

## WILMER, CUTLER & PICKERING

### Comparison of SEC Attorney Responsibility Rules and State Bar Rules Regarding Reporting of Misconduct

The SEC rules supplement state ethics rules and are not intended to limit a state's ability to impose more rigorous obligations on an attorney. The SEC rules govern if there is a conflict between the SEC rules and a state's rules. 17 C.F.R. § 205.1.

Colorado	District of Columbia	Maryland	Missouri	New York	Virginia
<b>ATTORNEY'S DUTY TO ORGANIZATIONAL CLIENT</b>					
<p><u>SEC Rule: Organizational Client</u>                      The SEC rules state that an attorney appearing and practicing before the SEC in the representation of an issuer owes his or her professional and ethical duties to the issuer as an organization. 17 C.F.R. § 205.3(a).</p>					
A lawyer employed or retained by an organization represents the organization which acts through its duly authorized constituents, and the lawyer owes allegiance to the organization itself, and not its individual stockholders, directors, officers, employees, representatives or other persons connected with the entity. Rule 1.13(a).	A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents. Rule 1.13(a).	A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents. Rule 1.13(a).	A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents. Rule 1.13(a).	When a lawyer employed or retained by an organization is dealing with the organization's directors, officers, employees, members, shareholders or other constituents, and it appears that the organization's interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents. DR 5-109(a).	A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents. Rule 1.13(a).

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<b>GENERAL PROHIBITION AGAINST REVEALING CONFIDENCES</b>					
<p><u>SEC Rule: Confidential Information</u>  The SEC rules permit, but do not require, an attorney to reveal confidences, as described below.</p>					
<p>Attorney 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 Rules 1.6(b) and (c). Rule 1.6(a).</p>	<p>Attorney shall not knowingly reveal confidences, or use confidences to the client's disadvantage, except where permitted under Rule 1.6(c) or 1.6(d). Rule 1.6(a).</p>	<p>Attorney shall not reveal confidences unless the client consents after consultation, except as stated in Rule 1.6(b). Rule 1.6(a).</p>	<p>Attorney 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 Rule 1.6(b). Rule 1.6(a).</p>	<p>Attorney shall not knowingly reveal client confidences or secrets except when permitted under DR 4-101(C). DR 4-101(B). Attorney may reveal confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them. DR 4-101(C)(1).</p>	<p>Attorney shall not reveal confidences except as stated in Rule 1.6(b) or 1.6(c). Rule 1.6(a).</p>
<b>EXCEPTION TO COMPLY WITH LAW</b>					
<p>Attorney must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client. In addition, other provisions of the Rules permit or require a lawyer to disclose information relating to the representation. Commentary to Rule 1.6.</p>	<p>Attorney may reveal confidences when permitted by these Rules or required by law or court order. Rule 1.6(d)(2)(A).</p>	<p>Attorney may reveal confidences to the extent the attorney reasonably believes necessary to comply with these Rules, a court order or other law. Rule 1.6(b)(4).</p>	<p>Attorney must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client. In addition, other provisions of the Rules permit or require a lawyer to disclose information relating to the representation. Commentary to Rule 1.6.</p>	<p>Attorney may reveal confidences or secrets when permitted under Disciplinary Rules or required by law or court order. DR 4-101(C)(2).</p>	<p>Attorney may reveal confidences to the extent the attorney reasonably believes necessary to comply with law or a court order. Rule 1.6(b)(1).</p>

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<b>EXCEPTION TO PREVENT CLIENT CRIME OR FRAUD</b>					
<u>SEC Rule: Injury to Financial Interests or Property of Issuer or Investors</u>					
Attorney may reveal confidences if the attorney reasonably believes disclosure is necessary 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.” 17 C.F.R. § 205.3(d)(2)(i).					
<p>Attorney may reveal “the intention of a client to commit a crime and the information necessary to prevent the crime.” Rule 1.6(b).</p> <p><u>Note:</u> There is no provision allowing an attorney to reveal confidences to prevent economic injury.</p>	<p>Attorney may reveal confidences to the extent reasonably necessary “to prevent a criminal act that the lawyer reasonably believes is likely to result in death or substantial bodily harm absent disclosure of the client’s secrets or confidences by the lawyer.” Rule 1.6(c)(1).</p> <p><u>Note:</u> There is no provision allowing an attorney to reveal confidences to prevent economic injury.</p>	<p>Attorney may reveal confidences to the extent the attorney reasonably believes necessary “to prevent the client from committing a criminal or fraudulent act that the lawyer believes is likely to result in death or substantial bodily harm or in substantial injury to the financial interests or property of another.” Rule 1.6(b)(1).</p>	<p>Attorney may reveal confidences 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.” Rule 1.6(b)(1).</p> <p><u>Note:</u> There is no provision allowing an attorney to reveal confidences to prevent economic injury.</p>	<p>Attorney may reveal “the intention of a client to commit a crime and the information necessary to prevent the crime.” DR 4-101(C)(3).</p>	<p>Attorney <i>shall</i> promptly reveal “the intention of a 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 the client of the possible legal consequences of the 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.” Rule 1.6(c)(1).</p> <p><u>Note:</u> Disclosure regarding future crimes is mandatory under the Rule; however, the “as stated by the client” language in the Rule</p>

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					<p>appears to require that a client confess his or her intention to commit a crime before the attorney's mandatory disclosure requirement is triggered. There are no known Virginia Legal Opinions analyzing the issue.</p> <p>Attorney may reveal confidential information to the extent the attorney reasonably believes necessary where such information "clearly establishes that the client has, in the course of the representation, perpetrated upon a third party a fraud related to the subject matter of the representation." Rule 1.6(b)(3).</p> <p><u>Notes:</u></p> <ol style="list-style-type: none"> <li>1. There is no requirement that the fraud caused, or may cause, substantial injury to the financial interest or property of others.</li> <li>2. Information is "clearly established" when the client</li> </ol>

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					<p>acknowledges to the attorney that the client has perpetrated a fraud. Rule 1.6(c)(2). According to two Virginia Legal Opinions, a client's confession is required before an attorney can reveal confidences under Rule 1.6(b)(3). <u>See</u> Virginia LEO 1347 (June 28, 1990); Virginia LEO 1367 (July 24, 1990). However, at least one court has established a less rigorous standard, requiring the attorney "to show that a reasonable attorney in his position would find the communications at issue to be convincing evidence of the perpetration of a fraud on the government during the course of his representation related to the subject matter of that representation. But the fraud itself need not be conclusively</p>

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					proved.” <u>X Corp. v. Doe</u> , 805 F. Supp. 1298, 1310 (E.D. Va. 1992), <u>aff’d sub nom. Under Seal v. Under Seal</u> , 17 F.3d 1435 (4th Cir. 1994).
<b>EXCEPTION TO AVOID ASSISTING CLIENT IN CRIME OR FRAUD</b>					
In the course of representing a client, attorney shall not knowingly “fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.” Rule 4.1(b).	Attorney shall not knowingly “fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.” Rule 4.1(b).	Attorney shall not knowingly fail to disclose “a material fact to a third party when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client,” even if compliance with this Rule requires disclosure of information otherwise protected by Rule 1.6. Rules 4.1(a)(2); 4.1(b).	In the course of representing a client, attorney shall not knowingly “fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.” Rule 4.1(b).	Attorney may reveal confidences or secrets “to the extent implicit in withdrawing a written or oral opinion or representation previously given 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.” DR 4-101(C)(5).	Attorney shall not knowingly fail to disclose “a fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.” Rule 4.1(b).

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<b>EXCEPTION FOR CLIENT FRAUD UPON A TRIBUNAL</b>					
<p><u>SEC Rule: Fraud or Perjury Upon the SEC</u>            Attorney may reveal confidences if attorney reasonably believes disclosure is necessary to prevent issuer, in an SEC investigation or administrative proceeding, from committing perjury, suborning perjury or perpetrating a fraud upon the Commission. 17 C.F.R. § 205.3(d)(2)(ii).</p>					
No corresponding rule.	No corresponding rule.	No corresponding rule.	No corresponding rule.	No corresponding rule.	<p>Attorney shall promptly reveal “information which clearly establishes that the 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 the client advise the tribunal of the fraud.” Rule 1.6(c)(2).</p> <p><u>Note:</u> It is unclear whether this rule applies to fraud perpetrated against the SEC as there are no known Virginia cases or state ethics opinions regarding this question.</p>

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<b>EXCEPTION TO RECTIFY CONSEQUENCES OF MATERIAL VIOLATION</b>					
<p><u>SEC Rule: Rectification of Consequences of Material Violation</u>            Attorney may reveal confidences if attorney reasonably believes disclosure is necessary to rectify 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.” 17 C.F.R. § 205.3(d)(2)(iii).</p>					
No corresponding rule.	No corresponding rule.	Attorney may reveal confidences to the extent the attorney reasonably believes necessary “to rectify the consequences of a client’s criminal or fraudulent act in the furtherance of which the lawyer’s services were used.” Rule 1.6(b)(2).	No corresponding rule.	No corresponding rule.	No corresponding rule.
<b>EXCEPTION FOR ATTORNEY SELF-DEFENSE</b>					
<p><u>SEC Rule: Attorney Self-defense</u>            Attorney may reveal confidences in connection with any investigation, proceeding or litigation in which the attorney’s compliance with the Issuer’s Confidence part of the rule is in issue. Part 205.3(d)(1).</p>					
Attorney may reveal confidences 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	Attorney may reveal confidences to the extent reasonably necessary “to establish a defense to a criminal charge, disciplinary charge, or civil claim, formally instituted against the lawyer, based upon conduct in which the client was involved, or to the extent reasonably necessary to respond to	Attorney may reveal confidences to the extent the attorney reasonably believes necessary “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	Attorney may reveal confidences 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	Attorney may reveal confidences or secrets “to defend the lawyer or his or her employees or associates against an accusation of wrongful conduct.” DR 4-101(C)(4).	Attorney may reveal confidences to the extent the attorney 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



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involved, or to respond to allegations in any proceedings concerning the lawyer's representation of the client." Rule 1.6(c).	specific allegations by the client concerning the lawyer's representation of the client." Rule 1.6(d)(3).	conduct in which the client was involved or to respond to allegations in any proceeding concerning the lawyer's representation of a client." Rule 1.6(b)(3).	involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client." Rule 1.6(b)(2).		involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client." Rule 1.6(b)(2).