

AMERICAN BAR ASSOCIATION

TASK FORCE ON CORPORATE RESPONSIBILITY
SECTION OF BUSINESS LAW
SECTION OF TAXATION
SECTION OF TORT TRIAL AND INSURANCE PRACTICE
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY
YOUNG LAWYERS DIVISION
SECTION OF REAL PROPERTY, PROBATE AND TRUST LAW
TASK FORCE ON IMPLEMENTATION OF SECTION 307 OF
SARBANES-OXLEY ACT OF 2002
LAW PRACTICE MANAGEMENT SECTION
SECTION OF FAMILY LAW

PROPOSED AMENDMENTS TO RULE 1.6 OF THE
ABA MODEL RULES OF PROFESSIONAL CONDUCT

EXECUTIVE SUMMARY

Summary of Recommendation

The ABA Task Force on Corporate Responsibility recommends that Rule 1.6(b) of the ABA Model Rules of Professional Conduct (the “Model Rules”) be amended to permit the lawyer to reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary in order to (i) prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used the lawyer’s services, or (ii) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services.

Summary of the Issue that the Recommendation Addresses; Explanation of the Proposed Policy Position

Rule 1.6(a) of the Model Rules generally prohibits a lawyer from revealing information relating to the representation of a client in the absence of the client’s informed consent or implicit authorization. The Model Rules, however, currently authorize or require a lawyer to reveal such client information in a variety of circumstances where important policy considerations outweigh the policy of protecting the confidentiality of client information. For example:

- Where a lawyer’s withdrawal from representation will not avoid continued assistance to a client’s crime or fraud, the lawyer may be required under the existing Model Rule 4.1(b) to “disaffirm an opinion, document or affirmation or the like” previously given by the lawyer.

- Where a lawyer representing a client in an adjudicative proceeding knows that the client has testified falsely, the lawyer may be required, not merely permitted, to disclose the falsity to the tribunal, even if the result is the client's loss of the case and a prosecution for perjury.
- To the extent reasonably believed to be necessary, the lawyer is allowed to disclose information relating to the representation of a client in order to establish a claim or defense in a case against the client, including an action seeking recovery of legal fees.

In making its recommendation, the Task Force believes that where the client abuses the lawyer-client relationship by using the lawyer's services to commit a crime or fraud which results in substantial economic harm to another, the policy of protecting confidentiality is outweighed by the policy of protecting the interests of society and the professional integrity of the lawyer. The lawyer disciplinary rules of forty-two states have concurred in this balancing of policy interests by permitting a lawyer to disclose client information in order to prevent a client from perpetrating a fraud that constitutes a crime.

Minority Views or Opposition

The Task Force was unanimous in approving the Task Force Report containing the proposed amendments to Model Rule 1.6. Proposed amendments to the same effect were considered by the House of Delegates at the 2001 Annual Meeting. The proposed amendment to Model Rule 1.6 adding paragraph (b)(2) was not adopted by the House of Delegates. The proposed amendment to Model Rule 1.6 adding paragraph (b)(3) was thereupon withdrawn by the proponents.