AMERICAN BAR ASSOCIATION
ADOPTED BY THE HOUSE OF DELEGATES
August 11-12, 2003

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

RULE 1.6: CONFIDENTIALITY OF INFORMATION

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

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

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

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

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

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or

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

(4) to secure legal advice about the lawyer's compliance with these Rules;

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

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

Commentary

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

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

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

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

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

Authorized Disclosure

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

Disclosure Adverse to Client

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

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

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

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

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

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5~~3~~) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

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

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

required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

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

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

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

Acting Competently to Preserve Confidentiality

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

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

Former Client

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

REPORT

I. BACKGROUND OF THE RECOMMENDATION

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

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

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

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

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

[2] The written and oral testimony submitted at these hearings is available on the Task Force Web Site.

[3] Testimony of Alfred P. Carlton, Jr., at 91, available on the Task Force Web Site.

Professional Conduct[4] is largely drawn, responds to the Task Force's founding charge from Robert Hirshon and to President Carlton's call for broad policy conclusions.[5]

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

- The Sarbanes-Oxley Act of 2002[6] has brought about, among many other things, extensive federal regulation of the accounting profession, including the creation of an external regulatory organization (the Public Company Accounting Oversight Board), detailed prescriptions governing the auditing work of the firms that certify the financial statements of public corporations, and limits on the scope of non-auditing services that such firms may supply.

- In response to concern that existing rules of professional conduct did not sufficiently direct the lawyer for the corporation to report illegal conduct to the corporation's board of directors,[7] Congress adopted Section 307 of the Sarbanes-Oxley Act of 2002,[8] requiring the SEC to promulgate rules of professional conduct for lawyers "appearing and practicing"[9] before the SEC. The SEC adopted these rules (the "Part 205 Rules")[10] on

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

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

[6] P.L. 107-204, 107th Cong., 2d sess. (July 30, 2002).

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

[8] Section 307 requires the SEC to issue rules:

> setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers, including a rule
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> > (1) requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); and
> >
> > (2) if the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors.

[9] The term "appearing and practicing" before the SEC is defined for purposes of the SEC's new rules of professional conduct to include "providing advice in respect of the United States securities laws or

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

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

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

II. THE ROLE OF THE LAWYER REPRESENTING THE CORPORATION

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

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

[10] 17 CFR Part 205, effective Aug. 5, 2003.

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

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

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

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

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

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

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

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

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

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

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

This conception of the lawyer as a promoter of corporate compliance with law emanates from the basic values of the legal profession. It follows naturally from the ABA's goal "to increase public understanding of and respect for the law, the legal process, and the role of the legal profession."[18] It is also in keeping with the ABA's Model Rules of Professional Conduct, which emphasize the lawyer's responsibility "[a]s advisor [to] provide[] a client with an informed understanding of the client's legal rights and obligations and explain[] their practical implications."[19]

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

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

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

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

19 Model Rules Preamble ¶[2].

20 Model Rules 1.1, 1.3.

21 Model Rule 1.2.

22 Model Rule 1.4(a)(2).

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

24 Model Rule 1.2, Comment [10].

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

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

III. PROPOSED AMENDMENTS TO MODEL RULE 1.6

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

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

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

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

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

A. Confidentiality and its Limitations -- Existing Law and Policy

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

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

- Where a lawyer's withdrawal from representation will not avoid continued assistance to a client's crime or fraud, the lawyer may be required under the existing Model Rules to "disaffirm an opinion, document or affirmation or the like" previously given by the lawyer.[30]

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

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

[29] This paragraph paraphrases Comment [2] to Model Rule 1.6.

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

- Where a lawyer representing a client in an adjudicative proceeding knows that the client has testified falsely, the lawyer may be required, not merely permitted, to disclose the falsity to the tribunal, even if the result is the client's loss of the case and a prosecution for perjury.[31]

- To the extent reasonably believed to be necessary, the lawyer is allowed to disclose information relating to the representation of a client in order to establish a claim or defense in a case against the client, including an action seeking recovery of legal fees.[32]

- The lawyer disciplinary rules of forty-two states permit a lawyer to disclose client information in order to prevent a client from perpetrating a fraud that constitutes a crime, and nineteen states permit such disclosure to rectify substantial loss resulting from client crime or fraud in which the client used the lawyer's services.[33]

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

[32] Model Rule 1.6(b)(3), and Comment [9].

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

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

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

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

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

B. Conforming Model Rule 1.6 to Existing Law and Policy

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

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

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

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

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

[35] The "RESTATEMENT."

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

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

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

The Task Force believes that the interest of society, and the bar, in assuring that a lawyer's services are not used by a client in the furtherance of a crime or a fraud creates a demanding need for an exception to the important principle of confidentiality, as most states have recognized. The importance of protecting both society and the bar from the consequences of a client's misuse of the lawyer's services in the furtherance of a serious crime or fraud must be balanced against the importance to the client-lawyer relationship of the principle of confidentiality.[38]

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

> We believe that the proposed Section 307 rules that mandate withdrawal from representation, notice to the SEC and disaffirmance risk destroying the trust and confidence many issuers have up to now placed in their legal counsel, creating divided loyalties and driving a wedge into the attorney-client relationship. Providing notice to the SEC that the attorney has withdrawn "for professional considerations" and disaffirming specific documents will have a similar effect as a violation of client confidences, and may itself be a violation of the attorney's duties to the client under state court rules, because it will promptly trigger an enforcement investigation and potentially civil lawsuits. As a consequence, some issuers might not even consult qualified attorneys regarding close issues of whether or not to disclose information in a filing or otherwise because the attorney might engage in a noisy withdrawal even though all that may have been involved was a matter of business judgment as to the materiality of certain information.
>
> Moreover, mandating withdrawal and disaffirmance removes the flexibility that lawyers need in order to have time to counsel their corporate clients effectively. In some instances, premature withdrawal and disaffirmance of documents might seriously and unfairly harm the issuer and its shareholders or create disruption in the market for issuer's securities, when more time spent with managers or expert advisers might have avoided the need for the attorney to employ so extreme

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

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

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

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

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

[39] Comment f to RESTATEMENT §67 further explains:

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

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

IV. CONCLUSION

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

Respectfully submitted,

The Task Force on Corporate Responsibility

James H. Cheek, III, Chair

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

GENERAL INFORMATION FORM

Submitting Entity: Task Force on Corporate Responsibility

Submitted By: James H. Cheek, III, Chair

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

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

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

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

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

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

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

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

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

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

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

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

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

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