CORPORATE PRACTICE: FROM THE MODEL CODE TO THE MODEL RULES TO THE STATES

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I. INTRODUCTION

Until recently, attorneys practicing corporate law had relatively uniform ethical obligations throughout the various jurisdictions within the United States. This uniformity came about because virtually all of the states had adopted similar ethical standards for corporate attorneys based on one extremely ambiguous model. The states are now revising their ethical standards based on a less ambiguous model. The result is less ambiguity, but less uniformity.

The highest court of each state promulgates a code of behavior for its lawyers. Since 1970, in virtually every state, this code was based on the American Bar Association's (A.B.A.) Model Code of Professional Responsibility.¹ Both the ABA and the individual states adopted the original Code with little debate and minor revisions. In 1983, after several years of lively debate, compromise, and revision, the ABA replaced the Model Code with the Model Rules of Professional Conduct.²

The debate and disagreement did not end with the ABA's adoption of the Model Rules. On the contrary, the discussion has intensified as the forum moved from the ABA to the states, and the Model Rules changed upon adoption by the states from mere models to binding rules. At the present time, thirty-three states have revised their codes

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¹ Model Code of Professional Responsibility (1981) [hereinafter Model Code]. The Model Code was adopted by the House of Delegates of the ABA August 12, 1969, to become effective for ABA members on January 1, 1970. It has been amended several times since the original date.


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based on a review of the new model. In contrast to the manner in which most states accepted the Model Code with little or no revision, many states are not accepting the Model Rules without revision. Instead, many states are examining the model carefully and are revising some rules in order to meet the needs of the individual state. The adopted rules are far from uniform.

This article will examine the Model Rules that relate specifically to corporate practice. The first section will review the major provisions of the Model Code that relate to corporate law, in order to set out both the theory behind these provisions and their limitations. The next section will apply a similar analysis to two provisions of the Model Rules, Rules 1.13 and 1.6. The third section will focus on how the individual states are accepting, rejecting, or revising the major provisions of the Model Rules that deal with corporate practice. Finally, the article will demonstrate how the rules adopted by several states may be inconsistent with the theory used for creating the model.

II. THE MODEL CODE OF PROFESSIONAL RESPONSIBILITY

The 1969 version of the Code of Professional Responsibility is virtually a redraft of its predecessor, the Canons of Professional Ethics, which were adopted in 1908. To a large extent, those 1908 Canons were a redraft of the first formal lawyers’ code—the Alabama Code of Ethics—adopted by that state in 1887. The Alabama Code was based on lectures delivered by a Philadelphia judge, George Sharswood, during the 1850’s. Thus to a large extent, the 1969 Model Code emerged as an outdated restatement of the ethical principles that existed over a century ago. The problem was compounded by the fact that there was very little discussion about the continuing relevancy of these principles at either the national or state levels. In addition, there was no consideration about the format in which to place these principles.

Clearly the practice of law today is far different than it was during the last century. Technology represents only a small part of this change. More fundamental is the fact that lawyers today no longer represent just individuals nor do they practice primarily alone, representing only a few clients. Additionally, the practice of law today goes well beyond simply acting as a litigator or conveyancer.

These changes in the practice of law are especially noticeable to a lawyer representing a business client. In earlier times a lawyer repre-
sented an individual engaged in business, rather than representing the business itself. Most individuals engaged in business operated as sole proprietors. Partnerships were viewed as truly complex organizations. Moreover, the first modern business corporations act was not adopted until 1875. Thus, at the time when the ethical principles that provided the basis for the Model Code were formed, lawyers were only beginning to represent organizations, and it was rare for them to be practicing law in organizations. The Model Code provides little ethical guidance for the modern lawyer practicing corporate law.

The Model Code does address the major concerns that pertain to the obligations that lawyers have to all clients, including the corporate client. Sections deal with client confidences, loyalty to the client, disclosure of confidential information, and conflicts of interests. Nevertheless, even the principles found in these sections do not relate directly to the unique ethical dilemmas that frequently arise in corporate representation.

The Model Code provisions that address these unique corporate problems are Ethical Consideration (EC) 5-18, EC 5-24, and Disciplinary Rule (DR) 5-107(B). These provisions all fall under Canon 5 of the Code: A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client. These provisions are not only limited in scope, but also limited in enforceability. The most important of these three provisions, EC 5-18, is an Ethical Consideration and not a Disciplinary Rule. Ethical Considerations are aspirational in character and represent the objectives toward which all lawyers must strive. Violations of these provisions will not lead to discipline. In contrast, the Disciplinary Rules are mandatory in character and state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.

Due to the limited enforceability and inherent ambiguity of its provisions, the Model Code provides little guidance for the practicing lawyer. Ethical Consideration 5-18 provides:

A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and his professional judgment should not be influenced by

9. Id.
the personal desires of any person or organization. Occasionally a lawyer for an entity is requested by a stockholder, director, officer employee, representative, or other person connected with the entity to represent him in an individual capacity; in such cases the lawyer may serve the individual only if the lawyer is convinced that differing interests are not present.10

The thrust of this provision is that a lawyer retained by a corporation, or by any other organization recognized by law as a separate entity, represents the entity itself and not the individuals who own or control it. Even though the entity can act only through its duly authorized constituents, the lawyer owes his or her loyalty and professional duties to the entity and does not represent its owners or managers individually. This principle remains at the core of corporate representation, even though an organization is composed of various strata of personnel, including shareholders, board members, and managers through whom counsel interacts.11

The central question is who is the client in a corporate setting? The simplified answer, according to the Model Code, is that the entity is the client. This answer is pat and satisfyingly high-minded, but insufficient in dealing with the complex nature of real corporate life.12

In the real world, the lawyer who represents a corporation must work with those who own or control the entity. Even though the professional codes instruct that the organization is the client, the lawyer may view some of these individuals, or all of them collectively, as clients. The effective lawyer maintains relationships with these individuals that lead them to confide in the lawyer and act on the lawyer's advice.13 When the goals of all are in harmony with the good of the entity, these relationships pose no difficulties. However, when conflicts arise that present legal dilemmas, the lawyer, according to the Ethical Consideration, may have to repudiate individual relationships for the good of the corporation.

This puts the lawyer in an interesting ethical dilemma because a lawyer must represent the entity as distinct from those agents within the entity. This is problematical. Because the entity can only act through its constituents, the lawyer's duty to the entity may be indistinguishable from the lawyer's duty to those agents who are acting on behalf of the organization. Yet the lawyer cannot represent management when the lawyer feels that management is not truly acting for the

13. Id. at 733.
benefit of the entity.

The entity concept arises from two branches of law \(^{14}\) and carries forward the general legal fiction that the corporation is a separate person. First, substantive corporate law characterizes an organization as a separate person capable of entering into relationships. The lawyer represents this fictitious person. Second, the law of agency defines the relationship between principal and agents, as well as the relations between agents of a common principal. \(^{18}\) The lawyer is an agent serving the organization as principal. Corporate law and agency law are distinct branches of law. Nevertheless, the legal principles found in these two branches of law create the basis for many of the lawyer’s ethical problems in the corporate area.

The predominant Anglo-American judicial view has traditionally been that the corporation is indeed a fictitious entity endowed with separate legal characteristics that are often identical to those of natural persons. \(^{16}\) The corporation is usually regarded as a “person” unless the subject matter or constitutional or statutory provisions limit its application to natural persons. Under the United States Constitution, the corporation is protected against unreasonable searches and seizures, deprivation of liberty or property interests without due process of law, and denial of equal protection of the laws. \(^{17}\) In addition, the corporation has been held to be a “client” entitled to invoke the attorney-client privilege. \(^{18}\)

The lawyer is an agent of the corporation. As an agent, the lawyer’s obligations run to the principal, the corporation, and not to the individual officer who retained the lawyer. \(^{16}\) Nevertheless, the lawyer must work with other individuals who are also agents of the corporation. Even though these agents have a common principal, the lawyer represents an independent voice within the corporation. This creates no major difficulty as long as corporate affairs are running smoothly and the objectives of all the agents and the corporation are the same. In this situation the lawyer has little difficulty in representing the entity in accordance with Ethical Consideration 5-18, because the client is obviously identified. On the other hand, when a serious intra-corporate dis-

\(^{14}\) ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, 143 (1984) [hereinafter ANNOTATED MODEL RULES].

\(^{15}\) Id.


\(^{18}\) Id. at 150.

\(^{19}\) See, e.g., Lane v. Chowning, 610 F.2d 1385, 1389 (8th Cir. 1979); Diversified Industries, Inc. v. Meredith, 572 F.2d 596, 608 (8th Cir. 1977).
pute erupts and individuals or factions take conflicting positions, the identity of the client is not so readily apparent. The potentially diverse positions taken by a variety of company agents put the lawyer in a difficult position.

The remaining Model Code provisions that reinforce the entity theory found in Ethical Consideration 5-18 do little to assist the lawyer in the precarious position of representing a corporation during an intra-corporate conflict. Disciplinary Rule 5-107(B) states that a “lawyer shall not permit a person who recommends, employs or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.”20 The obvious danger in such instances is that the lawyer’s loyalty to the corporate client may be influenced by the interests or objectives of the fee-payer. Agency principles again play a part in this situation. When an agent for a principal hires another agent, the second individual does not become a sub-agent for the first. Instead, the two individuals become co-agents and owe allegiance to their common principal, rather than to one another. The lawyer is not hired “by” the officers or board, but “by” and “for” the corporation acting through those agents.21 Nevertheless, a lawyer may have difficulty convincing an immediate supervisor that this theory is correct.

Additional language to support the independence of the lawyer is found in Ethical Consideration 5-24, which states:

Although a lawyer may be employed by a business corporation with non-lawyers serving as directors or officers, and they necessarily have the right to make decisions of business policy, a lawyer must decline to accept direction of his professional judgment from any layman. . . . A lawyer should not accept employment from such an organization unless the board sets only broad policies and there is no interference in the relationship of the lawyer and the individual client he serves.22

Ethical Consideration 5-24 does not provide that the lawyer representing the corporation can refuse to be bound, directed or supervised by any single person or collection of persons within the corporation. On the contrary, the lawyer must accept direction from persons in the corporation who are lawfully granted the power to give direction.23

Ethical Consideration 5-24 also provides that when the lawyer is employed by an organization “a written agreement that defines the relationship between him and the organization and provides for his independence is desirable since it may serve to prevent misunderstanding as

23. C. Wolfram, supra note 12, at 733-34.
to their respective roles.\textsuperscript{24} Rarely are such agreements made.\textsuperscript{25} Yet even such agreements may not resolve the problems that arise when the lawyer disagrees with the actions of those duly authorized to act. In addition, such agreements may not allow the lawyer to reveal those actions to others outside of the organization.

The entity concept was re-examined during the discussions leading to the ABA adoption of the Model Rules of Professional Conduct in 1983. A number of alternatives were examined and discarded.\textsuperscript{26} In the end, the traditional view of the entity as the client was reinforced by a generally applicable concept of client-lawyer relations that can be used whenever the question of client identity is at issue.\textsuperscript{27} In addition, the Commission and the ABA House of Delegates re-examined the issue of disclosure of confidential information. In contrast with the entity concept, the disclosure provisions were modified significantly. These areas will be examined in the next section.

III. THE MODEL RULES OF PROFESSIONAL CONDUCT

The Code of Professional Responsibility came under attack even before its adoption in 1969. The critics attacked from a variety of conflicting positions.\textsuperscript{28} One group wanted to make the Model Code clearer and more responsive to the realities of modern practice. Other critics cited the need for more specific guidance in certain problem areas. The ABA leadership concluded that there was a need for a thorough review of this area.\textsuperscript{29}

The debate went on from 1977 until the final draft of the Model Rules was adopted by the House of Delegates in 1983. The early drafts of the proposed rules created turmoil and division within the ABA, and to some extent, outside it.\textsuperscript{30} The final document is a product of considerable compromise, an abandonment of extreme changes, and to some extent, a maintaining of the status quo.

The debate was especially lively over several issues that have a direct impact on the corporate lawyer. Some drastic changes were suggested in early proposals. However, like other sections of the Model Rules, the final version of the corporate sections was modified to be acceptable to a larger part of the corporate bar.\textsuperscript{31} Although the Model

\textsuperscript{24} Model Code EC 5-24.
\textsuperscript{25} Evans, The Organization as Client, 68 A.B.A. J. 814 (1982).
\textsuperscript{26} See infra notes 28-31 and accompanying text.
\textsuperscript{27} G. Hazard & W. Hodes, supra note 21, at 231.
\textsuperscript{28} C. Wolfman, supra note 12, at 60.
\textsuperscript{29} Id. In August, 1977, ABA President Williams B. Spann, Jr. appointed the late Robert J. Kutak of Omaha, Nebraska chairman of the Special Commission on Professional Standards, also referred to as the "Kutak Commission."
\textsuperscript{30} Id. at 61.
\textsuperscript{31} Riger, The Model Rules and Corporate Practice-New Ethics for a Competi-
Rules are more accommodating to modern corporate practice than the Model Code, the new version reaffirms the entity theory.

Even though Rule 1.13 adheres to the theory set out in Ethical Consideration 5-18 of the Model Code, the Rule provides very specific guidance for the lawyer to follow when engaged in an internal struggle over the direction that the entity is taking. The Rule also imposes limitations on joint representation and communication with the constituents of the organization. Rule 1.13 defines how the attorney can represent the entity within the internal structure of the organization. In addition, Rule 1.6 defines the limitations placed on the attorney when operating outside of the structure. Specifically, Rule 1.6 sets limits on the lawyer's disclosure of information to others outside of the organization. These two Rules will now be examined.

A. **Rule 1.13: Organization as Client**

By adopting Rule 1.13, the ABA implicitly rejected a number of alternative viewpoints regarding the identity of the client proposed over the years.\(^{39}\) One theory held that the client consisted of the constituents of the organization, rather than the organization itself.\(^{39}\) The lawyer could represent all constituents as long as all of the interests were not in conflict. If a conflict occurred, joint representation could not continue. A second viewpoint held that in representing the corporation the lawyer was "counsel for the situation," and should act for the benefit of all in the interests of justice.\(^{39}\) Again, this would work as long as the interests were not in conflict.

These two viewpoints have in common the concept that the lawyer represents the group, both the constituents and the entity. In other words, the entity shares a lawyer with certain leading individuals, such as directors and officers.\(^{39}\) This reflects the reality of corporate representation, because the lawyer must look to individuals with authority, and not to a legal fiction, for direction in the representation. In addition, the lawyer must have a working relationship with these individuals in order to gain both the authority and the information needed to provide effective representation. Yet a problem arises when the lawyer, who is charged with the responsibility of looking after the legal interests of the corporation, believes that the corporation's authorized agents are not acting in the best interests of the corporation. The group

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\(^{32}\) Annotated Model Rules, supra note 14, at 144.


\(^{34}\) Annotated Model Rules, supra note 14, at 144.

\(^{35}\) G. Hazard & W. Hodes, supra note 21, at 232.
method of representation breaks down in this situation.

The Model Code states that the lawyer owes allegiance "to the entity," and not to other individuals.\textsuperscript{36} The Model Code does not say what specific approach the lawyer should follow when there is an intra-corporate disagreement. In contrast, the Model Rules provide a clearer definition of the scope of the representation along with more specific guidelines for a course of conduct. The basic structure of corporate representation is found in Model Rule 1.13, entitled "Organization as the Client." Model Rule 1.13 will now be examined in depth.

1. Paragraph (a) of Rule 1.13: Identity of the Client

Despite the apparent limitations of Ethical Consideration 5-18, early versions of the Model Rules followed it closely.\textsuperscript{37} Various group representation alternatives were rejected in favor of a reaffirmation of the entity concept. To a certain extent, the Final Draft Revision approved by the Commission went somewhat further than the Model Code by stating that the corporate lawyer "represents the organization as distinct from its directors, officers, employees, members, shareholders or other constituents."\textsuperscript{38} There seemed to be no possibility that the lawyer could ever represent both the entity and its constituents. An amendment offered by the American College of Trial Lawyers that would have provided that a lawyer jointly represents the entity as well as its directors, employees, and shareholders was also rejected.\textsuperscript{39} The final version of Model Rule 1.13, which was revised in the floor amendment process in the ABA House of Delegates meeting in February 1983 and in May 1983,\textsuperscript{40} represented a compromise between two extreme positions and a return to the status quo. The Rule as amended reflected two basic premises to which there was general agreement: \textit{first}, the client is the organization, not its directors, officers, or other constituents, and \textit{second}, the organization can act only through its constituents.\textsuperscript{41} The final version of Model Rule 1.13(a) was as follows: "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."\textsuperscript{42} This version may actually represent a semantic compromise among several of the proposals. The clear distinction between the organization and the con-

\textsuperscript{36} \textbf{Model Code EC} 5-18.
\textsuperscript{37} C. Wolfram, \textit{supra} note 12, at 734.
\textsuperscript{38} \textbf{The Legislative History of the Model Rules of Professional Conduct: Their Development in the ABA House of Delegates} 87-88 (1987) [hereinafter \textit{Model Rules Legislative History}].
\textsuperscript{39} \textbf{Amendments to Proposed Model Rules of Professional Conduct with Synopsis} 42 (1983).
\textsuperscript{40} C. Wolfram, \textit{supra} note 12, at 734.
\textsuperscript{41} \textit{Model Rules Legislative History}, \textit{supra} note 38, at 92.
\textsuperscript{42} \textit{Id.}
stituents contained in the Final Draft Revision was discarded along with a proposal that would have mandated joint representation. Instead, the Rule states that the lawyer must take direction from individuals in authority in representing the organization.

Nevertheless, the Rule adheres to the concept that a lawyer for a corporation owes the same duties to that client as to a client who is an individual. The relationship is a fiduciary one, with responsibilities to the entity and not to others who run the entity. Yet in many respects, in order to meet this duty to the entity and to protect the interests of the corporation, the lawyer may have to protect the interests of other constituents. This may or may not take the form of some type of joint representation.

The general theory used for the Model Rules was similar to that used in the Model Code under Ethical Consideration 5-18, but with two major differences. First, the Code refers to “corporation” while the Rules refer to “organization,” which makes the Rules’ coverage more expansive to include unincorporated associations and governmental organizations. Secondly, unlike the Model Code, the Model Rules include a number of additional provisions that go well beyond the general theory and provide some additional guidance for the lawyer when faced with an intra-corporate dispute.

2. Paragraph (b) of Rule 1.13: Decision-Making Authority

The second section of Mode Rule 1.13 sets out a specific set of procedures for the lawyer to follow when involved in an intracorporate disagreement. This was an attempt to clarify some of the ambiguity

43. See generally, Model Rules Legislative History, supra note 38.
44. C. Wolfram, supra note 12, at 735.
45. Model Rules Rule 1.13 comment para. 2.
46. Rule 1.13(b) states:

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer’s representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) asking reconsideration of the matter;
(2) advising that a separate legal opinion on the matter be sought
inherent in Ethical Consideration 5-18\textsuperscript{47} and to make the Rules more functional for the corporate lawyer trying to maintain professional independence under a modern system of corporate governance.

Statutory corporate law provides for a corporate governance model consisting of three sets of actors: shareholders, directors, and officers. The basic model traditionally has been the same for all corporations, regardless of size. Nevertheless, statutes defining the respective roles of these sets of actors use general language in order to give the organization a degree of flexibility. Corporate statutes, however, are quite explicit in separating the functions of the shareholders-owners from management by giving the board of directors the ultimate power and authority to run the business.\textsuperscript{48} The role actually played by a board of directors varies widely from one corporation to another, depending on a variety of considerations. Yet, with very few exceptions, the board remains the ultimate decision making authority.

The shareholders, as owners, elect the board of directors to manage the corporation. The role of the owners is limited as long as the board of directors is acting within its authority. The shareholders do retain certain authority superior to the board, such as removal of directors in some situations,\textsuperscript{49} and the power to approve or disapprove certain fundamental corporate changes such as amendments to the articles of incorporation,\textsuperscript{50} mergers,\textsuperscript{51} sale of all or substantially all of the corporation’s assets,\textsuperscript{52} voluntary dissolution,\textsuperscript{53} and, in some cases, amendments to the by-laws.\textsuperscript{54}

By operation of the business judgment rule, the shareholders are generally unable to interfere with the decisions made by the board within its discretion.\textsuperscript{55} A court will generally refrain from substituting its judgment for that of the directors, as long as the directors had a

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for presentation to appropriate authority in the organization; and
(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

**Model Rules Rule 1.13(b).**

47. For criticism of this section, see G. Hazard, Ethics in the Practice of Law 43-57 (1978); Forrow, supra note 11, at 1797; Kaplan, Some Ruminations on the Role of Counsel for a Corporation, 56 Notre Dame L. Rev. 873, 876-82 (1981).

48. See, e.g., Revised Model Business Corp. Act § 8.01(b) (1988): “All corporate powers shall be exercised by or under authority of, and the business and affairs of the corporation managed under the direction of its board of directors. . . .”

49. Id. at §§ 8.03(d), 8.08.
50. Id. at § 10.03(b).
51. Id. at §§ 11.01, 11.03.
52. Id. at § 12.02.
53. Id. at § 14.02.
54. Id. at § 10.20(b).
55. H. Henn & J. Alexander, supra note 17, at 661.
reasonable basis for their decision and acted in good faith with reasonable care within the corporation's power and their authority. If the owners are unable to interfere with the business decisions of the board, can the lawyer who is supposed to be representing the interest of the corporation have the power to interfere?

In general, the lawyer representing the organization is not obligated to determine whether policy decisions made by authorized corporate management are in the best interest of the organization. Clearly, corporate action may fall within the confines of the business judgment rule. However, corporate agents may also act in a manner that is self-serving, beyond authority, or likely to result in substantial harm to the corporation. The lawyer must act to protect the entity.

The Model Rules recognize the ultimate authority of the board by placing certain limitations on what the corporate lawyer can do in such an event. In essence, the lawyer can voice disagreement with a corporate decision by taking the matter up the chain of command in the least disruptive manner until it comes before the "highest authority that can act in behalf of the organization as determined by applicable law." Ordinarily, the highest authority is the board of directors or similar governing body. If the board refuses to follow the lawyer's opinion, the only recourse is to resign. This lawyer is not permitted to raise an issue with the shareholders or others outside of the organization.

The original Commission Proposed Rule 1.13 gave the lawyer considerable discretion to act on behalf of the organization by going beyond the board if it refused to follow the lawyer's advice. The lawyer could "take further remedial action that the lawyer reasonably believes to be in the best interest of the organization," including "revealing information" if the lawyer thought it was in the best interest of the organization to protect it from corporate waste. However, the proposal

58. Model Rules Rule 1.13(b)(3).
59. Id. Rule 1.13 comment 5.
60. Commission Proposed Rule 1.13(c) states:
   When the organization's highest authority insists upon action, or refuses to take action, that is clearly a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer may take further remedial action that the lawyer reasonably believes to be in the best interest of the organization. Such action may include revealing information otherwise protected by Rule 1.6 only if the lawyer reasonably believes that:
   (1) the highest authority in the organization has acted to further the personal or financial interests of members of that authority which are in conflict with the interests of the organization; and
contemplated the possibility of only a limited disclosure outside of the entity’s walls. The lawyer would have had to exhaust all internal review mechanisms before concluding that the entity could be best served by seeking outside help. These were to be “loyal disclosures,” as opposed to the adverse disclosures permitted or required under other Rules or other law.61

3. Paragraph (c) of Rule 1.13: Illegal Activity of Organization Authorities

Rule 1.13(c) gives the lawyer discretion to resign if the board of directors disregards the lawyer’s advice and insists upon a course of conduct that is clearly a violation of law and that is likely to result in substantial injury to the organization.62 The rule only permits the lawyer to resign. By implication, this would prohibit the lawyer from doing anything else. The original proposal had allowed the lawyer to “take further remedial action that the lawyer reasonably believes to be in the best interest of the organization,” or to make loyal disclosures outside of the organization after exhausting internal procedures.63 Because the lawyer cannot override the board’s authority or reveal any confidences of the corporate client, resignation is the only option that allows the lawyer to voice disapproval of the decision. Moreover, the threat of resignation may induce the board to change its course of action.

This approach is consistent with modern corporate practice which recognizes the ultimate management authority of the board of directors. Once the board has been apprised that serious adverse consequences may result from its conduct, it is proper to conclude that the organization has been notified and the lawyer’s professional obligation has been fulfilled.64 This rule should hold true as long as the board is disinterested and using due care within the confines of business judg-

(2) revealing the information is necessary in the best interest of the organization.

Model Rules Legislative History, supra note 38, at 88-89.

61. G. Hazard & W. Hodes, supra note 21, at 240.

62. Rule 1.13(c) states:
If, despite the lawyer’s efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with Rule 1.16.

Model Rules Rule 1.13(c).

63. Model Rules Legislative History, supra note 38, at 88 (Commission Proposed Rule 1.13(c)).

ment. However, when the conduct of the highest authority is motivated by the personal interests of its members, an assumption that the corporation has made an objective, informed decision may be untenable. Nevertheless, the lawyer has no discretion to do anything but resign. Unless another Rule could be used, the lawyer would have to remain idle as management looted or destroyed the organization.

In such a situation, the strongest action a lawyer could take under Rule 1.13 with respect to the outside world is to resign and perhaps give notice of withdrawal to third parties. However, the lawyer may find other Rules applicable. Rule 1.13(c) notes that any resignation must be in accordance with Rule 1.16. In addition, the official comments to Rule 1.13 state that "this Rule does not limit or expand the lawyer's responsibility under Rules 1.6, 1.8, and 1.16, 3.3 or 4.1. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.2(d) can be applicable."

Rule 1.2(d) states that a "lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent..." Clearly, a lawyer cannot advise the client to commit a criminal or fraudulent course of conduct. At the same time, the lawyer is not permitted to reveal past wrongdoing unless specifically permitted by Rule 1.6. Yet the lawyer may discover that an illegal or fraudulent act has already begun and is continuing. In such a situation, withdrawal becomes mandatory unless the action stops. This puts the lawyer in the awkward position of being unable to stop the action because of the ethical barrier of revealing the information outside of the organization. The organization could continue the course of action after the lawyer departs.

The original version of Rule 1.6 gave the lawyer the discretion to reveal information to prevent a criminal or fraudulent act that was likely to result in death or substantial bodily harm, or in substantial injury to the financial interests or property of another. In addition, the lawyer could reveal information to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services had been used. The final version eliminated the choice of disclosure to prevent fraudulent acts and substantial injury to the financial interests or property of another. Therefore, the lawyer can only reveal confidences to prevent crimes that are likely to result in death or substantial bodily harm. Thus disclosure is more narrow than allowed under the Model Code, which allowed the lawyer to disclose

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67. Id. Rule 1.2(d).
68. Model Rules Rule 1.2 comment 7.
69. See infra notes 84-85 and accompanying text.
70. Id.
information in order to prevent the client from committing any crime.\textsuperscript{71}

4. Paragraph (d) of Rule 1.13: Clarifying the Identity of the Client

Model Rule 1.13(d) requires the lawyer to "explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing."\textsuperscript{72} This section is a necessary procedural corollary to the "entity" approach that provides the foundation for Rule 1.13, and protects both the organization and individuals from situations in which the lawyer's role may be ambiguous to a layperson.

Ordinarily, the constituents of the organization share the legal interests of the organization and will work with the lawyer in full cooperation. All of these individuals are co-agents of the organization and all share the same objectives. However, the lawyer's co-workers should be aware that the lawyer represents the organization and must give it undivided loyalty. Fairness dictates that these individuals not be lulled into a false sense of security by confiding in someone who might become an adversary's lawyer.\textsuperscript{73}

In essence, whenever there is any ambiguity about the identity of the client, the lawyer must give a "Miranda"-type warning to individuals that the organization is the client. Moreover, when a conflict develops between the interests of the organization and the interests of certain constituents, the lawyer has a clear duty to choose sides. The lawyer must represent the entity diligently even if it means causing injury to some of the entity's individual members.\textsuperscript{74} Nevertheless, the lawyer is bound by the fairness limitations of the Model Rules. In particular, Rule 4.3\textsuperscript{75} requires a lawyer to reveal his status to unrepresented parties, and Rule 4.4\textsuperscript{76} requires observance of the rights of third

\textsuperscript{71} Model Code DR 4-101(C)(3).
\textsuperscript{72} Model Rule 1.13(d) states in full: "In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing." Model Rules 1.13(d).
\textsuperscript{73} G. Hazard & W. Hodes, supra note 21, at 243.
\textsuperscript{74} Id. at 263.
\textsuperscript{75} Rule 4.3, concerning dealings with an unrepresented person, states:
In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. Model Rules Rule 4.3.
\textsuperscript{76} Rule 4.4, concerning respect for rights of third persons, states: "In representing a client, a lawyer shall not use means that have no substantial purpose other than
persons. Thus the lawyer must inform these individuals that they are non-clients and are not represented by legal counsel.

This fairness limitation serves to benefit the unrepresented individuals because they are warned that the lawyer for the organization may not represent them. However, the limitation primarily protects the organization because if the relationship among the parties is not clarified at an early stage of the transaction, the organization may later be estopped to deny that the representation was joint.  

Rule 1.13(d) is a procedural rule that directs the lawyer to clarify to others that the organization is the client and representation can be joint only if it is in the best interests of the organization.

5. Paragraph (e) of Rule 1.13: Multiple Representation

In some circumstances the organization's interests may not be in conflict with those interests of individual constituents. In such a situation, the lawyer can jointly represent others along with the entity. In some situations, both economy and strategy dictate a common defense with a shared lawyer. Rule 1.13(e) recognizes such situations and sets out procedures for the lawyer to follow in order to gain consent of the client for such joint representation. To take on clients in addition to the organization, the lawyer must conclude that he or she can represent all of the parties adequately and must also get the consent of all concerned.

The situations involving potential joint representation or clear separate representation require the lawyer to exercise independent judgment as to what is in the best interest of the organization. The lawyer's judgment about what is in the best interest of the organization may be in direct contrast to the course of action that those in authority wish to take. The lawyer may conclude that he or she cannot represent those in authority because they are acting counter to the interests of the organization. The lawyer needs to discover these divergent interests very early in the process. Otherwise, it may be impossible for the lawyer to represent the entity effectively. In such situations, the best course of action may be for the lawyer to resign and give an appropriate notice of

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77. See Annotated Model Rules, supra note 14, at 154.
78. Rule 1.13(e) states:
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.
Model Rules Rule 1.13(e).
withdrawal.

B. Model Rule 1.6: Confidentiality of Information

Rule 1.6 was perhaps the most controversial of all of the proposals discussed by the Commission and by the ABA House of Delegates. There was no disagreement that protecting client confidences was an important obligation of an attorney. Clients need to confer fully and frankly on all matters relating to the representation in order for the attorney to give adequate advice. Instead, the debate centered on the exceptions to the lawyer's duty of confidence.

The Model Code allows the lawyer to reveal information when the client consents, when permitted by law or court order, to prevent a future crime, and to collect a fee or to defend himself against accusations of wrongful conduct. The Model Rules adhere to the exceptions relating to client consent, for collecting fees, or in defense of charges. The debate centered on the other exceptions, especially the exception to prevent a future crime.

79. Rule 1.6, concerning confidentiality of information, is as follows:
   (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
   (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
       (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
       (2) 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.

Model Rules Rule 1.6.


81. Disciplinary Rule 4-101(C) states:
   A lawyer may reveal:
   (1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.
   (2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.
   (3) The intention of his client to commit a crime and the information necessary to prevent the crime.
   (4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

Model Code DR 4-101(C).

82. See supra note 79.
The original commission proposal\textsuperscript{83} both expanded and contracted the lawyer's ability to reveal information in order to prevent a future crime. The proposal defined confidentiality much more broadly than had the predecessor Model Code, which varies the obligations of the lawyer based on whether the information was defined as "secrets" or "confidences." The Proposed Rule avoided these limitations by protecting all "information relating to the representation." Thus, more information would be protected. This section was adopted without modification.

However, the attempt to limit the future crime exception stirred considerable controversy. The Model Code permits the lawyer to reveal confidential information in order to prevent the client from committing any future crimes. The commission proposal limited disclosures to only those crimes or frauds that resulted in substantial personal or financial injury of another. The commission proposal, while emphasizing the lawyer's obligation to maintain a client's confidences, would have granted the lawyer discretion to disclose confidential information if the lawyer deemed such disclosure necessary to prevent the client from committing a criminal or fraudulent act that the lawyer believed was likely to result in death or substantial bodily harm to another person, or in substantial injury to another person's financial interest or property.\textsuperscript{84} This proposed rule would have also given the lawyer discretion to disclose confidences if a client had used the lawyer's services to commit a crime or perpetuate a fraud, and if disclosure was necessary to rectify the consequences of that act.\textsuperscript{85}

\textsuperscript{83} Commission Proposed Rule 1.6 was as follows:

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm, or in substantial injury to the financial interests or property of another;

(2) to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services had been used;

(3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, or to establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer based upon conduct in which the client was involved; or

(4) to comply with other law.

\texttt{Model Rules Legislative History, supra note 38, at 47-48.}

\textsuperscript{84} \texttt{Model Rules Rule 1.6 (b)(1) (Rev. Final Draft 1982).}

\textsuperscript{85} \texttt{Model Rules Legislative History, supra note 38, at 48 (Commission Proposed Rule 1.6(b)(2)).}
In addition, this proposal would have relaxed the mandatory disclosure requirement in the Model Code by authorizing no more than discretionary disclosure. Nevertheless, the American College of Trial Lawyers totally opposed even this modified discretionary disclosure. The fear was that the Rule would transform the lawyer into a “policeman” over a client and would discourage frank communication between the lawyer and the client, by narrowing the circumstances in which the lawyer could reveal client confidences. The attorney needs to know everything about the client’s affairs that might be relevant to the representation. The client should not be inhibited about providing the lawyer vital information out of fear of disclosure by the lawyer. In addition, there was also a self-serving concern by lawyers about disclosure: If lawyers have the discretion to disclose, they would be subject to liability to third persons for failure to make disclosure.

The final version of Rule 1.6 adopts the position advanced by the American College of Trial Lawyers, which does not include those

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86. Model Code DR 4-101(C). ABA Comm. on Professional Ethics, Formal Op. 314 (1965) indicates that a lawyer must disclose even the confidences of his clients if “the facts in the attorney’s possession indicate beyond reasonable doubt that a crime will be committed.”

87. Riger, supra note 31, at 733 n. 20.

88. Model Rules Legislative History, supra note 38, at 48.

89. Riger, supra note 31, at 735 n. 23.

90. The following amendments were made to Rule 1.6(b) at the February, 1983, ABA midyear meeting:

   (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

   (1) to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in imminent death or substantial bodily harm, or in substantial injury to the financial interests or property of another; or

   (2) to rectify the consequences of a client’s criminal or fraudulent act in the furtherance of which the lawyer’s services had been used;

   (3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, or to establish a defense to a criminal charge, or civil claim or disciplinary complaint against the lawyer based upon conduct in which the client was involved, or to respond to the client’s allegations in any legal proceeding concerning the lawyer’s professional conduct for the client.

   (4) to comply with other law.

Model Rules Legislative History, supra note 38, at 50. The following additional change was made at the May 23, 1983, ABA meeting:

   (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

   (2) 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 the client’s allegations in any legal proceeding concerning the lawyer’s profes-
provisions giving a lawyer discretion to disclose confidences to prevent substantial injury to financial interests or property of others, or to rectify the consequences of a client’s criminal or fraudulent act in the furtherance of which the lawyer’s services had been used. The provision authorizing disclosures needed to “comply with other law” is also not included. Commentators have suggested that these exceptions relating to “services used by the lawyer” or to “comply with other law” are so important that they will have to be read back into Rule 1.6 by the courts or by practicing lawyers. The innocent lawyer should be able to rectify the harm caused when a client misuses the services of the lawyer. In addition, the court order creates an exception to confidentiality, regardless of what the Rule provides.61 This forced exception may be extremely important for the lawyer practicing in tax or securities areas, which often require the lawyer to make certain disclosures.

Nevertheless, the final version of Rule 1.6 limits considerably the discretion and influence that the lawyer once had to prevent the client from committing criminal acts and from rectifying the consequences of crimes or frauds in which the services of the lawyer were used.62 Most of the criminal or fraudulent acts committed by business organizations involve finance and property rather than physical harm to individuals. The Rule removes these financial injuries. This Rule, along with the limitations imposed by Rule 1.13, significantly changes the role of the lawyer for the organization.

One commentator has suggested that the corporate bar may be the major beneficiary of the amended version of Rule 1.6, because the amendments mark the end of a decade of agitation over the responsibility of the bar to the Securities and Exchange Commission (SEC) and to third parties in securities frauds.63 The SEC has taken the position that lawyers have a duty to notify the SEC of clients’ violations of the securities law’s anti-fraud provisions.64 The Model Code gave the lawyer discretion to reveal information to prevent the client from commit-

91. G. Hazard & W. Hodes, supra note 21, at 92-93.
92. Compare Model Rules Rule 1.6 with Model Code DR 4-101(C) and DR 7-102(B).
tint any future crime and concerning some past frauds. Under Model Rule 1.6, however, the lawyer not only lacks discretion to disclose financial fraud, but risks a breach of the rules of ethics by doing so. Thus when the client is using the lawyer's services to commit a criminal or fraudulent act and refuses to follow the lawyer's advice to correct the conduct, the only ethical conduct for the lawyer is to withdraw pursuant to the Rules.

There was much disagreement within the profession over narrowing a lawyer's discretion to reveal information to prevent a future crime. Public outcry greeted the February 1983 amendments by the ABA House of Delegates. The revised Rule would subject to discipline a lawyer who tried to speak out to prevent a fraud. This led to a compromise by amending the Comments to Rule 1.6 to allow a lawyer to give notice if he or she is withdrawing from representation. This comment provides: "Neither this rule [1.6] nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like." The cross references contained in this Comment expand the impact of a notice of withdrawal, because the notice can be given even if it is to the disadvantage of the client (Rule 1.8) or does not protect the interests of the client during withdrawal (Rule 1.16). Significantly, the Comment does not limit to whom the lawyer may send a notice of withdrawal. The ability to make a noisy withdrawal enhances the power of the lawyer because he or she can put pressure on the client without having to run the risk that such threat of disclosure is improper.

95. Model Code DR 4-101(C).
96. Disciplinary Rule 7-102(B)(1) is as follows:
A lawyer who receives information clearly establishing that:
(1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication.

Model Code DR 7-102(B)(1). The early version of this provision did not contain the final "except . . ." clause, which effectively vitiates the disclosure requirement. See ABA Canons of Professional Ethics Ann., Canon 41 (1967).
98. Id.
99. Model Rules Rule 1.6 comment para. 16 (August 2, 1983, as enacted by the House of Delegates).
100. The Comments in the March 1983 draft implied that notice of withdrawal should be sent only to the third parties who had relied on the lawyer's work product, but the June 1983 draft, approved by the House of Delegates on August 2, 1983, eliminates that implication. Rotunda, supra note 97, at 479-80.
The notice of withdrawal provision does not reestablish the broad disclosure provisions contained in the Model Code or in the original Commission Proposed Model Rules that allowed disclosure of fraudulent acts substantially harming the financial or property interests of another. However, it clearly allows the lawyer to pressure the client or to undo that which the lawyer has already participated in or aided.101

The fact that the notice of withdrawal is discretionary may actually lead to situations in which notice becomes mandatory. When other law requires disclosure, and when the Model Code or Model Rules do not mandate confidentiality, the lawyer cannot seek protection in the discretionary aspects of the lawyer's ethical duty.102 Under the law of evidence, the lawyer has no privilege to keep client information confidential if the client communication furthers client fraud or crime.103 Under the law of agency, the lawyer as agent has no right to keep confidential the principal's crimes or frauds committed in the course of the representation.104 In addition, neither the law of torts nor the law of agency allow the lawyer to commit any tort on behalf of the principal.108 The addition of this Comment to Rule 1.6 giving the lawyer discretion to give notice of withdrawal is an important component of the new ethical rules.

Overall, Model Rules 1.13 and 1.6 provide a corporate lawyer with more specific guidance than found in the Model Code. Rule 1.13 reaffirms the concept that the lawyer represents the organization. At the same time, the Rule provides useful procedures for the lawyer to follow in order to fulfill the professional obligation to the organization. Rule 1.6 places significant restrictions on the lawyer's discretion to make disclosures to prevent clients from committing crimes. The expanded definition of confidential client information ("information relating to the representation") and the absence of any exceptions for future crimes, frauds, or use of lawyer services, significantly alter the obligations that

101. Id. at 484.
102. Id. at 482.
104. See, e.g., United States v. Calvert, 523 F.2d 895 (8th Cir. 1975), cert. denied, 424 U.S. 911 (1976); United States v. Aldridge, 484 F.2d 655 (7th Cir. 1973), cert. denied, 415 U.S. 922 (1974); State v. Phelps, 545 P.2d 901, 904 (Or. Ct. App. 1976) (conversations in furtherance of a crime are unprivileged even though at the time of conversation the lawyer was unaware of client's criminal intent).
a lawyer has under versions of the Model Code adopted by the states. States may be unwilling to accept any major deviations from current practices or state laws.

In addition, Rules 1.13 and 1.6 cannot be used by the corporate lawyer in isolation. There are several important additional Rules such as 1.7 and 1.16 that the lawyer must use along with Rules 1.13 and 1.6 in order to represent the organization in a competent and ethical manner. Finally, the lawyer must be aware that not all states have adopted each of the ABA Model Rules exactly as approved by the House of Delegates. The lawyer's conduct is not regulated by the ABA Model Rules but by the actual Rules adopted by each of the states. The next section will examine how individual states are adopting binding versions of the Model Rules.

IV. The Adoption of the Model Rules by the States

The debate over adopting a replacement to the Model Code of Professional Responsibility was both lively and lengthy. The Kutak Commission\textsuperscript{106} started its deliberation in August 1977. The ABA House of Delegates examined the commission proposals in meetings in August 1982 and February and August 1983. The entire set of Rules and Comments was approved by a divided vote.\textsuperscript{107} There continues to be disagreement within the profession on a number of important provisions.

In addition, it appears that the Model Rules will not be accepted in the same uniform way that the Code of Professional Responsibility was accepted fifteen years earlier.\textsuperscript{108} The first states that reviewed the Model Rules have rejected many significant recommendations, primarily in the area of restricting disclosure of client wrongdoing.\textsuperscript{109} As the Rules are adopted by the states they move from being mere models to binding rules that control the conduct of lawyers practicing law in that state. A violation of the Rules will then subject the attorney to discipline.

Because the states are not adopting the ABA Model Rules in a consistent manner, the lawyer who practices law in several states may be faced with different, and sometimes competing, ethical obligations. The problem may be especially acute for the lawyer who represents an organization with significant contacts with a number of states. Thus lawyers must know and understand both the consistencies and inconsistencies that exist among and between the states. This section will examine how individual states have adopted the several sections of the

\textsuperscript{106} See supra note 29.
\textsuperscript{107} C. Wolfram, supra note 12, at 62.
\textsuperscript{108} Id. at 62-63.
\textsuperscript{109} Id. at 63.
Model Rules of Professional Conduct that relate to corporate practice. Each state-adopted Rule will be compared to the ABA Model. In most cases, footnotes show how the state amended the ABA Model. Deleted material is exhibited in strikeout and new material is in italics.

ARIZONA

Arizona adopted Rule 1.13 without amendment. The state made two significant changes in Rule 1.6.110 First, the state rule permits the lawyer to reveal information necessary to prevent the client from committing any crime. Second, disclosure is mandatory, instead of just permissive, to prevent a client from committing a crime likely to result in death or substantial bodily harm.

ARKANSAS

Arkansas adopted Rule 1.13 without amendment. Rule 1.6 permits disclosure of confidences to prevent a client from committing any crime. In addition, the state made the notice of withdrawal provisions a black-letter rule instead of a mere comment.111

CALIFORNIA

The California ethics rules follow neither the ABA Model Code

110. Arizona’s amendments to Rule 1.6 are as follows:
    (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b), (c) and (d) or ER 3.3(a)[2].
    (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm.
    (c) A lawyer may reveal the intention of his client to commit a crime and the information necessary to prevent the crime.
    (d) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary 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 proceedings concerning the lawyer’s representation of the client.

ARIZ. R. Ct 42, ER 1.6 (emphasis added).

111. The Arkansas amendments to Rule 1.6 are as follows:
    (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
        (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
        
        (c) Neither this Rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation or the like.

ARK. CT. R., Model Rules of Professional Conduct Rule 1.6 (emphasis added).
nor the ABA Model Rules, and never have. However, the California Supreme Court approved amendments to its Rules of Professional Conduct that became effective on May 27, 1989.\textsuperscript{112} The court declined to adopt a new rule on confidentiality and retained the position that it is the duty of the lawyer to maintain inviolate client confidences and secrets.\textsuperscript{113} However, the Court adopted a new rule—Rule 3-600—taken from ABA Model Rule 1.13. The new rule provides that the client is the organization itself, acting through its constituents.\textsuperscript{114}

\textbf{Connecticut}

Connecticut's version of Rule 1.13 follows the model with minor additions that confirm that a lawyer may resign under this Rule as under any other circumstance governed by Rule 1.16.\textsuperscript{115} The confidentiality rule requires disclosure of confidential information to prevent a client from committing a criminal act likely to result in death or substantial bodily harm. The rule permits disclosure to prevent a criminal act likely to result in substantial injury to the property or financial interests of another, as well as to rectify the consequences of a criminal or fraudulent act in the commission of which the lawyer's services had been used.\textsuperscript{116}

\begin{enumerate}
\item \textsuperscript{112} Law. Man. on Prof. Conduct (ABA/BNA) 415-16 (December 21, 1988).
\item \textsuperscript{113} Cal. Bus. & Prof. Code § 6068(e) (West 1989) states that it is the duty of an attorney to "maintain inviolate the confidence, and at every peril to himself \textit{or herself} to preserve the secrets, of his or her client."
\item \textsuperscript{114} California Rule 3-600(A) states: "In representing an organization, a member shall conform his or her representation to the concept that the client is the organization itself, acting through its highest authorized officer, employee, body, or constituent overseeing the particular engagement." Cal. R. Ct., Revised Rules of Professional Conduct Rule 3-600.
\item \textsuperscript{115} The Connecticut revisions to Rule 1.13 are as follows:
\begin{itemize}
  \item (c) [T]he lawyer may resign in accordance with rule 1.16, as he may do under any of the other circumstances set out in rule 1.16.
\end{itemize}
\item (e) A lawyer representing an organization may also represent any of its directors, officers, employers, 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.
\end{enumerate}

\begin{enumerate}
\item \textsuperscript{116} The Connecticut revisions to Rule 1.6 are as follows:
\begin{itemize}
  \item (a) A lawyer shall not reveal information . . . except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (a), (b), (c), and (d).
  \item (b) A lawyer \textit{may} shall reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in \textit{imminent} death or substantial bodily harm.
  \item (c) A lawyer may reveal such information to the extent the lawyer reasona-
DELAWARE

Delaware adopted Rule 1.13 and Rule 1.6 without amendment.\textsuperscript{117}

FLORIDA

Florida adopted Rule 1.13 without amendment. The state expanded the disclosure limitations of Rule 1.6, making some disclosures mandatory. The confidentiality rules require the lawyer to disclose confidential information to prevent a client from committing a crime or to prevent death or substantial bodily harm regardless of criminal conduct. In addition, the “mandated by law or tribunal” provision, which was deleted in the transition from the Model Code to the Model Rules, was included in the Florida Rule.\textsuperscript{118}

\begin{quote}

\begin{itemize}
\item[(d)] A lawyer may reveal such information to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and 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.
\end{itemize}
\end{quote}

\textit{Id.} Rule 1.6 (emphasis added).

\textsuperscript{117} \textsc{Del. Code Ann.}, tit. 16, the Delaware Lawyers’ Rules of Professional Conduct Rule 1.13, 1.6.

\textsuperscript{118} Florida’s amendments to Rule 1.6 are as follows:

(a) A lawyer shall not reveal information relating to representation of a client except as stated in paragraphs (b), (c), and (d) unless the client consents after disclosure to the client.

(b) A lawyer may shall reveal such information to the extent the lawyer believes necessary:

\begin{itemize}
\item[(1)] To prevent a client from committing a crime; or
\item[(2)] To prevent a death or substantial bodily harm to another.
\end{itemize}

(c) A lawyer may reveal such information to the extent the lawyer believes necessary:

\begin{itemize}
\item[(1)] To serve the client’s interest unless it is information the client specifically requires not to be disclosed;
\item[(2)] To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client;
\item[(3)] To establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved;
\item[(4)] To respond to allegations in any proceeding concerning the lawyer’s representation of the client; or
\item[(5)] To comply with the Rules of Professional Conduct.
\end{itemize}

(d) When required by a tribunal to reveal such information, a lawyer may first exhaust all appellate remedies.

\textsc{Fla. R. Ct.}, Rules of Professional Conduct Rule 4-1.6 (emphasis added).
IDAHO

Idaho adopted Rule 1.13 without amendment. Idaho's Rule 1.6 permits lawyers to reveal information in order to prevent a client from committing any crime and to disclose a client's intention to commit a crime.119

INDIANA

Indiana adopted Rule 1.13 without amendment. Indiana Rule 1.6 allows disclosure to prevent the client from committing any crime.120

KANSAS

Kansas adopted all of Model Rule 1.13 with the exception of section (c).121 Kansas deleted the language allowing the lawyer to resign, and advises the lawyer to follow Rule 1.16. Therefore, in certain situations outlined in Rule 1.16, withdrawal will be mandatory. Kansas Rule 1.6 permits disclosure for any crime and to comply with the requirements of law or orders of any tribunal. The rule essentially follows the Code with the exception that the protected information is expanded to include any information relating to the representation, and not just confidences and secrets.122

119. The Idaho amendment to Rule 1.6 is as follows:
(b)(1) to prevent the client from committing a criminal act crime, that the lawyer believes is likely to result in imminent death or substantial bodily harm; or including disclosure of the intention of his client to commit a crime;

120. Indiana's amendment to Rule 1.6 is as follows:

(b)(1) to prevent the client from committing any criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

IND. Ct. R., Code of Professional Responsibility Rule 1.6 (emphasis added).

121. Kansas Rule 1.13(c) is as follows:
(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization consents upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with shall follow Rule 1.16.

KAN. Ct. R. P., Supreme Court Rules Rule 1.13 (emphasis added).

122. The Kansas amendments to Rule 1.6 are as follows:

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent a client from committing a crime criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) to comply with requirements of law or orders of any tribunal; or

Id. Rule 1.6 (emphasis added).
LOUISIANA

Louisiana adopted Rule 1.13 and 1.6 without amendment.\textsuperscript{123}

MARYLAND

Maryland adopted most of the ABA version of Rule 1.13 with the exception of Rule 1.13(c).\textsuperscript{124} The state rejected the ABA approach to Rule 1.13(c) and adopted the language of the original commission proposal that allows the attorney to take action, including revealing information, in order to protect the corporation from the conduct of its highest authority. The Comment section presents some examples of lawyer action, such as informing shareholders in a close corporation about Board misconduct.\textsuperscript{125} The state adopted most of the confidentiality provisions set out in the original commission proposal instead of the ABA final version. Maryland Rule 1.6 permits a lawyer to reveal confidential information, if necessary, to prevent a client from committing a criminal or fraudulent act that would result in any death, substantial

\begin{enumerate}
\item LA. REV. STAT. ANN. tit. 21A, ch. 4 App. Art. 16 Rules 1.13, 1.6.
\item Maryland amended Rule 1.13(c) is as follows:
\begin{enumerate}
\item If, despite the lawyer's efforts in accordance with paragraph (b), when the organization's highest authority that can act on behalf of the organization insists upon action, or refuses to take action, that is clearly a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with rule 1.16 take further remedial action that the lawyer reasonably believes to be in the best interest of the organization. Such action may include revealing information otherwise protected by Rule 1.6 only if the lawyer reasonably believes that:
\begin{enumerate}
\item the highest authority in the organization has acted to further the personal or financial interests of members of the authority which are in conflict with the interests of the organization; and
\item revealing the information is necessary in the best interest of the organization.
\end{enumerate}
\end{enumerate}
\item MD. R. App. Rules of Professional Conduct Rule 1.13(c) (emphasis added).
\item Maryland added the following language to the Official Comment to Rule 1.13:
\begin{quote}
In such a situation, if the lawyer can take remedial action without a disclosure of information that might adversely affect the organization, the lawyer as a matter of professional discretion may take such action as the lawyer reasonably believes to be in the best interest of the organization. For example, a lawyer for a close corporation may find it reasonably necessary to disclose misconduct by the Board to the shareholders. However, taking such action could entail disclosure of information relating to the representation with consequent risk of injury to the client; when such is the case, the organization is threatened by alternative injuries; the injury that may result from the governing Board's action or refusal to act, and the injury that may result if the lawyer's remedial efforts entail disclosure of confidential information. The lawyer may pursue remedial efforts even at the risk of disclosure in the circumstances stated in paragraphs (c)(1) and (c)(2).
\end{quote}
\item Id. Rule 1.13 comment (emphasis added).
\end{enumerate}
bodily injury, or substantial injury to the property or financial interests of another, or to rectify the consequences of a criminal or fraudulent act in which the lawyer's services had been used. The Rule also permits discretionary disclosure when required by law.\textsuperscript{126}

**MICHIGAN**

Michigan adopted the Kutak Commission version of Rule 1.13(a) mandating that the attorney represent the organization as "distinct" from other constituents. However, the state adopted the ABA adopted procedural section in Rule 1.13(b).\textsuperscript{127}

\begin{quotation}
126. The Maryland amendments to Rule 1.6 are as follows:
\begin{quotation}
(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
\begin{quotation}
(1) to prevent the client from committing a criminal or fraudulent act that the lawyer believes is likely to result in imminent death or substantial bodily harm or in substantial injury to the financial interests or property of another;
(2) to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services were used;
(3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, or to establish a defense to a criminal charge, civil claim, or disciplinary complaint against the lawyer based upon conduct in which the client was involved or to respond to allegations in any proceedings concerning the lawyer's representation of the client.
(4) to comply with these Rules, a court order or other law.
\end{quotation}
\end{quotation}

*Id.* Rule 1.6 (emphasis added).

127. The Michigan amendments to Rule 1.13 are as follows:
\begin{quotation}
(a) A lawyer employed or retained by an organization to represent an organization represents the organization acting through its duly authorized constituents: as distinct from its directors, officers, employees, members, shareholders, or other constituents.
\begin{quotation}
(c) If, despite the lawyer's efforts in accordance with paragraph (b), when the organization’s highest authority that can act on behalf of the organization insists upon action, or a refusal refuses to act take action, that is clearly a violation of a legal obligation to the organization or a violation of law which reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, the lawyer may resign in accordance with rule 1.16: take further remedial action that the lawyer reasonably believes to be in the best interest of the organization. Such action may include revealing information otherwise protected by Rule 1.6 only if the lawyer reasonably believes that
(1) the highest authority in the organization has acted to further the personal or financial interests of members of that authority which are in conflict with the interests of the organization; and
(2) revealing the information is necessary in the best interest of the organization.
\end{quotation}
\end{quotation}

(d) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are
Michigan's Rule 1.6 on confidentiality is a rejection of the ABA Model Rule in favor of the old Code.\textsuperscript{128} The state retains the Model Code distinction between "confidences" and "secrets" and permits the lawyer to disclose confidences and secrets to prevent a client from committing a crime, to rectify the consequences of a client's illegal or fraudulent act in the furtherance of which the lawyer's services were used, and to comply with law or court order.\textsuperscript{129}

A recent ethics opinion confirmed that the lawyer's obligation runs to the corporation and not just to majority shareholders. A lawyer employed by a closely held corporation must disclose information about a proposed fraud to be committed on the minority shareholders if the adverse to those of the constituents with whom the lawyer is dealing: the lawyer believes that such explanation is necessary to avoid misunderstandings on their part.


\textsuperscript{129} Michigan Rule 1.6 is set out in its entirety without comparison to the ABA Model:

(a) "Confidence" refers to information protected by the client-lawyer privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(b) Except when permitted under paragraph (c), a lawyer shall not knowingly:

(1) reveal a confidence or secret of a client;
(2) use a confidence or secret of a client to the disadvantage of the client; or
(3) use a confidence or secret of a client for the advantage of the lawyer or of a third person, unless the client consents after full disclosure.

(c) A lawyer may reveal:

(1) confidences or secrets with the consent of the client or clients affected, but only after full disclosure to them;
(2) confidences or secrets when permitted or required by these rules, or when required by law or by court order;
(3) confidences and secrets to the extent reasonably necessary to rectify the consequences of a client's illegal or fraudulent act in the furtherance of which the lawyer's services have been used;
(4) the intention of a client to commit a crime and the information necessary to prevent the crime; and
(5) confidences or secrets necessary to establish or collect a fee, or to defend the lawyer or the lawyer's employees or associates against an accusation of wrongful conduct.

(d) A lawyer shall exercise reasonable care to prevent employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by paragraph (c) through an employee.

\textit{Id.} Rule 1.6 (emphasis added).

\textsuperscript{129} Law. Man. on Prof. Conduct (ABA/BNA) 94 (March 30, 1988).
majority refuses to follow the lawyer's advice to disclose it to the minority.\textsuperscript{130}

**MINNESOTA**

Minnesota has made several major changes from the ABA proposed Model Rules of Professional Conduct. Minnesota accepted the entity concept as set out in Rule 1.13(a). However, the state rejected the concept that there has to be a threat of substantial injury to the organization before the lawyer can act. Minnesota Rule 1.13(c) expanded the circumstances in which a lawyer could resign by deleting the ABA provision that the actions being objected to be those of the board. In addition, if a violation of law appears likely, the Rule provides that the lawyer can do more than resign. The Rule specifically allows the lawyer to reveal criminal or fraudulent acts in accordance with the Rules of Professional Conduct.\textsuperscript{131} This is especially significant because Minnesota rejected the ABA version of Rule 1.6 and retained the original Model Code provisions contained in DR 4-101. Thus, the lawyer may reveal the intention of a client to commit any future crime, not just those involving imminent death or substantial bodily harm. In addition, the state retained the distinction between "confidences" and "secrets."\textsuperscript{132} Minnesota is currently considering an amendment to this Rule that would allow the attorney to reveal confidences and secrets in order to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services were used.\textsuperscript{133}


\textsuperscript{131} The Minnesota amendments to Rule 1.13 are as follows:

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), a violation of law appears likely the highest authority that can act on behalf of the organization insists upon action, or a refusal to act that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with rule 1.16 and, if the violation is criminal or fraudulent, may reveal it in accordance with the Rules of Professional Conduct.

\textsuperscript{132} Minn. R. Ct., Rules of Professional Conduct Rule 1.13 (emphasis added).

\textsuperscript{133} The Minnesota Rule 1.6 is a restatement of Model Code DR 4-101. Id. Rule 1.6.

The provision was approved by the Minnesota Lawyers Board in the fall of 1988. The Supreme Court will consider the matter after review by the State Bar Association.
MISSISSIPPI

Mississippi adopted Rule 1.13 without amendment. Mississippi’s confidentiality section retained the old standards that allow the lawyer to reveal information to prevent a client from committing any crime or when required by law or court order.\textsuperscript{134}

MISSOURI

Missouri adopted Rules 1.13 and 1.6 without amendment.\textsuperscript{135}

MONTANA

Montana adopted Model Rules 1.13 and 1.6 without amendment.\textsuperscript{136}

NEVADA

Nevada adopted the provisions of Model Rule 1.13 under Nevada Rule 163. The confidentiality rules set out under Nevada Rule 156 require the lawyer to disclose confidences to prevent a criminal act likely to result in imminent death or substantial bodily harm. In addition, the lawyer can disclose confidential information to prevent or to rectify a crime or fraud in the commission of which the lawyer’s services had been used.\textsuperscript{137}

NEW HAMPSHIRE

New Hampshire incorporated the language of the proposed final

\textsuperscript{134} The Mississippi amendments to Rule 1.6 are as follows:
(a) A lawyer shall not reveal \ldots and except as stated in paragraphs (b) and (c).
(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
   (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
   
   (c) A lawyer may reveal such information to the extent required by law or court order.

\textsuperscript{135} Mo. R. Ct., Rules Governing the Missouri Bar and the Judiciary Rule 4 Rules 1.13, 1.6.

\textsuperscript{136} Mont. R. Ct., Rules of Professional Conduct Rules 1.13, 1.16.

\textsuperscript{137} Nevada’s amendments to Rule 1.6 (incorporated in Nevada Rule 156) are as follows:

(b) 2. A lawyer may shall reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm.

3. A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
   (a) to prevent or rectify the consequences of a client’s criminal or fraudulent act in the commission of which the lawyer’s services have been used, but the lawyer shall, where practicable, first make reasonable effort to persuade the client to take corrective action; or

\textsuperscript{138} Nev. Ct. R., Supreme Court Rules Rule 156 (emphasis added).
draft of May 30, 1981 of the Kutak Commission for Rule 1.13(a). The state rejected the subsequent ABA amendments because of a concern that the Model Rule provides for dual loyalty to both the organization and individuals within the organization.\textsuperscript{138} The Comments also are derived primarily from the earlier draft.

Rule 1.13(b) was modified so that the attorney needs to proceed if there is likely "material" injury to the organization instead of "substantial" injury. Rule 1.13(c) also returns to the Kutak Commission proposal allowing the attorney to do more than resign when the board is engaged in corporate waste; the lawyer may reveal information if it is in the best interest of the organization.\textsuperscript{139}

\begin{flushleft}
139. The New Hampshire amendments to Rule 1.13 are as follows:

(a) A lawyer employed or retained to represent an organization represents the organization acting through its duly authorized constituents, as distinct from its directors, officers, employees, members, shareholders or other constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in material substantial injury to the organization; the lawyer shall proceed as is reasonably necessary in the best interest of the organization, in determining how to proceed, shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any The measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) asking reconsideration of the matter;
(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and
(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts When a matter has been referred to the organization's highest authority in accordance with paragraph (b), the highest authority that can act on behalf of the organization and that authority insists upon action, or a refusal refuses to act take action, that is clearly a violation of law a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial material injury to the organization, the lawyer may resign in accordance with rule 1.16 take further remedial action that the lawyer reasonably believes to be in the best interest of the organization. Such action may include revealing information relating to the representa-
\end{flushleft}
The confidentiality provisions of Rule 1.6 permit disclosure to prevent a client from committing a crime likely to result in death, any bodily harm, or substantial injury to the financial or property interests of another. The Comments indicated that the state did not want to depart from the earlier provisions of the code, noting that hopefully "no New Hampshire lawyer will be subject to professional censure for either disclosing or failing to disclose client confidences, as their individual conscience may dictate." New Jersey

New Jersey was the first state to base its rules primarily on the new ABA Model Rules. The state adopted a hybrid version of Rule 1.13, following the Kutak Commission proposed sections (a), (c), and (d) and accepting the remainder from the ABA Model. Thus, the lawyer represents the organization as distinct from its constituents and can disclose protected information if the board is acting for personal or financial reasons against the interests of the organization. New Jersey

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140. The New Hampshire amendment to Rule 1.6 is as follows:

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or bodily harm or substantial injury to the financial interest or property of another; or

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141. *Id.* Rule 1.13 (emphasis added).

142. The amended New Jersey Rule 1.13 is as follows:

(a) A lawyer employed or retained to represent an organization represents the organization acting through its duly authorized constituents as distinct from its directors, officers, employees, members, shareholders or other constituents.

(c) If, despite the lawyer's efforts in accordance with paragraph (b) the When the organization's highest authority insists upon action, or refuses to take action, that is clearly a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with Rule 1.16 take further remedial action that the lawyer reasonably believes to be in the best interest of the organization. Such action may include revealing information otherwise protected by RPC 1.6 only if the lawyer reasonably believes that:
Rule 1.6 makes mandatory the disclosure of information "to the proper authorities" necessary to prevent a client from committing a criminal, illegal, or fraudulent act that the lawyer reasonably believes will result in death (not just imminent death), or substantial bodily harm or substantial injury to the financial or property interest of another. Disclosure is also mandatory to prevent a fraud upon a tribunal. The lawyer is permitted to disclose information necessary to rectify the consequences of a client's illegal or fraudulent act in which the lawyer's services were used. The section defines a "reasonable belief" standard to mean a conclusion based on information that has some foundation in fact and would constitute prima facie evidence.\footnote{148}

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(1) the highest authority in the organization has acted to further the personal or financial interests of members of that authority which are in conflict with the interests of the organization; and

(2) revealing the information is necessary in the best interest of the organization.

(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing if the lawyer believes that such explanation is necessary to avoid misunderstanding on their part.


143. New Jersey's amended Rule 1.6 is as follows:

(a) A lawyer shall not reveal information . . . and except as stated in paragraphs (b) and (c).

(b) A lawyer may shall reveal such information to the proper authorities, as soon as, and to the extent the lawyer reasonably believes necessary, to prevent the client

(1) to prevent the client from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to result in imminent death or substantial bodily harm or substantial injury to the financial interest or property of another;

(2) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to perpetrate a fraud upon a tribunal.

(c) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to rectify the consequences of a client's criminal, illegal or fraudulent act in the furtherance of which the lawyer's services had been used;

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

(3) to comply with other law.

(d) Reasonable belief for purposes of RPC 1.6 is the be-
A recent U.S. District Court in New Jersey created some ambiguity in interpreting the use of ethical standards in that state. The court ruled that in motions to disqualify counsel the court should use the stricter ABA Model instead of the adopted Rules in New Jersey.\textsuperscript{144}

**New Mexico**

New Mexico adopted the provisions of Model Rule 1.13 under New Mexico Rule 16-113.\textsuperscript{148} The sections are identical with the exception that the state included section headings.

New Mexico adopted the provisions of Model Rule 1.6 under New Mexico Rule 16-106.\textsuperscript{148} Rule 16-106 states that a lawyer “should” reveal confidential information to prevent a client from committing a criminal act likely to result in imminent death or substantial bodily harm and that a lawyer “may” reveal information to prevent a client from committing a criminal act likely to result in substantial injury to the property or financial interests of another.

**North Carolina**

The rules in this state reflect the influence of both the Model Code and the Model Rules. They use the rule-and-comment format of the Model Rules, but are organized under ten broad canons, similar to the Model Code.\textsuperscript{147} North Carolina did not adopt the procedural section of Model Rule 1.13. Instead, the state simply set out the entity theory under North Carolina Rule 5.10.\textsuperscript{148} In addition, the state kept the language of EC 5-18 as part of the comment section to Rule 5.10.

North Carolina did not adopt Model Rule 1.6. The state retained most of the disclosure provisions of the Model Code, including disclosure to prevent any future crime.\textsuperscript{148}

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\textit{Life or conclusion of a reasonable lawyer that is based upon information that has some foundation in fact and constitutes prima facie evidence of the matters referred to in subsections (b) or (c).}

\textit{Id. RPC 1.6} (emphasis added).

\textsuperscript{144} The U.S. District Court for the District of New Jersey recently concluded that, in deciding motions to disqualify counsel, it must look to the ABA Model Rules, which are incorporated into the court's local rules by reference, and not to the standards contained in the state's amended version of the Model Rules. See United States v. Walsh, 699 F.Supp. 469 (D.N.J. 1988).

\textsuperscript{145} N.M. S.Ct. R. ANN., Rules Governing the Practice of Law, Rules of Professional Conduct Rules 16-113.

\textsuperscript{146} Id. Rule 16-106.

\textsuperscript{147} Law. Man. on Prof. Conduct (ABA/BNA) § 01:18 (January 21, 1987).

\textsuperscript{148} North Carolina’s Rule 5.10, regarding responsibility of counsel representing an organization, states: “A lawyer who represents a corporation or other organization represents and owes his allegiance to the entity and shall not permit his professional judgment to be compromised in favor of any other entity or individual.” ANN. R. N.C., Rules of Professional Conduct Rule 5.10.

\textsuperscript{149} North Carolina’s Rule 4, regarding preservation of confidential information, states:
NORTH DAKOTA

North Dakota follows the entity theory exactly as set out in the model. However, the state removed all of the procedures from the black letter rules. In addition, the state did not adopt Model Rule 1.13(c), which allowed discretionary withdrawal if the organization refused to act.\textsuperscript{160} Nevertheless, most of the procedures set out in the black letter

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\item [(A)] “Confidential information” refers to information protected by the attorney-client privilege under applicable law, and other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client. For the purposes of this rule, “client” refers to present and former clients.
\item [(B)] Except when permitted under Rule 4(C), a lawyer shall not knowingly:
\begin{enumerate}
\item [1)] Reveal confidential information of his client.
\item [2)] Use confidential information of his client to the disadvantage of the client.
\item [3)] Use confidential information of his client for the advantage of himself or a third person, unless the client consents after full disclosure.
\item [(C)] A lawyer may reveal:
\begin{enumerate}
\item [1)] Confidential information, the disclosure of which is impliedly authorized by the client as necessary to carry out the goals of the representation.
\item [2)] Confidential information with the consent of the client or clients affected, but only after full disclosure to them.
\item [3)] Confidential information when permitted under the Rules of Professional Conduct or required by law or court order.
\item [4)] Confidential information concerning the intention of his client to commit a crime, and the information necessary to prevent the crime.
\item [5)] Confidential information to the extent the lawyer reasonably believes necessary 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.
\end{enumerate}
\end{enumerate}
\end{enumerate}

\textit{Id.} Rule 4.

150. North Dakota Rule 1.13 is shown as adopted, without reference to the ABA Model:

\begin{enumerate}
\item [(a)] A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
\item [(b)] 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 reasonably believes that the organization’s interests are or are likely to become adverse to those of the constituents with whom the lawyer is dealing.
\item [(c)] 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
rules of the Model are also set out in the Comments. The state adopted all of the official comments and added another comment that seemed to give the lawyer broader discretion to act in accordance with an analysis of the specific situation.\footnote{181}

North Dakota's new confidentiality rule requires disclosure of confidential information to prevent the client from committing an act likely to result in imminent death or imminent substantial bodily harm. Disclosure would be permitted to prevent a crime or fraud likely to result in non-imminent death, non-imminent substantial bodily harm, or substantial harm to financial or property interests; to prevent or rectify the consequences of a client's crime or fraud in which the lawyer's services had been used without the lawyer's knowledge, with an exception for the situation of client perjury, in which case disclosure would not be permitted. Disclosure is also permitted when required by law or court order, or when the information has become generally known.\footnote{182}

\footnote{appropriate constituent of the organization other than the individual who is to be represented.}

\footnote{N.D. Ct. R., Rules of Professional Conduct Rule 1.13.}

151. The additional comment to North Dakota Rule 1.13 is as follows:

In determining how to proceed pursuant to Rule 1.6, the lawyer should consider the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations.

\footnote{Id. Rule 1.13 comment.}

152. Law. Man. on Prof. Conduct (ABA/BNA) 203-04 (July 8, 1987). North Dakota made significant modifications to the format used in the ABA Model. The North Dakota Rule is presented as adopted, without showing the amendments from the model:

A lawyer shall not reveal, or use to the disadvantage of a client, information relating to representation of the client unless required or permitted to do so by this rule. When such information is authorized by this rule to be revealed or used, the revelation or use shall be no greater than the lawyer reasonably believes necessary to the purpose. Such revelation or use is:

(a) required to the extent the lawyer believes necessary to prevent the client from committing an act that the lawyer believes is likely to result in imminent death or imminent substantial bodily harm;

(b) permitted when the client consents after consultation;

(c) permitted when impliedly authorized in order to carry out the representation;

(d) permitted to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in non-imminent death, non-imminent substantial bodily harm, or substantial injury or harm to the financial interests or property of another;

(e) permitted to the extent the lawyer reasonably believes necessary 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
Oklahoma adopted Rule 1.13 without amendment. The state expanded the protected information as set out in the Model Rules. However, the state retained the Model Code provisions allowing the lawyer to disclose information about any crime and as required by the Rules. Disclosure becomes mandatory if required by law or court order.183

Oregon elected to revise its version of the Model Code instead of adopting a version of the Model Rules.184

Pennsylvania adopted Rule 1.13 without amendment. Rule 1.6 requires the lawyer to reveal confidential information in order to comply with Rule 3.3, candor to the tribunal. In addition, the state accepted much of the original commission proposal by allowing the attorney to reveal information to prevent a client from committing a crime resulting in substantial personal or property harm, or to prevent or to rectify a client's criminal or fraudulent act in which the lawyer's services were used.185

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\text{in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;}
\]

(f) permitted, except as limited by Rule 3.3(c), to prevent or to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services had been used without the lawyer's knowledge;

(g) permitted to comply with law or court order; and

(h) permitted when information has become generally known.


153. The Oklahoma amendments to Rule 1.6 are as follows:

(a) A lawyer shall not reveal . . . except as stated in paragraphs (b) and (c).

(b) A lawyer may reveal the following information to the extent the lawyer reasonably believes necessary:

(1) the intention of his client to commit a crime and the information necessary to prevent the crime; a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm, or

(2) or as otherwise permitted under these Rules.

(c) A lawyer shall reveal such information when required by law or court order.


154. Or. R. Ct., Code of Professional Responsibility.

155. The Pennsylvania amendments to Rule 1.6 are as follows:

(a) A lawyer shall not reveal . . . except as stated in paragraphs (b) and (c);

(b) A lawyer shall reveal such information if necessary to comply with the duties stated in Rule 3.3.

(c) A lawyer may reveal such information to the extent that the lawyer reasonably believes necessary:
RHODE ISLAND

Rhode Island adopted Rule 1.13 without amendment. The state adopted Rule 1.6 with some additional language that restates that revealing information is subject to a lawyer's discretion.156

SOUTH DAKOTA

South Dakota adopted Rule 1.13 without amendment. The state adopted all of the provisions of the Model Rules and added provisions permitting disclosure to protect employees from claims. The state also permits disclosure to rectify the consequences of criminal or fraudulent acts in which the lawyers services had been used.157

UTAH

Utah has no counterpart to Rule 1.13.158 The confidentiality provisions of Rule 1.6 permit disclosure to prevent crimes and frauds likely

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm or substantial injury to the financial interests or property of another;
(2) to prevent or to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services are being or had been used; or
(3) 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 or disciplinary proceeding 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.

(d) The duty not to reveal information relating to representation of a client continues after the client-lawyer relationship has terminated.

Pa. R. Ct., Rules of Professional Conduct Rule 1.6 (emphasis added).

156. Rhode Island adopted Rule 1.6 in its entirety but added one clause as follows: "(b) A lawyer may, but is not obligated to, reveal information to the extent that the lawyer reasonably believes necessary. . . ." R.I. Ct. R., Supreme Court Rules Rule 47-1.6 (emphasis added).

157. The South Dakota amendments to Rule 1.6 are as follows:

. . . .
(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

. . . .
(2) to establish a claim or defense on behalf of the lawyer or the lawyer's employees in a controversy between the lawyer or the lawyer's employees and the client, to establish a defense to a criminal charge or civil claim against the lawyer or the lawyer's employees based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer or the lawyer's employees representation of the client;
(3) to the extent that revelation appears to be necessary to rectify the consequences of a client's criminal or fraudulent act in which the lawyer's services had been used.

S.D. CODIFIED LAWS ANN. § 16-18 app., Code of Professional Responsibility Rule 1.6 (emphasis added).

158. Law. Man. on Prof. Conduct (ABA/BNA) § 01:26 (February 17, 1988).
to result in any death, substantial bodily injury, and substantial injury to property or financial interests. The Rule also allows disclosure to rectify the consequences of the client's criminal or fraudulent act in the commission of which the lawyer's services had been used. The Rule adds a new section allowing disclosure to comply with the rules of professional conduct or other law.\textsuperscript{160}

\textbf{VIRGINIA}

Virginia retained the format of the Model Code but changed some substance to reflect the content of the Model Rules. The entity theory of EC 5-18 was retained exactly. The state recently issued an ethics opinion stating that the lawyer must serve the best interests of the board as a whole and not those of the individual members who question or do not question the lawyer's loyalty.\textsuperscript{160}

The state retained the distinction between "confidences" and "secrets." The confidentiality provisions allow an attorney to reveal information establishing that the client during the course of the representation has perpetrated a fraud on a third party. The attorney must reveal such information if the fraud was perpetrated on a tribunal. In addition, the attorney must reveal a client's intention to commit a crime, but only after warning the client of the duty to reveal and urging the client to abandon the criminal plans.\textsuperscript{161}

\textsuperscript{159.} Utah's amended Rule 1.6 is as follows:

(a) A lawyer shall not reveal information relating to representation of a client except as stated in paragraph (b), except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b); unless the client consents after disclosure.

(b) A lawyer may reveal such information to the extent the lawyer believes necessary:

(1) To prevent the client from committing a criminal or fraudulent act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or substantial injury to the financial interest or property of another;

(2) To rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used;

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

(4) To comply with the Rules of Professional Conduct or other law.

\textbf{Utah Code Jud. Admin., Rules of Professional Conduct Rule 1.6 (emphasis added).}

\textsuperscript{160.} Va. Opin. 930 (June 11, 1987), Law. Man. on Prof. Conduct (ABA/BNA) \S\ 901:8721 (April 27, 1988).

\textsuperscript{161.} Virginia Code Disciplinary Rule 4-101 is as follows:

(C) A lawyer may reveal:

(1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.
WASHINGTON

Washington did not adopt Rule 1.13 and has no counterpart to the Rule.\textsuperscript{162} Rule 1.6 retains the Model Code provision permitting disclosure of information to prevent the client from committing any crime. Washington also retains the distinction between "confidences" and "secrets."\textsuperscript{163}

WEST VIRGINIA

West Virginia adopted Rule 1.13 without amendment. Rule 1.6

(2) Confidences or secrets when required by law or court order.

(3) Information which clearly establishes that his client has, in the course of the representation, perpetrated upon a third party a fraud related to the subject matter of the representation.

(4) Confidences or secrets necessary to establish the reasonableness of his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

(D) A lawyer shall reveal:

(1) The intention of his client, as stated by the client, to commit a crime and the information necessary to prevent the crime, but before revealing such information, the attorney shall, where feasible, advise his client of the possible legal consequences of his action, urge the client not to commit the crime, and advise the client that the attorney must reveal the client's criminal intention unless thereupon abandoned, and, if the crime involves perjury by the client, that the attorney shall seek to withdraw as counsel.

(2) Information which clearly establishes that his client has, in the course of the representation, perpetrated a fraud related to the subject matter of the representation upon a tribunal. Before revealing such information, however, the lawyer shall request that his client advise the tribunal of the fraud. Information is clearly established when the client acknowledges to the attorney that he has perpetrated a fraud upon a tribunal.

\textbf{VA. CODE ANN.}, Supreme Court Rules Pt. 6 § II DR 4-101.

\textsuperscript{162} Law. Man. on Prof. Conduct (ABA/BNA) § 01:16 (January 21, 1987).

\textsuperscript{163} Washington's amended Rule 1.6 is as follows:

(a) A lawyer shall not reveal confidences or secrets information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such confidences or secrets information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a crime criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

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

\textbf{VA. CT. R. ANN.}, Rules of Professional Conduct 1.6 (emphasis added).
allows the lawyer to reveal information to prevent a client from committing any crime.\textsuperscript{164}

\textbf{WISCONSIN}

Wisconsin adopted Rule 1.13 without amendment. The state made mandatory the broad disclosure provisions set out in the early commission proposal. Wisconsin's Supreme Court Rule 20:1.6 on confidentiality requires disclosure of confidential information to prevent a client from committing a crime or fraud likely to result in death or substantial bodily harm or in substantial injury to the financial or property interests of another. Disclosure is also permitted to rectify the consequences of a criminal or fraudulent act in the furtherance of which the lawyer's services were used. Finally, the rule allows the lawyer to reveal the identity of the client in some situations.\textsuperscript{165}

\textbf{WYOMING}

Wyoming adopted Rule 1.13 without amendment. Rule 1.6 permits disclosure to prevent the client from committing any criminal act.\textsuperscript{166}

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\textsuperscript{164} The West Virginia amendment to Rule 1.6 is as follows:

\begin{quote}
(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm.
\end{quote}

\textbf{W. VA. CT. R., Rules of Professional Conduct Rule 1.6}

\textsuperscript{165} Wisconsin's amendments to Rule 1.6 are as follows:

(a) A lawyer shall not . . . except as stated in paragraphs (b) (c) and (d).

(b) A lawyer \textit{may shall} reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in imminent death or substantial bodily harm or in substantial injury to the financial interest or property of another.

(c) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services had been used;

(d) This rule does not prohibit a lawyer from revealing the name or identity of a client to comply with ss. 19.43 and 19.44, Stats. 1985-86, the code of ethics for public officials and employees.

\textbf{Wis. CT. R. P, Supreme Court Rules SCR 20:1.6 (emphasis added).}

\textsuperscript{166} Wyoming Rule 1.6, confidentiality of information, is as follows:

\begin{quote}
(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial
V. Summary

The states are not adopting the Model Rules in the same manner in which they adopted the Model Code. Most states adopted the Model Code with little debate and few modifications. In contrast, the states are reviewing the Model Rules thoroughly in order to determine if provisions are consistent with state policies and practices. Some states are rejecting the new model entirely. Others are accepting parts while modifying others. Some of the changes are substantial while others may be viewed as slight "tinkering." In any event, the results are far from uniform.

The states seem to be accepting most of the provisions of Rule 1.13. The most controversial area is section (a), identity of the client. The majority of the states opted to maintain the status quo by adopting the entity theory as approved by the ABA House of Delegates. However, several states opted for the Kutak Commission proposal that stated the lawyer represents the organization as "distinct" from its constituents. In addition, most states have accepted the procedural sections with few modifications, except for some states that prefer the Kutak Commission proposal for disclosure in the case of corporate waste by the highest authority.

The states are not giving the same deference to Model Rule 1.6 that they gave to Model Rule 1.13. Most states are retaining the policies of the old Model Code that allowed the lawyer permissive disclosure of information in order to prevent a client from committing any crime, not limited to those resulting in imminent death or serious bodily harm. Several states opted to make disclosure mandatory instead of permissive for crimes resulting in imminent death or serious bodily injury. Several states adopted a compromise between the Model Code and the Model Rules by permitting disclosure to prevent crimes of a substantially serious nature to either persons or to the financial or property interests of another.

The first table at the end of the article shows whether a state accepted, rejected, or modified the new ABA Model Rule 1.13. The table includes only those states that reviewed the new standards after the ABA adoption in 1983. The table also states in general terms the type of modification that the state has made.

The second table indicates if the state accepted, rejected, or modified ABA Model Rule 1.6. In contrast to the widespread acceptance of Rule 1.13, a large number of states refused to accept Rule 1.6 as

\[ \text{bodily harm;} \] or

167. The states currently rejecting both modified MODEL RULES Rules 1.6 and 1.13 are North Carolina, Oregon, Virginia, and Washington.
presented by the ABA. Most states made major modifications. Few states adopted the significant limitations placed on disclosure of client information, which permitted disclosure only to prevent the client from committing a criminal act likely to result in imminent death or substantial bodily harm. A majority of states retained the theory of the old Model Code, which gave the lawyer the discretion to disclose client information to prevent the client from committing any future crime.

The two tables illustrate that many states are departing from the model presented by the ABA. The lawyer can no longer assume that the ethical rules learned in law school will represent current practices. Moreover, the lawyer practicing law in more than one state will have to be aware of the potentially different ethical obligations that may be determined by the client's location.

Most states have adopted the entity theory as set out in the Model Rules. This rule permits joint representation when the interests of the entity and the constituents are not adverse. Yet several states did not accept this position, viewing the organization as "distinct" and precluding any joint representation. No state accepted the position, advanced by the American College of Trial Lawyers during the ABA debates, that the lawyer represents both the entity and its constituents.

In addition, several states permit the lawyer to do more than just resign when the board engages in certain activities. Clearly, the conduct of both the lawyer and the organization's constituents may be altered with the knowledge that the lawyer has discretion to disclose protected information. Out of concern about disclosure, the constituents may not give the lawyer all the information necessary for adequate representation.

The disclosure provisions set out by the Model Rules were unacceptable to most of the states. The final version of Rule 1.6 represented a compromise between the moderate alteration proposed by the Commission and the extreme position strongly advocated by the American College of Trial Lawyers. The lively debate at the national level seemed to encourage the states to scrutinize this section more carefully. The end result is lack of uniformity by the states.

It appears that most states probably would have adopted the original Commission Proposed Rule 1.6 because it represented only a slight modification of the status quo. The expansion of protected information eliminated the confusion created by the Model Code's distinction between "confidences" and "secrets" while, at the same time, continuing to maintain exceptions to the general rule. This broadened principle of confidentiality would still protect the interests of clients to be able to communicate freely with the lawyer. Nevertheless, the exceptions to the principle were changed as part of the compromise to get the ABA to adopt the Model Rules. The final version does not allow the lawyer to reveal information to prevent the client from committing a serious financial crime, to rectify a fraud in which the lawyer's services were
used, or to comply with law or court order.

Most of the states accepted the broadened principle of confidentiality. However, most of the states are not accepting the Model Rule limitations placed on exceptions. A significant majority of states permit disclosure for any future crime, not just those that are likely to result in imminent death or substantial bodily harm. Some states have included the exception for rectifying fraud in which the lawyer's services were used or when required by law. At least one state is currently considering adding the section on rectifying fraud.

The states seem to be recognizing what the ABA House of Delegates did not: rules of confidentiality should not be used to shield a client's future wrongdoing from scrutiny nor should confidences be preserved at the cost of compelling lawyers to be instruments of fraud.

The ABA version does not permit the lawyer to reveal information that would prevent a client from committing a crime or fraud resulting in serious financial injury. The ABA version does not permit a lawyer to rectify the harm caused when a client abuses the services of a lawyer.

The principle of confidentiality preserves the free flow of information between the lawyer and the client. Clients need to know that they can confide in their lawyer. At the same time, clients need to know that they cannot use lawyers as instruments of fraud or crime. The large number of states that rejected the ABA compromise version of Rule 1.6 seem to be indicating that the principle of confidentiality can best be enhanced by permitting rather than preventing disclosure.

These changes may cause some significant problems for the lawyer practicing corporate law. The ethical rules are no longer uniform among and between the states. Most states still adhere to the entity theory. Yet the lawyer operating in a state that does not adhere to this theory will have to treat corporate constituents differently than in a state that does. In addition, the corporate constituents will have to be informed about the specific duties required of a lawyer under Rules 1.13 and 1.6. The simplicity and the uniformity of the old Model Code no longer exists.
<table>
<thead>
<tr>
<th>State</th>
<th>Adopted Rule 1.13</th>
<th>Modifications</th>
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</tr>
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<td>can act against board’s bad conduct</td>
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### TABLE 2
Position of States that Review Model Rule 1.6

<table>
<thead>
<tr>
<th>Adopted Rule 1.6</th>
<th>Current Disclosure Provision</th>
<th>Model Rule limits</th>
</tr>
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<tr>
<td>Arizona</td>
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<td>yes</td>
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<td>permissive</td>
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<td>permissive</td>
</tr>
<tr>
<td>Missouri</td>
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<td>no</td>
</tr>
<tr>
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<td>no</td>
</tr>
<tr>
<td>Nevada</td>
<td>yes (modified)</td>
<td>permissive</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>yes (modified)</td>
<td>permissive (some limits)</td>
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