Regulating Corporate Governance: Amended Rules of Professional Conduct Allow Lawyers to Make the World a More Ethical Place

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The recent exposure of fraudulent activity committed by companies such as Enron and WorldCom has forced our Nation to scrutinize its standards of professional ethics. In the aftermath of these corporate debacles, the federal government has taken measures to protect against future occurrences of corporate fraud. In July 2002, Congress passed the Sarbanes-Oxley Act, which authorized the Securities and Exchange Commission (SEC) to enact rules that would establish higher standards of professionalism and accountability not only for corporations and accounting firms but also for the legal profession. On August 5, 2003, SEC rules imposing new standards obligating attorneys to report certain instances of corporate misconduct took effect.

1. See Brooke A. Masters, ABA Eases Rule on Informing; Lawyers Can Now Report Suspected Fraud by Clients, WASH. POST, Aug. 12, 2003, at E1. The environment of heightened scrutiny created by the collapse of Enron and magnified by the subsequent collapse of WorldCom culminated with the ABA's vote on August 11, 2003, to relax confidentiality rules, thereby permitting lawyers to report fraudulent activities by their clients. See id.


4. See 17 C.F.R. pt. 205. In part 205, the SEC went beyond establishing minimum standards regarding the attorney's obligation to report. Id. Most significantly, part 205 also introduced a new corporate governance structure, the Qualified Legal Compliance Committee (QLCC). Id. pt. 205.2(k). The QLCC is a committee composed of independent directors, not employed by or otherwise personally interested in the corporation's activities, and is authorized to investigate and report any material violations by the corporation to the board of directors, or under certain circumstances, to the SEC. See id. It was offered as an alternative to the proposed "noisy withdrawal" requirements that would mandate attorneys to report any material violations by their client to the SEC. There are many opponents to the SEC's introduction of the QLCC under part 205. For example, the District of Columbia Bar argues:
American Bar Association (ABA) adopted the new SEC standards for the legal profession.5

The most significant changes in the ABA Model Rules of Professional Conduct affect the confidential and privileged nature of the attorney-client relationship.6 The general rule of confidentiality, Rule 1.6, requires that all communications and information relating to a client’s representation not be revealed.7 Prior to these changes, there were only four express instances when a lawyer was permitted to disclose confidential information.8 The amendments to Rule 1.6 add two new exceptions, permitting a lawyer to disclose confidential information to

[T]he substantive thrust of the “noisy withdrawal” proposals, including the proposed QLCC alternative, which would require self-reporting of possible, but unadjudicated violations of law and state law fiduciary duties, is unprecedented and is not an appropriate exercise of authority under Section 307 of Sarbanes-Oxley or any provision of the federal securities laws.

DC BAR, COMMENTS OF THE CORPORATION, FINANCE AND SECURITIES LAW SECTION: PART NINE, http://www.debar.org/for_lawyers/sections/corporation_finance_and_securities_law/statement/part9.cfm (last visited June 8, 2004). In response to these concerns, the SEC made clear that the final rules only apply to attorneys appearing or practicing before the SEC. See 17 C.F.R. pt. 205. Also, the SEC clarified “that authority to enforce compliance with these rules is vested solely in the SEC and no private right of action is being created.” WILSON SONSINI GOODRICH & ROSATI, SEC IMPLEMENTS RULES ON ATTORNEY STANDARDS OF PROFESSIONAL CONDUCT—EXTENDS COMMENT PERIOD FOR “NOISY WITHDRAWAL” PROVISIONS 1 (Feb. 2003), available at http://www.wsgr.com/PDFSearch/Tab7-ProfConductMemo.pdf.

5. Compare 17 C.F.R. pt. 205, with MODEL RULES OF PROF'L CONDUCT R. 1.6, 1.13 (2004) [hereinafter MODEL RULES] (adopting only SEC standards directly applicable to lawyers). There is no incorporation in the ABA rules regarding the QLCC or other parts of the SEC rules that apply to the greater structure of corporate governance. See MODEL RULES, supra, R. 1.6, 1.13. Still, the ABA’s adoption of the rules was not easily approved. See Masters, supra note 1. In fact, the vote was almost evenly split, 218 to 201, in favor of the amendments to Rule 1.6 of the Model Rules of Professional Conduct. Id. The vote regarding the changes to Rule 1.13 was slightly less controversial, though the House of Delegates still split 239 to 147. Conference Report: ABA Annual Meeting, 19 Laws. Man. on Prof. Conduct (ABA/BNA) 467 (Aug. 13, 2003) [hereinafter Conference Report].

6. See Dennis Archer, Keynote Address: Why is Accountability Important?, 54 S.C. L. REV. 881, 884 (2003). Archer commented that “[b]y granting the SEC broad power to adopt new ethical rules for corporate lawyers, the Act could threaten the attorney-client privilege, the work product doctrine, and other evidentiary rules designed to encourage open and frank communications between the client and the advocate.” Id.

7. MODEL RULES, supra note 5, R. 1.6(a). This section of the Model Rules is intended to create a general prohibition against the disclosure of such information. See id. Comment 3 to this rule asserts that confidentiality shall attach to any matter that relates to client representation, regardless of its source. See id. R. 1.6 cmt. 3.

8. See id. R. 1.6(b); see also infra Part I.C (discussing the four limited exceptions to the confidentiality rule: when there is a risk of death or bodily harm; when the lawyer needs to secure legal advice regarding compliance with the Rules of Professional Conduct; when the lawyer needs to defend himself in a controversy between the lawyer and a client; or in compliance with the law or a court order).
prevent a crime or fraud in furtherance of which the client has used the lawyer’s services and to prevent, mitigate, or rectify any substantial injury that may result or has resulted from such a crime or fraud. An additional change to Rule 1.13 further expands a lawyer’s ability to disclose confidential information. Under the old rule, a lawyer was obligated to report a client’s illegal misconduct “up the ladder” to the highest authority within the corporation. If internal reporting failed, the attorney was permitted only to withdraw or resign from representation. The newly amended Rule 1.13 permits a lawyer, under certain circumstances, to report the continuance of the illegal misconduct to outside authorities, such as the SEC.

The adoption of these rules has spurred massive controversy not only within the legal profession but also in the corporate setting. Opponents argue that the rules are a direct assault on the confidentiality inherent in the attorney-client relationship. Furthermore, opponents argue that this assault will undermine effective legal representation by decreasing

9. MODEL RULES, supra note 5, R. 1.6; see infra Part I.F (discussing the two new circumstances under which it may be permissible for a lawyer to disclose confidential information relating to client representation).

10. MODEL RULES, supra note 5, R. 1.13; see also infra Part I.F (discussing the amendment to Rule 1.13 as permitting a lawyer to use his or her discretion in the determination of whether it may be necessary to reveal confidential information to an outside authority).

11. MODEL RULES OF PROF’L CONDUCT R. 1.13 (2003) (amended 2004) [hereinafter 2003 RULES]. Both the old rule and the new rule require the lawyer to report “up the ladder” to a higher authority within the corporation; the new rule, however, changes what course of action a lawyer may take if the higher authority does not take sufficient action to stop the reported illegal activity. Id.; see also MODEL RULES, supra note 5, R. 1.13.


13. MODEL RULES, supra note 5, R. 1.13(c). The legislative history of Rule 1.13 demonstrates the ABA’s intent to limit the reporting of illegal misconduct to outside sources who have the authority and the capability to take preventive action. See AM. BAR ASS’N: ADOPTED BY THE HOUSE OF DELEGATES § III, at 6-7, http://www.abanet.org/leadership/2003/journal/119b.pdf (last visited June 7, 2004).

14. See Steven Pearlstein, Not So Firm with Lawyers, WASH. POST, Aug. 13, 2003, at E1 (referring to the issue of disclosure requirements as “an interesting issue, with good arguments to be found on both sides. But in many ways, it’s a sideshow that will have much less impact on lawyers’ behavior than stripping a few senior partners of their licenses and draining the bank accounts of a couple of big law firms.”); see also Masters, supra note 1 (discussing the Washington State Bar Association’s feud with the SEC over the new disclosure requirements).

15. See, e.g., Lance Cole, Revoking Our Privileges: Federal Law Enforcement’s Multifront Assault on the Attorney-Client Privilege (and Why It Is Misguided), 48 VILL. L. REV. 469, 586-87 (2003); see also, e.g., Conference Report, supra note 5, at 467 (noting other opposing arguments such as the erosion of values of client confidentiality, the vague language of the rule defining fraud and disclosure requirements, and that the ABA should not give in to outside regulation).
clients' trust and confidence in their attorneys. Proponents of the amended rules argue that the new reporting rules will aid in the prevention of corporate fraud. Proponents principally assert that lawyers have an ethical duty to advise clients not to participate in illegal fraudulent practices. As a result, proponents argue, the attorney is as fit a watchdog as any to report and assist in the prevention of corporate misconduct.

By taking measures to regulate not only the corporate but also the legal arena the SEC has augmented lawyers' responsibilities to include ensuring legal compliance by their clients. In fulfilling this greater responsibility, opponents of the new rules argue that the amended rules impose a new duty, requiring lawyers to betray their clients' confidentiality. If this concern is valid, the new duty would directly affect the traditional notions of confidentiality and privilege in communications between attorneys and clients. Bearing this concern in

16. See Jill E. Fisch & Kenneth M. Rosen, Is There a Role for Lawyers in Preventing Future Enrons?, 48 VILL. L. REV. 1097, 1101 (2003) (arguing that “mandatory rules, backed by the threat of SEC sanctions, may be counterproductive as a tool for increasing the effectiveness of client representation”).

17. See Christina R. Salem, The New Mandate of the Corporate Lawyer After the Fall of Enron and the Enactment of the Sarbanes-Oxley Act, 8 FORDHAM J. CORP. & FIN. L. 765, 784 (2003) (noting that, “[w]ithout the threat of lawyer disclosure, devious corporate agents will likely be more susceptible to stray from the law”).


20. See Standards of Professional Conduct for Attorneys Appearing and Practicing Before the Commission in the Representation of an Issuer, 17 C.F.R. pt. 205.1 (2003). Acting under the authority of the Sarbanes-Oxley Act, the SEC set forth rules creating greater accountability for gatekeepers—accountants, analysts, and attorneys—in order to improve corporate decision-making. Jill E. Fisch & Caroline M. Gentile, The Qualified Legal Compliance Committee: Using the Attorney Conduct Rules to Restructure the Board of Directors, 53 DUKE L.J. 517, 519 (2003). In addition, the SEC created an alternative mechanism, the Qualified Legal Compliance Committee (QLCC), to improve the decision-making process. See 17 C.F.R. pt. 205.3(c). By creating this alternative mechanism within the corporate arena, the burden on the legal profession may be somewhat relieved. See id. That is, if a corporation has created a QLCC to monitor its activities, the lawyer may only be required to report any material violation to the QLCC. See id. pt. 205.3(c)(1). Then the QLCC, not the lawyer, will be responsible for investigating and further reporting that violation. See id. Therefore, the focus would shift away from the lawyer toward the board of directors. Fisch & Gentile, supra at 584.


22. See MODEL RULES, supra note 5, R. 1.6(b). The amended rule creates two new exceptions for when an attorney may disclose confidential information relating to the
mind, the ABA's adoption of the SEC rules signals the legal profession's awareness of public criticism surrounding its role in the recent failures of corporate governance. Adopting the rules demonstrates a willingness to satisfy this higher responsibility. Still, the goal is a system of legal ethics that ensures the prevention of corporate fraud while affording a high level of protection to attorney-client confidentiality. At present, lawyers and law firms across the country are adjusting to the amended rules.

This Comment analyzes the fiduciary duties that flow from the corporate lawyer to the corporate client in an effort to determine what representation of a client. See infra Part I.F. But see infra Part III (arguing that although the rule allows for two new exceptions, because of the limited nature of the exceptions, there is no harm done to the attorney-client relationship).

23. See REPORT OF THE AMERICAN BAR ASSOCIATION TASK FORCE ON CORPORATE RESPONSIBILITY 18-19 (Mar. 31, 2003), available at http://www.abanet.org/buslaw/corporateresponsibility/final_report.pdf [hereinafter ABA REPORT] (commenting that public observers have asserted that along with the private sector participants, lawyers also bear responsibility for corporate failures); see also Mike France, What About the Lawyers?, BUS. WK., Dec. 23, 2002, at 58-62 (revealing the attorneys' role in the perpetration of the Enron scandal). By drafting documents that execute corporate dealings and writing opinion letters that vouch for the legality of those dealings, lawyers inevitably play a critical role in the execution of any corporate action. Id. For this reason, the legal profession has fallen within the focus of the heightened scrutiny surrounding corporate misconduct. See id. In its recommendation of new Rule 1.13, the ABA Task Force noted that, "[k]nowledgeable observers have asserted that through inaction, inattention, indifference or, in some cases, conflicting personal interests or loyalties, some of these participants [including counsel] bear significant responsibility for these [corporate] failures, and lawyers have not been excluded from such assertions." ABA REPORT, supra at 18-19, 34-35.

24. See ABA REPORT, supra note 23, at 40-47; see also Susan R. Martyn, In Defense of Client-Lawyer Confidentiality . . . and Its Exceptions . . . , 81 NEB. L. REV. 1320, 1350 (2003) (emphasizing the increasing importance of facilitating law enforcement in the government's efforts to amend the rules to permit broader exceptions to the rule of confidentiality).

25. See 148 CONG. REC. S6551 (daily ed. July 10, 2002) (statement of Sen. Edwards); see also ABA REPORT, supra note 23, at 24-25 (stating that the intent behind the changes to the Model Rules of Professional Conduct is "to enhance the lawyer's ability to exercise and bring to bear independent professional judgment, and thereby enhance the lawyer's ability to promote corporate responsibility without undermining the constructive and collaborative relationship that must exist with the client so that compliance with law can be most effectively promoted").

26. Brooke A. Masters, New Rules Leave Lawyers in Bind on Whistle-blowing, WASH. POST, Aug. 6, 2003, at E1 (noting that legal departments and law firms have implemented new policies and procedures as well as training programs to teach compliance with the new reporting requirements); see, e.g., FRIED, FRANK, HARRIS, SHRIVER & JACOBSON, SEC "UP-THE-LADDER" REPORTING REQUIREMENT: PRACTICAL SUGGESTIONS FOR IN HOUSE ATTORNEYS 1-5 (July 18, 2003), available at http://www.ffhsj.com/cmemos/030718_Ladder.pdf [hereinafter "UP-THE-LADDER"] (suggesting methods by which law firms might adjust to the new rules).
effect the amended rules of professional conduct will have on the attorney-client privilege. First, this Comment considers the existing structure of intra-corporate fiduciary duties and the traditional role of the corporate lawyer. Next, this Comment traces the evolution of the recent legislation that brought about the adoption of these rules. Through a close examination of the plain language and legislative intent behind the amended rules, this Comment considers when a lawyer is required, or permitted, to act under the new rules and when a lawyer becomes liable for inaction. Finally, this Comment explains the impact of the new rules on the role of the lawyer in representing a corporate client. It concludes that the new rules support the prevention of corporate fraud while still protecting the confidential nature of the attorney-client relationship.

I. A BRIEF HISTORY OF THE LAWYER'S ROLE IN CORPORATE GOVERNANCE

A. The Corporation as a Client: The Traditional Relationship Between Attorney and Client

An examination of the intra-corporate and lawyer-corporation fiduciary relationships illustrates how significantly the amended Model Rules of Professional Conduct may impact the relationship between corporate lawyer and client. A system of corporate governance limits the impact that management decisions may have on the constituents of

27. See 148 CONG. REC. S6551 (daily ed. July 10, 2002) (statement of Sen. Edwards) (noting that lawyers may play a critical role in protecting against failures in the system of corporate governance). The post-Enron reforms are directed at the legal profession because the system of corporate governance has failed. See infra Part II (analyzing the intent of the amended rules). Actions by Congress and the SEC show the need for lawyers and accountants to act as effective gatekeepers to restore the system. See Fisch & Gentile, supra note 20, at 519-21, 535-36. Until the recent corporate-governance failures, however, state courts and the SEC had limited their focus to board strength and independence when determining how to best remedy improper corporate decisions. See, e.g., In re Walt Disney Co. Deriv. Litig., 825 A.2d 275 (Del. Ch. 2003) (denying a motion to dismiss because plaintiff alleged facts sufficient for a jury to find that directors breached their fiduciary duty of care in employment decisions); see also H. Lowell Brown, The Corporate Director's Compliance Oversight Responsibility in the Post Caremark Era, 26 DEL. J. CORP. L. 1, 44-45 (2001). In In re Walt Disney, the court noted that it would be more “hesitant to second-guess the business judgment of a disinterested and independent board of directors.” 825 A.2d at 278. Now, the focus has changed. Legislators and courts seek the assistance of outsiders in ensuring legal compliance by corporations. See, e.g., Fisch & Gentile, supra note 20, at 7 (noting that in Sarbanes-Oxley, “Congress focused its efforts primarily on advisors . . . rather than on the executives who run the corporations (and who bore primary responsibility for the wrongdoing) or the directors who oversee the decisions made by the executives (and who acquiesced in the wrongdoing).”).
the corporation (e.g., shareholders, employees, officers, and directors). Because it forms legally enforceable duties, the fiduciary relationship between management and shareholders plays a fundamental role in this system. Through corporate governance, management becomes liable for breaching a fiduciary duty by failing to act in the best interest of the corporation.

For example, in In re Walt Disney Co. Derivative Litigation, the Court of Chancery of Delaware denied defendant directors’ motion to dismiss the shareholders’ complaint alleging a breach of the fiduciary duty of care by the directors. Courts generally hesitate to second-guess the business judgment rule. However, in this case the court determined

28. See MODEL RULES, supra note 5, R. 1.13 cmt. 1 (defining the constituents of the corporation as officers, directors, employees, and shareholders); see also BLACKWELL ENCYCLOPEDIC DICTIONARY OF BUSINESS ETHICS 147 (1997) [hereinafter ETHICS DICTIONARY]; see also John R. Boatright, Fiduciary Duties and the Shareholder-Management Relation: Or, What’s So Special About Shareholders?, 4 BUS. ETHICS Q., 393-407 (1994) [hereinafter Fiduciary Duties].

29. See RESTATEMENT (SECOND) OF AGENCY § 1 (2000) (defining fiduciary duties as the duty of care, loyalty, and obedience); see also ETHICS DICTIONARY, supra note 28, at 147; see also Boatright, supra note 28 at 394 (emphasizing the importance of the shareholder right to elect directors who act as fiduciaries in the management of the corporation). Boatright argues that “[s]ince these various rights and duties are legally enforceable, they provide a relatively effective solution to the problem of accountability.” See id.

30. See, e.g., MODEL BUS. CORP. ACT § 8.31(a) (2003) (stating instances when a director may be held liable for breaching a fiduciary duty). First, a director may be liable for action not taken in good faith. See id. § 8.31(a)(2)(i). Second, a director may be liable if the action results from a decision that the director did not reasonably believe to be in the best interests of the corporation, or as to which the director was not sufficiently informed. See id. § 8.31(a)(2)(ii). Third, directorial liability will attach if the director’s action is influenced by a personal relationship with, or a lack of independence from, another person who has a material interest in the action. See id. § 8.31(a)(2)(iii).


32. See id. at 291; see also In re Caremark Int’l, 698 A.2d 959, 967 (Del. Ch. 1996) (noting that directorial liability for a breach of fiduciary duty may arise in two contexts). In this case, the court ruled:

First, such liability may be said to follow from a board decision that results in a loss because that decision was ill advised or “negligent.” Second, liability to the corporation for a loss may be said to arise from an unconsidered failure of the board to act in circumstances in which due attention would, arguably, have prevented the loss.

Id.

33. See, e.g., Shlensky v. Wrigley, 237 N.E.2d 776 (III. App. Ct. 1998). In Shlensky, the court deferred to the business judgment of the directors. In doing so, the court noted:

Directors are elected for their business capabilities and judgment and the courts cannot require them to forego their judgment because of the decisions of directors of other companies. Courts may not decide these questions in the absence of a clear showing of dereliction of duty on the part of the specific directors and mere failure to “follow the crowd” is not such a dereliction.
that directors who fail to exercise any business judgment, or to make a good faith effort to fulfill the fiduciary duties owed to shareholders, may be held liable. Corporate constituents cannot always resolve their conflicting interests, and occasionally must seek help in the form of a judicial remedy to correct failures of corporate governance.

In our system of corporate governance, a lawyer representing a corporation owes his or her ethical duty to the corporation itself. In other words, the lawyer has a duty to act in the best interests of the client organization, not in the independent interests of management or shareholders. Therefore, in the protection of a working system of

Id. at 781.
34. See In re Walt Disney Co., 825 A.2d at 289. Determining the boundary of the business judgment rule, the court stated:
[A]ll of the alleged facts, if true, imply that defendant directors knew that they were making material decisions without adequate information and without adequate deliberation, and that they simply did not care if the decisions caused the corporation and its stockholders to suffer injury or loss. Viewed in this light, plaintiffs' new complaint sufficiently alleges a breach of the directors' obligation to act honestly and in good faith in the corporation's best interests for a Court to conclude, if the facts are true, that the defendant directors' conduct fell outside the protection of the business judgment rule.

Id.
35. See, e.g., In re Abbott Labs. Derivative S'holders Litig., 325 F.3d 795 (7th Cir. 2003) (holding that directors had breached their duty of loyalty owed to the corporation's shareholders). Corporate governance is most vulnerable when a conflict of interest arises between management and the shareholders. See Rosman v. Shapiro, 653 F. Supp. 1441, 1446 (S.D.N.Y. 1987) (holding that a lawyer will be disqualified where a conflict of interest arises between two shareholders, each reasonably believing he or she was the lawyer's client). The ABA Task Force also discussed the problems associated with the occurrence of conflicting interests. See ABA REPORT, supra note 23, at 25-30. Specifically, the task force noted the temptation of executive officers to maximize their own self-interest at the expense of long-term corporate welfare. See id. Another conflict arises when corporate officers who benefit from reporting information reflecting positive growth do not inform shareholders of financial setbacks. See id.; see also Enron Heads Knew of Deals to Grow Earnings: WSJ, REDIFF.COM, Jan. 2, 2002, http://www.rediff.com/money/2002/jan/02enron.htm [hereinafter Enron Heads] (discussing Enron executives' fraudulent misrepresentation of financial accounting information).

36. See Jesse v. Danforth, 485 N.W.2d 63, 66 (Wis. 1992). In this case, the court describes the corporate entity rule, holding that if a lawyer represents individuals in the creation of a corporation, once incorporation has occurred, that lawyer retroactively represents the corporation, not the individuals. See id. The modern test applied to determine whether a lawyer represents an individual or a corporation is the "reasonable expectation" test set forth by the court in Rosman. See 653 F. Supp. at 1446.

37. RESTATEMENT (THIRD), THE LAW GOVERNING LAWYERS § 96(1)(b)(2) (2000) [hereinafter RESTATEMENT GOVERNING LAWYERS]. This duty is also spelled out in the Model Rules of Professional Conduct. See MODEL RULES, supra note 5, R. 1.13. Rule 1.13 states that the lawyer "represents the organization acting through its duly authorized constituents." Id. The rationale for this rule is that corporations are independent legal
corporate governance, the confidentiality of communications between the attorney and client, as well as the attorney-client privilege, flow not to the individuals of the corporation, but to the corporation as its own legal entity.  

B. Confidentiality and Privilege

The principles of confidentiality and privilege form essential elements of the attorney-client relationship. Each may exist independently. Whereas confidentiality applies to communication involving information exchanged within a protected relationship, privilege may or may not attach to those communications. In order to qualify as a privileged communication, the parties must have an intention of confidentiality and the communication must have some basis for protection, such as seeking and rendering legal representation. If the communication meets both criteria, then privilege exempts the communication from either party’s duty of disclosure. But, privilege will not arise unless both parties contemplate the existence of an attorney-client relationship.

entities that require representation, but can act only through their constituents. See id. at R. 1.13 cmt. 1.

38. See Danforth, 485 N.W.2d at 66; 2003 RULES, supra note 11, R. 1.13.
39. See Freeman v. Chi. Musical Instrument Co., 689 F.2d 715, 721 (7th Cir. 1982); Am. Can Co. v. Citrus Feed Co., 436 F.2d 1125, 1128 (5th Cir. 1971); Baird v. Koerner, 279 F.2d 623, 635 (9th Cir. 1960); Consol. Theatres, Inc. v. Warner Bros. Circuit Mgmt. Corp., 216 F.2d 920, 927 (2d Cir. 1954). Each of these cases noted that it is part of a court’s duty to protect the privacy of the attorney-client relationship. E.g., Freeman, 689 F.2d at 721.
40. See Lawyer Disciplinary Bd. v. McGraw, 461 S.E.2d 850, 859 (W. Va. 1995) (noting that the ethical duty of confidentiality and the evidentiary rule of attorney-client privilege are both factors determinative of whether information is confidential). The amended rules do not seek to alter the confidential nature of a communication. Rather, the new rules expand the circumstances under which the attorney-client privilege may be lifted to allow a lawyer to disclose confidential information. See MODEL RULES, supra note 5, R. 1.6.
42. See BLACK’S LAW DICTIONARY, supra note 41 (defining privileged communication as “communication that is protected by law from forced disclosure”).
43. See WIGMORE, supra note 41, at 391-92 (noting that when a communication falls within the scope of seeking and rendering legal representation, public policy supports the formation of a privileged and confidential relationship).
44. See id. at 392-93.
45. See I FRANKLIN D. CLECKLEY, HANDBOOK ON EVIDENCE FOR WEST VIRGINIA LAWYERS § 5-4(E)(2)(e) (3d ed. 1994); see also RESTATEMENT GOVERNING LAWYERS, supra note 37, § 14 (describing the formation of a client-lawyer relationship). In order to form a client-lawyer relationship, the client must manifest to the lawyer his or her intent that the lawyer will provide services in a legal capacity, and the lawyer consents or reasonably should know that the client is relying on him or her to do so. Id. § 14(1).
Once the parties form an attorney-client relationship, confidentiality attaches to all communications between the parties that are related to the representation. 46 Privilege, on the other hand, attaches only to communications that arise within the scope of seeking and rendering legal counsel. 47 Public policy supports the confidentiality ensured by the attorney-client relationship. 48 The protection offered by the confidentiality rule bolsters the effectiveness of legal representation by diminishing client reluctance to share true and accurate information. 49

Alternatively, such a relationship can be formed if a tribunal appoints a lawyer to do so. Id. § 14(2). In Upjohn Co. v. United States, the Supreme Court ruled on the issue of when privilege will attach to communications between a corporate client and its lawyer. 449 U.S. 383, 395-96 (1981). There, the Supreme Court concluded that privilege did protect communications between the company's employees and its general counsel regarding questionable payments made for the benefit of foreign government officials to secure government business. Id. at 386. In his concurring opinion, Chief Justice Burger spelled out the general rule set forth in the majority opinion:

[A] communication is privileged at least when, as here, an employee or former employee speaks at the direction of the management with an attorney regarding conduct or proposed conduct within the scope of employment. The attorney must be one authorized by the management to inquire into the subject and must be seeking information to assist counsel in performing any of the following functions: (a) evaluating whether the employee's conduct has bound or would bind the corporation; (b) assessing the legal consequences, if any, of that conduct; or (c) formulating appropriate legal responses to actions that have been or may be taken by others with regard to that conduct.

Id. at 403. When a communication is intended by the client to assist the lawyer in the effective legal representation of that client, it will be protected by the attorney-client privilege. See id. at 394.

46. MODEL RULES, supra note 5, R. 1.6.
47. See WIGMORE, supra note 41, at 392-93. Wigmore defines the scope of privilege: (1) Where legal advice of any kind is sought, (2) from a professional legal advisor in his capacity as such, (3) the communications relevant to the purpose, (4) made in confidence by the client, (5) are at his instance protected permanently from disclosure by either himself or his legal adviser, (6) except the protection be waived.

Id.

48. See id. at 391-92. The benefit of attaching privilege to the attorney-client relationship clearly outweighs the harm that would result if privilege did not attach. See id. at 392. The outcome of the balance is as follows:

It is obvious that little loss is caused to the investigation of facts by allowing the privilege; for the attorney could only report the statements made to him by the client, and by testimonial process the client himself (in civil cases) could equally be made to disclose his knowledge. On the other hand, the harm to the relation by requiring disclosure is also plain; for the attorney must be fully and candidly informed on the case by his client, and clients would tend to withhold such information if the law could immediately force the attorney to repeat it to the court.

Id.

As a result, courts have held that the rules of professionalism impose a broad duty of confidentiality on lawyers regarding information concerning their client's representation.  

For example, in *Harris v. Baltimore Sun Co.*, the court interpreted the scope of the confidential protection granted to "information relating to representation of a client" to preclude counsel from revealing public documents to the detriment of the client. The Maryland Court of Appeals first noted that the unprivileged nature of public records did not necessarily deprive them of the protection of confidentiality. The court interpreted Maryland Rule 1.6 as imposing a very broad obligation of confidentiality. Ultimately, the court held that Maryland Rule 1.6 "should be read to prohibit those needless revelations of client information that incur some risk of harm to the client." In his dissent, Judge Chasanow argued that a literal reading of the language of Maryland Rule 1.6 demonstrates the confidentiality rule was intended as a broad, absolute protection of information, with only enumerated exceptions allowing for disclosure of such information.

Both the majority rationale and Judge Chasanow's dissent support the broad confidentiality rule intended by the ABA's Model Rules of Professional Conduct. For example, the comment to Rule 1.6 states that the duty of confidentiality covers any information relating to the representation, regardless of its source. This language further supports disclosure between client and lawyer). These cases note the long-standing principle that "[t]he attorney-client privilege is founded on the necessity that a client be free to reveal information to an attorney, without fear of its disclosure, in order to obtain informed legal advice." E.g., Purcell, 676 N.E.2d at 438.

50. See, e.g., *Harris v. Baltimore Sun Co.*, 625 A.2d 941, 945 (Md. 1993); see also *MODEL RULES,* supra note 5, R. 1.6 cmt. 3 (stating that the rule of confidentiality should apply to all information relating to the representation, not only to matters communicated in confidence by the client).

51. *Harris,* 625 A.2d at 941.

52. *Id.* at 945. In that case, the court interpreted Maryland Lawyers' Rules of Professional Conduct Rule 1.6. See *MD. LAWYERS' RULES OF PROF'L CONDUCT* R. 1.6 (1987) (amended 2004). The pertinent language of the Maryland rules is the same as the Model Rules of Professional Conduct.

53. See *Harris,* 625 A.2d at 944.

54. *Id.*

55. *Id.* at 947 (quoting C. WOLFRAM, *MODERN LEGAL ETHICS* 301 (1986)). The court reversed and remanded the case to determine whether the information revealed was indeed harmful to the client. *Id.* at 948.

56. *Id.* at 949 (Chasanow, J., concurring in part and dissenting in part); see *infra* Part I.C (discussing the enumerated exceptions to the confidentiality rule).

57. See *Harris,* 625 A.2d at 944-45, 949.

58. *MODEL RULES,* supra note 5, R. 1.6 cmt. 3.
the conclusion that the ABA intended the rule’s broad scope of coverage.59

C. Limited Exceptions to the Rule of Confidentiality

Although states differ in their standards of professional conduct, each traditionally has allowed limited exceptions to the broad rule of confidentiality.60 A facial examination of Model Rule 1.6 allows a lawyer to disclose confidential information under limited circumstances.61 These exceptions arise when a public interest outweighs the social interest of upholding the confidentiality of attorney-client communications.62 Traditionally, Rule 1.6 created four exceptions allowing a lawyer to disclose confidential information: when there is a reasonably certain risk of death or substantial bodily harm;63 when a lawyer must secure legal advice regarding compliance with the Rules of Professional Conduct;64 when a lawyer needs to defend himself or herself against a claim by the client;65 or when a lawyer acts in compliance with the law or a court order.66

Although the prohibition against disclosing confidential information has been interpreted broadly,67 the exceptions were intended for narrow interpretation.68 Permissive disclosure under these exceptions occurs when a lawyer reasonably believes it necessary to accomplish the express purposes of the exceptions.69 Though a lawyer has discretion in

59. See id. The comment describes the confidentiality rule as “appl[y]ing not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.” Id.

60. See, e.g., CODE OF PROF’L RESPONSIBILITY DR 4-101(c)(1)-(4) (1970), reprinted in N.Y. STATE BAR ASS’N, HANDBOOK ON PROF’L ETHICS AND RESPONSIBILITY (1970) (allowing exceptions to the confidentiality rule in four instances: (1) where the lawyer has the consent of his or her client, but only after full disclosure to the client; (2) “when permitted under the Disciplinary Rules or required by law or court order”; (3) to prevent a crime; or (4) where the lawyer needs to defend himself against an accusation of wrongful conduct); see also United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950) (noting the distinction between confidential information and information that may be privileged because of the existence of an attorney-client relationship). The confidentiality rule prescribed by the Model Rules of Professional Conduct applies to confidential information, not necessarily to the attorney-client privilege. See MODEL RULES, supra note 5, R. 1.6.

61. 2003 RULES, supra note 11, R. 1.6(b).

62. See id. R. 1.6 cmt. 6.

63. See id. R. 1.6(b)(1).

64. See id. R. 1.6(b)(2).

65. See id. R. 1.6(b)(3).

66. See id. R. 1.6(b)(4).

67. See supra Part I.B.

68. See 2003 RULES, supra note 11, R. 1.6 cmt. 6.

69. See id. R. 1.6 cmt. 12.
determining the necessity of disclosure, the comments to Rule 1.6 outline specific factors he or she should consider in making this determination. 70 By laying out stringent guidelines, the comment to Rule 1.6 sets forth limitations for when the lawyer may actually make disclosures. This demonstrates the ABA's intent to apply a narrow interpretation to these exceptions. 71

Courts also have narrowly interpreted these exceptions. 72 For example, in In re Goebel, 73 the Supreme Court of Indiana reprimanded an attorney for violating Rule 1.6 of the Indiana Rules of Professional Conduct when he disclosed confidential information to prevent his own death or serious bodily harm. 74 In that case, the client revealed to his attorney his intent to kill an adverse witness. 75 After the client demanded that his attorney reveal the address of the witness, the attorney did so, in violation of the confidentiality of information rule. 76 The court noted that Indiana Rule 1.6(b) allowed the attorney to disclose confidential information to prevent criminal conduct, 77 but that in this case the lawyer had improperly exercised his discretion. 78 The court determined that the attorney's self-interest was not sufficient justification for his exercise of discretion under the narrow exception to the rule. 79 Indeed, the lawyer's use of discretion is only justified when used in furtherance of an express purpose set forth in the enumerated exceptions to the rule. 80 In coming to this conclusion, the court focused on the policy behind Rule 1.6, noting that "[t]he observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full

70. Id. R. 1.6 cmt. 13 (listing factors such as the nature of the attorney-client relationship, the relationship between the lawyer and those injured, and the lawyer's experience and involvement with the specific transaction).
71. Id. R. 1.6 cmts. 6-13.
72. See In re Goebel, 703 N.E.2d 1045, 1049 (Ind. 1998).
73. Id.
74. See id.
75. See id. at 1047. The witness was also a client of the attorney's law firm. Id. at 1046-47.
76. See id. at 1047.
77. See id. at 1048.
78. See id.
79. See id.; see also Plan Comm. in the Driggs Reorganization Case v. Driggs, 217 B.R. 67, 71 n.6 (1998) (stating that attorney's disclosures were proper under Rule 1.6(b)). The court in Driggs noted that an attorney seeking to justify disclosure of confidential information has a high burden of proof, while an attorney seeking to justify disclosure under a crime-fraud exception typically has a lesser burden. Id. (citing X Corp. v. Doe, 805 F.Supp. 1298, 1309 (E.D. Va. 1992)). The court then stated that the first step in determining whether disclosure is justified is determining whether it was "warranted under the higher standard arguably established by Rule 1.6(b)." Id. at 72 n.6.
80. MODEL RULES, supra note 5, R. 1.6(b).
development of facts essential to proper representation of the client, but also encourages individuals to seek early legal assistance.\(^{80}\)

**D. Corporate Fraud and Secondary Liability**

In recent history, several issues surrounding confidentiality and privilege have arisen in the corporate setting.\(^{82}\) Most significantly, cases of corporate fraud have raised the issue of lawyer liability for non-disclosure in cases where corporate clients participate in illegal activity.\(^{83}\) In 1994, the Supreme Court considered the scope of section 10(b) of the Securities Exchange Act of 1934 in the case of *Central Bank of Denver v. First Interstate Bank of Denver*.\(^{84}\) Section 10(b) makes it unlawful to commit fraud in the purchase or sale of securities.\(^{85}\) After examining the statutory text, congressional intent, and policy considerations, the Court held that section 10(b) required scienter evident in primary participation, but did not necessarily transfer liability to secondary participants in fraudulent sales or purchases of securities.\(^{86}\) Therefore, the Court held that no private cause of action was applicable against secondary actors, such as lawyers, accountants, and banks, for mere aiding and abetting.\(^{87}\)

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81. *In re Goebel*, 703 N.E. 2d at 1049.


83. *See infra* text accompanying notes 90-94, 103-11 (using Enron and WorldCom as examples of this phenomenon).

84. *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 166-67 (1994) (stating the issue in the case was to determine whether section 10(b) liability extends equally to those who merely aid and abet the violation as well as to those who actually engage in the manipulation or deception).

85. 15 U.S.C. § 78j (West Supp. 2003). Section 10(b) states:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce . . . To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe . . . .

*Id.* § 78j(b).


87. *Id.* (noting that a secondary actor may be held liable when that actor participates in a manipulation or deception on which a purchaser or seller of securities relies). Since the *Central Bank* decision, the courts have considered secondary liability in several cases. The circuits are currently split on what test should apply to determine when secondary actors may be held liable. *See WEIL, GOTSHAL & MANGES, SARBANES-OXLEY MATERIALS: IMPORTANT RULING CONCERNING LIABILITY OF SECONDARY ACTORS IN SECURITIES MARKETS, INCLUDING INVESTMENT BANKING, ACCOUNTING AND LAW FIRMS, http://www.weil.com/wgm/cWGMPubs.nsf/0/701cd6715a22b4dd85256c5b004a487e?Opendocument (Dec. 2002) [hereinafter SARBANES-OXLEY UPDATES].* The Court of Appeals for the Second Circuit applied the "bright line" test in *Wright v. Ernst & Young LLP*, 152 F.3d 169, 175 (2d Cir. 1998), to affirm the lower court's dismissal of appellant's
The Court in *Central Bank* held that unless a lawyer serves as a primary actor in the execution of the fraud, the Act does not subject the lawyer to liability.\(^8\) In 2003, this rule was superseded by statute, thereby increasing the potential for liability of secondary actors.\(^9\)

Two of the largest and most well-known cases of corporate fraud occurred in 2001 and 2002.\(^9\) In December of 2001, the Enron scandal spurred a massive investigation that led to the uncovering of several other instances of corporate wrongdoing.\(^9\) The Enron scandal involved the creation of illegal financial partnerships.\(^9\) Enron financial directors removed Enron's debt from its balance sheet and attributed it to these partnerships in order to attain good credit ratings.\(^9\) Due to these actions,
Enron shareholders, who had relied on the fraudulent information, incurred gigantic losses.\footnote{94} The scandal prompted several lawsuits raising the issue of accountability for such fraudulent practices.\footnote{95} In \textit{Newby v. Enron Corp.}, plaintiff shareholders brought a class action suit, not only against Enron's corporate directors and auditing firms, but also against secondary actors including Enron's outside counsel, Vinson & Elkins.\footnote{96} In assessing Vinson & Elkins' motion to dismiss, the issue before the court was whether a law firm was liable as a secondary actor for non-disclosure of fraudulent information to third parties.\footnote{97} Pursuant to the Model Rules of Professional Conduct and the Texas Rules of Professional Conduct, the court concluded that:

\textit{[P]rofessionals, including lawyers and accountants, when they take the affirmative step of speaking out, whether individually or as essentially an author or co-author in a statement or report, whether identified or not, about their client's financial condition, do have a duty to third parties not in privity not to knowingly or with severe recklessness issue materially misleading statements on which they intend or have reason to expect that those third parties will rely.\footnote{98}}

Based on this reasoning, the court denied Vinson & Elkins' motion to dismiss, thus allowing the possibility of law firm liability.\footnote{99}

\footnote{94. See Tom Petrino, \textit{Enron and Ivan Boesky: Symbols of Their Eras}, L.A. TIMES, Jan. 13, 2002, at C1. Enron's shareholders suffered substantial harm when its share price fell from ninety dollars per share to pennies. See \textit{id.} (noting that shares closed at sixty-seven cents on January 10, 2002). In addition to the injury to shareholders, thousands of Enron employees lost their jobs and retirement savings. \textit{Id.}}


\footnote{96. See \textit{Newby}, 235 F. Supp. 2d at 565. The complaint alleged that defendants were liable "for (i) making false statements, or failing to disclose adverse facts while selling Enron securities and/or (ii) participating in a scheme to defraud and/or a course of business that operated as fraud or deceit on purchasers of Enron's public securities during the Class period . . . ." \textit{Id.}}

\footnote{97. See \textit{id.} at 598.}

\footnote{98. See \textit{id.} at 609-10.}

\footnote{99. See \textit{id.} at 610. In this case, the lawyers may still be held liable if it is found that they participated in the material misrepresentation of information to the public. \textit{Id.} The SEC proposed this approach to the court in an amicus curiae brief. \textit{Id.} at 585-86; see also \textit{SARBANES-OXLEY UPDATES}, \textit{supra} note 87. The decision in \textit{Newby} sets a precedent for increasing the potential liability for secondary actors who aid corporations in fraudulent activity. See Kurt Eichenwald, \textit{A Higher Standard for Corporate Advice}, N.Y. TIMES, Dec. 23, 2002, at A1. The significance of this precedent is that it not only sidesteps the law laid down in \textit{Central Bank} by the Supreme Court in 1994, but it also represents a more significant change than any of the other reforms made in the aftermath of the massive corporate frauds that the U.S. market experienced. \textit{Id.}; see also Eichenwald, \textit{supra} (noting}}
Forty-one states already include in their rules of professional conduct a crime-fraud exception to the confidentiality rule.\textsuperscript{100} In cases where the lawyer participates in the perpetration of fraud, the attorney-client

that none of the new rules promulgated in response to the Enron debacle accomplished such an increase in secondary liability). The impact of this decision has yet to be seen. As it is still subject to appeal, the rule set forth by Judge Harmon in Newby only controls the law in the Southern District of Texas. \textit{See id.} However, because the rule is based on a theory that is being promoted by the SEC, and in light of the other reforms recently enacted, banks, law firms, and accounting firms should consider the factors that led to this decision in order to avoid similar increased secondary liability. \textit{See id.}

privilege does not extend to protect the illegal activity. Newby opened the door for further consideration of the duty to disclose when a lawyer not directly involved in the fraudulent practice discovers such a practice's occurrence.

Six months after the Enron debacle, another scandal raised this issue. In June of 2002, WorldCom announced a finding of improper accounting, amounting to a loss of $3.8 billion. Like the Enron scandal, the WorldCom scandal generated a large volume of lawsuits. In July of 2003, the U.S. District Court for the Southern District of New York ruled on the monetary settlement in SEC v. WorldCom. The court emphasized the need for changes in the standards of accountability, professionalism, and traditional structure of corporate governance. The court mandated a new corporate governance structure that included an active, independent board of directors, unique shareholder participation in nominating directors, and constraints on executive compensation packages. The court also required specialized training for employees in accounting, public reporting, and business ethics. Rather than simply punishing WorldCom, Judge Rakoff's opinion served to encourage positive future corporate behavior. Recognizing the need

101. See, e.g., N.Y. CODE, supra note 100; see also MODEL RULES, supra note 5, R. 1.6.
105. See, e.g., Goldstein v. MCI WorldCom, 340 F.3d 238 (5th Cir. 2003) (opining on action brought by shareholders against the bankrupt corporation alleging that the corporate officers acted knowingly or with severe recklessness when they failed to write off millions of dollars of uncollectible accounts); WorldCom, 273 F. Supp. 2d 431 (ruling on action brought by the SEC against WorldCom alleging massive accounting fraud); In re WorldCom, Inc., 263 F. Supp. 2d 745 (S.D.N.Y. 2003) (hearing action brought by WorldCom employees seeking recovery of funds invested in the company's 401(k) plan).
106. WorldCom, 273 F. Supp. 2d at 436 (approving the SEC's settlement proposal as an amount sufficient to punish and deter, while maintaining reasonableness in light of the complexity of the situation).
107. Id. at 431 (noting that "[t]his case raises fundamental questions about how market regulators, and the courts, should respond when criminals use the vehicle of a public company to commit a massive fraud").
108. Id. at 432. The court also encouraged WorldCom's commitment to implementing all internal controls required under the Sarbanes-Oxley Act by no later than June 30, 2004, one year earlier than required by the Act. Id. at 433.
109. Id. at 433. The court's rationale in approving the settlement was that the court had never seen a "large company accused of fraud that has so rapidly and so completely divorced itself from the misdeeds of the immediate past and undertaken such extraordinary steps to prevent such misdeeds in the future." Id.
110. See id. Judge Rakoff's opinion in WorldCom provides an example of what devices corporations should use to ensure future prevention of corporate fraud because the court balanced WorldCom's reparative actions against dissolution or liquidation.
to clean up the corporate governance system, Congress also responded to the wave of corporate scandals.\footnote{111}{See infra Part I.E (discussing the enactment and the impact of the Sarbanes-Oxley Act).}

\textbf{E. The Sarbanes-Oxley Act: Demanding a New Exception to the Confidentiality Rule}

In July of 2002, Congress enacted the Sarbanes-Oxley Act in response to the corporate fraud involving Enron and WorldCom.\footnote{112}{Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.A.).} The Act represented a major effort by Congress to restore investor confidence and to ensure a higher standard of corporate responsibility.\footnote{113}{See H.R. REP. NO. 107-610, at 1 (2002).} Congress recognized that corporate directors and auditing companies were not the only professions in need of improvement.\footnote{114}{148 CONG. REC. S6551 (daily ed. July 10, 2002) (statement of Sen. Edwards).} As a result, Senator Edwards proposed an amendment to the Sarbanes-Oxley Act to increase the ethical responsibilities of lawyers.\footnote{115}{Id. (noting that where corporate executives and accountants do what they are responsible for doing, but also that the lawyers do what they are responsible for doing as members of the bar and as citizens of the country).} On the floor of the Senate, he argued:

\begin{quote}
For the sake of investors and regular employees, ordinary shareholders, we have to make sure that not only the executives and accountants do what they are responsible for doing, but also that the lawyers do what they are responsible for doing as members of the bar and as citizens of the country.
\end{quote}

The resulting legislation not only called for major corporate reform,\footnote{116}{Id.} but also required the SEC to set minimum standards of professional conduct for attorneys of publicly traded corporations.\footnote{117}{15 U.S.C.A. § 7245 (Supp. 2003).}

\textbf{F. The ABA’s Adoption of the SEC Rules Created After Sarbanes-Oxley: New Confidentiality Exceptions}

attorneys appearing before the SEC. Even though several states have more stringent ethical standards than those promulgated by the SEC, the SEC standards were designed to preempt any conflicting or inconsistent standards set forth by any U.S. jurisdiction. One week later, on August 12, 2003, the ABA adopted the SEC standards affecting the legal profession.

The most significant changes in the new ABA Model Rules of Professional Conduct affect the lawyer’s permission to disclose confidential information. The ABA amended Rule 1.6 to permit two new exceptions to the rule of confidentiality. First, a lawyer may now disclose confidential information to prevent the commission of a crime or fraud in furtherance of which the client has used the lawyer’s services. Second, even if such a crime or fraud has already occurred, the lawyer may make disclosures to prevent, mitigate, or rectify any substantial injury that may result. The changes evolved from the rationale that

120. Id. pt. 205.1.
121. Id. Part 205.1 states that the SEC rules will preempt state rules. Id. In Washington, for example, the state bar reacted negatively to the new SEC rules. See Masters, supra note 26 (stating that the Washington State bar’s ethics opinion prohibits lawyers from disclosing confidential information unless such disclosure is authorized under state rules, not the new SEC rules).
122. See Pearlstein, supra note 14. Though the ABA’s Model Rules of Professional Conduct are not binding on states, they are intended to represent policy and standards that states may choose to adopt. See MODEL RULES, supra note 5, Preface, at vii (defining the Model Rules as “the adoption of professional standards that serve as models of the regulatory law governing the legal profession”); see also ABA REPORT, supra note 23, at 4 (noting that “the ABA is well positioned to draw public policy conclusions and to contribute to the ongoing debate on matters of public corporation governance that affect corporate responsibility”). State law has largely regulated the legal profession. In fact, each state has its own set of rules of professional conduct. See, e.g., N.Y. CODE, supra. The New York Code of Professional Responsibility largely adopted the Model Rules of Professional Conduct, though with some variation. Compare id. with MODEL RULES, supra note 5. California’s rules, on the other hand, are quite distinct from the Model Rules of Professional Conduct. Compare CAL. RULES OF PROF’L CONDUCT (1992) [hereinafter CAL. RULES] with MODEL RULES, supra note 5. For example, there is no express confidentiality rule included in the California Rules. CAL. RULES, supra. Rule 2-100 mandates that a lawyer “shall not communicate directly or indirectly” regarding the matter of representation with another party whom the lawyer knows to be represented by another lawyer without consent of the other lawyer. Id. R. 2-100.
123. See supra text accompanying notes 6-8.
124. See supra text accompanying note 9.
125. MODEL RULES, supra note 5, R. 1.6(b)(2). The rule only allows the lawyer to reveal confidential information “to the extent the lawyer reasonably believes necessary . . . ” Id.
126. Id. R. 1.6(b)(3). Connecticut, Hawaii, Massachusetts, Maryland, Michigan, Minnesota, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Texas, Utah, Virginia, Wisconsin, and Wyoming permit disclosure to mitigate or rectify substantial loss. CONN. RULES, supra note 100; HAW.
when a client commits such an abuse against the attorney-client relationship, that client "forfeits" the protection of the confidentiality rule.\textsuperscript{27}

Even when the client does not operate through the lawyer's services, if the lawyer becomes cognizant of activity "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."\textsuperscript{128} Rule 1.13 requires the lawyer to proceed by reporting such activity to a higher authority within the organization.\textsuperscript{129} Under Rule 1.13, if such higher authority does not take appropriate action, "then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure . . . ."\textsuperscript{130}

Traditionally, the rule only permitted the lawyer to withdraw or resign from representation if a higher authority within the corporation did not take measures to prevent the illegal activity.\textsuperscript{131} Furthermore, after withdrawal from representation, the lawyer was still bound by the rule of confidentiality under Rule 1.6.\textsuperscript{132} In contrast, the amended rule mandates a duty to report "up-the-ladder," while granting a new right to make disclosures under the rare circumstance that internal reporting does not stop the fraudulent practice.\textsuperscript{133}

\begin{thebibliography}{1}
\bibitem{lawyers} Rules, supra note 100; Mass. Rules, supra note 100; Md. Rules, supra note 100; Mich. Rules, supra note 100; Minn. Rules, supra note 100; Nev. Rules, supra note 100; N.J. Rules, supra note 100; N.C. Rules, supra note 100; N.D. Rules, supra note 100; Ohio Code, supra note 100; Okla. Rules, supra note 100; Pa. Rules, supra note 100; S.D. Rules of Prof'l Conduct R. 1.6 (2002); Tex. Rules, supra note 100; Utah Rules, supra note 100; Va. Rules, supra note 100; Wis. Rules, supra note 100; Wyo. Rules, supra note 100.

\textsuperscript{127} MODEL RULES, supra note 5, R. 1.6 cmt. 7. This is not an abandonment of attorney-client confidentiality. Indeed, in order to maintain the protection of the attorney-client privilege, the client need only discontinue the unlawful conduct to avoid the permissive disclosure. \textit{Id.}

\textsuperscript{128} Id.

\textsuperscript{129} See \textit{id}. The comment to the rule explains that, "[t]he organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation." \textit{Id.} cmt. 5.

\textsuperscript{130} Id. R. 1.13(c)(2).

\textsuperscript{131} Id. R. 1.13(c).

\textsuperscript{132} See \textit{id}. R. 1.6 cmt. 14 (stating that even after withdrawing from representation because the client was perpetrating a crime or fraud through the lawyer's services, the lawyer is still "required to refrain from making disclosure of the client's confidences, except as otherwise permitted by Rule 1.6").

\textsuperscript{133} Id. R. 1.13(b).
Amended Rule 1.13 represents a significant departure from the ABA’s prior position. The policy behind the old rule represented the traditional adherence to confidentiality within the attorney-client relationship in furtherance of effective legal representation. The amended rule implies that protecting the public from potential harm caused by future corporate fraud overrides the necessity of maintaining confidentiality between lawyers and clients.

II. THE IMPACT OF THE AMENDED RULES ON THE PRACTICE AND INVOLVEMENT OF CORPORATE LAWYERS WITH THEIR CLIENTS

The ABA’s adoption of the new disclosure rules has evoked heavy commentary and concern regarding the effect of the amended rules on the role of the lawyer. Much of the initial concern arose after the enactment of the Sarbanes-Oxley Act, one year before the ABA adopted the rules implementing the new standards. The rules, as adopted, provide the lawyer with more discretion and more leverage, thereby ensuring greater effectiveness in legal representation.

A. Plain Language and Legislative Intent of the Amended Model Rules of Professional Conduct

One of the concerns with the adoption of the new Model Rules of Professional Conduct regards their imprecise language. This imprecision evokes the greater concern surrounding lawyer liability in a case where the lawyer opts not to disclose confidential information.

134. See id.
135. See id. R. 1.6 cmt. 2 (noting the fundamental role of confidentiality in the client-lawyer relationship). Confidentiality is granted to information between clients and lawyers because the “lawyer needs this information to represent the client effectively, and, if necessary, to advise the client to refrain from wrongful conduct.” Id.
136. Id. R. 1.6 cmt. 7.
137. See supra text accompanying note 14.
138. See, e.g., Mona L. Hymel, Controlling Lawyer Behavior: The Sources and Uses of Protocols in Governing Law Practice, 44 ARIZ. L. REV. 873, 888 (2002) (discussing the increasing use of “protocols to provide the detailed ethical guidance that is missing in specialized law practice”).
139. MODEL RULES, supra note 5; see infra Part II.B.
140. See Conference Report, supra note 5 (discussing opponents’ argument that the vagueness in the language of the rules diminishes their value).
141. See, e.g., The Evolving Legal and Ethical Role of the Corporate Attorney After the Sarbanes-Oxley Act of 2002, 52 AM. U. L. REV. 655 (2003). The panel noted that:
There are a lot more questions than there are answers. I think all of us sitting here could talk at great length about all of the issues that were talked about in the first two panels, whether it is the desirability of federalization, federalizing the state ethics, making it mandatory, or you name it. We could all talk about it. See id. at 661.
The following analysis will demonstrate that these rules do provide clarity regarding when and to whom a practicing lawyer should disclose confidential information.\textsuperscript{142} It also will determine that the rules do not intend to impose additional liability on lawyers.\textsuperscript{143}

1. Amended Rule 1.13

Amended Rule 1.13(b) mandates that the lawyer proceed as he or she believes reasonably necessary when he or she “knows” that the client has engaged in unlawful conduct, and that substantial injury to the organization “likely” will result from such conduct.\textsuperscript{144} Though mandatory, the rule permits the lawyer to use his or her discretion in determining the necessity of such action to protect the best interest of the client.\textsuperscript{145} This mandate only requires that the lawyer proceed by reporting the illegal activity to a higher authority within the corporation.\textsuperscript{146} If the lawyer reasonably determines that it is not

\begin{enumerate}
\item \textsuperscript{142} See infra Part III (commenting that the improvements made to the rules of professionalism will clearly enhance the lawyer’s ability to effectively represent clients).
\item \textsuperscript{143} See infra Part II.A.1-2.
\item \textsuperscript{144} MODEL RULES, supra note 5, R. 1.13(b). The rule expressly requires that an objective standard be used to determine whether a lawyer has the requisite knowledge to come within the rule’s purview. See id. (implementing a standard of what “a reasonable lawyer, under the circumstances, would conclude”); see also 2003 RULES, supra note 11, R. 1.0(f) (stating that “knowledge may be inferred from circumstances”). Additionally, lawyers cannot “shut their eyes to what was plainly to be seen.” ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 346 (Rev), at 801:102 (1982); 2003 RULES, supra note 11, R. 4.2 cmt. 8. Once it is determined that a lawyer has knowledge of the unlawful conduct and before Rule 1.13(b)'s mandate to act becomes effective, the lawyer must determine that the unlawful conduct is likely to cause substantial injury. MODEL RULES, supra note 5, R. 1.13(c)(2). As compared with Model Rule 1.6, “likely” provides a looser standard than “reasonably certain.” See id. R. 1.6. Therefore, the mandate in Rule 1.13(c) would require lawyer action even if the situation does not qualify under the new Rule 1.6 exceptions. But in order for the lawyer to permissibly reveal confidential information beyond the highest authority of the organization, the rules require that the lawyer meet the “reasonably certain” standard. See id. R. 1.13(c).
\item \textsuperscript{145} MODEL RULES, supra note 5, R. 1.13(b). This language does not differ from the old rule. 2003 RULES, supra note 11, R. 1.13(b). The drafters used mandatory (rather than permissive) language, requiring the lawyer to act unless he or she does not reasonably believe that action is in the best interest of the client. MODEL RULES, supra note 5, R. 1.13(b). The comments to Rule 1.13 define the “organization” as a legal entity. \textit{Id}. at R. 1.13 cmt. [1]. The lawyer must use his or her discretion to determine what is in the best interest of that entity, not the best interest of a single, organizational constituent. \textit{See id}. R. 1.13 cmts. 1-2; see supra Part I.A (discussing the organizational client as a corporate entity rather than the independent constituents).
\item \textsuperscript{146} \textit{Id}. R. 1.13(b)(3).
necessary to take action, then the requirement to report the misconduct to higher authority within the organization will not apply.\textsuperscript{147}

The rule outlines how the lawyer may proceed if the highest authority does not act pursuant to the lawyer's advice in addressing the problem.\textsuperscript{148} The drafters used permissive language for this part of the rule, thereby allowing lawyers to decide whether to report activity to outside authorities.\textsuperscript{149} Moreover, this part of the rule does not become effective unless the highest authority fails to act "in a timely and appropriate manner" to stop the fraudulent misconduct.\textsuperscript{150} It is only in this situation that amended Rule 1.13(c)(2) permits the lawyer to disclose confidential information relating to the representation that he or she believes necessary to protect the organization from substantial injury.\textsuperscript{151} This permission extends beyond the scope of the new exceptions to Rule 1.6.\textsuperscript{152} However, the lawyer's discretion to disclose is limited still by his or her loyalty to the client and the duty to promote the client's best interest.\textsuperscript{153} The comment to Rule 1.13 provides a formulaic evaluation to guide the lawyer in his or her determination of the proper course of action with respect to reporting confidential information.\textsuperscript{154}

The legislative intent behind this rule becomes apparent in these limitations. The rule serves the following goal:

\textsuperscript{147} Id. R. 1.13(c); see also id. R. 1.13(b) (defining what body of the corporation is the appropriate higher authority to whom the lawyer should report).

\textsuperscript{148} Id. R. 1.13(c).

\textsuperscript{149} See id. The rule states that 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." Id. (emphasis added).

\textsuperscript{150} See id. R. 1.13(c)(1).

\textsuperscript{151} See id. R. 1.13(c)(2).

\textsuperscript{152} See id.

\textsuperscript{153} See id. R. 1.13(b); see also id. R. 1.13(d) (limiting the circumstances that trigger the exception). For example, Rule 1.13(d) states that in a case where the lawyer represents an organization during the investigation of an alleged violation of the law, the exception does not apply. Id.

\textsuperscript{154} See id. R. 1.13 cmt. 3. The comment lays out three factors that the lawyer should consider in determining whether disclosure is consistent with the best interest of the organization. See id. Specifically, the lawyer should consider circumstances at the time of determination, such as the lawyer's expertise, the time constraints under which the lawyer is working, and the lawyer's previous experience with the client. Id. Once the lawyer has decided to disclose information relating to the violation, the lawyer should consider the severity of the violation and its consequences, the motive of the person(s) acting illegally, the person's responsibility within the corporation, the organization's policies on the handling of such conduct, and any other relevant considerations. See id. R. 1.13 cmt. 4. The lawyer has the option to either immediately report to the higher authority or to recommend that the constituent reconsider the action. Id.
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.  

In furtherance of this goal, Rule 1.13 encourages the lawyer's use of discretion in determining whether it is necessary to report a violation. Rule 1.13 does not attach liability to lawyers except where they unreasonably fail to act.

2. Rule 1.6(b)

The adoption of Rule 1.13 was slightly less controversial than that of Rule 1.6(b). Rule 1.13 amended the procedure for disclosure, while

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155. AM. BAR ASS'N, supra note 13, at 6.
156. See supra notes 148-54 and accompanying text.
157. MODEL RULES, supra note 5, R. 1.13 cmt. 4; see also id. R. 1.6 (stating that if a lawyer "reasonably" concludes that the "best interest of the organization does not require" that the matter "be referred to a higher authority," then the attorney has met his or her ethical obligation).
158. See Conference Report, supra note 5 (inferring from the divided vote of the House of Delegates that adoption of the amended rules did involve controversy).
159. MODEL RULES, supra note 5, R. 1.13. The relevant portions of the new rule state that:

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 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.

Id. R. 1.13(b) (emphasis added). The rule then states:

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.

Id. (emphasis added). Finally, Rule 1.13(c) describes the lawyer's options if his or her conduct, as mandated under Rule 1.13(b), does not succeed in preventing the client's unlawful conduct. Specifically, Rule 1.13(c) states:

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
Rule 1.6 added two new exceptions to the confidentiality rule.\(^\text{161}\) Traditionally, the exceptions to the confidentiality rule in 1.6(b) have been interpreted narrowly.\(^\text{161}\) Drawing on that traditional interpretation, the new exceptions to Rule 1.6 apply only in limited circumstances.\(^\text{162}\)

Generally, the exceptions apply when the client actively uses the lawyer as a vehicle to facilitate fraud.\(^\text{163}\) Specifically, Rule 1.6(b)(2) permits disclosure to prevent illegal fraud when the lawyer deems the crime or fraud "reasonably certain to result in substantial injury to the financial interests or property of another."\(^\text{164}\) Additionally, Rule 1.6(b)(3) grants a right to disclose even if the illegal activity has already run its course, and when the disclosure may "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."\(^\text{165}\) The rule allows for disclosure to be subject to the lawyer's broad discretion.\(^\text{166}\) In fact, Rule 1.6(b), as amended, does not

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  \item 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.
  \item Id. R. 1.13(c) (emphasis added).
  \item 160. MODEL RULES, supra note 5, R. 1.6(b)(2-3); see also infra Part II.B (noting that the interpretations of the new exceptions to the confidentiality rule are no different than the pre-existing exceptions). The Rule 1.6 exceptions are still narrowly construed and arise only in limited circumstances. See infra Part II.B.
  \item 161. See supra Part I.C (discussing the narrow interpretation of exceptions to the confidentiality rule).
  \item 162. See ABA REPORT, supra note 23 at 44 (stating that privilege should only be broken when the integrity of the profession or its importance to society is in jeopardy).
  \item 163. MODEL RULES, supra note 5, R. 1.6(b)(2), (3). Both exceptions are limited to the prevention of crime or fraud "in furtherance of which the client has used or is using the lawyer's services." Id.
  \item 164. Id. R. 1.6(b)(2).
  \item 165. Id. R. 1.6(b)(3).
  \item 166. Id. R. 1.6(b)(2). The lawyer may use his or her discretion to determine whether "substantial injury" is "reasonably certain" to result. Id. R. 1.6(b)(2). Rule 1.0(h) defines the scope of the lawyer's discretion to include a range of conduct that a "reasonably prudent and competent lawyer" would engage in. Standards of Professional Conduct for Attorneys Appearing and Practicing Before the Commission in the Representation of an Issuer, 17 C.F.R. pt. 205.2(l) (2003) (citing MODEL RULES, supra note 5, R. 1.0(h)). The elasticity inherent in the language of the rule represents the intent to grant the lawyer in this situation maximum discretion. See AM. BAR ASS'N, supra note 13. According to the American Bar Association the rules were:
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      \item [I]ntended 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.
    \end{itemize}
  \item Id.
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There is no language defining what constitutes a "substantial injury" under the rule. See MODEL RULES, supra note 5. Still, the choice of language in this rule, along with its
intend for the lawyer to be held liable if he or she reasonably, however improperly, determines disclosure unnecessary.\textsuperscript{167}

The comment to Rule 1.6 states that the exceptions to the general prohibition against disclosing confidential information are limited to the "extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud."\textsuperscript{168} Just as lawyers used their discretion under prior exceptions to disclose confidential information, lawyers may continue to use their discretion in determining the necessity of disclosure under the new exceptions.\textsuperscript{169} However, they still may disclose information only under explicit, limited circumstances as described in the language of the rule.\textsuperscript{170} Naturally, line-blurring occurs with a grant of broader discretion, but the limited nature of the circumstances in which the new exceptions arise should offer guidance to lawyers in the application of the new rules.\textsuperscript{171} Because the exceptions are non-mandatory, Rule 1.6(b) does not place liability on the lawyer acting under the new exceptions.\textsuperscript{172}
B. The Practical Impact of the New Rules on Corporate Lawyers

Already, companies, lawyers, and law firms have reacted to the new rules. For example, on July 18, 2003, prior to the adoption of the rules, Fried, Frank, Harris, Shriver & Jacobson LLP published a memorandum entitled SEC “Up-the-Ladder” Reporting Requirement: Practical Suggestions for In-House Attorneys to describe how internal and outside counsel should comply with the new rules. Specifically, the memorandum suggested that in implementing new compliance policies, corporations should consider the development of qualified legal compliance committees to deal with evidence of criminal or fraudulent practice. Significantly, this memorandum concluded that the impact of the new rules requires each company to “devise appropriate procedures based on its own culture, structure and needs . . .”

In a newsletter sent out among its firm and clients, Venable LLP, announced the goals it hopes to achieve through the restructuring of the

173. See Masters, supra note 1 (reporting that the ABA rules were adopted on August 11, 2003).


175. See id. Because the establishment of QLCCs may serve to reduce attorney liability, it is not surprising that law firms recommend their implementation. See Fisch & Gentile, supra note 20. Fisch and Gentile note that once a lawyer has reported a matter to the QLCC, the lawyer is relieved of all further obligations under the SEC rules. Id. at 521, 536. Then, the QLCC becomes solely responsible for compliance with the rules. Id. at 536-37. The SEC’s creation of the QLCC as an alternative mechanism of preventing corporate misconduct is itself controversial. Id. at 534. Though it helps to relieve lawyers of responsibility under the rules, the QLCC may not be the most effective governance structure. Id. at 541-45. For example, the QLCC is composed of independent directors who may have limited incentives to pursue actively the best interests of the corporation and its shareholders. Id. at 558-59. Also, because of the great potential for liability that flows from the responsibility of the QLCC, it may be difficult for corporations to attract qualified directors to serve on the committee. See id. at 541-42. Fisch and Gentile note that “as the burdens associated with being a director increase, . . . success in attracting and retaining qualified directors decreases.” Id. at 541. Despite these potential problems, several companies have in fact developed qualified legal compliance committees, as “Up-the-Ladder” suggests. See “UP-THE-LADDER,” supra note 26, at 6-7. For example, the Board of Directors for Sun Microsystems announced that Sun’s Audit Committee will serve as the company’s Qualified Legal Compliance Committee. See SUN MICROSYSTEMS, QUALIFIED LEGAL COMPLIANCE COMMITTEE, http://www.sun.com/company/cgov/legalcompliance.html (last visited June 14, 2004). In compliance with SEC rules, the Board permits attorneys to report to that committee in lieu of reporting to Sun’s management. Id.; see also REYNOLDS AMERICAN INC., QUALIFIED LEGAL COMPLIANCE COMMITTEE CHARTER, http://www.reynoldsamerican.com/gov/charters/legal.asp (adopted July 28, 2004) (authorizing the QLCC to receive and consider reports of material violations under part 205 of the SEC rules, investigate those reports, make recommendations to determine an appropriate response, and notify the SEC if R.J. Reynolds “fails in any material respect to implement an appropriate response that the QLCC has recommended for adoption by [RAI]”).

system of corporate governance required under the Sarbanes-Oxley reforms. The newsletter discussed the importance of the corporate lawyer in guiding executive management and boards of directors in their new roles and responsibilities. It also outlined the role of the corporate lawyer as a watchdog. Noting the potential conflicts, the newsletter posited that it is possible for lawyers to maintain these new roles and responsibilities without sacrificing the confidences of their clients:

The leadership challenge for corporate counsel lies in balancing a supportive, "can-do" executive leadership attitude with an unwavering sense of ethical, professional and legal responsibility. Our leadership challenge lies in using wisdom, judgment, diplomacy and creativity to accomplish legitimate business objectives through honest and lawful means. Corporate counsel must operate—and be perceived—as both aggressive business leaders and protectors of the business.

By following this model, lawyers will capably execute their responsibilities as required by the new rules.

III. APPROPRIATE PROCEDURES IMPLEMENTED IN COMPLIANCE WITH THE NEW RULES ENHANCE THE LAWYER-CORPORATION RELATIONSHIP WITHOUT UNDERMINING THE CONFIDENTIALITY RULE

The recent failures in our system of corporate governance directly resulted in the enactment of the Sarbanes-Oxley Act, SEC Rule 17 C.F.R. part 205, and the ABA's adoption of the amendments to Rules 1.6 and 1.13 of the Model Rules of Professional Conduct. As noted earlier, corporate governance is vulnerable when faced with conflicts of interest between different constituencies within the corporation. The structure of corporate governance was designed to place a check on the acts of each individual constituent to ensure actions are in the best interests of the corporation as an entity. Because the lawyer does not

178. See id.
179. Id. at 7.
180. Id.
181. See id.
182. See supra text accompanying notes 6-13.
183. See supra Part I.A.
184. See ABA REPORT, supra note 23, at 2 (discussing the need for reform in the area of internal corporate governance). The report addresses corporate governance, as well as the issue of the professional conduct of lawyers, "in the context of the system of checks
represent individual constituents, but rather the corporation as an entity, granting the lawyer broader discretion to determine how best to serve the interests of that corporation will enable the lawyer to represent his or her client more effectively. In turn, this discretion will enable the lawyer to strengthen corporate responsibility.

Implementing compliance policies and independent, qualified legal-compliance committees within corporations will encourage the establishment of more veins of communication within the corporation. Greater internal communication will enhance the lawyer's ability to fulfill his or her role as counselor, thereby promoting greater corporate compliance with the law. These positive changes to the corporate governance structure ultimately will increase investor protection and restore investor confidence in corporate America.

To reach this end, the rules permit lawyers to disclose confidential information relating to the representation of their clients in a broader number of circumstances. Although increased disclosure may threaten the confidentiality of the attorney-client relationship, greater harm may result without an increase. Furthermore, the rules allowing for increased disclosure do not broaden lawyers' liability. Because the rules are discretionary, the lawyer should balance the interests of the client and the duties owed to the client when electing disclosure as the proper course of action. Only if disclosure best serves the client's

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\text{and balances designed to enhance the public trust in corporate integrity and responsibility.}^{185} \text{ See supra Part II.A.}
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\text{186. See supra Part II.A.}
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\text{187. See ABA REPORT, supra note 23, at 28, 37; see also "UP-THE-LADDER," supra note 26, at 3 (recommending regular meetings between independent directors and legal counsel in order to increase the flow of information and analysis to those directors).}
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\text{188. See ABA REPORT, supra note 23, at 36-37.}
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\text{190. See supra Part II.A.}
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\text{191. See supra Part II.A.}
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\text{192. See MODEL RULES, supra note 5, preamble (20) (stating that "[t]he Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability."). Imposing secondary liability on attorneys under the new rules would serve to undermine the attorney's ability to effectively represent his or her client. See supra note 88. Also, the drafters are sensitive to the negative social impact that imposing such liability would have. See id. (discussing the court's concern that high litigation costs associated with such liability would hinder the free flow of professional advice).}
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\text{193. See H. Lowell Brown, The Dilemma of Corporate Counsel Faced with Client Misconduct: Disclosure of Client Confidences or Constructive Discharge, 44 BUFF. L. REV.}
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interest should the lawyer reveal confidential information pursuant to Rule 1.13. Granting the lawyer discretion to disclose confidential information in the best interest of the organizational client serves to enhance the public's trust and confidence.

IV. CONCLUSION

The ABA's adoption of the SEC rules promulgated under the authority of the Sarbanes-Oxley Act is a positive development for the legal profession. The limited exceptions to the confidentiality rule in cases where the client illegally uses the lawyer's services enable lawyers to exercise ethical discretion to assist their clients. By promoting a higher ethical standard within the corporate environment, lawyers will encourage corporations to act in the best interest of the public. By providing corporate lawyers discretion, rather than a mandate to reveal confidential information, the rules augment effective representation and protect the public good without undermining the lawyer-client relationship. By granting corporate lawyers this discretion, the United States makes progress toward ensuring an environment of corporate accountability.

777, 807-11 (1996). Brown discusses the difficulty in this balance, stating that the corporate lawyer will have to determine:

[W]ho commands his primary loyalty and how he can adequately fulfill his duties and responsibilities to each constituent in the face of their conflicting interests. Because the Model Code and the Model Rules fail to explain how a corporate lawyer can determine the "entity's" interest in such situations, the lawyer must confront competing loyalties and duties of confidences to the various groups with little or no guidance as to how he might resolve the conflicts.

See id. at 778 n.1.

194. See MODEL RULES, supra note 5, R. 1.13.

195. See 2003 RULES, supra note 11, R. 1.6 cmt. 2 (stating that trust is "the hallmark of the client-lawyer relationship").