

## **ABA approves Corporate Counsel consulting their personal ethics.**

That title may be an overstatement, but it focuses your attention where I would like to have it—what do you do if your personal ethics revolts against what your client is doing? There are lots of options, but let's spend this page talking about one of them.

In late July, 2003, the chief justices of all 50 states adopted a resolution in favor of the proposal of the ABA's Corporate Responsibility Task Force to permit lawyers to reveal client confidences to prevent fraud. Ronald M. George, chief justice of the California Supreme Court, said the changes would make it clear to lawyers that they would not be disciplined for disclosing client confidences to prevent fraud.

Think about that. Lawyers needed to be assured that they would not lose their license if they prevented injury. The maxim "Do no evil" seems to have been forgotten. Lawyers and courts have stopped thinking of themselves as an honorable profession with a primary purpose of serving the public but instead think of themselves as a profession that is there to serve clients (not the public).

We solicit articles to be published on this site. If you have an opinion, one way or the other on this topic (or on others that may have some controversy or are on the leading edge of present legal ethics or corporate governance thought, submit an article for us to consider.

There is real progress (not all would agree) in ethics coming out of the ABA by its 12 August 2003 approval of the Corporate Responsibility Task Force Report. Its recommendations to permit lawyers to reveal confidences of corporate clients to persons outside of the organization in more instances is making the news headlines. But just as significant is the shift to note the need for lawyers to adopt actions shaped by personal ethics and not solely by legal case law and statutes. Further, the reasoning and available research point the way for lawyers searching for existing legal grounds that allow corporate counsel to go to prosecutors with corporate information.

The ABA Corporate Responsibility Task Force Report of August 2003<sup>1</sup> is noteworthy in that it is really one of the few times since 1964 (when the ABA abandoned its aspirational standards of the Canons of Professional Ethics in favor of an enforceable Code of Professional Responsibility Rules) that the ABA has attempted to go beyond the minimum requirements of the law and inject ethics into the legal responsibilities of lawyers. We applaud their statement at page 4 that

The term "corporate responsibility" is not self-defining. In framing its recommendations, the Task Force has understood that term to include, at the

very least, behavior by the executive officers and directors of the corporation that conforms to law and results from the proper exercise of the fiduciary duties of care and loyalty to the corporation and its shareholders. In the Task Force's view, moreover, the term "corporate responsibility" also embraces ethical behavior beyond that demanded by minimum legal requirements.

This injection of ethics comes because of a public demand for ethics. As the Task Force report points out, at page 51,

The Model Rules' treatment of the lawyer's obligation of confidentiality is significantly out of step with the policy balance reflected in the rules of professional conduct in most of the states, in Section 67 of the RESTATEMENT THIRD, THE LAW GOVERNING LAWYERS, and in the recommendations of the ABA Commission on Evaluation of the Rules of Professional Conduct ("Ethics 2000 Commission"). The Task Force believes that this inconsistency has become increasingly dissonant in the last year, as public opinion has demanded that lawyers play a greater role in promoting corporate responsibility.

The ABA Corporate Responsibility Task Force Report of August 2003 has done us a service by doing the research to which you may wish to have access when faced with a corporate client's executives that are "cooking the books" to unduly raise stock prices and the value of their stock options.

The Task Force agrees with the Reporter to the Restatement that Model Rule 1.6 "... should not be understood to preclude controlled disclosure beyond the organization in the limited circumstances where the wrongdoing is clear, the injury to the client organization is substantial, and disclosure would clearly be in the interest of the entity client."<sup>2</sup> The Task Force considers this especially important in the circumstance in which the board of directors or other highest authority of the organizational client is disabled from acting in the best interest of the organization, *e.g.*, because of self-interest or personal involvement in the violation.<sup>3</sup> P. 58 of the report. [Footnotes of quoted text are renumbered for this article.]

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The lawyer disciplinary rules of forty-one states permit a lawyer to disclose client information in order to prevent a client from perpetrating a fraud that constitutes a crime,<sup>4</sup> and eighteen states permit such disclosure to rectify substantial loss resulting from client crime or fraud in which the client used the lawyer's services.<sup>5</sup> Pp 49-50.

It seems to us that an enterprising attorney today may have the basis for divulging corporate fraud when his/her conscious says it would be unconscionable to remain silent.

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## Endnotes

1. The full text of the amendments recommended by the ABA Corporate Responsibility Task Force is available at: <http://www.abanet.org/buslaw/corporateresponsibility>

2. Comment f to RESTATEMENT § 96.

3. Model Rule 1.14, which deals with clients who are natural persons suffering diminished capacity due to minority, mental impairment, or similar reasons, while not entirely apposite, is analogous. In those circumstances the lawyer for the disabled client is “impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client’s interests.” The Task Force’s proposed Model Rule 1.13(c) seeks to accomplish the same result for an organizational client where the capacity of its governing board or other highest authority to act in the best interest of the organization is diminished by its self-interest or personal involvement in the violation.

4. States that permit disclosure to prevent crime: Alaska (Alaska Rules of Prof’l Conduct R. 1.6 (2001)); Arizona (Ariz. Rules of Prof’l Conduct ER 1.6 (2002)); Arkansas (Ark. Rules of Prof’l Conduct R. 1.6 (2002)); Colorado (Colo. Rules of Prof’l Conduct R 1.6 (2002)); Connecticut (Conn. Rules of Prof’l Conduct R. 1.6 (2002)); Florida (Fla. Rules of Prof’l Conduct R. 1.6(2002)); Georgia (Ga. State Bar R. 1.6 (2002)); Hawaii (Haw. Rules of Prof’l Conduct R.1.6 (2002)); Idaho (Idaho Rules of Prof’l Conduct. R. 1.6 (2002)); Illinois (Ill. Rules of Prof’l Conduct R.1.6 (2002)); Indiana (Ind. Rules of Prof’l Conduct R.1.6 (2002)); Iowa (Iowa Code or Prof’l Responsibility DR 4-101(2002)); Kansas (Kan. Sup. Ct. Rules R. 1.6 (2001)); Massachusetts (Mass. Rules of Prof’l Conduct R. 1.6 (2002)); Maryland (Md. Rules of Prof’l Conduct R. 1.6 (2002)); Maine (Me. R. Bar 3.6 (2002)); Michigan (Mich. Rules of Prof’l Conduct R 1.6 (2002)); Minnesota (Minn. Rules of Prof’l Conduct R. 1.6 (2001)); Mississippi (Miss. Rules of Prof’l Conduct R. 1.6 (2002)); Nebraska (Neb. Code of Prof’l Responsibility DR 4-101 (2002)); Nevada (Nev. Rules of Prof’l Conduct R. 156(2002)); New Hampshire (N.H. Rules of Prof’l Conduct R. 1.6 (2002)); New Jersey (N.J. Rules of Prof’l Conduct R. 1.6 (2002)); New Mexico (N.M Rules of Prof’l Conduct R.16-106 (2002)); New York (N.Y. Code of Prof’l Responsibility DR 4-101(2002)); North Carolina (N.C. Rules of Prof’l Conduct R. 1.6 (2002)); North Dakota (N.D. Rules of Prof’l Conduct R. 1.6 (2002)); Ohio (Ohio Code of Responsibility DR4-101) (2002)); Oklahoma (Okla. Rules of Prof’l Conduct R.1.6 (2002)); Oregon (Or. Code of Prof’l Responsibility DR 4-101(2002)); Pennsylvania (Pa. Rules of Prof’l Conduct R.1.6 (2002)); South Carolina (S.C. Rules of Prof’l Conduct R. 1.6 (2001)); Tennessee (Tenn. Rules of Prof’l Conduct R. 1.6 (2003)); Texas (Tex. Rules of Prof’l Conduct R. 1.05(2002)), Utah (Utah Rules of Prof’l Conduct R. 1.6 (2002)); Vermont (Vt. Rules of Prof’l Conduct R. 1.6(2001)); Virginia (Va. Rules of Prof’l Conduct R. 1.6 (2002));

Washington (Wash. Rules of Prof'l Conduct R. 1.6 (2002)); Wisconsin (Wis. Rules of Prof'l Conduct R. 1.6 (2002)); West Virginia (W. Va. Rules of Prof'l Conduct R. 1.6 (2002)); Wyoming (Wyo. Rules of Prof'l Conduct R. 1.6(2002)).

States that require such disclosure: Florida (Fla. Rules of Prof'l Conduct R. 1.6(2002)); New Jersey (N.J. Rules of Prof'l Conduct R. 1.6 (2002)); Virginia (Va. Rules of Prof'l Conduct R. 1.6(2002)); Wisconsin (Wis. Rules of Prof'l Conduct R. 1.6(2002)).

5. States that permit disclosure to rectify substantial loss resulting from client crime or fraud using the lawyer's services: Connecticut (Conn. Rules of Prof'l Conduct R. 1.6 (2002)); Hawaii (Haw. Rules of Prof'l Conduct R.1.6 (2002)); Massachusetts (Mass. Rules of Prof'l Conduct R. 1.6 (2002)); Maryland (Md. Rules of Prof'l Conduct R. 1.6 (2002)); Michigan (Mich. Rules of Prof'l Conduct R. 1.6 (2002)); Minnesota (Minn. Rules of Prof'l Conduct R. 1.6 (2001)); Nevada (Nev. Rules of Prof'l Conduct R. 156 (2002)); New Jersey (N.J. Rules of Prof'l Conduct R. 1.6 (2002)); North Carolina (N.C. Rules of Prof'l Conduct R. 1.6 (2002)); North Dakota (N.D. Rules of Prof'l Conduct R. 1.6 (2002)); Ohio (Ohio Code of Prof'l Responsibility DR 7-102(B)(1) (2002)); Oklahoma (Okla. Rules of Prof'l Conduct R. 1.6(2002)); Oklahoma (Okla. Rules of Prof'l Conduct R. 1.6 (2002)); Pennsylvania (Pa. Rules of Prof'l Conduct R. 1.6(2002)); South Dakota (S.D. Rules of Prof'l Conduct R. 1.6 (2002)); Texas (Tex. Rules of Prof'l Conduct R. 105 (2002)); Utah (Utah Rules of Prof'l Conduct (2002)); Virginia (Va. Rules of Prof'l Conduct R. 1.6(2002)); Wisconsin (Wis. Rules of Prof'l Conduct R. 1.6 (2002)).

States that require such disclosure: Hawaii (Haw. Rules of Prof'l Conduct R. 1.6 (2002)); Ohio (Ohio Code of Prof'l Responsibility DR 4-101(2002)); Oklahoma (Okla. Rules of Prof'l Conduct R. 1.6 (2002)).