Confidentiality v. Transparency: The High Wire Act of the Government Lawyer

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School attorneys are torn between ingrained respect for client privacy and the equally compelling goal of transparency in government operations. This presentation paper explores how courts, ethics authorities and legal scholars address this tension in the context of open government laws, contacts with journalists, whistle blowing and other disclosures of government affairs.

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In November 2012, the Supreme Court of Kansas disbarred Matthew Diaz, a government lawyer who disclosed confidential information to a private advocacy group that, he felt, was being wrongfully stonewalled by his employer.[1] Was he a heroic whistleblower vindicating the interests of the public who paid his salary, or a bumbling narcissist who lost sight of his professional responsibilities and chose to follow his own broken ethical compass?

From our first year of law school, we are taught that confidentiality is the glue that holds the attorney-client relationship together. The purpose of this state-sanctioned secrecy is not to protect wrongdoers, but to serve the public interest by incentivizing individuals, corporations and government agencies to seek proper guidance on their legal rights and obligations. Clients who function in a highly regulated environment need timely and accurate legal advice. Attorneys can provide it only with full disclosure of all pertinent facts, and a safe haven to brainstorm the implications of potential scenarios with their clients. It's a simple fact of human nature that this is less likely to occur if clients fear that details of their attorney-client relationship or, at times, even the fact of that relationship, may be revealed to anyone else.

Like Matthew Diaz, those of us who represent school districts and other government agencies find ourselves torn between our ingrained respect for our clients' privacy on the one hand, and the equally compelling goal of transparency in government operations. This article will explore how courts, ethics authorities and legal scholars are addressing this tug-of-war in the context of open government laws, contacts with journalists, whistle blowing and other disclosures of our government clients' affairs.

THE SCOPE OF ATTORNEY-CLIENT CONFIDENTIALITY

The starting point for discussion is the basic legal framework for attorney-client confidentiality. The American Bar Association's Model Rule of Professional Conduct 1.6, adopted in some form by most jurisdictions, establishes the general proposition that "[a] lawyer shall not reveal information relating to the representation of a client[.]" Model Rule 1.6(a). As Comment [3] to the Rule makes clear, this broad duty "applies not only to matters communicated in confidence by the client but also to all information relating to

[1] *In re Diaz*, 288 P.3d 486 (Kan. 2012).

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the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law."

This prohibition does not apply where "the disclosure is impliedly authorized in order to carry out the representation." Model Rule 1.6(a), or "the disclosure is permitted by paragraph (b)" of the Rule, which lists scenarios where public policy permits or requires disclosure of this information. What constitutes implied authorization is not clear from the face of the Rule, but Comment [5] suggests that "a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers."

Paragraph (b) of the Rule provides:

> 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;
>
> (6) to comply with other law or a court order; or
>
> (7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

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For lawyers representing institutional clients, including government agencies, the confidentiality obligations of Model Rule 1.6 must be construed *in pari materia* with Model Rule 1.13, addressing attorneys' ethical duties to organizational clients. Rule 1.13 provides that a lawyer for an organization "represents the organization acting through its duly authorized constituents." Rule 1.13(a). The next few subsections of the Rule explain the attorney's duty to "report up" and, in some cases, to "report out" misconduct by constituents within the organization.

CONFIDENTIALITY IN THE PUBLIC SECTOR

On their face, Rules 1.6 and 1.13 impose the same duties on attorneys representing private and public sector clients, and only spell out the confidentiality rights and obligations of attorneys, not the clients whom they represent. But state and federal "open government" laws have reshaped the confidentiality norms of our public entity clients. Some would argue that they constitute "implied authorization" under Rule 1.6(s) for attorneys to disclose otherwise private information. At the very least they have prompted reexamination of the contours of the attorney-client privilege in the government arena.

Most courts over the years have taken for granted that the attorney-client privilege applies to public sector clients;[2] however, until recently, little case law directly confronted the issue.[3] In fact, until the early 1960's, only two courts had ruled that communications between government lawyers and their clients were protected by the privilege.[4] Today, the existence of the privilege in some form is widely assumed, as reflected in the Restatement, "Unless applicable law otherwise provides, the attorney-client privilege extends to a communication of a governmental organization as stated in § 73 and of an individual employee or other agency of a governmental organization as a client with respect to his or her personal interest as stated in §§ 68-72."[5]

The Supreme Judicial Court of Massachusetts is one of the few courts that have squarely recognized the public sector attorney-client privilege:

> We now state explicitly that confidential communications between public officers and employees and government entities and their legal counsel undertaken for the purpose of obtaining legal advice or assistance are protected under the normal rules of the attorney-client privilege. . . . The necessity of the privilege for government entities and officials flows directly from the realities of modern government. Public employees must

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[2] *See, e.g., District Attorney for the Plymouth Dist. v. Selectmen of Middleborough*, 481 N.E.2d 1128 (Mass. 1985)(assuming without deciding that "public clients have an attorney-client privilege"); *Reed v. Baxter*, 134 F.3d 351, 356 (6th Cir. 1998)(assuming without deciding that local government entities may invoke the attorney-client privilege).

[3] For a general discussion of the issue, *see* Patricia E. Salkin, *Eliminating Political Maneuvering: A Light in the Tunnel for the Government Attorney-Client Privilege*, 39 IND. L. REV. 561 (2006)(referred to hereinafter as Salkin*)*; Kathleen Clark, *Government Lawyers and Confidentiality Norms*, 85 WASH. U. L. REV. 1033 (2007)(referred to hereinafter as Clark I*)*.

[4] Melanie B. Leslie, *Government Officials as Attorneys and Clients: Why Privilege the Privileged*?, 77 IND. L.J. 469, 476 (2002).

[5] AMERICAN LAW INSTITUTE, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 74 (2000).

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> routinely seek advice from counsel on how to meet their obligations to the public. It is in the public's interest that they be able to do so in circumstances that encourage complete candor, without inhibitions arising from the fear that what they communicate will be disclosed to the world. If counsel, despite all diligence, are unable to gather all of the relevant facts, they will less likely serve the public interest in good government by preventing needless litigation or ensuring government officials' compliance with the law. In short, counsel will be less likely to perform adequately the functions of a lawyer.[6]

These concerns certainly apply in the representation of public school districts.[7]

The attorney-client privilege for government clients took on a political dimension beginning in the Clinton Administration, with the contentious battles between the White House and the Office of Independent Counsel and, later, between the Senate and the White House over disclosure of memos written by court of appeals nominee Miguel Estrada, and Supreme Court nominee John Roberts, while they served in the Solicitor General's Office.[8] These disputes drew public attention to the longstanding tension between the competing values of secrecy in effective lawyer-client relationships and unlimited public access to government information.

One challenge in staking out the boundaries of public sector attorney-client confidentiality is defining what constitutes legal advice. School board attorneys and other government lawyers frequently consider more than legal technicalities when advising their clients, which has raised questions about the applicability of the attorney-client privilege to communications addressing such "non-legal" considerations. These concerns call into question the essential nature of legal advice. Model Rule 2.1 takes a broad view of the attorney's advisory role: "In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation." The comments to the rule explain:

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

The Second Circuit expounded at length on the point, in overturning a discovery order requiring disclosure of e-mails and other communications between an assistant county attorney and county officials:

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[6] *Suffolk Construction Co., v. Division of Capital Asset Management*, 870 N.E. 2d 33, 38-39 (Mass. 2007).

[7] *See Sandra T.E. v. South Berwyn School Dist. 100*, 600 F.3d 612, 621 (7th Cir. 2010).

[8] *See* Salkin, *supra* n. 4, at 569-71.

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Fundamentally, legal advice involves the interpretation and application of legal principles to guide future conduct or to assess past conduct....It requires a lawyer to rely on legal education and experience to inform judgment....But it is broader, and is not demarcated by a bright line. What Judge Wyzanski observed long ago applies with equal force today:

> The modern lawyer almost invariably advises his client upon not only what is permissible but also what is desirable. And it is in the ... public interest that the lawyer should regard himself as more than [a] predictor of legal consequences. His duty to society as well as to his client involves many relevant social, economic, political and philosophical considerations. And the privilege of nondisclosure is not lost merely because relevant nonlegal considerations are expressly stated in a communication which also includes legal advice.

....

The complete lawyer may well promote and reinforce the legal advice given, weigh it, and lay out its ramifications by explaining: how the advice is feasible and can be implemented; the legal downsides, risks and costs of taking the advice or doing otherwise; what alternatives exist to present measures or the measures advised; what other persons are doing or thinking about the matter; or the collateral benefits, risks or costs in terms of expense, politics, insurance, commerce, morals, and appearances. So long as the predominant purpose of the communication is legal advice, these considerations and caveats are not other than legal advice or separable from it. The predominant purpose of a communication cannot be ascertained by quantification or classification of one passage or another; it should be assessed dynamically and in light of the advice being sought or rendered, as well as the relationship between advice that can be rendered only by consulting the legal authorities and advice that can be given by a non-lawyer. The more careful the lawyer, the more likely it is that the legal advice will entail follow-through by facilitation, encouragement and monitoring.

....

It is hoped that legal considerations will play a role in governmental policymaking. When a lawyer has been asked to assess compliance with a legal obligation, the lawyer's recommendation of a policy that complies (or better complies) with the legal obligation—or that advocates and promotes compliance, or oversees implementation of compliance measures—is legal advice. Public officials who craft policies that may

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> directly implicate the legal rights or responsibilities of the public should be encouraged to seek out and receive fully informed legal advice in the course of formulating such policies....[9]

Despite these encouraging words, the issue remains a thorny one for government officials who serve not only as legal counsel, but, also, as political or policy advisors. Such was the case in one New York federal court decision, where the court held that the attorney-client privilege does not extend to incidental legal advice given by an attorney acting outside the scope of his role as an attorney, where the predominant purpose of the advice is non-legal.[10] In such cases, it is appropriate for the court to conduct *in camera* review and order redaction as necessary.[11]

"OPEN GOVERNMENT" LAWS

State "open government" laws granting public access to meetings and records of local public bodies were adopted in nearly every jurisdiction by the mid-1970's, and in many cases have drastically reshaped how, or even if, lawyers and their clients may communicate in private. What is clear from the decisions construing these statutes is that the text and legislative history of each individual enactment take precedence over our instinctual notion of attorney-client confidentiality.

For example, in a case from Oregon, a school board engaged outside counsel to advise it concerning allegations of mismanagement and misconduct by district employees.[12] With the board's authority, the attorney engaged an independent auditing firm and a private investigator to assist in gathering the facts. They both conducted investigations and submitted reports of their findings and opinions to the attorney, who shared them with the board as part of the legal advice he was rendering.

The issue before the court was whether those reports fell within an exemption to Oregon's public records law for "confidential communications made for the purpose of facilitating the rendering of professional legal services to the client …" Although the reports themselves were investigatory in nature and did not contain legal advice, the court held that they fell within the exemption because they were commissioned by the attorney specifically to assist him in rendering legal advice to his client.

In another case from Michigan, a school board met in closed session to discuss a letter drafted by its attorney, concerning a union grievance that the board was scheduled to act upon later in the meeting.[13] When the grievance was denied, the union challenged the board's action on the ground that the board violated Michigan's open meetings law by discussing the attorney's letter in closed session,

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[9] *In re County of Erie*, 473 F.3d 413, 419-22 (2d Cir.2007)(footnotes, citations, and internal quotation marks omitted).

[10] *Raba v. Suozzi*, No. CV-06-119, 2007 WL 128817 (E.D.N.Y. 2007).

[11] *See also*, *Cohen v. Middletown Enlarged City Sch. Dist.*, No. 05-Civ.3633, 2007 WL 631298 (S.D.N.Y. 2007); *Doctor John's Inc. v. Sioux City*, *Iowa*, No. C03-4121-MWB, 2007 WL 438931 (N.D. Iowa 2007).

[12] *Klammath County Sch. Dist. v. Teamey,* 140 P.3d 1152 (Or. Ct. App. 2006).

[13] *Ferryman v. Madison Sch. Dist.*, No.265996, 2007 WL 549230 (Mich. Ct. App. 2007).

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when the statute allowed them only to "consider material exempt from discussion or disclosure by state or federal statute."[14] The union did not dispute that the letter itself was "material" covered by the exemption, but contended that the board's private discussion went beyond merely "considering" it. The court disagreed, holding that "the term 'consider'....is not so limited that it required each board member to silently read the attorney's opinion letter and withhold all comment until the open meeting resumed."

As originally enacted, Florida's so-called "Sunshine Law" did not recognize an attorney-client privilege at all. The current version does allow for some private consultation, but only within highly structured parameters:

> Notwithstanding the provisions of subsection (1), any board or commission of any state agency or authority or any agency or authority of any county, municipal corporation, or political subdivision, and the chief administrative or executive officer of the governmental entity, may meet in private with the entity's attorney to discuss pending litigation to which the entity is presently a party before a court or administrative agency, provided that the following conditions are met:
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> (a) The entity's attorney shall advise the entity at a public meeting that he or she desires advice concerning the litigation.
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> (b) The subject matter of the meeting shall be confined to settlement negotiations or strategy sessions related to litigation expenditures.
>
> (c) The entire session shall be recorded by a certified court reporter. The reporter shall record the times of commencement and termination of the session, all discussion and proceedings, the names of all persons present at any time, and the names of all persons speaking. No portion of the session shall be off the record. The court reporter's notes shall be fully transcribed and filed with the entity's clerk within a reasonable time after the meeting.
>
> (d) The entity shall give reasonable public notice of the time and date of the attorney-client session and the names of persons who will be attending the session. The session shall commence at an open meeting at which the persons chairing the meeting shall announce the commencement and estimated length of the attorney-client session and the names of the persons attending. At the conclusion of the attorney-client session, the meeting shall be reopened, and the person chairing the meeting shall announce the termination of the session.

[14] MICH. COMP. LAWS § 15.268(h) (2008).

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(e) The transcript shall be made part of the public record upon conclusion of the litigation.[15]

In a Florida school board case,[16] the court upheld an attorney general's opinion that the exemption was limited to closed-door meetings attended solely by the board members, the district's chief executive, and legal counsel, and that the presence of administrative staff and consultants was not permitted, even where their specialized knowledge was essential to the discussion. A similar result was reached in a Pennsylvania school board case,[17] where a court found that that an exception in that state's Sunshine Act, allowing the board to meet in closed session "[t]o consult with its attorney or other professional advisor regarding information or strategy in connection with litigation or with issues on which identifiable complaints are expected to be filed" did not include the board's private discussion with an adverse litigant.

Not all courts have construed their open meetings laws as conservatively as Florida.[18] Others have taken just as hard a line.[19] The lesson from the cases is that the breadth of the public sector attorney-client privilege may be narrower under a state's open meetings and public records laws than it is under that state's ethical and evidence rules. Counsel would do well to determine the ground rules in advance, to avoid inadvertent disclosure of sensitive information.

CONTACTS WITH NEWS MEDIA

This wave of transparency that has laid bare government attorneys' consultations with their clients in many cases has raised vexing questions about the breadth of permissible disclosure to journalists and bloggers, or even in their memoirs. Professor Kathleen Clark has written extensively about Alberto Mora, who served as General Counsel of the Department of the Navy from 2001 to 2005. Mora led an effort within the Defense Department to promote more humane treatment of prisoners at Guantanamo Bay despite pushback from his superiors who favored more flexibility in their interrogation methods.[20]

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[15] FLA. STAT. § 286.011(8) (2014).

[16] *School Bd. of Duval County v. Florida Publishing Co*., 670 So.2d 99 (Fla. Dist. Ct. App. 1996); *see also Florida Advisory Legal Opinion AGO 97-61*, interpreting the Sunshine Law to provide that a school board attorney's discussions regarding school business with individual school board members are not privileged because they are not attorney-client communications, and that the attorney's written memorialization of such conversations are public records under Florida's public records law.

[17] *Trib Total Media v. Highlands Sch. Dist.*, 3 A.3d 695 (Pa. Cmwlth. 2010).

[18] *See Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors*, 69 Cal. Rptr. 480, 492 (Cal. Dist. App.3d 1968); *Oklahoma Ass'n of Municipal Attorneys v. State*, 577 P.2d 1310 (Okla. 1978); *Dunn v. Alabama State Univ. Bd. of Trustees*, 628 So.2d 519, 529-30 (Ala. 1993); *Markowski v. City of Marlin*, 940 S.W.2d 720 (Tex. Ct. App. 1997); *Tausz v. Clarion-Goldfield Cmt'y Sch. Dist*., 569 N.W.2d 125 (Iowa 1997).

[19] *See Lagan v. Accord*, 432 S.W.2d 753 (Ark. 1968); *Mackay v. Board of County Commissioners of Douglas County*, 746 P.2d 124 (Nev. 1987).

[20] *See Clark I, supra* n. 4; Kathleen Clark, *Lawyer Confidentiality, Open Government Laws and Whistleblowing, Part II*, THE PUBLIC LAWYER 14 (Summer 2013).

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Following the Abu Ghraib debacle, he sent a memorandum to the Navy inspector describing how his efforts were stymied by the powers that be.

Mora kept his advocacy internal within the military establishment but, after he left the Defense Department, he consented to an interview with Jane Mayer, a writer for the *New Yorker*, who had secured a copy of Mora's memorandum and later published an article chronicling his story.[21] Mora's disclosures to the journalist prompted discussion in legal ethics circles about whether he violated his duty of confidentiality under Rule 1.6(a). Mora noted that his memorandum was unclassified, signifying to him that the government felt its disclosure could not compromise national security. He also felt less inhibited because Mayer had secured a copy of his memorandum through other sources, and he thought he could legitimately provide additional background information since he already had been "outted."[22] None of that would seem to matter under Rule 1.6(a), which prohibits any disclosures "relating to the representation of a client" regardless of whether they are likely to prejudice the client or a portion of the information already is in the public domain. Nor did the subject matter of Mora's disclosures fit any of the scenarios where subsection (b) would permit disclosure.

The Rule 1.6(a) privacy issues raised by Mora's disclosures to the press are not limited to high-profile cases like his, but are present whenever we school board lawyers get a call from a reporter for comment on even the most mundane matter involving our clients. Since the scope of Rule 1.6(a) includes any information about the representation, not merely confidential attorney-client communications, one could argue that any public discussion of our clients' affairs is unethical unless it is expressly or impliedly authorized by our client. Many of us operate under a tacit understanding with our clients that board counsel will field inquiries from the news media involving issues with significant legal implications. Where the attorney's role in a particular district is less clear, there is no reason why mention of this function in officially adopted board policies prescribing the duties of the board attorney would not suffice as authorization under Rule 1.6(a).

BLOWING THE WHISTLE ON GOVERNMENT MISCONDUCT

Mora's internal advocacy had been disclosed to the press before he contributed to any public discussion of the matter, but what of the rights and duties of government attorneys who contemplate reporting misconduct to outside enforcement agencies or the public? The ability (or, in some cases, the obligation) of lawyers to blow the whistle publicly on their clients' misconduct has received much scholarly attention in recent years,[23] and was clearly on the minds of the ABA Ethics 2000 Commission,

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[21] Jane Mayer, *The Memo: How an Internal Effort to Ban the Abuse and Torture of Detainees was Thwarted*, NEW YORKER, Feb. 27, 2006, at 32.

[22] Alberto Mora, Remarks at Ethics of Lawyering in Government course, Washington Univ. Cong. & Admin. Law Clinic, Washington, D.C. (Apr. 3, 2006), cited in *Clark I* at 1035.

[23] *See Clark I, supra* n. 4*,* at 1037, n. 10,, and the following articles cited therein: Roger C. Cramton, *The Lawyer as Whistleblower: Confidentiality and the Government Lawyer*, 5 GEO. J. LEGAL ETHICS 291 (1991); Charles S. Doskow, *The Government Attorney and the Right to Blow the Whistle: The Cindy Ossias Case and Its Aftermath (A Two-Year Journey To Nowhere)*, 25 WHITTIER L. REV. 21(2003); James E. Moliterno*, The Federal Government Lawyer's Duty*

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as well as its Task Force on Corporate Responsibility, in their study of Model Rule 1.6 dealing with client confidentiality, and Model Rule 1.13 involving representation of organizational clients.

The Ethics 2000 Commission originally recommended changes in Rule 1.6 to give attorneys more discretion to disclose client confidences to prevent or remedy fraud. These recommended changes included amendments to subsection (b) of the Rule, permitting an attorney to reveal information to the extent the lawyer reasonably believes necessary to prevent or remediate substantial injury to the financial interests or property of another, in furtherance of which the client has used or is using the lawyer's services. The ABA House of Delegates initially rejected these proposals, but they were revived by the Task Force following the WorldCom, Tyco, and HealthSouth scandals, and adoption of the Sarbanes-Oxley Act.[24] The Task Force also recommended changes to subsections (b) and (c) of Model Rule 1.13, to require "reporting up," and to allow "reporting out," in appropriate cases.

The final version of Model Rule 1.6(b) provides that an attorney

> 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; [and] (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.

Model Rule 1.13(b) and (c) now read:

> (b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.
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> (c) Except as provided in paragraph (d), if

to Breach Confidentiality,14 TEMP. POL. & CIV. RTS. L. REV. 633 (2005); Jesselyn Radack, *The Government Attorney-Whistleblower and the Rule of Confidentiality: Compatible At Last*, 17 GEO. J. LEGAL ETHICS 125 (2003).

[24] 15 U.S.C. § 7201 *et seq* (2014).

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> (1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and
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> (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

Most states have adopted versions of these Model Rules with their own home-grown variations. A complete listing of how each state's iteration compares to the text of the Model Rules appears in the tables at the conclusion of this article.

There has been much discussion in the legal and academic community about whether government attorneys should be given greater leeway than their private sector colleagues to blow the whistle on unlawful or immoral conduct within the agencies they serve, even if otherwise confidential client information is disclosed.[25] Hawaii's version of Rule 1.6 goes further than any other state in allowing government attorneys to blow the whistle on their clients. Under that state's rule:

> A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . 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; [or] . . . 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.[26]

The District of Columbia's version of Rule 1.6 permits lawyers to disclose "when....required by law or court order," but specifically permits government lawyers to disclose when "permitted or authorized by law."[27] One commentator has suggested that this language may permit government lawyers to disclose information whenever permitted under open government laws such as the Freedom of Information Act,[28] but that interpretation is somewhat belied by the comments to the rule, which state that "[i]t is designed to permit disclosures that are not required by law or court order . . . , but which the government authorizes its attorneys to make in connection with their professional services to the

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[25] *See, e.g., Clark I*, *supra* n. 4; Mika C. Morse, *Honor or Betrayal? The Ethics of Government Lawyer-Whistleblowers*, 23 GEO. J. LEGAL ETHICS 421 (2010).

[26] HAW. RULES OF PROF'L CONDUCT R.1.6(b)(5), (6) (2014).

[27] D.C. RULE 1.6(e)(2)(A),(B) (2010).

[28] *See Clark, supra* at n. 4.

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government. Such disclosures may be authorized or required by statute, executive order, or regulation, depending on the constitutional or statutory powers of the authorizing entity . . .".[29]

The whistle blower provisions of Rules 1.6 and 1.13 have imposed high stakes for lawyers who attempt to "do the right thing," only to find that courts and ethics authorities have found them on the wrong side of these Rules after the fact. A notable example in the public sphere is Richard Ceballos, well known as the plaintiff in *Garcetti v. Ceballos*,[30] the Supreme Court decision denying First Amendment protection for statements made by public employees in the performance of their official duties. Ceballos, an assistant prosecutor in California, went on record with his superiors, and the court, recommending dismissal of a case after concluding that a police affidavit used to secure a search warrant contained material misrepresentations. He claimed that, in retaliation for shining a spotlight on this police misconduct, he was reassigned to a lesser position, transferred to a different courthouse and denied promotional opportunities.

The Court's holding addressed the rights of public employees generally, but Ceballos' status as an attorney, and his ethical duties to remedy the consequences of police misconduct or to respect the constitutional rights of the defendant in that case, played surprisingly little part in the Court's analysis.[31] Only Justice Breyer's dissent confronted the issue in any depth:[32]

> First, the speech at issue is professional speech—the speech of a lawyer. Such speech is subject to independent regulation by canons of the profession. Those canons provide an obligation to speak in certain instances. And where this is so, the government's own interest in forbidding that speech is diminished. . . . The objective specificity and public availability of the profession's canons also help to diminish the risk that the courts will improperly interfere with the government's necessary authority to manage its work.
>
> Second, the Constitution itself here imposes speech obligations upon the government's professional employee. A prosecutor has a constitutional obligation to learn of, to preserve, and to communicate with the defense about exculpatory and impeachment evidence in the government's possession . . . So, for example, might a prison doctor have a similar constitutionally related professional obligation to communicate with superiors about seriously unsafe or unsanitary conditions in the cellblock. . . . There may well be others.

[29] *See* D.C. RULE 1.6 Cmt. [37].

[30] 547 U.S. 410 (2006).

[31] There was no need to address these issues in the *Connick v. Myers*, 461 U.S. 138 (1983), which also dealt with the First Amendment rights of an assistant prosecutor, but did not implicate a government attorney's ethical duty to blow the whistle on illegal conduct.

[32] For a lengthy discussion of the issue, *see* Jeffrey W. Stempel, "*Tending to Potted Plants: The Professional Identity Vacuum in Garcetti v. Ceballos*," 12 NEV. L. J. 703 (2012).

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> Where professional and special constitutional obligations are both present, the need to protect the employee's speech is augmented, the need for broad government authority to control that speech is likely diminished, and administrable standards are quite likely available. Hence, I would find that the Constitution mandates special protection of employee speech in such circumstances. . . .[33]

Garcetti was limited to employees' rights under the First Amendment. But as Justice Kennedy noted in his opinion for the Court "the powerful network of legislative enactments—such as whistle-blower protection laws and labor codes" remains "available to those who seek to expose wrongdoing." He also mentioned in passing "additional safeguards in the form of, for example, rules of conduct and constitutional obligations apart from the First Amendment" applicable to government attorneys.[34] Thus far, however, the courts have shown little sympathy for attorneys seeking statutory whistle blower protection for disclosures that violate local attorney ethics rules.

In *Douglas v. DynMcDermott Petroleum Operations Co.,*[35] the Fifth Circuit rejected a Title VII retaliation claim by an in-house attorney who was terminated for disclosing confidential client information in violation of local attorney ethics rules:

> [The attorney] took no precautions to preserve the attorney-client relationship and instead acted with thoughtless indiscretion, demonstrating little regard for the ethical obligations inherent in the legal profession. This dereliction of professional duties meant that . . . the trust undergirding the attorney-client relationship was broken and [the attorney] could no longer function in her role as in-house counsel. . . . The ethics precepts of confidentiality and loyalty serve to assure that trust is not misplaced and to shield the employer-client from an abuse of the power that the attorney has acquired as a result of her unique position of confidence. The employer-client's reasonable expectation that its attorney will abide by the profession's ethical edicts is thus entitled to great weight . . . . To forgive a breach [of the duty of confidentiality] by allowing the legal protections sought in this case obviously would have repercussions beyond this one case because such a ruling would carve out a class of individual rights that trump professional ethical considerations and, by extrapolation, could lead to further tolerances with unanticipated consequences to the profession.[36] . . .

[33] 547 U.S. at 446-47 (Breyer, J., diss.)(citations omitted).

[34] 547 U.S. at 425.

[35] 144 F.3d 364 (5th Cir. 1998).

[36] *Id.* at 375.

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More recently, in *U.S. v. Quest Diagnostics Inc.*,[37] a former corporate general counsel joined with others to bring a *qui tam* action under the federal False Claims Act against his ex-employer. During the course of the litigation, he disclosed confidential information regarding client matters. The Second Circuit held that nothing in the False Claims Act suggests an intent to preempt state law regulating attorneys' disclosure of client confidences,[38] and that the attorney's disclosures violated New York's version of Rules 1.6 and 1.9 because they went beyond anything "necessary" to prevent the ongoing commission of a crime.[39] In that regard, the court observed that two other former executives, who brought the action with the attorney, had sufficient information on their own to litigate the case, and that the attorney also could have limited his disclosures to just the information required to avoid ongoing or future criminal activity.

The New York County Lawyers' Association recently opined on how these same ethics rules affect attorneys' ability to collect bounties in exchange for disclosing confidential information about their clients under the whistleblower provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.[40] The opinion found that SEC Rule 205 permits the reporting out of client confidences relating to certain securities law violations, regardless of whether the conduct is criminal or the lawyer's services were used and, to that extent, is broader than the leeway afforded New York attorneys under Rule 1.6.

The panel concluded that

> the New York exceptions permitting disclosure of confidential information are different from the SEC exceptions. Under the SEC rules discussed above, an attorney may collect a bounty in exchange for disclosure of confidential information in situations not permitted under the New York Rules. Even when disclosure is permitted under the New York Rules, for example, when clear corporate wrongdoing rising to the level of crime or fraud has been perpetrated through the use of the lawyer's services, preventing wrongdoing is not the same as collecting a bounty. Even in cases of clear criminal conduct or fraud, the lawyer's disclosure must be limited to reasonably necessary information.

The consequences for government lawyers who fail to follow legally sanctioned protocols for reporting misconduct can be quite severe, as Matthew Diaz discovered. Diaz, a member of the Navy judge advocate corps assigned to Guantanamo Bay, Cuba, was disturbed by his superiors' refusal to honor a request by a prisoners' rights group to release names of detainees so that they could be assisted in filing

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[37] 734 F.3d 154 (2d Cir. 2013).

[38] *Id.* at 163.

[39] *Id.* at 164. New York's version of Rule 1.9(c) prohibits attorneys from revealing confidential information of a former client, or using such information to the client's disadvantage, except as Rule 1.6 would permit or require. Rule 1.6(b)(2), in turn, authorizes an attorney to "reveal or use confidential information to the extent that the lawyer reasonably believes necessary: . . . (2) to prevent the client from committing a crime . . ."

[40] *See Formal Opinion 746* (Oct. 7, 2013), last accessed on Dec. 22, 2013, *available at* https://www.nycla.org/siteFiles/Publications/Publications1647_0.pdf

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habeas corpus petitions. One evening, he clandestinely printed a list of detainees from a secret computer in the staff judge advocate office, with each detainee's full name, internment serial number, country of origin, country of citizenship, and other identifying information including ethnicity, source identification number, and information regarding the detention or interrogation team assigned to each detainee. The printout included classified information.

At first, Diaz hid the list in a safe while contemplating what to do with it, but later cut the list into strips and placed them into a large Valentine's Day card that he sent anonymously to the advocacy organization. When his actions were brought to light, he was dismissed from the Navy, and sentenced to six months in prison following a court martial before facing attorney disciplinary authorities in Kansas where he was admitted to practice.

When Diaz was asked during his court martial proceeding why he chose to disclose the classified information surreptitiously, he replied, "Selfish reasons, I was more concerned with self-preservation, I didn't want to get—make any waves and jeopardize my career." He further explained that he chose not to share his concerns with his superior officers, or to seek ethical guidance through various Navy-sanctioned channels, because "I was worried about the effect it would have on me.... I wasn't really to put—willing to put my neck on the line and jeopardize my career at the time.... [So], I did it anonymously."[41] A bar disciplinary panel recommended a three year suspension, with immediate reinstatement based on credit for a temporary suspension, but the Supreme Court of Kansas found Diaz's conduct so egregious that nothing short of disbarment would suffice.

Each state's ethics rules provide a road map for attorneys who feel compelled to blow the whistle on misconduct within the agencies they represent. The different formulations from state to state reflect that jurisdiction's balancing of the privacy and transparency values discussed above through a legally-sanctioned rule-making process. *Diaz* is a stern warning to government attorneys who feel compelled to ignore these value judgments and take the law into their own hands.

CONCLUSION

The stark differences in the versions of Rules 1.6 and 1.13 adopted across the nation confirm the struggle that ethics regulators have had in reconciling confidentiality and transparency in the work of government lawyers. And cases like *Diaz* confirm the dire consequences that await government lawyers who ignore the prevailing rules in their own jurisdiction and choose to march to the beat of their own ethical drummer. However, with a working knowledge of precisely how our own jurisdictions have come to grips with these competing values, we can assure that our conduct remains within proper ethical boundaries.

[41] *In re Diaz*, 288 P.3d at 492.

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COMPARISON OF STATE CONFIDENTIALITY RULES
ABA Model Rule 1.6 (b) (2) and (3):
Revealing Confidential Information in Cases of Financial Harm

	Disclosure to prevent crime (including criminal fraud)		Disclosure to prevent non-criminal fraud likely to result in substantial loss	Limited to use of lawyer's services	Disclosure to rectify substantial financial loss resulting from crime or fraud
	Permitted or required	Amount of loss required for disclosure			
ABA Model Rule 1.6(b)(2) and (3)	Permit	Substantial	Permit	Yes	Permit; prevent, mitigate or rectify; use of lawyer's services
Alabama (former rule)	No		No		No
Alabama Rule 1.6(b)(2), (3) (current rule, effective 2/19/09)	Permit	Substantial	No	No	No
Alaska (former rule)	Permit	Substantial	Permit	No	No
Alaska Rule 1.6(b)(2), (3) (current rule, effective 4/15/09)	Permit	Substantial	Permit	No	Permit; mitigate and rectify; use of lawyer's services
Arizona (former rule)	Permit	Any	No		No

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Arizona Rule 1.6(d)(1), (2) (current rule, effective 12/1/03)	Permit	Substantial	Permit	Yes	Permit; mitigate and rectify; use of lawyer's services
Arkansas (former rule)	Permit	Any	No		No
Arkansas Rule 1.6(b)(2), (3) (current rule, effective 5/1/05)	Permit	Substantial	Permit	Yes	Permit; mitigate and rectify; use of lawyer's services
California (former rule)	No		No		No
California Rule 3-100 (current rule, effective 9/1/09)	Permit	Substantial	No	No	No
Colorado (former rule)	Permit	Any	No		No
Colorado Rule 1.6(b)(3), (4) (current rule, effective 1/1/08)	Permit	Substantial	Permit	Yes	Permit; mitigate and rectify; use of lawyer's services
Connecticut (former rule)	Permit	Substantial	No		Permit; rectify; use of lawyer's services
Connecticut Rule 1.6(c)(1), (2) (current rule, effective 1/1/07)	Permit	Substantial	Permit	No	Permit; mitigate and rectify; use of lawyer's services
Delaware (former rule)	Permit	Substantial	Permit	Yes	Permit; mitigate and rectify; use of lawyer's services
Delaware	Permit	Substantial	No	Yes	Permit; prevent,

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Rule 1.6(b)(2), (3) (current rule, effective 10/16/07)				mitigate or rectify; use of lawyer's services
D.C. (former rule)	No	No		No
D.C. Rule 1.6(d) (current rule, effective 2/1/07)	Permit Substantial	Permit	Yes	Permit; mitigate and rectify; use of lawyer's services
Florida (former rule)	Require Any	No		No
Florida Rule 1.6(b)(1) (current rule, effective 3/22/06)	Require Any	No		No
Georgia Rule 1.6(b)(1)(i) (current rule, effective 1/1/01)	Permit Substantial (also includes third-party criminal conduct)	No		No
Hawaii Rule 1.6(b), (c)(1), (2) (current rule, effective 1/1/94)	Permit Substantial	Permit		Require to extent necessary to rectify if substantial financial harm; permit to otherwise rectify
Idaho (former rule)	Permit Any	No		No
Idaho Rule 1.6(b)(1), (3) (current rule, effective 7/1/04)	Permit Any	No		Permit; mitigate and rectify; use of lawyer's services; limited to crime
Illinois (former rule)	Permit Any	No		No

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Illinois Rule 1.6(b)(1)-(3) (current rule, effective 1/1/10)	Permit Substantial	Permit	Yes	Permit; mitigate and rectify; use of lawyer's services
Indiana (former rule)	Permit Any	No		No
Indiana Rule 1.6(b)(2), (3) (current rule, effective 1/1/05)	Permit Substantial	Permit	Yes	Permit; mitigate and rectify; use of lawyer's services
Iowa (former rule)	Permit Any	No		No
Iowa Rule 1.6(b)(2), (3) (current rule, effective 7/1/05)	Permit Substantial	Permit	Yes	Permit; mitigate and rectify; use of lawyer's services
Kansas (former rule)	Permit Any	No		No
Kansas Rule 1.6(b)(1) (current rule, effective 7/1/07)	Permit Any	No		No
Kentucky (former rule)	No	No		No
Kentucky Rule 1.6(b)(1) (current rule, effective 7/15/09)	No	No		No
Louisiana (former rule)	No	No		No
Louisiana Rule 1.6(b)(2), (3) (current rule,	Permit Substantial	Permit	Yes	Permit; rectify and mitigate; use of lawyer's services

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effective 3/1/04)				
Maine (former rule)	Permit Any	No		No
Maine Rule 1.6(b)(2), (3) (current rule, effective 8/1/09)	Permit Substantial	Permit	Yes	Permit, mitigate and rectify; use of lawyer's services
Maryland (former rule)	Permit Substantial	Permit	No	Permit; rectify; use of lawyer's services
Maryland Rule 1.6(b)(2), (3) (current rule, effective 7/1/05)	Permit Substantial	Permit	Yes	Permit; rectify and mitigate; use of lawyer's services
Massachusetts (former rule)	Permit Substantial	Permit	No	Permit; rectify; use of lawyer's services
Massachusetts Rule 1.6(b)(1) and (3) (current rule, effective 9/1/08)	Permit Substantial	Permit	No	Permit; prevent
Michigan Rule 1.6(c)(3) and (4) (current rule, effective 10/1/88)	Permit Any	No		Permit; rectify; use of lawyer's services
Michigan Rule 1.6(b)(3) (rule proposed by State Bar Ethics Committee in 2004)	Permit Any	No		Permit; rectify; use of lawyer's services
Minnesota	Permit Any	No		Permit; rectify; use

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(former rule)				of lawyer's services
Minnesota Rule 1.6(b)(4), (5) (current rule, effective 10/1/05)	Permit Substantial	Permit	Yes as to fraud; no as to crime	Permit; rectify; use of lawyer's services
Mississippi (former rule)	Permit Any	No		No
Mississippi Rule 1.6(b)(2), (3) (current rule, effective 11/3/05)	Permit Substantial	Permit	Yes	Permit; mitigate and rectify; use of lawyer's services
Missouri (former rule)	No	No		No
Missouri Rule 1.6(b) (current rule, effective 7/1/07)	No	No		No
Montana (former rule)	No	No		No
Montana Rule 1.6(b) (current rule, effective 4/1/04)	No	No		No
Nebraska (former rule)	Permit Any	No		No
Nebraska Rule 1.6(b)(1) (current rule, effective 9/1/05)	Permit Any	No	No	No
Nevada (former rule)	Permit Any	Permit	Yes	Permit; rectify; use of lawyer's services; lawyer

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				shall make reasonable effort to persuade client to take corrective action
Nevada Rule 1.6(b)(2), (3) (current rule, effective 5/1/06)	Permit Any	Permit	Yes	Permit; mitigate and rectify; use of lawyer's services; lawyer shall make reasonable effort to persuade client to take corrective action
New Hampshire (former rule)	Permit Substantial	No		No
New Hampshire Rule 1.6(b)(1) (current rule, effective 1/1/08)	Permit Substantial	No		No
New Jersey (former rule)	Require (also required to prevent fraud upon tribunal) Substantial	Require	No	Permit; rectify; use of lawyer's services
New Jersey Rule 1.6(b), (d)(1) (current rule, effective 1/1/04)	Require Substantial (also required to prevent fraud upon tribunal and prevent third-party crimes and frauds; permitted reveal information to person threatened to extent necessary to protect them)	Require	No	Permit; rectify; use of lawyer's services
New Mexico (former rule)	Permit Substantial	No		No
New Mexico Rule 1.6(b)(2), (3)	Permit Substantial	No	Yes	Permit; prevent, mitigate or rectify;

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(current rule, effective 11/2/09)				use of lawyer's services
New York (former rule)	Permit Any (also permitted when implicit in withdrawing opinion used to further crime or fraud)	No		No
New York Rule 1.6(b)(2) (current rule, effective 4/1/09)	Permit Any (also permitted when implicit in withdrawing opinion used to further crime or fraud)	No		No
North Carolina (former rule)	Permit Any	No		Permit; rectify; use of lawyer's services
North Carolina Rule 1.6(b)(2), (4) (current rule, effective 3/1/03)	Permit Any	Permit	No as to crime; yes as to fraud	Permit; rectify and mitigate; use of lawyer's services
North Dakota (former rule)	Permit Substantial	Permit	No	Permit; rectify; use of lawyer's services without lawyer's knowledge
North Dakota Rule 1.6(c)(1), (2) (current rule, effective 8/1/06)	Permit Substantial	Permit	Yes	Permit; rectify and mitigate; use of lawyer's services
Ohio (former rule)	Permit Any	No		No
Ohio Rule 1.6(b)(2), (3) (current rule, effective 2/1/07)	Permit Substantial	No		Permit; mitigate; use of lawyer's services
Oklahoma	Permit Any	No		Permit; rectify; use

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(former rule)				of lawyer's services; must first try to contact client and give client opportunity to rectify
Oklahoma Rule 1.6(b)(2), (3) (current rule, effective 1/1/08)	Permit Substantial	Permit	Yes	Permit; rectify and mitigate; use of lawyer's services; must first try to contact client and give client opportunity to rectify
Oregon (former rule, effective 1/1/05)	Permit Any	No		No
Oregon Rule 1.6(b)(1) (current rule, effective 12/1/06)	Permit Any	No	No	No
Pennsylvania (former rule)	Permit Substantial (required when necessary to comply with Rule 3.3)	Permit	No as to crime; yes as to fraud	Permit; rectify and mitigate; use of lawyer's services
Pennsylvania Rule 1.6(c)(2), (3) (current rule, effective 7/1/06)	Permit Substantial	Permit	No	Permit; prevent, mitigate or rectify
Rhode Island (former rule)	No	No		No
Rhode Island Rule 1.6(b) (current rule,	No	No		No

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effective 4/15/07)				
South Carolina (former rule)	Permit Any	No		No
South Carolina Rule 1.6(b)(1), (3) (current rule, effective 10/1/05)	Permit Any	Permit	Yes	Permit; rectify and mitigate; use of lawyer's services
South Dakota (former rule)	No	No		Permit; rectify; use of lawyer's services
South Dakota Rule 1.6(b) (current rule, effective 1/1/04)	No	No		Permit; rectify; use of lawyer's services
Tennessee Rule 1.6(b)(1-3) (current rule, effective 1/1/2011)	Permit Substantial	Permit	Yes	Permit; prevent, mitigate, or rectify; use of lawyer's services
Texas Rule 1.05(c)(7) and (8) (current rule, effective 4/6/95)	Permit Any	Permit (not limited to substantial loss)	No	Permit; rectify; use of lawyer's services
Utah (former rule)	Permit Substantial	Permit	No	Permit; rectify; use of lawyer's services
Utah Rule 1.6(b)(2), (3) (current rule, effective 11/1/05)	Permit Substantial	Permit	Yes	Permit; rectify and mitigate; use of lawyer's services
Vermont (former rule)	Permit Any (required to reveal to third person to prevent client's crime or fraud)	No		No

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Vermont Rule 1.6(b) and (c)(1) (current rule, effective 9/1/09)	Require Any	Require	No	No
Virginia (former rule)	Require Any (also required to reveal fraud on tribunal)	Permit (not limited to substantial loss)	No	No
Virginia Rule 1.6(c) (current rule, effective 1/1/04)	Require Any (also required to reveal fraud on tribunal)	Permit (not limited to substantial loss)	No	No
Washington (former rule)	Permit Any (also permitted to reveal client's breaches of fiduciary responsibility)	No		No
Washington Rule 1.6(b)(2), (3) (current rule, effective 9/1/06)	Permit Any	No		Permit; mitigate or rectify; use of lawyer's services
West Virginia Rule 1.6(b)(1) (current rule, effective 1/1/89)	Permit Any	No		No
Wisconsin (former rule)	Require Substantial	Require	No	Permit; rectify; use of lawyer's services
Wisconsin Rule 1.6(c)(2) (current rule, effective 7/1/07)	Require Substantial	Require	No	Permit; mitigate or rectify; use of lawyer's services
Wyoming (former rule)	Permit Any	No		No

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Wyoming Rule 1.6(b)(1) (current rule, effective 7/1/06)	Permit	Any	No		No

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American Bar Association
CPR Policy Implementation Committee

Variations of the ABA Model Rules of Professional Conduct
Rule 1.13

August 2003

Variations from ABA Model Rule are noted. Based on reports of state committees reviewing recent changes to the model rules. For information on individual state committee reports, see http://www.abanet.org/cpr/jclr/home.html.

RULE 1.13: ORGANIZATION AS CLIENT

(2003 Task Force on Corporate Responsibility changes in bold)

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. **Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.**
(c) Except as provided in paragraph (d), if

> **(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action or a refusal to act, that is clearly a violation of law, and**
> **(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.**

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.
(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who

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<table>
<tr><td></td><td>withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization’s highest authority is informed of the lawyer’s discharge or withdrawal.
~~(d)~~(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.
~~(e)~~(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

• Nineteen (19) states have adopted 2003 Task Force for Corporate Responsibility changes as is: AL, AZ, AR, CO, CT, ID, IN, IA, KY, LA, MA, NE, NH, NM, OK, RI, SC, WA, WI
• Seven (7) states have adopted modified 2003 Task Force changes: AK, IL, NV, ND, OR, UT, VT
• Two (2) states have adopted only part of 2003 Task Force changes: MN, NC
• Sixteen (16) states and the District of Columbia have not adopted 2003 Task Force changes: CA, DE, D.C., FL, KS, ME, MD, MS, MO, MT, NJ, NY, OH, PA, SD, VA, WY
(Six (6) states have not made changes to Rule 1.13 since 2003 Task Force: GA, HI, MI, TN, TX, WV)</td></tr>
<tr><td>AL
Effective
2/19/09</td><td>Same as former MR
Does not adopt 2003 Task Force changes</td></tr>
<tr><td>AK
Effective
4/15/09</td><td>(b) Similar to former MR but replaces “action…in a matter related” with “conduct or intends to engage in conduct (whether act or omission);” replaces “is a violation” and “or a violation” with “violates;” replaces “to the organization, and that is likely” with “to the organization, and that this conduct is likely;”
(b)(3) is similar to former MR but adds to end of paragraph:
“The lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law, unless the lawyer reasonably believes that this is not necessary or is not in the best interest of the organization.”
(c)(1) Changes “address in a timely and appropriate manner an action” to “timely and appropriately rectify a threatened or ongoing action”
(c)(2) Deletes from “then the lawyer” through the end of the paragraph
(d) Changes “shall not apply with respect to information” with “does not apply to client confidences and secrets”
Adds (h):
"Constituents" denotes officers, directors, employees and shareholders of a corporate client, or positions equivalent to officers, directors, employees, and</td></tr>
</table>

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	shareholders held by persons acting for an organizational client that is not a corporation. **Adopts modified 2003 Task Force changes**
AZ Effective 12/1/04	Same as MR **Adopts 2003 Task Force changes**
AR Effective 5/1/05	Same as MR **Adopts 2003 Task Force changes**
CA Effective 9/1/09	***Rule 3-600 Organization as Client*** *(A) In representing an organization, a member shall conform his or her representation to the concept that the client is the organization itself, acting through its highest authorized officer, employee, body, or constituent overseeing the particular engagement.* *(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.* (D) Similar to MR (f) but deletes "when the lawyer knows…with whom the lawyer is dealing" and replaces with: "for whom the member acts, whenever it is or becomes apparent that the organization's interests are or may become adverse to those of the constituent(s) with whom the member is dealing. The member shall not mislead such a constituent into believing that the constituent may communicate confidential information to the member in a way that will not be used in the organization's interest if that is or becomes adverse to the constituent." (E) Similar to MR (g) but changes "appropriate official" to "appropriate constituent," adds "or constitution" before "who is to be represented," and adds to end of paragraph, "or organization members."

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	Does not adopt 2003 Task Force changes
CO Effective 1/1/08	Same as MR **Adopts 2003 Task Force changes**
CT Effective 1/1/07	Same as MR **Adopts 2003 Task Force changes**
DE Effective 10/16/07	Same as former MR **Does not adopt 2003 Task Force changes**
Wash., DC Effective 2/1/07	(b): deletes "to the organization" after "legal obligation" Does not have MR (c) – (e) (c): same as MR (f) but replaces "are adverse" with "may be adverse" (d): same as MR (g) **Does not adopt 2003 Task Force changes**
FL Effective 5/22/06	(a): adds "Representation of Organization" to beginning (b): same as former MR but adds "Violations by Officers or Employees of Organization" to beginning (c): same as former MR but adds "Resignation as Counsel for Organization" to beginning Does not have MR (d) and (e) (d): same as MR (f) but adds "Identification of Client" to beginning (e): same as MR (g) but adds "Representing Directors, Officers, Employees, Members, Shareholders, or Other Constituents of Organization" to beginning **Does not adopt 2003 Task Force changes**
GA Rules effective 1/1/01	Same as former MR but adds (f): (f) "Organization" as used herein includes governmental entities. Also adds to end of Rule: "The maximum penalty for a violation of this Rule is a public reprimand." **Has not made changes to Rule since 2003 Task Force**
HI Effective 1/1/14	(c)(1): Deletes text after "on behalf of the organization" and replaces with "(i) insists upon an action that is clearly a violation of law, (ii) or insists upon a refusal to act that is clearly a violation of law, or (iii) fails to address such a violation in a timely and appropriate matter, and" Deletes (h)
ID Effective 7/1/04	Same as MR **Adopts 2003 Task Force changes**
IL Effective 1/1/10	(b) Changes "obligation to the organization, or a violation" to: "organization, or a crime, fraud or other violation;" (c)(1) Changes "violation" to "crime or fraud;" (d) Changes in two places "violation" to "crime, fraud or other violation." **Adopts modified 2003 Task Force changes**
IN Effective 1/1/05	Same as MR **Adopts 2003 Task Force changes**

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<table>
<tr><td>IA
Effective
7/1/05</td><td>Same as MR
Adopts 2003 Task Force changes</td></tr>
<tr><td>KS
Effective
7/1/07</td><td>(b): same as former MR
(c): same as former MR but replaces “may resign in accordance with” with “shall follow”
Does not have MR (d) and (e)
(d): same as former MR
(e): same as MR (g)
Does not adopt 2003 Task Force changes</td></tr>
<tr><td>KY
Effective
7/15/09</td><td>Same as MR
Adopts 2003 Task Force changes</td></tr>
<tr><td>LA
Effective
3/1/04</td><td>Same as MR
Adopts 2003 Task Force changes</td></tr>
<tr><td>ME
Effective
8/1/09</td><td>(b): Deletes “that” before “is likely to result;” deletes from “Unless the lawyer reasonably believes” to the end of the paragraph and adds:
In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer’s representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing confidences and secrets to persons outside the organization. Such measures may include among others:
(1) asking reconsideration of the matter;
(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and
(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.
(c)(1) Deletes “or fails to address in a timely and appropriate manner”
(c)(2) Replaces MR with:
“(2) likely to result in substantial injury to the organization, the lawyer may resign in accordance with Rule 1.16 and make such disclosures as are consistent with Rule 1.6, Rule 3.3, Rule 4.1 and Rule 8.3, but only to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.”
(e) is identical to MR (f)
Adds as (g):
“A lawyer who acts contrary to this Rule but in conformity with promulgated federal law shall not be subject to discipline under this Rule, regardless whether such federal law is validly promulgated.”
Does not adopt 2003 Task Force changes</td></tr>
</table>

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MD Effective 7/1/05	*(c) When the organization's highest authority insists upon action, or refuses to take action, that is clearly a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is reasonably certain to result in substantial injury to the organization, the lawyer may take further remedial action that the lawyer reasonably believes to be in the best interest of the organization. Such action may include revealing information otherwise protected by Rule 1.6 only if the lawyer reasonably believes that:* *(1) the highest authority in the organization has acted to further the personal or financial interests of members of the authority which are in conflict with the interests of the organization; and* *(2) revealing the information is necessary in the best interest of the organization.* Does not have MR (d) and (e) (c) and (e): same as MR (f) and (g) **Does not adopt 2003 Task Force changes**
MA Effective 9/1/08	Same as MR **Adopts 2003 Task Force changes**
MI Effective 10/1/88	(a): replaces "acting through its duly authorized" with "as distinct from its directors, officers, employees, members, shareholders, or other" (b): same as former MR (c): same as former MR but adds "of a legal obligation to the organization or" before "of law" and adds to end "and may disclose information either: (1) when permitted by Rule 1.6, or (2) when the lawyer reasonably believes that: (i) the highest authority in the organization has acted to further the personal or financial interests of members of that authority which are in conflict with the interests of the organization; and (ii) revealing the information is necessary in the best interests of the organization." Does not have MR (d) and (e) (d) and (e): same as MR (f) and (g) **Made only partial amendments effective 1/1/2011 since the most recent amendments to the ABA Model Rules (amended Rules 3.1, 3.3, 3.4, 3.5, 3.6, 5.5, and 8.5 and adopted new Rules 2.4, 5.7, and 6.6.*
MN Effective 10/1/05	(c): same as former MR but adds "or fails to address in a timely and appropriate manner an" before "action," deletes "and is likely to result in substantial injury to the organization" and adds to end "and may disclose information in conformance with Rule 1.6" Does not have MR (d) (e) – (f): same as MR (e) – (g) **Adopts only part of 2003 Task Force changes**
MS Effective	Same as former MR **Does not adopt 2003 Task Force changes**

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11/3/05	
MO Effective 7/1/07	(b) and (c): same as former MR Does not have MR (d) and (e) (d) and (e): same as MR (f) and (g) **Does not adopt 2003 Task Force changes**
MT Effective 4/1/04	(b) and (c): same as former MR Does not have MR (d) and (e) (d) and (e): same as MR (f) and (g) **Does not adopt 2003 Task Force changes**
NE Effective 9/1/05	Same as MR **Adopts 2003 Task Force changes**
NV Effective 5/1/06	(d): replaces "representation of" with "retention by" (f): replaces language after "identity of the client" with "to the constituent and reasonably attempt to ensure that the constituent realizes that the lawyer's client is the organization rather than the constituent. In cases of multiple representation such as discussed in paragraph (g), the lawyer shall take reasonable steps to ensure that the constituent understands the fact of multiple representation." **Adopts modified 2003 Task Force changes**
NH Effective 1/1/08	Same as MR **Adopts 2003 Task Force changes**
NJ Effective 1/1/04	(a): replaces "by" with "to represent" and "acting through its duly authorized constituents" with "as distinct from its directors, officers, employees, members, shareholders or other constituents. For the purposes of RPC 4.2 and 4.3, however, the organization's lawyer shall be deemed to represent not only the organizational entity but also the members of its litigation control group. Members of the litigation control group shall be deemed to include current agents and employees responsible for, or significantly involved in, the determination of the organization's legal position in the matter whether or not in litigation, provided, however, that "significant involvement" requires involvement greater, and other than, the supplying of factual information or data respecting the matter. Former agents and employees who were members of the litigation control group shall presumptively be deemed to be represented in the matter by the organization's lawyer but may at any time disavow said representation." (b): same as former MR *(c) When the organization's highest authority insists upon action, or refuses to take action, that is clearly a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer may take further remedial action that the lawyer reasonably believes to be in the best interest of the organization. Such action may include revealing information otherwise protected by RPC 1.6 only if the lawyer reasonably believes that:* *(1) the highest authority in the organization has acted to further the personal or financial interests of members of that authority which are in conflict with the interests of the organization; and* *(2) revealing the information is necessary in the best interest of the*

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	organization. Does not have MR (d) and (e) (d): same as MR (f) but replaces language after "when the lawyer" with "believes that such explanation is necessary to avoid misunderstanding on their part" (e): same as MR (g) Adds (f) *For purposes of this rule "organization" includes any corporation, partnership, association, joint stock company, union, trust, pension fund, unincorporated association, proprietorship or other business entity, state or local government or political subdivision thereof, or non-profit organization.* **Does not adopt 2003 Task Force changes**
NM Rules effective 11/2/09	NM Rule 16-113 is almost identical to MR, but adds "of this rule" after reference to a paragraph throughout, adds "NMRA of the Rules of Professional Conduct" after reference to a rule throughout, and adds headings: A. Generally B. Acting in best interest of organization C. Authority to reveal information: D. Exception to authority to reveal information E. Notice of discharge or withdrawal F. Identity of client G. Personal representation of office or employee **Adopts 2003 Task Force changes**
NY Effective 4/1/09	(a) Changes wording and adds more details than MR: *"When a lawyer employed or retained by an organization is dealing with the organization's directors, officers, employees, members, shareholders or other constituents, and it appears that the organization's interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents."* (b): adds "or" before "intends," deletes "or" before "a violation;" Moves "is a violation…imputed to the organization, and" into a new subparagraph (b)(i) Replaces "that" before "is likely" with "(ii)" and moves the rest of the paragraph into a new subparagraph (b)(ii) (c) is identical to former MR Does not adopt MR (c) through (f) (d): same as MR (g) **Does not adopt 2003 Task Force changes**
NC Effective 3/2/06	(c): has former MR but adds "reveal such information outside the organization to the extent permitted by Rule 1.6 and may" after "the lawyer may" (e): replaces "either of these paragraphs" with "these Rules" **Adopts only part of 2003 Task Force changes**
ND Effective 8/1/06	(d): replaces "constituent" with "consultant" (f): replaces "knows or reasonably should know" with "reasonably believes," adds "or are likely to become" before "adverse" (g): replaces "official" with "constituent," deletes "or by the shareholders" **Adopts modified 2003 Task Force changes**

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OH Effective 2/1/07	(a): deletes "duly authorized," adds "A lawyer employed or retained by an organization owes allegiance to the organization and not to any constituent or other person connected with the organization. The constituents of an organization include its owners and its duly authorized officers, directors, trustees, and employees." to end *(b) If a lawyer for an organization* knows *or* reasonably should know *that its constituent's action, intended action, or refusal to act (1) violates a legal obligation to the organization, or (2) is a violation of law that* reasonably *might be imputed to the organization and that is likely to result in* substantial *injury to the organization, then the lawyer shall proceed as is necessary in the best interest of the organization. When it is necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer shall refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law.* *(c) The discretion or duty of a lawyer for an organization to reveal information relating to the representation outside the organization is governed by Rule 1.6 (b) and (c).* Does not have MR (d) and (e) (d): same as MR (f) (e): same as MR (g) but adds "written" after "If the organization's" **Does not adopt 2003 Task Force changes**
OK Effective 1/1/08	Same as MR **Adopts 2003 Task Force changes**
OR Effective 1/1/05 and amended 12/1/06	(g): replaces "shall" with "may only" **Adopts modified 2003 Task Force changes**
PA Effective 7/1/06	Same as former MR **Does not adopt 2003 Task Force changes**
RI Effective 4/15/07	Same as MR **Adopts 2003 Task Force changes**
SC Effective 10/1/05	Same as MR **Adopts 2003 Task Force changes**
SD Effective 1/1/04	Same as former MR **Does not adopt 2003 Task Force changes**
TN Rules effective 1/1/2011	(c) Replaced by: *If despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and is likely to result in substantial injury to the*

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	organization, the lawyer may withdraw in accordance with RPC 1.16 and may make such disclosures of information relating to the organization's representation only to the extent permitted to do so by RPCs 1.6 and 4.1. TN (d) same as MR (e) TN (e) same and MR (f) TN (f) same as MR (g) but adds references to Rule 2.2 in addition to 1.7.
TX Rules Effective 4/6/95	***Rule 1.13. Conflicts: Public Interests Activities*** *A lawyer serving as a director, officer or member of a legal services, civic, charitable or law reform organization, apart from the law firm in which the lawyer practices, shall not knowingly participate in a decision or action of the organization:* *(a) if participating in the decision would violate the lawyer's obligations to a client under Rule 1.06; or* *(b) where the decision could have a material adverse effect on the representation of any client of the organization whose interests are adverse to a client of the lawyer.* **Has not made changes to Rule since 2003 Task Force**
UT Effective 11/1/05	(e): replaces "reasonably believes that he or she has been discharged" with "has been discharged and reasonably believes the discharge was" Adds *(h) A lawyer elected, appointed, retained or employed to represent a governmental entity shall be considered for the purpose of this rule as representing an organization. The government lawyer's client is the governmental entity except as the representation or duties are otherwise required by law. The responsibilities of the lawyer in paragraphs (b) and (c) may be modified by the duties required by law for the government lawyer.* **Adopts modified 2003 Task Force changes**
VT Effective 9/1/09	(a) Adds after "representation that is:" "reasonably certain to result in harm that would require a disclosure of information relating to the representation under Rule 1.6(b), or that is;" Deletes "proceed as is reasonably" through "best interest in the organization to do so;" Adds at the end of last sentence in paragraph: "unless the lawyer reasonably believes that: (1) a disclosure required by Rule 1.6(b) is necessary to prevent harm pursuant to that rule before a referral can be made or acted upon; (2) a referral is otherwise not feasible in the circumstances, considering the best interests of the organization; or (3) a referral is not necessary in the best interests of the organization." (c) Combines (c)(1) and (c)(2) into one paragraph (c); Adds between "or a refusal to act, that" and "that is clearly" [of ABA (c)(1)]: "is reasonably certain to result in harm that would require a disclosure of information relating to the representation under Rule 1.6(b) or;" Replaces "the lawyer reasonably believes…certain to result" with "and is likely to result;" Adds new paragraphs (c)(1) and (c)(2): "(1) the lawyer reasonably believes that the action or refusal to act is reasonably certain to result in harm that would require a disclosure under Rule 1.6(b), then the lawyer must reveal the information, but only if and to the extent the lawyer reasonably believes necessary to prevent the harm; or (2) the lawyer reasonably believes that the action or refusal to act is a violation

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	of law that is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 requires or permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization." (d) Adds at beginning of paragraph: "Except for disclosures required by Rule 1.6(b)." **Adopts modified 2003 Task Force changes**
VA Effective 1/1/04	Same as former MR **Does not adopt 2003 Task Force changes**
WA Effective 9/1/06	Adds *(h) For purposes of this Rule, when a lawyer who is not a public officer or employee represents a discrete governmental agency or unit that is part of a broader governmental entity, the lawyer's client is the particular governmental agency or unit represented, and not the broader governmental entity of which the agency or unit is a part, unless:* *(1) otherwise provided in a written agreement between the lawyer and the governmental agency or unit; or* *(2) the broader governmental entity gives the lawyer timely written notice to the contrary, in which case the client shall be designated by such entity. Notice under this subsection shall be given by the person designated by law as the chief legal officer of the broader governmental entity, or in the absence of such designation, by the chief executive officer of the entity.* **Adopts 2003 Task Force changes**
WV Effective 1/1/89	Same as former MR **Has not made changes to Rule since 2003 Task Force**
WI Effective 7/1/07	Adds *(h) Notwithstanding other provisions of this Rule, a lawyer shall comply with the disclosure requirements of SCR 20:1.6(b).* **Adopts 2003 Task Force changes**
WY Effective 7/1/06	Same as former MR **Does not adopt 2003 Task Force changes**

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