? It should be possible under the Rule for an individual lawyer to withdraw from handling SEC representation while the law firm itself continues its representation of the issuer in unrelated matters. In addition, there may be cases — such as where the law firm is representing the issuer in enforcement proceedings brought by the Commission's Enforcement Division (as discussed in paragraph (3) above) or in defending the issuer in a securities class action — where withdrawal by the lawyer who represented the issuer in connection with SEC filings could seriously prejudice the issuer's defense. In such a case, particularly where the Commission staff or plaintiff's counsel are already aware of the alleged defect in the issuer's public filings, there seems little reason to require withdrawal, and withdrawal should not be required. The Commission should make clear by Scope Note or note to Section 205.3(d) that information that is already public or known to the Commission staff is not subject to the Rule, and by excluding attorneys defending clients in Commission administrative proceedings or court actions from the definition of appearing and practicing before the Commission, as suggested in paragraph (3) above.

We note that by focusing on the responsibility of the individual attorney, the Proposed Rule does not address the issue of when an attorney who is subject to the Proposed Rule will be deemed to have evidence of a material violation within the meaning of Section 205.2(e) when the relevant facts are known only by another attorney

within the same law firm who would not be subject to the Proposed Rule. The Proposed Rule does not purport to adopt a rule of imputed knowledge, and we suggest that a Scope Note to Section 205.2(e) make clear that, in the case of a law firm, no imputation of knowledge is intended, and that the attorney in the law firm who is subject to the Rule is the person who must have the knowledge of the material violation to trigger the responsibilities set forth in Section 205.2. As indicated in paragraph (2) above, it may be desirable to provide by Introductory Note or Scope Note that issuers are expected to establish appropriate disclosure controls and procedures that will bring knowledge of material violations to the attention of the attorney retained or employed by the issuer to supervise the activities described in Section 205.2(a)(4).

(5) Attorneys who act as counsel to qualified legal compliance committees (“QLCC”). We commend the Commission and its staff for proposing the creation of QLCC’s to deal with reporting requirements “up the ladder”, as required by Section 205.3. If a QLCC is created by an issuer, we assume that the QLCC will normally retain legal counsel to assist it. The Proposed Rule does not — but should — deal specifically with the obligations of such an attorney in the event the QLCC declines to follow the attorney’s advice or the issuer declines to follow the QLCC’s advice. We expect such occasions to be extremely rare, but assume that counsel to the QLCC will have no further responsibility under the Rule.⁴ Similarly, we assume that an attorney who referred the matter to the Chief Legal Officer who indicated it would be referred to the QLCC will have no further responsibility under the Rule.

II.
DOES THE PROPOSED RULE INDIRECTLY EXPAND THE
SCOPE OF DISCLOSURE OBLIGATIONS CURRENTLY IMPOSED
ON A REPORTING COMPANY BY THE FEDERAL SECURITIES LAWS
AND THE RULES OF THE COMMISSION ADOPTED PURSUANT THERETO
AND THEREBY EXPAND THE OBLIGATION OF ATTORNEYS
TO REPORT MATERIAL VIOLATIONS?

If Congress in enacting Section 307 of the S/O Act simply dealt with material violations of Federal securities laws, there would be no need to deal with this issue. However, Section 307, as drafted, literally covers not only a violation of Federal, but also state securities laws, as well as a material breach of fiduciary duty and, in a delphic

⁴ We note that Section 205.3(b)(6) of the Proposed Rule states that an attorney retained or directed by an issuer to investigate evidence of a material violation reported under paragraphs (b)(1), (4) or (5) shall be deemed to be appearing and practicing before the Commission. We suggest that it be made clear that this subsection does not apply to attorneys retained by QLCC’s.

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reference, “similar violation”. Faced with this ambiguous statutory language, the Commission has included references both to a material breach of fiduciary duty and to a “similar” violation in Section 205.2(i)’s definition of a “material violation”. But what does the definition of “material violation” mean in the context of an agency charged only with the responsibility for administering Federal securities laws, with a focus on disclosures for the protection of investors? We do not assume that Congress intended through a section dealing with standards of professional conduct for attorneys to overturn the U.S. Supreme Court’s decision in *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462 (1977), and create a Federal corporation law of fiduciary duty, which the Commission would be obligated to police, or impose on the Commission the obligation to supervise compliance with state securities laws. Rather it should be construed to mean that violation of state securities laws that give rise to material contingent liabilities and breaches of fiduciary duty that reasonable investors would consider important in making investment decisions would be required to be disclosed to investors as part of a document otherwise required to be filed with the Commission.

Currently, filings with the Commission on registration statements under the Securities Act of 1933 and in proxy statements and periodic filings under the Securities Exchange Act of 1934 do not require specific disclosure of state securities law violations (except as they may be required by Items 303 and 401(f) in Regulation S-K or as they may impliedly be implicated by required disclosure of loss contingencies) nor do they contain certain disclosure requirements that are specifically directed to breaches of fiduciary duty by officers, directors, or controlling shareholders. Material litigation involving officers, directors and 5% shareholders is required to be disclosed under instruction 4 to Item 103 (Legal Proceedings) and in Items 303 and 401(f) in Regulation S-K. Transactions with officers, directors and 5% shareholders and indebtedness owed by management are required to be disclosed by Item 404 of Regulation S-K. It is, of course, possible that the Commission may in the future adopt new disclosure requirements specifically dealing with violations of state securities laws or claims against officers and directors for material breaches of fiduciary duty. However, such a procedure would normally involve publication of proposed changes in existing disclosure requirements and time for hearing and comment, and presumably would be based on whether investors would consider them important in making investment decisions. Almost 20 years ago, a former SEC Commissioner noted in a thoughtful article that “absent specific Congressional direction, the Commission ought not to adopt disclosure rules whose primary purpose is to achieve particular corporate behavior”. See Longstreth, SEC Disclosure Policy Regarding Management Integrity, 36 Bus. Law. 1413, 1427 (1983). We question whether in adopting Section 307 of the S/O Act Congress intended to give the Commission such a broad mandate, but, in any event, before imposing upon attorneys practicing before the Commission the responsibility for carrying out such a mandate, we suggest that the Commission itself first issue more

specific disclosure requirements in its forms. It is therefore requested that the Commission indicate by Scope Note or otherwise in the Rule that the reference to material breach of fiduciary duty or a similar material violation in Section 205.2(i) is not intended to either (1) expand the scope of required disclosure under existing forms to be filed with the Commission unless and until the forms are amended to require such disclosure, or (2) alter the approach of attorneys subject to the Rule in determining what is required disclosure in documents filed with the Commission.

III.

**WHEN SHOULD AN ATTORNEY BE OBLIGATED UNDER THE
PROPOSED RULE TO WITHDRAW FROM REPRESENTATION
OF AN ISSUER, AND WHAT SHOULD BE THE EXTENT OF THE ATTORNEY'S
OBLIGATION TO DISAFFIRM PUBLIC FILINGS MADE WITH THE COMMISSION?**

In the limited time we have had to review the Proposed Rule and prepare this letter of comments, and in light of some of the problems of interpretation and application of Sections 205.3(b) and (d) noted below, we are not comfortable that we or other members of the securities bar have had the opportunity to consider carefully and identify the range of problems that may be presented by a rule that as a practical matter mandates withdrawal and disaffirmance in most cases. For that reason, we request a longer period than four weeks between issuance of the Proposed Rule on November 21 and the final date for comment on December 18 for the securities bar to consider and comment on the aspects of the Proposed Rule relating to withdrawal and disaffirmance. We recognize that the Commission is obligated by the time limitation imposed by Section 307 of the S/O Act to adopt a final rule on "reporting up the ladder" by January 26, 2003. However, that mandate does not apply to the withdrawal and disaffirmance provisions of Section 205.3(d), and we urge that the Commission defer adoption of those portions of Section 205.3(d) requiring mandatory withdrawal and disaffirmance for some additional comment period, and, in any event, defer the effective date of Section 205.3(d) for a period of time sufficient to permit issuers to create qualified legal compliance committees that can satisfy the requirements of Section 205.2(j).

If the Commission concludes that it must address the issue of withdrawal and disaffirmance when it initially adopts the Rule, then for the combination of reasons set forth below, we recommend (in the event the Commission insists on some mandatory disaffirmance or "noisy withdrawal" rule) that Section 205.3(d)(i) provide for (1) mandatory withdrawal only where the attorney *knows* that the issuer is engaged in fraudulent conduct or willful violation of the Federal securities laws that would trigger criminal sanctions under Section 24 of the Securities Act of 1933 or Section 32(a) of the Securities Exchange Act of 1934, where the attorney's services are being or have been used to assist the commission of such fraud or willful violation, and that otherwise

withdrawal should be permissive, and (2) disaffirmance should be permissive except where disaffirmance is necessary to prevent the issuer from using the attorney's opinion or other work product that is publicly associated with a Commission filing to assist in perpetrating a fraud.

Sections 205.3(d)(i)(A) and (B) contemplate that in the event an attorney retained by the issuer fails to receive an appropriate response within a reasonable time to a report of evidence of a material violation, and the attorney reasonably believes that a material violation is ongoing or is about to occur and is likely to result in substantial injury to the financial interest or property of the issuer or of investors, the attorney is obligated to withdraw from representing the issuer, and notify the Commission in writing of the withdrawal and that it is based on professional considerations⁵. The retained attorney is also required under Section 205.3(d)(1)(i)(C) to disaffirm to the Commission any opinion, document, affirmation, representation, characterization, or the like in a document filed with or submitted to the Commission, or incorporated into such a document, "that the attorney has prepared or assisted in preparing and that the attorney reasonably believes is or may be materially false or misleading". Under Section 205.3(d)(2)(ii), an inside attorney employed by the issuer need not withdraw from representation but must similarly disaffirm any such opinion or other document. The Proposed Rule does not require an employed attorney to withdraw because of the perceived hardship on the attorney, but it is difficult to see how, in spite of protections provided for whistleblowers, an attorney who disaffirms a document filed with the Commission would not seriously affect his or her long-term career prospects with an employer, whether or not the attorney formally withdraws from the engagement.

Section 205.3(d)(2) permits (but does not mandate) withdrawal and disaffirmance by a retained attorney and disaffirmance by an employed attorney where the attorney reasonably believes that a material violation has occurred and is likely to have resulted in substantial injury to the financial interest or property of the issuer or of investors but is not ongoing. In many cases it will be very difficult to determine whether a material violation is or is not "ongoing" where the violation is reflected in a past filing that may continue to be relied upon by investors. Accordingly, the distinction sought to be drawn by Section 205.3(d)(2) may well prove in many cases to be unavailable to counsel who are trying conservatively to balance protection of the client and its investors from unnecessary and highly disruptive actions against compliance with a mandate to withdraw and disaffirm.⁶ In addition, premature disclosure of either

⁵ For purposes of analysis, we view this notice of noisy withdrawal to raise the same issues as disaffirmance which are discussed in this letter.

⁶ The question of what constitutes an "ongoing" violation that triggers an obligation to withdraw and disaffirm may arise in a variety of circumstances. For example, an attorney subject to the

favorable or unfavorable facts may harm investors for any number of reasons recognized in the cases, including, for example, loss of a valuable asset (see *Securities & Exchange Commission v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 850 n.12 (2d Cir. 1968), contractual conditions imposed by another party to a contract for proper business reasons (see *State Teachers Retirement Board v. Fluor Corporation*, 654 F.2d 843 (2d Cir. 1981), or delay in announcing a substantial decrease in earnings until earnings figures could be sufficiently developed to be ripe for public release (see *Financial Industrial Fund, Inc. v. McDonnell Douglas Corp.*, 424 F.2d 514 (10th Cir. 1973). Often disclosure decisions must be made under extreme time pressures, and a rule that mandates withdrawal and disaffirmance under such circumstances could work to the disadvantage of both an issuer's current investors and those making or considering investment decisions on the basis of premature disclosures.

Compliance with the Proposed Rule is further complicated by the lack of clarity as to the "evidence" the attorney must have that will trigger action at the following stages in the reporting process under Sections 205.3(b) and 205.3(d): (1) when does the attorney first come into possession of evidence of a material violation that he or she is obligated to report to the CLO and/or CEO of the issuer ("stage one"), (2) what evidence must the attorney have as to whether the attorney has received an "appropriate and timely response" from the issuer's CLO that eliminates any further reporting obligation ("stage two"), (3) what evidence must the attorney have received as to whether satisfactory action has been taken by a board committee or the board of directors if the attorney concludes that he or she has not previously received an appropriate and timely response in Stage Two and therefore reports "up the ladder" ("stage three"), and (4) what evidence must the attorney have as to whether an appropriate and timely response has or has not been made by the issuer's Board of

Rule may have rendered a simple opinion on the validity of securities in connection with a shelf registration statement under the 1933 Act, pursuant to which a series of securities offerings have occurred and further offerings are contemplated. If a material defect is now discovered in the original prospectus (or in a subsequent 1934 Act filing incorporated by reference in the Registration Statement), will it be sufficient to cease offerings under the shelf or must the attorney withdraw and disaffirm his or her opinion if a rescission offer is not made to investors who previously purchased the securities? What if the statute of limitations has run on most or all of the securities sold under the shelf? Assume that the registration statement is not a shelf offering, but constituted a single offering of securities that was sold several years ago and the material defect in the prospectus is discovered after the statute of limitations has run, but the disclosure in the registration statement has been incorporated by reference in current 1934 Act filings. Must the attorney withdraw and disaffirm his or her opinion if a rescission offer is not made to investors, or will it be sufficient to file a corrected disclosure document under the 1934 Act at the time of the next required periodic filing? What if the attorney is no longer working on the prospectus, and periodic 1934 Act filings are handled in-house by the issuer?

Directors that triggers a mandatory or permissive obligation to withdraw and disaffirm to the Commission under Section 205.3(d) (“stage four”). In making decisions at each stage, the attorney will be confronted with a series of questions including (a) does the attorney know enough facts to commence the process of considering whether a material violation has occurred and is not continuing or about to occur, (b) do the facts in the attorneys’ possession establish a violation of securities law or breach of fiduciary duty, (c) if so, is the violation material, (d) does the issuer have a colorable defense to the violation, and (e) would correction of the violation by a subsequent quarterly filing on Form 10Q or annual report on Form 10-K be an appropriate and timely response to dealing with the violation, or would it require immediate filing of a Form 8-K and a press release? All of these issues must often be resolved under extreme time pressures and with the likelihood that more than one attorney (including both inside and outside counsel) will be involved in the process, often with conflicting views on the issues. It may often be difficult, if not impossible, for an attorney to determine whether or not the evidence would lead a hypothetical attorney “reasonably to believe” that a material violation has occurred, is occurring, or is about to occur, when experienced securities lawyers (not to mention lawyers with no securities law experience who are swept within the Proposed Rule) disagree among themselves about the matter.

The Proposing Release and the Proposed Rule offer ambiguous and conflicting guidance to attorneys attempting to cope with their obligations under the Proposed Rule. The following examples are intended to be merely illustrative of the problems presented and not furnish a complete analysis of the potential problems posed by both the reporting up and reporting out requirements of the Proposed Rule:

1. There is no clear standard defining the amount of evidence the attorney must possess to trigger a report up or out under any of the stages described above. Section 205.2(e) of the Proposed Rule states that “evidence of a material violation means information that would lead an attorney reasonably to believe that a material violation has occurred, is occurring, or is about to occur.” The Proposing Release indicates that the “objective standard” is intended to preclude reports based on mere “suspicion” of a material violation, and that there must be some “factual basis” that would lead an attorney to reasonably believe that a material violation has occurred, is occurring or is about to occur. The Proposing Release also emphasizes that the Proposed Rule is not intended to impose upon an attorney a duty to investigate evidence of a material violation or to determine whether in fact there is a material violation. On the other hand the Proposing Release states that actual knowledge is not required as a minimum threshold before triggering the reporting obligation, because a rule which obligates an attorney to report only a material violation which he or she “knows” could be interpreted as imposing an initial investigative obligation on the attorney, which

Section 307 of the S/O Act indicates should be borne by appropriate personnel within the issuer after the attorney has made a report.⁷

2. The Proposing Release leaves it unclear whether an attorney who is not an experienced securities lawyer has any reporting obligation at all, particularly where, as noted above, it is not intended that mere suspicions of violations be reported. In this connection, the Proposing Release states:

When an attorney “becomes aware” of information that would lead an attorney reasonably to believe in the existence of a material violation would turn, at least in part, on the attorney’s training, experience, position and seniority. Attorneys are not necessarily expected to identify issues they are not equipped to see. What the reasonable, experienced securities lawyer might regard as a clear violation of the law may appear different — or not appear at all — to an unseasoned attorney with a different level of expertise.

3. The Proposing Release leaves it unclear as to when an attorney’s reporting obligation is triggered by leaving open the possibility that an officer proposing to engage in clearly illegal conduct may change his or her mind. In this connection the Proposing Release states:

The duty to report does not even arise where the officer tells the attorney that he or she intends to pursue a course of action that the attorney thinks is clearly illegal where the issuer does business, because the officer might reconsider and not do what he or she said he or she would do. The attorney’s reporting obligation is not triggered until the attorney can be sure that the officer or employee will actually pursue an illegal course of action.

4. The Proposing Release makes clear that, at least in defending administrative proceedings before the Commission, assertion of a colorable defense or a colorable basis for contending that the staff should not prevail would be an appropriate response to avoid a reporting obligation, and that the burden will be on the Commission staff to prove its case. The Proposing Release states:

In an administrative proceeding, even where The Commission’s staff asserts it has evidence of a material violation by an issuer, an attorney

⁷ This ambiguity could, of course, be clarified by revision of the definition of “evidence of a material violation”. See our proposed revision of this definition at page 14, *infra*.

defending an issuer may assert any relevant and colorable affirmative defense on the issuer's behalf, and may require the Commission staff to prove its case against his or her client. It would not be an inappropriate response to reported evidence of a material violation for an issuer's CLO to direct defense counsel to assert either a colorable defense or a colorable basis for contending that the staff should not prevail. Such directions from the CLO, therefore, would not require defense counsel to report any evidence of a material violation to the issuer's directors under section 205.3(b)(4) of the proposed rule.

We see no reason why the same line of reasoning should not apply in the absence of an administrative proceeding and note that the definition of "appropriate response" in Section 205.2(b) does not contemplate either the availability of a colorable defense or the obligation of the Commission staff to bear the burden of proving its case.

5. The Proposing Release and the Proposed Rule leave it unclear as to when a material violation of securities law or breach of fiduciary duty will be deemed "ongoing" so as to trigger mandatory withdrawal and disaffirmance obligations under Section 205.3(d).

In light of the ambiguities and conflicts described above we believe that, at a minimum, Section 205.2(e) should be revised to state "evidence of a material violation means information of which an experienced securities attorney becomes aware that establishes *in his or her judgment, without further investigation*, that a material violation has occurred, is occurring or is about to occur with no likelihood that the threatened future conduct will not occur." In addition Section 205.2(b) should be revised by adding a new subsection (3) to state:

(b) Appropriate response means: (1) xxx; or (2) xxx; or (3) that the issuer has a colorable defense to any claim of material violation.

In addition, if the Commission continues to draw a distinction between ongoing and past violations in determining whether withdrawal and disaffirmance should be mandatory or permissive, an attempt should be made to define in Section 205.2, subject to further comment by the bar, what constitutes an "ongoing" material violation

A review of the current state of applicable rules in this area that deal with withdrawal and disaffirmance would, we believe, be helpful in explaining why we believe the approach we suggest in the second paragraph of this Part III — providing for permissive withdrawal and disaffirmance except in the limited circumstances where the attorney knows the client is engaged in criminal or fraudulent conduct — would strike the best balance between achieving the Commission's objective of protecting investors

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and preserving the policy underlying the attorney-client privilege of encouraging clients to consult with counsel concerning their legal affairs. Where an issuer is engaging in conduct that an attorney knows to be fraudulent or criminal, we believe that the rules of professional conduct of virtually all U.S. jurisdictions can be construed to require withdrawal by an attorney from representation of a client to prevent giving further assistance to the commission of the fraud or crime. This withdrawal obligation was also recognized by the American Bar Association's Standing Committee on Ethics and Professional Responsibility over ten years ago in its Formal Opinion 92-366, dated August 8, 1992, which concluded that ABA Model Rules 1.2(d) (prohibiting an attorney from assisting client crime or fraud) and 1.16(a)(1) (requiring withdrawal from a representation where continued representation would result in a violation of the rules) required such a result. A schedule setting forth the position of the various jurisdictions on this issue is attached hereto as Exhibit A. ABA Formal Opinion 92-366 also recognized that, in connection with such a withdrawal from representation, the attorney may disaffirm (and under certain circumstances might find it necessary to do so in order to give effect to the withdrawal) any opinion or document prepared by the attorney upon which third parties may be relying, in order to prevent the client from continuing to practice fraud by using the attorney's work product. In so concluding, the ABA Committee rationalized the prohibition in Model Rule 1.6 on disclosure of client confidences by reading it together with Rules 1.2(d) and 1.16(a)(ii), and the Comment to Rule 1.6 has for many years recognized that a withdrawing attorney may disaffirm opinions or the attorney's work product to the extent necessary to prevent commission of fraud. See ABA Model Rule 1.6, Comment [14].

Although the black letter of ABA Model Rule 1.6 has never been modified to reflect this result (and in fact amendment of the Rule itself has been rejected by the ABA's House of Delegates on more than one occasion), the position adopted in Formal Opinion 92-366 continues to represent the view of the ABA's Standing Committee on Ethics and Professional Responsibility, and today 41 jurisdictions permit an attorney to make disclosures under Rule 1.6 to prevent commission of a crime or fraud, and at least four jurisdictions mandate such disclosure. A description of the applicable rules of professional conduct permitting or mandating disclosure to prevent commission of crime or fraud is attached hereto as Exhibit B. As disclosed on Exhibit B, a substantially smaller number of jurisdictions permit or mandate disclosure to rectify harm caused by past fraud, and rules in some of the jurisdictions where disclosure is permitted under Rule 1.6 could be construed to make disclosure mandatory under ABA Model Rule 4.1 or its equivalent.

Even in the states (Florida, New Jersey, Virginia and Wisconsin) that clearly require an attorney to disclose confidential information to prevent a client from committing a crime or fraud, the breadth of the attorney's duty to disclose client

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confidences is generally limited by the requirement that disclosure may be made only to the extent the lawyer reasonably believes necessary. In addition, in Florida the lawyer is specifically enjoined not to disclose more information than is required to meet the requirements or accomplish the purpose of the rule. See Fla. Bar Reg. R4.1.6(b)(I) and (c), and in Wisconsin the lawyer is required to refrain from disclosing client confidences except as indicated, but may give notice of the fact of withdrawal and may also withdraw or disaffirm any opinion, document, affirmation or the like". See Wisc. SCR 20:1.6, and comment thereon.

We suggest that in assessing the impact of Section 205.3(d) for purposes of its cost/benefit analysis, the Commission consider its particular impact in the states of New York and California, where the largest number of attorneys are likely to be located who are practicing before the Commission and who will be affected by the Rule, and where the largest number of securities class actions are likely to be brought that may raise questions as to loss of the attorney-client privilege and/or breach of the attorney's duty to maintain client confidences through disaffirmance of filings with the Commission as currently mandated by the Proposed Rule.⁸ These states do not have rules that require disaffirmance and, at least in California, its rules of professional conduct may prevent disaffirmance.

In New York, the Disciplinary Rules of the Code of Professional Responsibility require attorneys not to assist clients in conduct that is known to be criminal or fraudulent, and require withdrawal to avoid violation of the Rules of Professional Conduct. The New York Rule also permits withdrawal if a client persists in a course of conduct involving a lawyer's services that the lawyer reasonably believes is criminal or fraudulent, or where the client has used the lawyer's services in perpetrating a crime or fraud. However, disclosure or disaffirmance is only permissive to prevent commission of a crime, and an opinion that is being used to further crime or fraud may be, but is not required to be, withdrawn. See New York CPR DR 2-110(b)(2), 2-110(c)(1)(ii) and (iii), DR 4-101(c)(3) and (5), and DR 7-102(a)(7).

⁸ According to the American Bar Association's website, out of 1,049,751 attorneys who are active attorneys in 2002, 132,452 are located in California and 122,739 are located in New York, making those two states the two largest states in which attorneys are resident. According to the Securities Class Action Clearinghouse maintained by Stanford Law School, the top three Federal circuits in number of filings in 2000 were the 9th Circuit (California) with 47 filings, the 2nd Circuit (New York) with 36 filings, and the 11th Circuit (Florida) with 26 filings. In 2001, the top three Federal circuits in number of filings were the 2nd Circuit with 192 filings, the 9th Circuit with 52 filings, and the 3rd Circuit (including Delaware and Pennsylvania) with 14 filings.

California, which among all the states may have the strictest articulation of the attorney's duty to maintain client confidences, provides in Section 6068(e) of the California Business & Professions Code that it is the duty of an attorney "to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client". California has recognized certain exceptions to this sweeping rule, including the ability of an in-house attorney to sue his employer for wrongful termination as a result of whistle blowing. Nevertheless, in upholding the right of the attorney-employee to prosecute a suit for retaliatory discharge, the California Supreme Court indicated that the trial court managing the case should seek to minimize unnecessary disclosure of client confidences through the use of such devices as protective orders and in camera hearings. See *General Dynamics Corporation v. Superior Court*, 7 Cal. 4th 1164, 987 P.2d 487 (1994). This limitation on disclosure of client confidences is also reflected in Rule 3-600 of the California Rules of Professional Conduct which, while permitting reporting "up the ladder", makes clear that the attorney is not to violate his or her duty of protecting all confidential information as provided in Business and Professions Code Section 6068(e).⁹

In the recently adopted Restatement of the Law Governing Lawyers, the American Law Institute in Section 67 has recognized the ability of attorneys to make disclosures to prevent commission of a crime or fraud, subject to two important

⁹ The relevant portion of California Rule 3-600 provides:

(B) If a member acting on behalf of an organization knows that an actual or apparent agent of the organization acts or intends or refuses to act in a manner that is or may be a violation of law reasonably imputable to the organization, or in a manner which is likely to result in substantial injury to the organization, the member shall not violate his or her duty of protecting all confidential information as provided in Business and Professions Code Section 6068, subdivision (e). Subject to Business and Professions Code Section 6068, subdivision (e), the member may take such actions as appear to the member to be in the best lawful interest of the organization. Such actions may include among others:

- (1) Urging reconsideration of the matter while explaining its likely consequences to the organization; or
- (2) Referring the matter to the next higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest internal authority that can act on behalf of the organization.

(C) If, despite the member's actions in accordance with paragraph (B), the highest authority that can act on behalf of the organization insists upon action or a refusal to act that is a violation of law and is likely to result in substantial injury to the organization, the member's response is limited to the member's right, and, where appropriate, duty to resign in accordance with Rule 3-700.

limitations — (1) the action to be precluded must constitute fraudulent conduct, and (2) the attorney's work product is being utilized to commit the fraud. The recently issued Preliminary Report of the ABA Task Force on Corporate Responsibility, while recommending mandatory, rather than permissive, disclosure to prevent a crime, limited disclosure to cases where the client has used or is using the lawyer's services in furtherance of the crime.

Accordingly, there is some precedent for the Proposed Rule's requirement in Section 205.3(d)(1)(i) that a retained attorney withdraw from representation of a client where necessary to prevent assisting in commission of fraud, and in Section 205.3(d)(1)(i) and (ii) for disaffirmance of the retained or employed attorney's work product that is being used to commit the fraud. However, the Section 205.3(d) requirement of disaffirmance goes significantly beyond existing rules of professional conduct in almost all jurisdictions (and probably exceeds the requirement in the four jurisdictions that mandate disclosure to prevent commission of fraud) in two respects:

(1) The disaffirmance requirement applies to any material violation of the securities laws, which, in the case of defective registration statements under the Securities Act of 1933 and defective proxy statements under Section 14 of the Securities Exchange Act of 1934 need not require a showing of fraud. Similarly, material breaches of fiduciary duty may only raise fairness issues that need not necessarily require a showing of fraud; and

(2) Section 205.3(d)(1)(i) and (ii) require disaffirmance of any document that the attorney has prepared or assisted in preparing, whether or not the attorney's participation would be known to and relied upon by investors. Indeed, under the chain of events contemplated by the Proposed Rule, the attorney could very well have *objected* to the contents of the document proposed to be filed, and the document — rather than reflecting the attorney's work product — will have been prepared and filed (or be about to be filed) over the attorney's objections. Thus the practical effect of the disaffirmance required in Section 205.3(d) is not to warn investors that they should not rely on the attorney's work product, but simply to assist the SEC's Division of Enforcement in fulfilling its own responsibilities. Because an attorney withdrawal under Section 205.3(d) will — by the Commission's own acknowledgment in the Proposing Release — be a rather rare event, the Division of Enforcement can be expected, even without mandatory disaffirmance, to move quickly against an issuer and by taking testimony from the responsible attorneys may be able to learn the relevant facts under the crime-fraud exception to the attorney-client privilege.

Disaffirmance of documents with which the attorney is not publicly identified also raises serious issues with respect to waiver of the attorney-client privilege. The

Commission attempts to deal with this problem by providing in Section 205.3(d)(3) that notification to the Commission does not breach the attorney-client privilege, and by providing in Section 205.3(e)(2) and (3) for sharing of confidential information by the attorney with the Commission, with or without the issuer's consent. The Commission acknowledges, however, that the law on waiver of the attorney-client privilege based on disclosure to a government agency is currently unsettled, and only recently the U.S. Court of Appeals for the Sixth Circuit concluded that such an arrangement constituted a waiver of the privilege. See *In re ColumbiaHealthCare Billing Practices Litigation*, 293 F.3d 289 (6th Cir. 2002); see also *Permian Corp. v. United States*, 665 F.2d 1214 (DC Cir. 1981); *Westinghouse Electric Corporation v. The Republic of the Philippines*, 951 F.2d 1414 (3d Cir. 1991); Fein and Kelleher, Preserving Privilege — Disclosure of the Results of an Internal Investigation, 17 *Andrews Delaware Corporate Litigation Reporter*, Issue 8, November 11, 2002.¹⁰ Indeed, in 1984 Congress rejected an amendment to the Securities Exchange Act of 1934, proposed by the Commission, that would have established a selective waiver rule regarding documents disclosed to the Commission. See *Westinghouse Electric Corporation v. The Republic of the Philippines*, 951 F.2d 1414, at 1425.

Section 205.1 of the Proposed Rule reflects the intention of the Commission to preempt standards of a state where an attorney is admitted or practices that conflict with the Rule. While Section 307 of the S/O Act affords a clear basis for preemption of any conflicting state rule in cases of reporting “up the ladder” (where state rules generally permit, rather than mandate, going up the ladder), preemption is by no means certain in the case of the provisions of Section 205.3(d) with respect to withdrawal and disaffirmance. The legislative history of Section 307 suggests that its sponsors were focusing on reporting up and not reporting out (see 148 Cong. Rec. S65555, S6557 (July 10, 2002), and the U.S. Supreme Court has emphasized in decisions spanning a century and reiterated as recently as this month that the intention of Congress to preempt state law must be “clearly manifested” or “clear and manifest” (see *Reid v. Colorado*, 187 US 137, 148 (1902); *Napier v. Atlantic Coast Line Railroad Company*, 272 US 605, 611 (1926); *Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Board*, 315 US 740, 749 (1942); *Rice v. Santa Fe Elevator Corp.*, 331 US 218, 230 (1947); *English v. General Electric Company*, 496 US 72, 79 (1990); *Sprietsma v. Mercury Marine*,

¹⁰ Sections 205.3(b)(2) and 205.3(b)(8)(ii) require an attorney subject to the Rule to take reasonable steps to document both appropriate and inappropriate responses to requests to remedy reported violations. Because of concerns with respect to potential waiver of the attorney-client privilege, attorneys may be reluctant to provide detailed documentation of advice furnished to an issuer client. For that reason, we suggest that the Commission indicate by Scope Note that reasonable attempts to protect the attorney-client privilege through the nature of such documentation will not subject the attorney to discipline for violation of the Rule.

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2002 US Lexis 9067, at *32, decided December 3, 2002; cf *Burks v. Lasker*, 441 US 471 (1979). Given the legislative history of Section 307, it is by no means certain that courts would uphold a claim of preemption in the face of the recognized role of the states in applying their rules of professional conduct to attorneys practicing before Federal administrative agencies (see *Kroll v. Finnerty*, 242 F.3d 1359 (CA. Fed. Cir. 2001), and the long-established practice in most jurisdictions to permit but not to mandate disclosure of attorney confidences to prevent commission of fraud, particularly where the preemption claim relates to a regulation that may seriously compromise the attorney-client privilege.

Under the circumstances, and because the Commission indicates that it will be rare when Section 205.3(d)'s requirement of withdrawal and disaffirmance will ever be triggered (particularly if use of QLCC's becomes widespread, eliminating the necessity of withdrawal and disaffirmance), it seems to us questionable policy to require in all cases mandatory withdrawal and public disaffirmance of filed documents. We recommend that the Commission consider (1) providing for permissive withdrawal except in cases in which the attorney *knows* that the attorney's work product or actions are assisting the fraudulent conduct, and (2) whether or not the Commission ultimately determines to make withdrawal mandatory rather than permissive for all ongoing violations of the securities law, narrowing the disaffirmance requirement in Section 205.3(d) to cover only documents with which the attorney is publicly identified. Public identification for this purpose might include an opinion (whether or not relevant to the alleged fraud if delivery of the opinion would prevent commission or continuation of a fraud) or a document (such as a merger agreement) in which an opinion of counsel is required as a condition to closing, and might include other public identification with the defective document.

IV.

WHAT STANDARDS GOVERN DISCIPLINARY ACTIONS BY THE COMMISSION FOR VIOLATION OF THE RULE, AND ACTIONS BY THIRD PARTIES CLAIMING DAMAGES AS A RESULT OF COMPLIANCE OR NONCOMPLIANCE BY ATTORNEYS WITH THE RULE?

Because Sections 307 and 602 of the S/O Act were adopted together as part of the same statute, it is assumed that they will be read in *pari materia*, and that Section 205.6(b) of the Proposed Rule recognizes that fact by limiting sanctions for violation of the Rule to the types of egregious conduct described therein.

However, Section 205.6(a) provides without qualification that violations of Part 205 by an attorney will be treated in the same manner as a violation of the Securities Exchange Act of 1934, and attorneys will be subject to the same penalties and remedies,

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and to the same extent, as for a violation of that Act. It is suggested that the Commission make clear that the penalties and remedies referred to in Section 205.6(a) will be subject to the limitations in Section 205.6(b) and consider including in a Scope Note to Section 205.6 the statements in the release proposing the Proposed Rule that the Commission will not proceed against attorneys for violation of the Rule when conduct amounts to no more than simple negligence and that violations of the Rule, without more, would not meet the standards for imposition of criminal penalties. Such a Scope Note may give comfort both to members of the securities bar and their malpractice insurers.

The release proposing the Rule also notes that nothing in Section 307 creates a private right of action based on compliance or noncompliance with the Rule. As the Commission recognizes, this reflects the clear legislative history of Section 307 (see 148 Cong. Rec. S6552, S6555, and S6557, July 10, 2002), and the well recognized rule that violation of rules of professional conduct do not constitute the basis for private suits for damages against attorneys. See Restatement of the Law Governing Lawyers, Section 52. Because of the importance of this concept, it is suggested that the Commission consider specifically incorporating a reference to it in Section 205.6, as has been done in the ABA Model Rules of Professional Conduct Scope paragraph [20] and the California Rules of Professional Conduct Rule 1-100(A).

Should the Commission or its staff have any questions concerning any of the comments contained in this letter, representatives of the firms signing this letter can be reached at the telephone numbers and email and mailing addresses shown below.

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EXHIBIT A**SCHEDULE OF JURISDICTIONS
REQUIRING WITHDRAWAL TO AVOID
ASSISTING IN COMMISSION OF CRIME OR FRAUD**

Jurisdictions	Rule requiring attorneys not to assist client in conduct that the attorney knows is criminal or fraudulent	Rule requiring withdrawal to avoid violation of rules of professional conduct or other law	Rule permitting withdrawal if client persists in course of conduct involving lawyer's services that lawyer reasonably believes is criminal or fraudulent, or client has used lawyer's services in perpetrating a crime or fraud
Alabama ARPC R1.2(d), 1.16(a)(1), 1.16(b)(1) & (2)	Yes	Yes	Yes
Alaska ARJC 1.2(d), 1.16(a)(1), 1.16(b)(1) & (2)	Yes	Yes	Yes
Arizona RPC ER 1.2(d), 1.16(a)(1), 1.16(b)(1) & (2)	Yes	Yes	Yes
Arkansas PCR 1.2(d), 1.16(a)(1), 1.16 (b)(1) & (2)	Yes	Yes	Yes
California PCR 3-700(B)(2), 3-700(C)(1)(b), Bus & Prof Code § 6128	Yes	Yes	Yes
Colorado RPC 1.2(d), 1.16(a)(1), 1.16(b)(1)(B)	Yes	Yes	Yes
Connecticut RDC 1.2(d), 1.16(a)(1), 1.16(b)(1) & (2)	Yes	Yes	Yes
Delaware PCR 1.2(d), 1.16(a)(1), 1.16(b)(1) & (2)	Yes	Yes	Yes

District of Columbia RPC 1.2(e), 1.16(a)(1), 1.16(b)(1) & (2)	Yes	Yes	Yes
Florida FLA Bar Reg R. 4-12(d), 4-1.16(a)(1), 4-1.16(b)(1) & (2)	Yes (includes “or reasonably should know”)	Yes	Yes
Georgia State Bar Rule 1.2(d), 1.16(a)(1), 1.16(b)(1) & (2)	Yes	Yes	Yes
Hawaii PCR 1.2(d), 1.16(a)(1), 1.16(b)(1) & (2)	Yes	Yes	Yes
Idaho Rule 1.2(d), 1.16(a)(1), 1.16(b)(1) & (2)	Yes	Yes	Yes
Illinois PCR 1.2(d), 1.16(a)(2), 1.16(b)(1)(B) & (C)	Yes	Yes (violation of rules)	Yes (client seeks to pursue illegal course of conduct or insisting that lawyer pursue course of conduct that is illegal or prohibited by rules)
Indiana RPC 1.2(d), 1.16(a)(1), 1.16(b)(1) & (2)	Yes	Yes	Yes
Iowa CPR DR 7-102(A)(7), 2-110(B)(2), 2-116(C)(1)(b) & (c)	Yes (illegal or fraudulent)	Yes (violation of rules)	Yes (illegal course of conduct)
Kansas Sp. Ct. Rule 1.2(d), 1.16(a)(1) & (4), 1.16(b)(1)	Yes	Yes (also criminal or fraudulent contract)	Yes (use lawyer’s services to perpetrate crime or fraud)
Kentucky SCR 1.2(d), 1.16(a)(1), 1.16(b)(1) & (2)	Yes	Yes	Yes
Louisiana State Bar Art. XVI, RPC 1.2(c), 1.16(a)(1), 1.16(b)(1) & (2)	Yes	Yes	Yes

Maine Rule 3(6(d), 3.5(b)(ii), 3.5(c)(2) & (3)	Yes (violation of rules)	Yes	Yes
Maryland Rule 1.2(d), 1.16(a)(1), 1.16(b)(1) & (2)	Yes	Yes	Yes
Massachusetts Sp. Jud. Ct. Rule 3:07, RPC 1.2(d), 1.16(a)(1), 1.16(b)(1) & (2)	Yes	Yes	Yes
Michigan RPC 1.2(C), 1.16(a)(1), 1.16(b)(1) & (2)	Yes	Yes	Yes
Minnesota RPC 1.2(c), 1.16(a)(1) & (4), 1.16(b)(1)	Yes	Yes (also course of conduct that is criminal or fraudulent)	Yes
Mississippi RPC 1.2(d), 1.16(a)(1), 1.16(b)(1) & (2)	Yes	Yes	Yes
Missouri S.Ct. Rule 4-1.2(d), 4-1.16(a)(1), 4-1.16(b)(1) & (2)	Yes	Yes	Yes
Montana PCR 1.2(d), 1.16(a)(1), 1.16(b)(1) & (2)	Yes	Yes	Yes
Nebraska CPRsp. DR 7-102(A)(7), DR 2-110(B)(2), DR2-110(C)(1)(b) & (c)	Yes (illegal or fraudulent)	Yes (violation of rule)	Yes (illegal course of conduct)
Nevada SCR 152-4, 166.1(a), 166.2(a) & (b)	Yes	Yes	Yes
New Hampshire RPC 1.2(d), 1.16(a)(1), 1.16(b)(1) & (2)	Yes	Yes	Yes
New Jersey RPC 1.2(d), 1.16(a)(1), 1.16(b)(1) & (2)	Yes	Yes	Yes

New Mexico PRC 16-102.D, 16-116.A(1), 16-116.B(1) & (2)	Yes	Yes	Yes
New York Jud. Appx. CPR DR7-102(a)(7), DR 2-110(b)(2), DR 2-110(c)(1)(ii) & (iii)	Yes (illegal or fraudulent)	Yes (violation of rules)	Yes
North Carolina (PCR 1.2(d), 1.16(a)(1), 1.16(b)(2)	Yes	Yes	Yes
North Dakota PCR 1.2(d), 1.16(a)(1), 1.16(b)(1) & (2)	Yes	Yes	Yes
Ohio CPR DR 7-102(A)(7), DR 2-110(B)(2), DR 2-110(C)(1)(b) & (c)	Yes	Yes (violation of rules)	Yes (illegal course of conduct)
Oklahoma St. Chap. 1.2, Appx. 3-A, Rule 1.2(c), Rule 1.16(a)(1) & (3)	Yes	Yes (also course of conduct that is criminal or fraudulent)	No
Oregon CPR DR 7-102(A)(7), DR 2-110(B)(2), DR 2- 110(C)(1), (b) & (c)	Yes (illegal or fraudulent)	Yes (violation of rules)	Yes (illegal course of conduct)
Pennsylvania RPC Rule 1.2(d), 1.16(a)(1), 1.16(b)(1) & (2)	Yes	Yes	Yes
Rhode Island Sp. Ct. Art. V, Rule 1.2(d), 1.17(a)(1), 1.17(b)(1) & (2)	Yes	Yes	Yes
South Carolina Code Ann. § Title 407, 1.2(d), 1.16(a)(1), 1.16(b)(1) & (2)	Yes	Yes	Yes

South Dakota RPC 1.2(d), 1.16(a)(1), 1.16(b)(1) & (2)	Yes (includes “or reasonably should know”)	Yes	Yes
Tennessee Sp. Ct. Rule 8, DR 7-102(A)(7), DR 2-110(B)(2), DR 2-110(C)(1)(b) & (c)	Yes	Yes (violation of rules)	Yes (illegal course of conduct)
Texas RPC 1.02(c), 1.15(a)(1), 1.15(b)(2) & (3)	Yes	Yes	Yes
Utah Jud. Adm. Rule 1.2(c), 1.16(a)(1), 1.16(b)(1) & (2)	Yes	Yes	Yes
Vermont RPC 1.2(d), 1.16(a)(1), 1.16(b)(1) & (2)	Yes	Yes	Yes
Virginia Sup. Ct. R. 1.2(d), 1.16(a)(1), 1.16(b)(1) & (2)	Yes	Yes	Yes
Washington RPC 1.2(d) 1.15(a)(1), 1.15(b)(1) & (2)	Yes	Yes	Yes
West Virginia PCR 1.2(d), 1.16(a)(1), 1.16(b)(1) & (2)	Yes	Yes	Yes
Wisconsin SCR 20:1.2(d), 20:1.16(a)(1), 20:1.16(b)(1) & (2)	Yes	Yes	Yes
Wyoming PCR 1.2(d), 1.16(a)(1), 1.16(b)(1) & (2)	Yes	Yes	Yes

EXHIBIT B**SCHEDULE OF JURISDICTIONS
PERMITTING OR MANDATING DISCLOSURE OF FRAUD**

Jurisdiction	Disclosure to Prevent Commission of Fraud		Disclosure to Rectify Past Fraud	
	Permitted	Required	Permitted	Required
Alabama ARPC 4.6	No	No	No	No
Alaska RPC 1.6	Yes	No	No	No
Arizona RPC ER 1.6	Yes (crime)	No	No	No
Arkansas MRPC 1.6	Yes (crime)	No	No	No
California Cal. Bus & Prof Code § 6068(e)	No (but see Note 3)	No	No	No
Colorado RPC 1.6	Yes (crime)	No	No	No
Connecticut RPC 1.6(C)(1) & (2)	Yes	No	Yes	No
Delaware Prof. Code 1.6	No	No	No	No
Dist. Columbia RPC 1.6	No	No	No	No
Florida Fla. Bar Reg. R4-1.6	Yes	Yes (crime)	No	No
Georgia State Bar Rule 1.6	Yes	No	No	No
Hawaii Prof Code Rule 1.6, 4.1	Yes	No (but see Note 2(b))	Yes	Yes
Idaho RPC 1.6	Yes (crime)	No	No	No

See notes at end of Schedule.

Illinois Sp. Ct. PC Rule 1.6	Yes (crime)	No	No	No
Indiana RPC 1.6, 4.1	Yes (crime)	No (but see Note 2(b))	No	No
Iowa Code Prof. Resp. DDR 4-101	Yes (crime)	No	No	No
Kansas Sp. Ct. Rule 1.6	Yes (crime)	No	No	No
Kentucky SCR 1.6, 4.1	No	No (but see Note 2(b))	No	No
Louisiana St. Bar Assn. Act XVI RPC 1.6	No	No	No	No
Maine CPR 3.6(b), 3.6(h)	Yes (crime)	No	No	Yes (except when info. protected as privileged communication)
Maryland Rule 1.6, 4.1	Yes	No (but see Note 2(b))	Yes	No
Massachusetts Sup. Jud. Ct. Rule 3.7 RPC 1.6	Yes	No	Yes	No
Michigan RPC 1.6	Yes	No	Yes	No
Minnesota RPC 1.6, 4.1	Yes (crime)	No (but see Note 2(b))	Yes	No
Mississippi RPC 1.6, 4.1	Yes (crime)	No (but see Note 2(b))	No	No
Missouri S. Ct. Rule 4-1.6	No	No	No	No

See notes at end of Schedule.

Montana PCR 1.6	No	No	No	No
Nebraska Neb. Ct. Rule CPR DR 4-101	Yes (crime)	No	No	No
Nevada Rule 156	Yes	No	Yes	No
New Hampshire RPC 1.6	Yes (crime)	No	No	No
New Jersey RPC 1.6, 4.1	Yes	Yes	Yes	No
New Mexico RPC 16-106	Yes (crime)	No	No	No
New York CPR DR 4- 101(C)(3) & (5)	Yes (crime)	No	Yes (withdraw opinion being used to further crime or fraud)	No
North Carolina PCR 1.6	Yes (crime)	No	Yes	No
North Dakota PCR 1.6, 4.1	Yes	No (but see Note 2(b))	Yes	No
Ohio CPR Canon 4 DR 4-101, DR 7-102(B)(1)	Yes (crime)	No	Yes	Yes
Oklahoma S-Bk. 1, St. Chap. 1, Appx. 3-A, Rule 1.6	Yes (crime)	No	Yes	No
Oregon PR DR 4-101	Yes (crime)	No	No	No
Pennsylvania RPC 1.6	Yes (crime)	No	Yes (fraud specifically referred to)	No

See notes at end of Schedule.

Rhode Island SPC Art. V, Rule 1.6	No	No	No	No
South Carolina SC Code Ann. Title 407, 1.6	Yes (crime)	No	No	No
South Dakota Rule 1.6	No	No	Yes	No
Tennessee Sup. Ct. Rule 8 DR 4-101	Yes (crime)	No	No	No
Texas RPC 1.05(c)(7) & (8), 1.05(f) and 4.01(b)	Yes	see Notes 1 and 2(b)	Yes	Yes
Utah Jud. Adm. Rule 1.6	Yes	No	Yes	No
Vermont RPC 1.6, 4.1	Yes	see Notes 1 and 2(b)	No	No
Virginia Sup. Ct. R. 1.6(b)(3), 1.6(c)(1), 4.1	Yes	Yes (crime)	Yes	No
Washington RPC 1.6	Yes (crime)	No	No	No
West Virginia PCR 1.6	Yes (crime)	No	No	No
Wisconsin SCR 20:1-6	Yes	Yes	Yes	No
Wyoming PCR 1.6	Yes (crime)	No	No	No

See notes at end of Schedule.

Notes:

1. Some rules of professional conduct (noted in the foregoing table as “crime”) permit disclosure in order to prevent commission of a crime or criminal act, but do not specifically refer to fraud. It is assumed in those jurisdictions that fraud would constitute a criminal act.

2. Other provisions of the rules of professional conduct that might be implicated by fraudulent conduct of a client, but, except as noted, are not reflected in the table, include:

(a) The rule requiring an attorney to disclose facts to a “tribunal” to avoid assisting a fraudulent act by a client (see ABA Model Rule 3.3(a)(2)). The Ethics 2000 Commission Report made clear that a tribunal for this purpose would include an administrative agency only when acting in an adjudicatory capacity.

(b) The rule requiring an attorney to disclose facts to a third party to avoid assisting a fraudulent act of a client (see ABA Model Rule 4.1(b)). Although the Model Rule makes clear it is not applicable to confidences prohibited by Rule 1.6, several Model Rule jurisdictions have not included the reference to Rule 1.6, nor has it been included in the comparable rule adopted by several other jurisdictions that have not adopted the Model Rules. (See Hawaii PCR 4.1(b), Indiana RPC 4.1 and comment, Kentucky SCR 4.1, Maryland Rule 4.1(a)(2) and (b), Michigan RPC 4.1 and comment, Minnesota RPC 4.1, Mississippi RPC 4.1(b), New Jersey RPC 4.1(a)(2) and (b), North Dakota PCR 4.1, Ohio CPR DR 7-102(B)(1), Texas PCR 1.01(f) and 4.01(b), Vermont RPC 4.1 and reporter’s note, and Virginia Sp. Ct. R. 4.1(b)). In those jurisdictions the applicable rules either expressly mandate disclosure or could be construed to do so under certain circumstances.

3. Under some circumstances, in California an exception may be made to the flat prohibition against disclosure of client confidences contained in California Business & Professions Code Section 6068(e). See *General Dynamics Corporation v. Superior Court*, 7 Cal 4th 1164, 987 P.2d 487 (1994).