CORRUPTION AND THE U.S. LAWYER'S ETHICAL DUTIES REGARDING CLIENT WRONGDOING

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Federal, state, and local governments in the United States have a long history of spending public money on construction, and an almost equally long history of corruption in public construction projects. Development of extensive oversight and structured procurement processes in the United States has been an acknowledgement of the appetite for corruption when significant sums of money are at stake. According to the United States Census Bureau, public construction projects in the U.S. currently amount to ~$297 billion annually.\(^1\) Perhaps more surprising is that ~$266 billion of that spending is done at the state and local level, and only ~$31 billion is spent at the federal level. The 2012 Census of Governments found that there are over 89,000 local governments in the United States.\(^2\) Many of these local governments are individually spending tens and even hundreds of millions of dollars a year on construction projects – each an opportunity for corruption.

This paper is intended to complement the discussion at the Ethics Plenary Session of the ABA Forum on Construction Law 2018 Fall Meeting. The paper will introduce some significant instances of corruption in public construction and other government procurement in the United States and will provide a description of oversight intended to uncover or to prevent corruption at the federal and state levels, along with a précis of construction procurement in the federal government and in one exemplar state. Tying into the discussion of corruption, the focus of the second half of the paper is on the lawyer’s ethical duties relating to client wrongdoing, including a discussion of how the Rules of Professional Conduct apply in such situations and an appendix containing an abstract of relevant ABA Model Rules of Professional Conduct.
CORRUPTION IN THE UNITED STATES HAS A LONG AND STORIED HISTORY

A famous early example of corruption involved William M. “Boss” Tweed, the head of New York City’s Tammany Hall political machine in the mid-nineteenth century. In 1858, New York City set aside $250,000 to construct a courthouse. Tweed used the construction of the courthouse to embezzle large sums from New York City’s budget. In 1873, Tweed was tried and convicted in the unfinished courthouse. After the Tweed Ring was broken up, work stopped on the building from 1872 to 1876 and the courthouse was not finished until 1881. As a result of corruption perpetrated at the behest of Tweed, the final cost for the project was, by some estimates, as high as $14 million. To provide some perspective, in 1867, while the construction of the courthouse was underway, the United States purchased Alaska from Russia for just $7.2 million. Over a hundred years later, in 1982, the New York Times published an article titled “Corruption is Called a Way of Life in New York Construction Industry,” highlighting the pervasive culture of corruption that still existed in New York and the indifference to corruption exhibited by construction executives.

In this century, the massive highway project in Boston known as the “Big Dig” spawned its own share of corruption. In 2008, four managers of Aggregate Industries NE, Inc. were convicted on, and two others pled guilty to conspiracy and fraud charges for, delivering substandard concrete to the Big Dig. The managers were accused of falsifying records to hide the inferior quality of more than 5,000 truckloads of concrete. The Big Dig was a $15 billion dollar project – considered the costliest highway project in U.S. history – that involved rerouting Interstate 93 from an elevated roadway into tunnels beneath downtown Boston. The project was plagued by construction problems, leaks, falling debris, huge cost overruns, and allegations of corruption. In 2006, 12 tons of concrete ceiling panels collapsed in one of the tunnels and killed
a motorist. The case against Aggregate Industries for supplying inferior concrete was never connected to that casualty, but the National Transportation Safety Board’s accident report determined that the wrong type of adhesive was used to secure the concrete slabs in the tunnel ceiling.¹⁰

More recently, in 2016, executives from a Buffalo, New York based construction company were charged with allegedly paying bribes to state officials in order to win the construction contract for a $750 million Tesla solar panel factory.¹¹ The company lost millions of dollars in contracted work and, by the end of 2017, had decided to close down its general contracting branch.

The acceptance of corruption as a reality of the construction industry remains relatively high today compared to other industries. In a 2014 Global Economic Crime Survey conducted by PricewaterhouseCoopers (PwC), 49% of respondents in the engineering and construction sector reported experiencing cases of bribery and corruption, and 42% reported experiencing procurement fraud.¹² The level of bribery and corruption experienced in the engineering and construction sector was higher than any other sector surveyed.¹³ PwC also found that fewer engineering and construction companies conducted fraud risk assessments than companies in other sectors.¹⁴ Additionally, engineering and construction companies that identified an external perpetrator of an economic crime were less likely than non-construction companies to inform law enforcement, end a business relationship, or notify regulatory authorities, and were more likely to do nothing.¹⁵

Today, there continue to be cases of corruption involving public officials, and contractors continue to be investigated and prosecuted by law enforcement. In April 2018, a U.S. District Judge in Texas sentenced Juan Jose Garza and Armando Jimenez to 37 months and 18 months in
prison, respectively, for conspiracy to commit wire fraud. Garza, the former director of the La Joya Housing Authority, recruited Jimenez to submit false high-cost bids for construction projects in order to ensure that Jimenez’s real company would be the low bidder. Jimenez would then submit invoices for work that he claimed was done by his construction company, but that work was actually completed by subcontractors working for Garza.

Similarly, in Florida, Javier Estepa and Diego Alejandro Estepa Vasquez, the president and vice president of Aaron Construction Group, a Florida-based construction company, were charged with defrauding a low-income housing development program. According to the indictment, the scheme ran from June 2014 through December 2016, and involved the company submitting falsified bids to the Miami-Dade Public Housing and Community Development Program for the renovation and repair of low-income housing in the county. The company allegedly falsely underrepresented the number of employees needed for each project, submitted final estimates for payment that included false records, as well as misrepresented the employment status of some of their employees. If convicted, both men face up to 20 years imprisonment, a $250,000 fine, and restitution.

Many of the construction cases prosecuted by law enforcement involve instances of bid manipulation or bid rigging. This is perhaps because such arrangements involve cooperation between various entities, whether that be a government official and a contractor or simply multiple contractors. There are, however, many additional cases of corruption that can be perpetrated by a single contractor. These other forms of corruption include, but are not limited to, change order abuse, duplicating invoices, using inadequate materials, and failing to perform required quality assurance and testing.
Cases of corruption are certainly not unique to construction projects. One newly infamous case is the matter of Glenn Defense Marine Asia (GDMA), a firm run by Leonard Glenn Francis, a Malaysian national of Portuguese and Sri Lankan extraction universally known as "Fat Leonard." Francis disbursed hundreds of thousands of dollars in cash, travel expenses, luxury items, and prostitutes among a large number of U.S. uniformed officers of the United States Seventh Fleet. They in turn gave him classified material about the movements of U.S. ships and submarines, confidential contracting information, and information about active law enforcement investigations into Glenn Defense Marine Asia. Francis then "exploited the intelligence for illicit profit, brazenly ordering his moles to redirect aircraft carriers to ports he controlled in Southeast Asia so he could more easily bilk the Navy for fuel, tugboats, barges, food, water and sewage removal."18

In 2010, Navy officials became suspicious that some of the bills submitted by GDMA from Thailand were padded.19 After a three-year secret investigation, and having planted false information that their inquiries had been closed, putting him off his guard, federal agents lured Francis to the United States in September 2013, arresting him at a San Diego hotel in a sting operation. He pleaded guilty in January of 2015.20 Leonard admitted to using his U.S. Navy contacts, including ship captains, to obtain classified information and to defraud the Navy of tens of millions of dollars by steering ships to specific ports in the Pacific and falsifying service charges. In his plea, Francis identified seven Navy officials who accepted bribes. He faces a maximum prison sentence of 25 years and agreed to forfeit $35 million in personal assets, an amount he admits to overcharging the Navy. So far, there have been over 30 civilians criminally charged in the scandal, and 550 active duty and retired military (including 60 admirals) have been under investigation and are facing all kinds of adverse action. The Washington Post called
the scandal "perhaps the worst national-security breach of its kind to hit the Navy since the end of the Cold War."\(^{21}\)

Cases of corruption are also expanding as the government continues to play a larger role in private sectors like healthcare. As an example, in July of 2017, the Justice Department announced charges against more than 400 people across the country for health care fraud.\(^{22}\) The potential for corruption is also likely to expand as the government continues to fulfill its increasingly specialized needs by contracting with private companies. The most obvious growing need for the government is in the information and technology sector. Amazon’s website indicates that over 2,000 government agencies are already using its web services.\(^{23}\) Similar services are likely to make up an increasing portion of the federal, state, and local governments’ budgets. This, of course, will increase the possibility of corruption and will likely spur additional regulations and oversight.

Whether the industry is construction, military procurement, healthcare or any other, the individuals and companies involved are represented by counsel. Clients may be seeking advice prior to entering into contracts or after their actions are questioned, by competitors or authorities, or in the media and by the public. As in the Watergate scandal of a prior generation, attorneys may find themselves the targets of investigations, and even criminal prosecutions, for the advice they gave or for their failure to give advice. Since the time of Watergate, related ethical considerations have been incorporated into the evolution of the ABA Model Rules of Professional Conduct, which are discussed in detail in the concluding section of this paper.

**GOVERNMENT OVERSIGHT AND INVESTIGATIONS**

Examples of contracting dollars at work abound in daily life -- in road construction, buildings, security, defense or other essential government services. The staggering amount of
money collected through taxation and then redistributed through federal and state programs requires numerous vehicles for delivery as well as legions of people to plan and perform the projects. Governments rightfully take a special interest in overseeing how the money is spent. Their oversight and investigations, be they federal, state or local, have the potential to point a finger at the attorneys who represented the parties in their prior business dealings. Those attorneys, therefore, are well-advised to consider, in real time, the implications of what they learn from their clients, in order to avoid running afoul of ethical or even criminal rules.

**Federal Oversight**

In the three branches of the United States federal government, there is a multiplicity of opportunities for review of contracting and construction. The Judicial Branch becomes involved if criminal or civil cases are brought before the courts, and in the Legislative Branch Congress has established the Government Accountability Office (the "GAO", formerly known as the General Accounting Office) to provide non-partisan oversight of programs and funding. On occasion, GAO reports may touch on situations that indicate the possibility of corruption, but the GAO has no enforcement power itself. Congress may also investigate through the actions of congressional committees, which can have subpoena power as well as the power of persuasion.

The primary means of oversight of federal contracting, however, is found within the various Executive Branch agencies themselves. Each federal government agency receives appropriated funds for projects -- some specifically designated for construction, others for major procurements -- and yet other funds are designated more generally as operating and maintenance or “O&M” funds. Each government agency has a subcomponent called the Office of Inspector General (the "OIG"), that oversees a number of issues for the agency, most especially the lawful
use of agency funds. OIG’s are staffed with both legal counsel and law enforcement agents and have budgets to hire financial analysts. Some agencies even have separate audit services, such as the Defense Contract Audit Agency (the "DCAA") or the Department of Labor Office of Federal Contract Compliance Programs (the "OFCCP"). The OFCCP historically conducts approximately 1,500 to 4,000 compliance audits each year, and in February of 2018 the OFCCP mailed notice letters to approximately one thousand supply and service contractors notifying them of a potential compliance evaluation. These Department of Labor evaluations include review of contractors’ compliance with statutes and regulations that by themselves might not appear likely to disclose any corruption issues, but construction contractors' hiring practices are fair game in such audits and are certainly also fertile ground for corruption.

These various oversight organizations are both proactive and reactive, meaning they conduct inspections and audits on their own but also respond to reports of problems from whistleblowers. These investigations are designed to help the agency more effectively perform its mission through the appropriate use of funds. In conducting this function, OIG’s may make recommendations to senior leaders regarding changes within the organization. An agency can independently take various punitive actions for violations, such as barring an entity from participating in contracts, or revoking licenses, permits or access, and may take action against individual employees through termination or other punishments. Agencies can also take more aggressive action, to retrieve money improperly taken from the agency and seek criminal penalties for wrongdoers.

The ultimate tool available to all government agencies is referral to the Department of Justice. Either through a written report or by presentation to a United States Attorney’s Office ("USAO"), an agency may try to convince the Department of Justice (the "DOJ") that there are
issues deserving of treatment by the criminal or civil justice system. Once the USAO is involved in a matter, the responsibility is officially handed over from the requesting agency to the DOJ, which pursues the interests of the agency in a manner consistent with the law, guidance from the Courts, and the U.S. Attorney’s manual governing conduct of DOJ attorneys.

The federal False Claims Act is the primary means by which criminal and civil penalties are sought for fraud against the federal government.25 That act provides, *inter alia*, that anyone who knowingly presents to the federal government a false or fraudulent claim for payment or approval or knowingly makes or uses a false record or statement, can be subject to civil and criminal penalties. The False Claims Act encompasses many of the fraudulent practices used by construction contractors, including lying about the costs of supplies and services and seeking reimbursements of excessive amounts, employing unqualified individuals into high-compensation positions, paying kickbacks to government officials to gain access to government funds, creating phony entities and/or invoices to get improper payments, and any number of other schemes.

American companies performing work in foreign countries may also be subject to the Foreign Corrupt Practices Act, which makes it illegal to bribe foreign governments.26 This law notes that, even if bribes are acceptable business tools in a foreign county, U.S. companies may not engage in such activity to gain an unfair advantage over other, law abiding U.S. companies.

*State and Local Oversight*

In addition to the substantial power and scope of federal fraud investigations, the U.S. system reserves a substantial amount of authority and responsibility to state and local governments to oversee their own budgets and spending. Federal authorities tend to be selective in the cases they investigate and prosecute -- identifying those instances with a particular federal
interest that is consistent with current enforcement priorities. Accordingly, many cases are left to state authorities. Some projects and programs are funded in large part or in total by state funds, some crimes have disparate effects on a particular state or the people within it, and state prosecutors are typically elected officials who often have to respond to public scrutiny and interest to particular issues.

The Center for the Advancement of Public Integrity at Columbia University published a report in 2016 devoted to state and local anti-corruption oversight. A survey for that report found three basic oversight models at the state level: (1) states with an inspector general system and an ethics commission, (2) states with only an ethics commission, (3) and states with no statewide oversight. The report also noted that there is a wide consensus on the factors that allow effective of anti-corruption agencies: strong legal foundations, broad jurisdiction, safeguards of independence, robust enforcement powers, ample resources, partnerships with complementary institutions, and political will. In most states, the Attorney General also has a broad range of authority to lead enforcement efforts. Attorney General fraud units, often divided between procurement fraud and health care fraud, investigate matters affecting the use of state funds for contracts.

A scholarly paper in the American Economic Review for 2014 provided a rigorous analysis of corruption from the standpoint of the geographic location of the individual states' capital cities. A prior study in 1966 had argued that states in which the capital city was distant from major metropolitan centers were particularly prone to corruption at the state level due to a "lower level of scrutiny by citizens and the media." The authors of the 2014 paper built on that argument and found statistical support for the proposition that "isolated U.S. capital cities are associated with lower accountability" and hence higher corruption. That conclusion may have
implications for clients in the construction industry who may be considering venturing into unfamiliar territory, and whose attorneys may or may not be up to speed on local practices.

An interesting development in the last decade has been the increased use of state false claims acts. Just as "Little Miller Acts" are the state cognate of the federal Miller Act, these acts can be mirror images of the federal False Claims Act but include state-specific causes of actions for the misuse of state funds. These acts have given great new flexibility to state Attorney Generals, who now have subpoena power to investigate matters even when there is no criminal case, and before a civil case has been filed.

In addition to Attorney General authority, many states have also given power to their legislative bodies to conduct investigations similar to what can be seen taking place in the U.S. Congress. This authority serves as another means for the legislature, which may control the budget, to oversee how funds are being used and managed.

**THE AWARDING OF CONTRACTS**

Mechanisms for the awarding of contracts are in some cases designed or intended to minimize occasions for corruption. Attorneys representing companies or individuals may find themselves in ethical quandaries as their clients' actions, taken or intended, are revealed to them. A good fundamental understanding of the contracting mechanisms is a prerequisite for being able to provide sound advice to the clients, as well as for being aware of the ethical pitfalls for the lawyers themselves.

*Federal Contracts*

The procurement procedure prescribed in the Code of Federal Regulations for public construction contracts remains competitive sealed bidding. However, there has been a trend towards competitive negotiation to give the government more flexibility. Pursuant to 48 C.F.R.
Section 36.103, the contracting officer is required to use "sealed bid procedures for a construction contract if the conditions in 6.401(a) apply . . . ." Section 6.104(a) provides that contracting officers shall solicit sealed bids if:

(1) time permits the solicitation, submission and evaluation of sealed bids;
(2) the award shall be made on the basis of price and other price-related factors;
(3) it is not necessary to conduct discussions with the responding offerors about their bids; and
(4) there is a reasonable expectation of receiving more than one sealed bid.

Under the sealed bidding method of procurement, the federal government will identify a need and will usually contract with an architect/engineer or use government design and engineering professionals to prepare a detailed set of drawings and specifications. The government will then solicit bids by formal advertisement from general contractors to construct the project. The bids will all be opened at the same time and the contract must then be awarded, without negotiation or discussion, to the lowest responsible bidder that has submitted a responsive bid.

If the conditions in Section 6.401(a) are not met, then the government may pursue contracts via the negotiation method. Notably, this is the prescribed method of procurement for architecture and engineer services.33

The competitive negotiation form of contracting is more focused on the "best value" for the price. These types of procurements allow the contracting officer to focus on the tradeoffs between price and technical value. In this form of contracting the federal government issues requests for proposals (RFP's) that outline the requirements for the contract. The government will then evaluate the proposals on the stated factors, which may include price, past performance,
technical issues, and cost information. After evaluation of the proposals the government may conduct discussions with the proposers under certain circumstances. The government will then award the contract.

The government may also use a two-phase design build selection process if the contracting officer determines that this method is appropriate, based on the following:

(1) Three or more offers are anticipated.

(2) Design work must be performed by offerors before developing price or cost proposals, and offerors will incur a substantial amount of expense in preparing offers.

(3) The following criteria have been considered:

(i) The extent to which the project requirements have been adequately defined.

(ii) The time constraints for delivery of the project.

(iii) The capability and experience of potential contractors.

(iv) The suitability of the project for use of the two-phase selection method.

(v) The capability of the agency to manage the two-phase selection process.

(vi) Other criteria established by the head of the contracting activity.

In phase one of this type of procurement, proposals are solicited from design builders. The proposals contain a variety of criteria about past performance, technical approach, qualifications. Price is excluded from phase one. The government selects the most highly qualified offerors and only those offerors submit phase two proposals. In phase two, the government evaluates the price and design and makes an award.
Construction contracts may also be governed by the Federal grant regulations, if they are funded by a Federal grant or cooperative agreement, as opposed to a federal contract governed by the FAR.\textsuperscript{38} These regulations have their own set of requirements.

An aggrieved contractor may file a protest against an award of contract at the agency level, with the GAO, or at the Court of Federal Claims. All three of these forums have strict deadlines and procedural rules that must be followed. It is important to note that an agency is given wide discretion in its actions, and therefore bid protests are often not successful.

\textit{State Contracts}

Within the fifty states and the District of Columbia (not to mention the Commonwealth of Puerto Rico and other U.S. territories), there are an equal number of separate sets of regulations for construction contacting. As a representative example, the treatment here is based on the State of Maryland's procurement regulations found at Title 21 of the Code of Maryland Regulations ("COMAR").

Pursuant to COMAR, competitive sealed bidding is the preferred method of procurement for Maryland state contracts.\textsuperscript{39} Under this procurement method, an invitation to bid is initiated and contractors and vendors may submit bids. The bids are all opened at one time and the "contract is to be awarded to the responsible and responsive bidder whose bid meets the requirements and evaluation criteria set forth in the invitation for bids, and is either the most favorable bid prices or most favorable evaluated bid price."\textsuperscript{40} In determining the most favorable bid, the regulations state that "[b]ids shall be evaluated to determine which bidder offers the most favorable price to the State in accordance with the evaluation set forth in the invitation for bids. Only objectively measurable criteria which are set forth in the invitation for bids shall be applied in determining the most favorable evaluated bid price."\textsuperscript{41}
The state may also use the following procurement methods under certain circumstances:

1. Competitive sealed proposals;
2. Negotiated award after unsatisfactory competitive sealed bidding;
3. Noncompetitive negotiations: Sole source or Emergency and expedited;
4. Small procurement procedures;
5. Competitive negotiated procurement or
6. Intergovernmental cooperative purchasing.  

The Maryland state procurement regulations also detail a process by which a construction manager may be hired for a project to provide a range of "preconstruction services and construction management services which may include, but are not limited to, cost estimation and consultation regarding the design of the project, prequalifying and evaluating trade contractors and subcontractors, awarding the trade contracts and subcontracts, scheduling, cost control, and value engineering." Procurement agencies are to use the competitive sealed proposals procurement method to select the construction manager.  

Maryland agencies are also permitted to use a design build method of procurement under certain circumstances. The selection of the design-builder is to be conducted using a multi-step sealed bid procurement method or the competitive sealed proposals procurement method.  

Under Maryland regulations, an interested party "may protest to the appropriate procurement officer against the award or the proposed award of a contract." An interested party is defined as "an actual or prospective bidder, offeror, or contractor that may be aggrieved by the solicitation or award of a contract, or by the protest." Protestors are required to seek resolution of their complaints initially with the procurement agency, but a subsequent appeal to the Maryland Board of Contract Appeals must be made within 10 days of receipt of the final procurement agency action.
Notably, an interested party may not protest a contract for architectural services or engineering services.\textsuperscript{50} Instead for these type of services, "[w]ithin 10 days of receipt of notice of a recommendation by the Transportation Board or the General Board to the Board to enter into an architectural services or engineering services contract subject to this title, a prospective offeror of architectural services or engineering services may appeal the recommendation to the Board."\textsuperscript{51}

\textbf{ETHICAL DUTIES REGARDING CLIENT WRONGDOING}

This analysis is based on the 2018 version of the American Bar Association's ("ABA") Model Rules of Professional Conduct. Some version of the ABA Model Rules has been adopted in all states (and D.C.), in their 2018 form.\textsuperscript{52} Practitioners, of course, will need to be guided by the rules as they may have been adopted by states in which they practice. For ease of reference, an abstract of applicable parts of the Model Rules is contained as an Appendix to this paper.

In the U.S. legal system, confidentiality is a keystone of the attorney-client relationship. The Model Rules provide: "A lawyer shall not reveal information relating to the representation of a client" except in carefully circumscribed circumstances.\textsuperscript{53} The attorney-client privilege, permitting the client to deny to third parties access to communications between lawyer and client seeking legal advice, is recognized in every U.S. jurisdiction and is thought to promote justice overall. Conversely, the rules also describe situations when a lawyer may have an obligation to report improper behavior.

A second keystone of the attorney-client relationship is the principle that the lawyer is forbidden from participating in a client's unlawful conduct. Model Rule 1.2(d) provides in pertinent part:
(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.\textsuperscript{54}

More generally, there are model rules that reflect the lawyer's duty of honesty and trustworthiness. Model Rule 4.1, Truthfulness in Statements to Others, provides that in the course of representation a lawyer shall not knowingly "make a false statement of material fact or law to a third person." Model Rule 8.4 provides that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."\textsuperscript{55}

The situation regarding unlawful conduct of others is less straightforward. As discussed in the ABA Journal for November 2005: "Finding the exact boundaries of the ethical obligation to report wrongdoing by others can be a great source of turmoil. What often makes the decision difficult is that a lawyer must reconcile the obligation to report wrongdoing with duties to preserve client confidences."\textsuperscript{56}

As described in a recent ABA Business Law Section article, the question has not always been so vexing.\textsuperscript{57} Early ethical rules in most states would have generally allowed a lawyer to disclose prospective crimes of clients. By 1980, the Model Code of Professional Responsibility, allowed a lawyer to "reveal the intention of his client to commit a crime and the information necessary to prevent the crime."\textsuperscript{58} Development of the Model Rules of Professional Conduct included much discussion of the issue, and in 1983 Model Rule 1.6 allowed disclosure but only "to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm."\textsuperscript{59} The ABA Ethics 2000 Commission took up the
issue again, with the result that its recommendations to revise Model Rule 1.6 were rejected by the ABA House of Delegates, and the issue was debated over a number of years.\footnote{60}

The current version of Model Rule 1.6 provides, in relevant part:

(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…\footnote{61}

These options provide significant leeway for the lawyer who is considering whether circumstances require her to make a disclosure of a client's actions. Definitions for the terms "believes", "fraud", "reasonably" and "substantial" are all set out at Model Rule 1.0, Terminology, but those definitions are in some instances less than helpful. For instance, "fraud" is defined as "conduct that is fraudulent… and has a purpose to deceive." \footnote{62} Moreover, even in the circumstances described, the rule does not make action mandatory. The lawyer "may" take the actions prescribed but is not required by the rule to do so.

The litigator finds firmer guidance in Model Rule 3.3, Candor Toward the Tribunal. In relevant part that rule states that:
(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.\textsuperscript{63}

Note that the directive of this rule is mandatory. The lawyer "shall" take measures including disclosure to the tribunal "if necessary." Note also that the mandate of this rule continues to the end of the proceeding, and that this rule prevails if it comes into conflict with the duty of confidentiality under Model Rule 1.6.

More generally in the litigation setting, Model Rule 3.3 also provides:

(a) A lawyer shall not knowingly:

\(4\) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer’s client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

The remedial measures that may be called for can include not only remonstrating with the client and disclosure to the tribunal, but also seeking withdrawal. A request for withdrawal alone may lead to alerting the tribunal, as there may be reluctance on the part of the tribunal to permit withdrawal at an advanced stage in a proceeding.
The transactional or business lawyer's Rule 4.1 burden of truthfulness in statements to others can be implicated in the context of her representation of clients. Reich and Wirtner, above, postulate that the lawyer may as a last resort disaffirm work product, even an opinion that is factually and legally correct, if the lawyer believes it will be used by the client for nefarious purpose of a fraudulent transaction.64

Model Rule 1.4, Communication, requires the lawyer to "consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law." Such communication may well be the precursor to difficult decisions by the lawyer that may include disclosure and/or withdrawal.

When representing an organizational client, the lawyer will look to Model Rule 1.13, Organization as Client, for guidance. The current rule lays out a multi-stage process, based upon the "best interests of the organization," for handling circumstances in which action or inaction by a representative of the organization might lead to substantial injury to the organization. In such a situation, the lawyer "shall refer" violations to higher authority in the organization, including the highest authority in the organization.65 If despite the lawyer's efforts the highest authority in the organization fails to act appropriately to address something that "is clearly a violation of law" and the lawyer reasonably believes that substantial injury to the organization is reasonably certain to result, 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 that the lawyer reasonable believes necessary to prevent substantial injury to the organization."66 The plethora of caveats in the language of this rule is a reflection of the difficulties that the drafters have encountered over many years in reaching a consensus on the issue of disclosure.
Withdrawal from a representation that is or threatens to become problematic on account of client misconduct falls within the scope of Model Rule 1.16, Declining or Terminating Representation, which provides in part:

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

(1) the representation will result in violation of the Rules of Professional Conduct or other law;…

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(2) the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer’s services to perpetrate a crime or fraud;

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.67

This rule thereby provides for mandatory withdrawal if it appears the lawyer will become personally involved in any unlawful activity, not only a breach of ethical obligations. Permissively, withdrawal may also be appropriate if the client's course of action involves crime or fraud. The lawyer will need to consider the likely consequences of withdrawal, which will often draw attention to the client’s conduct, even if the reasons for disclosure are not disclosed to
other parties, and may thereby prejudice the client to some extent. But the lawyer must continue
with the representation if a court or other tribunal refuses to allow withdrawal.

3 https://www.nytimes.com/1986/05/05/nyregion/boss-tweed-s-courthouse-an-elegant-
monument-to-corruption.html
5 Id.
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10 National Transportation Safety Board, Accident Report, Ceiling Collapse in the Interstate 90
Connector Tunnel, https://www.ntsb.gov/investigations/AccidentReports/Pages/HAR0702.aspx
bribery-bid-rigging-a/517271/.
12 https://www.pwc.com/gx/en/economic-crime-survey/assets/economic-crime-survey-2014-
construction.pdf.
13 Id.
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APPENDIX

ABSTRACT OF SELECTED MODEL RULES
APPLICABLE TO DUTIES REGARDING CLIENT WRONGDOING

MRPC RULE 1.0

TERMINOLOGY

(a) “Belief” or “believes” denotes that the person involved actually supposed the fact in question to be true. A person’s belief may be inferred from circumstances.

(d) “Fraud” or “fraudulent” denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

(e) “Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

(g) “Partner” denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(k) “Screened” denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(l) “Substantial” when used in reference to degree or extent denotes a material matter of clear and weighty importance.
MRPC RULE 1.2

SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client’s decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer’s representation of a client, including representation by appointment, does not constitute an endorsement of the client’s political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

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

MRPC RULE 1.4

COMMUNICATION

(a) A lawyer shall:
(1) promptly inform the client of any decision or circumstance with respect to which the client’s informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client’s objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

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

MRPC RULE 1.6

CONFIDENTIALITY OF INFORMATION

(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;

(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.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

MRPC RULE 1.13

ORGANIZATION AS CLIENT

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law 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.

(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 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.
(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.

(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.

MRPC RULE 1.16

DECLINING OR TERMINATING REPRESENTATION

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

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(2) the lawyer’s physical or mental condition materially impairs the lawyer’s ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;
(2) the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer’s services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer’s services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client’s interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.
MRPC RULE 1.18

DUTIES TO PROSPECTIVE CLIENT

(a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing; or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
(ii) written notice is promptly given to the prospective client.

**MRPC RULE 3.3**

**CANDOR TOWARD THE TRIBUNAL**

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer’s client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

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

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

MRPC RULE 4.1

TRUTHFULNESS IN STATEMENTS TO OTHERS

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

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

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

MRPC RULE 8.1

BAR ADMISSION AND DISCIPLINARY MATTERS

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(a) knowingly make a false statement of material fact; or

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 1.6.

MRPC RULE 8.3

REPORTING PROFESSIONAL MISCONDUCT

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty,
trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge’s fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.

**MRPC RULE 8.4**

**MISCONDUCT**

It is professional misconduct for a lawyer to:

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

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

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

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity,
disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.