

reports to a QLCC.⁹⁰ The Commission has provided a form of “safe harbor” against any inconsistent standard of a state or other United States jurisdiction in Section 205.6(c), and against a private action in Section 205.7.

Section 205.3(d) Issuer Confidences

205.3(d)(1) provides:

(1) Any report under this section (or the contemporaneous record thereof) or any response thereto (or the contemporaneous record thereof) may be used by an attorney in connection with any investigation, proceeding, or litigation in which the attorney’s compliance with this part is in issue.

Paragraph (d)(1) makes clear that an attorney may use any records the attorney may have made in the course of fulfilling his or her reporting obligations under this part to defend himself or herself against charges of misconduct. It is effectively equivalent to the ABA’s present Model Rule 1.6(b)(3) and corresponding “self-defense” exceptions to client-confidentiality rules in every state. The Commission believes that it is important to make clear in the rule that attorneys can use any records they may have prepared in complying with the rule to protect themselves.

One comment expressed concern that this provision would empower the Commission to use such records against the attorney. That concern misreads this paragraph, which expressly refers to the use of these records “by an attorney” in a proceeding where the attorney’s compliance with this part is in issue.

205.3(d)(2) provides:

(2) An attorney appearing and practicing before the Commission in the representation of an issuer may reveal to the Commission, without the issuer’s consent, confidential information related to the representation to the extent the attorney reasonably believes necessary:

(i) To prevent the issuer from committing a material violation that is likely to cause substantial injury to the financial interest or property of the issuer or investors;

(ii) To prevent the issuer, in a Commission investigation or administrative proceeding from committing perjury, proscribed in 18 U.S.C. 1621; suborning perjury, proscribed in 18 U.S.C. 1622; or committing any act proscribed in 18 U.S.C. 1001 that is likely to perpetrate a fraud upon the Commission; or

(iii) To rectify the consequences of a material violation by the issuer that caused, or may cause, substantial injury to the financial interest or property of the issuer or investors in the furtherance of which the attorney’s services were used.

This paragraph thus permits, but does not require, an attorney to disclose,

under specified circumstances, confidential information related to his appearing and practicing before the Commission in the representation of an issuer. It corresponds to the ABA’s Model Rule 1.6 as proposed by the ABA’s Kutak Commission in 1981–1982 and by the ABA’s Commission of Evaluation of the Rules of Professional Conduct (“Ethics 2000 Commission”) in 2000,⁹¹ and as adopted in the vast majority of states.⁹² It provides additional protection for investors by allowing, though not requiring, an attorney to disclose confidential information relating to his appearing and practicing before the Commission in the representation of an issuer to the extent the attorney reasonably believes necessary (1) to prevent the issuer from committing a material violation that the lawyer reasonably believes is likely to result in substantial injury to the financial interest or property of the issuer or investors; (2) to prevent the issuer from perpetrating a fraud upon the Commission; or (3) to rectify the consequences of an issuer’s material violations that caused or may cause substantial injury to the issuer’s financial interest or property in the furtherance of which the attorney’s services were used.

The proposed version of this rule provided that the attorney appearing or practicing before the Commission could disclose information to the Commission:

(i) To prevent the issuer from committing an illegal act that the attorney reasonably believes is likely to result in substantial injury to the financial interest or property of the issuer or investors;

(ii) To prevent the issuer from committing an illegal act that the attorney reasonably

⁹¹ ABA, *Report of the Commission on Evaluation of the Rules of Professional Conduct* (November 2000), recommended permitting a lawyer to disclose confidential “information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services.”

⁹² Thirty-seven states permit an attorney to reveal confidential client information in order to prevent the client from committing criminal fraud. See *Restatement (Third) of the Law Governing Lawyers* (2000) section 67, Cmt. f, and Thomas D. Morgan & Ronald D. Rotunda, *Model Code of Professional Responsibility, Model Rules of Professional Conduct, and Other Selected Standards*, at 146 (reproducing the table prepared by the Attorneys’ Liability Assurance Society (“ALAS”) cited in the Restatement). The ABA’s Model Rule 1.6, which prohibits disclosure of confidential client information even to prevent a criminal fraud, is a minority rule. In its *Carter and Johnson* decision (1981 WL 384414, at n.78), the Commission expressly did not address an attorney’s obligation to disclose a client’s intention to commit fraud or an illegal act.

believes is likely to perpetrate a fraud upon the Commission; or

(iii) To rectify the consequences of the issuer’s illegal act in the furtherance of which the attorney’s services had been used.

Several comments stated that permitting attorneys to disclose illegal acts to the Commission, in the situations delineated by the proposed rule, would undermine the relationship of trust and confidence between lawyer and client, and may impede the ability of lawyers to steer their clients away from unlawful acts.⁹³ Other comments expressed concern that this provision conflicts with, and would (in their eyes impermissibly) preempt, the rules of professional conduct of certain jurisdictions (such as the District of Columbia) which bar the disclosure of information which an attorney is permitted to disclose under this paragraph, particularly where it permits the disclosure of past client misconduct.⁹⁴ Some aver that “it is not a lawyer’s job” in representing an issuer before the Commission “to correct or rectify the consequences of [the issuer’s] illegal actions, or even to prevent wrong-doing.”⁹⁵

Other commenters noted that these disclosure provisions should be limited to illegal acts that are likely to have a material impact on the market for the issuer’s securities,⁹⁶ or to ongoing criminal or fraudulent conduct by the issuer,⁹⁷ while others suggest that attorneys should only be permitted to disclose information where there is a risk of death or bodily harm, and not where only “monetary interests” are

⁹³ See comments of Joseph T. McLaughlin, Heller Ehrman, at 2; Comments of the Los Angeles County Bar Association, at 2.

⁹⁴ Comments of Eleven Persons or Law Firms, at 8–9; Comments of the American Bar Association, at 33 (urging the Commission to refrain from considering the proposed disclosure provisions unless and until it receives express Congressional authority to preempt state privilege rules); Comments of 77 law firms, at 2; Comments of Latham & Watkins, at 5–6; Comments of Theodore Sonde, at 2; Comments of Schiff Hardin & Waite, at 7–8; Comments of Sheldon M. Jaffe, at 7–9; Comments of Emerson Electric, at 2; Comments of the Federal Bar Council, at 9–10 & n.9; Comments of JP Morgan & Chase, at 11 & n.3 (citing treatise for proposition that only six states permit disclosure to rectify past fraud).

⁹⁵ Comments of the Law Society of England and Wales, at 12.

⁹⁶ Comments of the Los Angeles County Bar Association, at 2; Comments of Edward C. Brewer, III at 8; see also Comments of the Association of the Bar of the City of New York at 5 (supporting attorney disclosure of materials facts to avoid assisting a criminal or fraudulent act by the client, or to correct prior representations made by the lawyer and believed by the lawyer still to be relied upon by a third person where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud).

⁹⁷ Comments of Theodore Sonde, at 2.

⁹⁰ *Id.*, at 42–43.