Attorneys as SEC Whistleblowers: Can an Attorney Blow the Whistle on a Client and Get a Monetary Award?

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I.  INTRODUCTION

This is a primer on attorneys as award-seeking SEC whistleblowers. It digests the relevant law and explains how it applies in real situations. That law includes the SEC attorney conduct and whistleblower award rules and each state’s ethics rules applicable to attorney disclosure. Fully assessing a particular situation will often require referring to the relevant rules for each state that might come into play for a particular lawyer in a particular situation. We therefore include information about choice of law and a chart summarizing the relevant rules in each of 51 US jurisdictions.

Our hope is that with this primer close at hand, attorneys and companies will not only be equipped to spot issues and apply the law, but will also understand how limited the circumstances are that will allow a lawyer to disclose confidential information to the SEC without client consent and seek a monetary award. This is true even though the SEC has expanded the circumstances allowing disclosure beyond those recognized in many states.

We will end with steps companies can take to deal with risks related to attorneys who are actual or would-be whistleblowers.

II.  CONSIDERING THE POSSIBILITY THAT ONE OF YOUR ATTORNEYS WILL BLOW THE WHISTLE ON YOU

In the world of the US Securities and Exchange Commission, attorneys are ubiquitous. They are employed by every public company and financial industry firm subject to the Commission’s enforcement jurisdiction. But how many of these companies have considered whether one of their internal or outside counsel could disclose confidential company information to the SEC without company consent and become an award-seeking whistleblower?

True, only rare circumstances will allow that to happen, in part because all attorneys, if they practice in the US, are subject to state ethics rules that generally prohibit disclosing client confidences. The SEC officially recognizes this ethical duty and the benefit the investing public gets when public companies and securities firms consult with attorneys. As the Commission stated when it created its whistleblower award rules in 2011, “This important benefit could be undermined if the whistleblower award program created monetary incentives for counsel to disclose information about possible securities violations in violation of their ethical duties to maintain client confidentiality.”

The SEC whistleblower award rules thus generally exclude attorneys from eligibility for monetary whistleblower awards if they try to use information obtained while performing their professional duties to blow the whistle on a client or employer.

But the award rules also carve out exceptions to the general attorney exclusions. These exceptions involve certain limited circumstances in which attorneys become eligible to collect awards for disclosing confidential client information to the SEC. To complicate matters, the circumstances may differ depending on the state that governs the lawyer’s conduct, because the SEC whistleblower award rules establishing the exceptions incorporate by reference existing SEC attorney conduct rules and state ethics rules that permit lawyers in certain circumstances to disclose confidential information without client consent.

According to the SEC, the exceptions in the award rules strike the right balance because they are “consistent with the public policy judgments that have been made as to when the benefits of permitting disclosure are justified notwithstanding any potential harm to the attorney-client relationship.” But are the SEC’s exceptions really consistent “with the public policy judgments that have been made”? The answer is no, as far as many states
are concerned. Often the SEC rules allow disclosure where state rules do not. And that may be bad news for some company managers, particularly those inclined to skate close to, or across, the line separating appropriate responses from inappropriate ones when SEC enforcement issues arise.

III. THE THICKET OF REGULATION RELATING TO ATTORNEY DISCLOSURE

Consider the following two scenarios:

First, an attorney is appearing and practicing before the Commission in connection with an issuer. The attorney reasonably (at least from the SEC’s point of view) believes that reporting out to the SEC without client consent is necessary to prevent the issuer from committing a non-criminal fraud that is likely to cause substantial financial injury to the issuer or investors. In those circumstances, 13 states forbid disclosure. Seven states do not even permit a noisy withdrawal by the attorney. Seven additional states forbid disclosure if the issuer client did not use the attorney’s services in furtherance of the fraud. Nevertheless, the SEC permits disclosure by the lawyer without client consent. Moreover, the SEC expressly says its rule trumps the contradictory state rules. Only the California bar challenges the SEC on that point.

Second, consider a lawyer who reasonably believes reporting out to the SEC is necessary to rectify a substantial financial injury that has resulted from an issuer client’s fraud. In furtherance of the fraud, the client has used the lawyer’s services. In those circumstances, nine states forbid disclosure. Seven do not even permit a noisy withdrawal. But again the SEC permits disclosure by the lawyer without client consent, and says its rule trumps the state rules.

We have been referring to the “Part 205” attorney conduct rules adopted by the SEC in 2003 as required by the Sarbanes-Oxley Act of 2002. When the SEC proposed and then determined to override longstanding attorney confidentiality rules in many states, the Commission sparked enormous controversy among US lawyers, and particularly those who had dominated the debate within the American Bar Association. At the time, the ABA Model Rules of Professional Conduct prohibited disclosure of confidential client information even to prevent a criminal fraud. But as the SEC pointed out, the majority of states permitted disclosure under those circumstances, and later in 2003, the ABA revised the Model Rules to better align them with the SEC’s new rules. All of this was in reaction to the notorious frauds at Enron, Worldcom, and other public companies.

An ABA task force promoting the 2003 revision had noted that a number of exceptions to the basic confidentiality rule were already well established in the Model Rules and in the lawyer disciplinary rules of most states. The task force added,

All of these exceptions could be said to detract from the atmosphere of confidentiality conducive to clients’ disclosure of important information to their lawyers, yet these limitations exist and serve similarly important policy purposes, including the protection of the ultimate client or third parties, and the protection of the professional integrity of the lawyer. This balancing of competing policy interests represents a carefully developed system of lawyer regulation.

But that last statement was a reach, at best. However “carefully developed” the “system of lawyer regulation” may have seemed to the ABA task force, it was not and is not a universally adopted or static system. The relevant rules in a number of jurisdictions vary substantially from the SEC attorney conduct rules and the ABA Model Rules, and both the Model Rules’ and certain states’ exceptions to confidentiality principles have changed considerably in recent years. Even after the SEC Part 205 rules and ABA Model Rule revisions were adopted in 2003, it remained more accurate to say that the US had a thicket of lawyer regulation rather than a carefully developed system.
And it was that thicket that the SEC confronted again eight years later, in 2011. Just as the massive corporate accounting frauds in the early 2000s resulted in Section 307 of Sarbanes-Oxley Act, which required the SEC to propose and adopt what became the Part 205 attorney conduct rules, so did the massive financial meltdown of 2007-08 result in Section 922 of the Dodd-Frank Act of 2010, which required the SEC to propose and adopt the whistleblower award rules.

Before we tackle how the whistleblower award rules treat attorney whistleblowers, we will describe briefly how those rules work more generally.

IV. ELIGIBILITY FOR SEC WHISTLEBLOWER AWARDS

In general, individuals who provide information useful to SEC enforcement fall into three categories as to their eligibility for monetary awards under the SEC whistleblower program.

The first category covers individuals who are ineligible to receive any award. This category includes persons associated with the SEC or a similar authority, those convicted of a crime related to the enforcement action for which they otherwise could receive an award or who knowingly provide false information to the SEC, and external auditors who fail to file a required report with the SEC about a possibly illegal act and instead provide the information to the SEC seeking a whistleblower award.

The second category covers individuals with compliance or ethical responsibilities, including attorneys, who can become eligible for a whistleblower award under certain circumstances. In addition to attorneys, this category includes officers and directors, compliance and internal audit personnel, internal and external accountants, and external auditors doing non-audit work. Within this category, attorneys are the most restricted group with respect to blowing the whistle in hopes of getting an award.

The third category covers everyone else. This category includes the entity’s remaining employees, customers, and agents. These individuals can generally provide information to the SEC without restriction and be potentially eligible for a whistleblower award.5

V. BASIC SEC WHISTLEBLOWER AWARD ELIGIBILITY REQUIREMENTS

Ordinary individuals (category three above) and, under certain circumstances, attorneys and other individuals with compliance or ethical responsibilities (category two above) can become eligible for a monetary whistleblower award by voluntarily providing the SEC with “original information” that leads to an SEC enforcement action that results in monetary sanctions totaling more than $1 million. When that occurs, the SEC must pay the whistleblower anywhere from 10 percent to 30 percent of amounts collected in the SEC action and certain related actions.

“Original information” means information (a) derived from the “independent knowledge” or “independent analysis” of the whistleblower;6 (b) not already known to the SEC from any other source (unless the whistleblower is the original source); and (c) not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit or investigation, or from the news media (unless the whistleblower is a source of the information). Even if the SEC already knows some information about a matter, a whistleblower can still satisfy the “original information” requirement by providing new information that “materially adds to the information that the Commission already possesses.”7
VI. AWARD ELIGIBILITY EXCLUSIONS

Even if an attorney meets the basic whistleblower requirements above, they will generally be excluded — at least initially — from eligibility for a monetary award. That is, they will not be eligible unless a specific exception applies. This is because individuals are initially ineligible for awards if they obtained the “original information” in one or more of six ways, and at least one of these ways is likely to apply to an attorney in any given situation. The SEC rules state that if information is obtained in one of these ways and no exception applies, the Commission will not consider the information to be “original information,” and therefore the provider of the information will not be eligible for a whistleblower award.

Here are the six categories of exclusion. Individuals are initially ineligible for awards if they obtained the otherwise “original information” in any of the following ways:

1. Through a privileged communication;
2. In connection with the legal representation of a client on whose behalf they or their employer or firm are providing services;
3. Because they were an officer, director, trustee, or partner of an entity and another person informed them of allegations of misconduct or they learned the information in connection with the entity’s processes for identifying, reporting, and addressing possible violations of law;
4. Because they were an employee whose principal duties involve compliance or internal audit responsibilities, or they were associated with a firm retained to perform compliance or internal audit functions;
5. Because they were associated with a firm retained to conduct an inquiry or investigation into possible violations of law;
6. Because they were associated with a public accounting firm, if they obtained the information through the performance of an engagement required by the federal securities laws (other than a financial statement audit of an issuer) and the information relates to a violation by the client or the client’s directors or employees. These six ways of becoming excluded from eligibility for awards apply to attorneys and other individuals with compliance or ethical responsibilities. The first two exclusions focus on attorneys and have different corresponding exceptions than the other four exclusions.

VII. EXCLUSIONS AND EXCEPTIONS RELATED TO PRIVILEGED COMMUNICATIONS AND LEGAL REPRESENTATIONS

We will focus on the first two of the six award eligibility exclusions because they are aimed primarily at attorneys.

The first exclusion is for information obtained through a privileged communication. The second exclusion is for information obtained in connection with the legal representation of a client on whose behalf the whistleblower or the whistleblower’s employer or firm is providing services.

These two exclusions promote the government’s interest in maximizing attorneys’ opportunities to persuade their clients not to violate the federal securities laws. According to the Commission, “the exclusions send a clear, important signal to attorneys, clients, and others that there will be no prospect of financial benefit for submitting information in violation of an attorney’s ethical obligations.”

But because the government also has a strong interest in intervening before someone acts illegally, in stopping violations that are ongoing, and in prosecuting violations that have occurred, the SEC whistleblower rules provide exceptions to the two exclusions. Confidential client information can be disclosed to the SEC without client consent — and
qualify as “original information” that makes the provider eligible for an award — if such disclosure would otherwise be permitted under the SEC’s attorney conduct rules, the applicable state attorney conduct rules, or “otherwise.”

A lot is packed into that last brief statement. It incorporates a tremendous amount of law into the SEC whistleblower rules specifically applicable to attorneys by referring to three sets of rules or laws that under specific circumstances permit an attorney to disclose confidential client information to the SEC without client consent so the attorney can become eligible for a whistleblower award.

VIII. CIRCUMSTANCES THAT PERMIT AN ATTORNEY TO DISCLOSE CONFIDENTIAL INFORMATION TO THE SEC AND SEEK AN AWARD

We will now expand upon each of the three sets of rules or laws. First, there are the SEC’s rules; second, the applicable state rules; and third, any other rule or law or court order that would be to the same effect.

A. The SEC’s Attorney Conduct Rules (Part 205)

As required by the Sarbanes-Oxley Act of 2002, the Commission prescribed minimum standards of professional conduct for attorneys appearing and practicing before the Commission on behalf of issuers. These standards are known as “Part 205.”

The eligibility exceptions in the SEC whistleblower rules created by reference to Part 205 do not potentially apply to all attorneys but only to a subset, because Part 205 applies only to attorneys “appearing and practicing” before the Commission in the context of providing legal services for an “issuer.” “Appearing and practicing” is broadly defined. It includes, for example, merely advising on a US securities law issue regarding a document that the attorney has notice will be incorporated into a document to be filed with or submitted to the Commission. “Issuer” is also broadly defined; it includes any person controlled by an issuer, where an attorney provides legal services to such person on behalf of, or at the behest, or for the benefit of the issuer, regardless of whether the attorney is employed or retained by the issuer.

Part 205 deals primarily with when an attorney must cause reporting “up the ladder” within the confines of the issuer because the attorney has become aware of evidence of a “material violation” by the issuer or an issuer’s agent. The reporting obligations in Part 205 do not include an obligation to “report out” to the SEC or anyone else in any circumstance. Part 205 does, however, permit attorneys it covers to “report out” to the SEC — that is, to reveal confidential information related to the representation to the Commission without the issuer’s consent — but only to the extent the attorney reasonably believes 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;
- To prevent the issuer, in a Commission investigation or administrative proceeding, from committing perjury, suborning perjury, or knowingly and willfully perpetrating a fraud upon the Commission (by, e.g., concealing a material fact or making a materially false representation) or;
- 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.

These, then, are the three circumstances under which the SEC’s attorney conduct rules and the SEC whistleblower rules, read together, permit confidential client information to be disclosed by an attorney to the SEC without client consent and qualify as “original information” that makes the providing attorney eligible for an award.
The SEC’s 2003 final rule release on Part 205 purported to put these three exceptions into context relative to then-applicable attorney ethics rules, noting that they corresponded to Model Rule 1.6 as previously proposed by several ABA commissions (but not adopted by the ABA) “and as adopted in the vast majority of states.” But as our state-by-state chart below indicates, it was an exaggeration to say that the “vast majority” of states had adopted exceptions that corresponded to the SEC’s three exceptions.

B. Applicable State Attorney Conduct Rules

The state attorney conduct rules that are relevant to these issues deal separately with (a) an attorney’s duty to protect confidential client information, and (b) the duties of attorneys representing organizations. In 50 jurisdictions (the District of Columbia and all states but California) the main confidentiality rule is some version of Model Rule 1.6, and the organization representation rule is some version of Model Rule 1.13.

Under Model Rule 1.6, entitled “Confidentiality of Information,” a lawyer is prohibited from disclosing client confidences unless an exception applies that permits or requires disclosure. As stated in the Comments to the Model Rules:

The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.

. . . This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person . . . [However], a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation.

Under Rule 1.13, entitled “Organization as Client,” lawyers representing organizations are subject to “reporting up” obligations similar to those in the SEC’s Part 205 rules. In a number of jurisdictions, lawyers are also permitted to “report out” if necessary to prevent substantial injury to the organization.

1. Interplay Between State Rules and the SEC’s Part 205 Rules

The SEC’s Part 205 rules do not prohibit disclosure of confidential client information without client consent. That prohibition is found in the attorney ethics rules in every jurisdiction. Each jurisdiction’s rules apply at all times to all attorneys subject to the rules of that jurisdiction, bind them to the basic rule of confidentiality, and also provide potential exceptions to that rule.

Part 205 applies only to attorneys who are appearing and practicing before the SEC in the representation of an issuer, so naturally the exceptions to state confidentiality requirements in Part 205 apply only to attorneys in that situation. For attorneys subject to Part 205, both sets of exceptions, state and SEC, apply.

Part 205 sets forth “minimum standards of professional conduct,” which means that to the extent Part 205 modifies the effect of a state’s rules regarding client confidences, it is a one-way ratchet in favor of disclosure without client consent.

If neither Part 205 nor the applicable jurisdiction explicitly permits disclosure of confidential client information without client consent under the circumstances, and the lawyer is not “otherwise” permitted to disclose, the lawyer will be prohibited by the jurisdiction’s ethics rules from disclosing client confidences to the government without client consent, and the attorney cannot seek an SEC whistleblower award.
In practice, the general prohibition of disclosure in the applicable state rules should govern all situations and prevent an attorney from becoming an award-seeking SEC whistleblower except where the client is truly a bad actor. If an attorney reasonably believes his or her client is a continuing bad actor, such that Part 205 permits disclosure, while the applicable jurisdictional rules forbid disclosure, Part 205 will govern, and disclosure will be permitted without client consent, according to the SEC.19

Conversely, in circumstances in which a jurisdiction requires disclosure by a lawyer, Part 205 — which never does more than permit disclosure — takes a back seat. The jurisdiction’s standard will govern, and disclosure without client consent will be required.20

2. Relevant Categories of Client Misconduct Covered by State Ethics Rules

For SEC whistleblower award purposes, each jurisdiction’s ethics rules cover five main categories of client misconduct and state for each of those categories whether the attorney is permitted to report out, required to report out, or forbidden from reporting out. Reporting out means revealing confidential information relating to the representation to a third party without the client’s consent, as the lawyer reasonably believes appropriate because of the circumstances of client misconduct.

We set out below the five categories of client misconduct and five corresponding situations the client’s lawyers might find themselves in, as described in the ABA Model Rules of Professional Conduct. We will comment briefly on corresponding permissive reporting-out provisions in the SEC’s Part 205 rules, and explain the state rule that overlies the five categories and five corresponding situations in cases where the client is an organization. Following that are two charts, the first showing how these situations correspond to the Model Rules, and the second showing how the ethics rules of each jurisdiction treat the reporting-out issue in each of the situations. Often that treatment is different than the treatment in the Model Rules.

(1) Intended fraud: The lawyer reasonably believes reporting out is necessary to prevent the client from committing a non-criminal 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. See Model Rule 1.6(b)(2).

Compare this situation to the corresponding provision in the SEC’s Part 205 rules permitting reporting out. That provision permits the attorney appearing and practicing before the Commission in connection with an issuer representation to report out to the SEC when the attorney reasonably believes reporting out 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. Note that the SEC rule permitting reporting out makes no mention of the client’s use of the lawyer’s services.

(2) Intended crime: The lawyer reasonably believes reporting out is necessary to prevent the client from committing a crime 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. See Model Rule 1.6(b)(2).

There is no explicit corresponding provision — no mention of crime as such — in the SEC’s Part 205 rules permitting reporting out.21

(3) Past crime or fraud: The lawyer reasonably believes reporting out is necessary 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. See Model Rule 1.6(b)(3).

Compare this to the corresponding provision in the SEC’s Part 205 rules permitting reporting out. That provision permits the attorney to report out to the SEC when the
attorney reasonably believes reporting out is necessary 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.

(4) Lack of candor: In connection with the proceedings of a tribunal (including depositions), the lawyer reasonably believes reporting out is necessary (a) to correct a false statement of material fact or law previously made to the tribunal by the lawyer; (b) to rectify the situation if the lawyer, the lawyer’s client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity; or (c) because the lawyer knows that a person intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding. See Model Rule 3.3.22

Compare this to the corresponding provision in the SEC’s Part 205 rules permitting reporting out. That provision permits the attorney to report out to the SEC when the attorney reasonably believes reporting out is necessary to prevent the issuer, in a Commission investigation or administrative proceeding, from committing perjury, suborning perjury, or knowingly and willfully perpetrating a fraud upon the Commission (by, e.g., concealing a material fact or making a materially false representation).

(5) Ongoing crime or fraud: The lawyer knows reporting out is necessary to avoid assisting a criminal or fraudulent act by the client. See Model Rule 4.1.

There is no directly corresponding provision — no mention of the attorney assisting the violation — in the SEC’s Part 205 rules permitting reporting out.

When the client is an organization, the following situation overlies the five situations above.

Organizational client violating the law: The lawyer reasonably believes (a) reporting out is necessary because the organizational client’s highest authority insists upon clearly violating the law or fails to address in a timely and appropriate manner a clear violation of law that might reasonably be imputed to the organization, (b) the violation is reasonably certain to result in substantial injury to the organization; and (c) disclosure is necessary to prevent substantial injury to the organization. See Model Rule 1.13.

This situation, like situation (1) above, corresponds with the provision in the SEC’s Part 205 rules that permits the attorney appearing and practicing before the Commission in connection with an issuer representation to report out to the SEC when the attorney reasonably believes reporting out 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.

For attorneys who represent organizations and might be in one of the five situations discussed above, Rule 1.13 must be read in conjunction with the rules in that jurisdiction that might be applicable to that situation. In some jurisdictions, Rule 1.13 can expand the attorney’s ability to report out under the rules applicable to the five situations. In other jurisdictions, Rule 1.13 can restrict the attorney’s ability to report out under the rules applicable to the five situations. If the organization is an issuer, the SEC’s Part 205 rules may also apply and may govern, as discussed in Section B.1 above.

The following chart summarizes the above information about the Model Rules.
COMMON SITUATIONS THAT COULD PERMIT ATTORNEY DISCLOSURE TO THE SEC WITHOUT CLIENT CONSENT UNDER THE ABA MODEL RULES OF PROFESSIONAL CONDUCT

MODEL RULE 1.6: DISCLOSING A CLIENT’S CONFIDENTIAL INFORMATION IN CASES OF CLIENT MISCONDUCT

1. **Intended Fraud**: The lawyer reasonably believes it is necessary to reveal confidential information relating to the representation of a client to prevent the client from committing a non-criminal fraud that is reasonably certain to result in substantial injury to the financial interests or property of another.

2. **Intended Crime**: The lawyer reasonably believes it is necessary to reveal confidential information relating to the representation of a client to prevent the client from committing a crime.

3. **Past Crime or Fraud**: The lawyer reasonably believes it is necessary to reveal confidential information relating to the representation of a client 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.

MODEL RULE 3.3: CANDOR TOWARDS THE TRIBUNAL

4. **Candor Toward the Tribunal**: In connection with the proceedings of a tribunal, the lawyer reasonably believes disclosure is necessary (a) to correct a false statement of material fact or law previously made to the tribunal by the lawyer; (b) to rectify the situation if the lawyer, the lawyer’s client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity; or (c) because the lawyer knows that a person intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding.

MODEL RULE 4.1: TRUTHFULNESS IN STATEMENTS TO OTHERS

5. **Ongoing Crime or Fraud**: The lawyer knows that disclosure of confidential information relating to the representation of a client is necessary to avoid assisting a criminal or fraudulent act by the client.

MODEL RULE 1.13: DISCLOSING A CLIENT’S CONFIDENTIAL INFORMATION IN CASES WHERE THE CLIENT IS AN ORGANIZATION

**Overlay When Client Is An Organization**: The lawyer reasonably believes (a) reporting out is necessary because the organizational client’s highest authority insists upon clearly violating the law or fails to address in a timely and appropriate manner a clear violation of law that might reasonably be imputed to the organization; (b) the violation is reasonably certain to result in substantial injury to the organization; and (c) disclosure is necessary to prevent substantial injury to the organization.

IMPORTANT NOTE: RULES IN MANY JURISDICTIONS DIVERGE FROM THE MODEL RULES

3. Corresponding Situations for Lawyers Under State Ethics Rules

As shown in the chart below, for each of these situations, each jurisdiction has one or more rules of professional conduct that require, permit, or forbid disclosure of client confidences without client consent. In most jurisdictions, the rule numbers correspond more or less to the ABA Model Rule numbers but the content is often different. The information in the chart is up to date as of April 25, 2013 and includes pointers to the applicable rules in each jurisdiction. The chart does not reflect any potentially material case law that may exist.
### RELEVANT RULES OF THE FIFTY STATES AND THE DISTRICT OF COLUMBIA

<table>
<thead>
<tr>
<th>State</th>
<th>Situation (1) Intended Fraud</th>
<th>Situation (2) Intended Crime</th>
<th>Situation (3) Past Crime or Fraud</th>
<th>Situation (4) Candor Toward the Tribunal</th>
<th>Situation (5) Ongoing Crime or Fraud</th>
<th>Overlay if Client is an Organization</th>
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<td>Disclosure Forbidden ARPC 1.6(a) ^</td>
<td>Disclosure Forbidden ARPC 1.6(a) ^</td>
<td>Disclosure Required ARPC 3.3(a)(3) and (b)**</td>
<td>Disclosure Forbidden ARPC 1.2(d) and 4.1(b)</td>
<td>Disclosure Possibly Forbidden ^ ARPC 1.13(c)</td>
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<td>Disclosure Required ARPC 3.3(a)(3) and (b)**</td>
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**RELEVANT RULES OF THE FIFTY STATES AND THE DISTRICT OF COLUMBIA**
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* An asterisk denotes rules for Situation 1 and Situation 2 that permit a lawyer to disclose confidential information without client consent only if the client has used the attorney’s work product to commit or further the crime/fraud.

** A double asterisk denotes instances where Rule 3.3 is not limited by Rule 1.6, meaning that if the lawyer reasonably believes disclosure of confidential information without client consent is necessary to avoid assisting with an ongoing client crime or fraud, the lawyer must disclose regardless of Rule 1.6 limitations.

† A cross denotes state rules where Rule 1.6 permits disclosure of client crimes and frauds involving substantial financial interests and such disclosure is made mandatory whenever Rule 4.1 applies. The logic here is rooted in the language of Rule 4.1, which states that an attorney “shall not knowingly…fail to disclose” an ongoing client crime or fraud, unless such disclosure is limited by Rule 1.6 (a limit applied in most states). Thus, if an attorney is permitted to disclose client crimes or frauds under a state’s version of Rule 1.6, the attorney is required to disclose a client’s ongoing crime or fraud whenever Rule 4.1 applies.

∆ A delta sign denotes state rules that include comments allowing what is called “noisy withdrawal,” meaning the lawyer may disaffirm documents prepared in the course of the representation that are being used or will be used in furtherance of a fraud, even though such a noisy withdrawal may have the collateral effect of inferentially revealing client confidences. Where noisy withdrawal applies, if the applicable rule of professional conduct mandates disclosure, noisy withdrawal is also mandatory. However, if the applicable rule of professional conduct only permits disclosure at the lawyer’s discretion, noisy withdrawal is also permissive. See Model Rule 1.2, Comment 10, and Model Rule 4.1, Comment 3. Comments to many state versions of Rules 1.2, 4.1 and 1.6 permit or require an attorney to make a noisy withdrawal. See also ABA Formal Opinion 92-366 (Aug. 8, 1992).

^ An upwards carat denotes rules, applicable when the client is an organization, in which disclosure is forbidden unless (i) the attorney has fulfilled reporting-up obligations to the organization’s highest authority; (ii) the attorney is also in one of the five other situations on this chart; and (iii) that other situation, under the state’s rules, permits or requires an attorney to disclose.
Kansas Rule 1.6 only permits disclosures to prevent crimes, thus only those disclosures are mandated by Rule 4.1. See note 1 above.

Massachusetts has a lengthy Rule 3.3(e) governing disclosure of ongoing client crime/fraud in criminal cases.

Missouri’s Rule 1.6 prohibits all disclosures relating to representation except those designed to prevent death/substantial bodily harm. Thus, 4.1 does not mandate disclosures to prevent ongoing client crime or fraud. See note 4 above.

Montana’s Rule 1.6 prohibits all disclosures relating to representation except those designed to prevent death/substantial bodily harm. Thus, 4.1 does not mandate disclosures to prevent ongoing client crime or fraud. See note 4 above.

Missouri’s Rule 1.6 only permits disclosures to prevent crimes, thus only those disclosures are mandated by Rule 4.1. See note 5 above.

New Hampshire’s Rule 1.6 only permits disclosures to prevent crimes, thus only those disclosures are mandated by Rule 4.1. See note 6 above.

New Mexico’s Rule 1.6 only permits disclosures to prevent crimes, thus only those disclosures are mandated by Rule 4.1. See note 7 above.

Ohio’s Rule 4.1 is not limited by Rule 1.6.

Oregon’s Rule 1.6 only permits disclosures to prevent crimes, thus only those disclosures are mandated by Rule 4.1. See note 8 above.

Rhode Island’s Rule 1.6 limits all disclosures relating to representation except those designed to prevent death/substantial bodily harm. Thus, 4.1 does not mandate disclosures to prevent ongoing client crime or fraud. See note 9 above.

Tennessee has a unique Rule 4.1 stating that if a lawyer learns that a client intends to commit a crime or fraud under circumstances in which the lawyer will not assist the offense by remaining silent, the lawyer must remonstrate with the client against the crime or fraud and withdraw if the client does not desist. The lawyer is not required to reveal the client’s intended or ongoing fraud but noisy withdrawal is required as to any person the lawyer reasonably believes knows of the lawyer’s involvement in the matter and whose financial or property interests are likely to be damaged by the client’s intended or ongoing misconduct. If the client’s intended conduct is a crime, full disclosure of the crime is permitted by Rule 1.6(b).

See note 11.

See note 11.

West Virginia’s Rule 1.6 only permits disclosures to prevent crimes, thus only those disclosures are mandated by Rule 4.1. See note 12 above.

Wyoming’s Rule 1.6 only permits disclosures of a client’s intent to commit a crime or a client’s ongoing crimes, thus only those disclosures are mandated by Rule 4.1. See note 13 above.
4. When Multiple Jurisdictions’ Ethics Rules Might Apply: The Choice of Law Conundrum

As the chart above shows, many arbitrary decisions have been made by the various jurisdictions in the area of attorney disclosure. As a result, general common sense is useless for determining whether reporting out is permitted in a particular case. The only recourse is to determine which jurisdictions’ rules might apply, and to examine the potentially applicable jurisdictions’ admonitions in each of the potentially applicable categories.

Leaving aside the SEC’s ethics rules, which whenever issuers are involved could trump applicable state ethics rules, whether a particular situation permits an attorney to report out could be resolved in various ways depending on which jurisdiction’s ethics rules apply. Jurisdictions have widely varying rules, and many lawyers are licensed to practice in more than one jurisdiction. Moreover, the lawyer’s conduct might involve significant contacts with more than one jurisdiction.

Model Rule 8.5, “Disciplinary Authority; Choice of Law,” was intended to address these problems, but the Rule is complicated and sometimes uncertain in application, and 12 states have not adopted any version of it. Further complications are caused by disagreement among the remaining 39 jurisdictions as to which version of Rule 8.5 to use.

The most recent version of Model Rule 8.5 was adopted in 2002 by the ABA, and that version has been adopted by 27 states. Nine others have adopted a modified version of the 2002 model rule. Two jurisdictions (New York and the District of Columbia) continue to use an earlier and brighter-line version of the model rule. The remaining state, Wisconsin, uses a modified version of that earlier model rule.

Part (a) of Model Rule 8.5 describes the circumstances under which a lawyer is subject to the disciplinary authority of a jurisdiction. Part (b) identifies which jurisdiction’s rules of professional conduct should be applied to the lawyer’s conduct.

The most recent (2002) version of Model Rule 8.5 provides:

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer’s conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer’s conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer’s conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer’s conduct will occur.

The older version of Rule 8.5, used by New York and the District of Columbia, provides as follows:

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer’s conduct occurs. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction where the lawyer is admitted for the same conduct.
(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the Rules of Professional Conduct to be applied shall be as follows:

(1) For conduct in connection with a matter pending before a tribunal, the rules to be applied shall be the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise, and

(2) For any other conduct,

(i) If the lawyer is licensed to practice only in this jurisdiction, the rules to be applied shall be the rules of this jurisdiction, and

(ii) If the lawyer is licensed to practice in this and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

For SEC award eligibility purposes, choice-of-law complications are mitigated to a degree because the distinction between required and permitted disclosure does not matter under the whistleblower rules. Attorneys can disclose confidential information to the SEC as long as disclosure is at least permitted. Nevertheless, companies who want to assess the risk that an attorney will blow the whistle to the SEC might consider the possibility that an attorney might be more inclined and quicker to disclose if applicable state rules could be read to require, rather than merely permit, disclosure. Therefore, in the chart we have distinguished between disclosure required and disclosure permitted.

5. Is Disclosure Permitted Because of a Waiver of Attorney-Client Privilege or an Exception to the Privilege?

When the SEC adopted the whistleblower award rules, it referred to circumstances under which “an attorney could submit the information [on which a whistleblower award may be based] to us . . . consistent with applicable state bar rules (e.g., based on waiver of the privilege or a crime-fraud exception).” This is puzzling because state bar rules do not permit a lawyer to voluntarily report out to the government about a client’s misconduct based on a waiver of the attorney-client privilege or the crime-fraud exception. Rather, waiver of privilege or the crime-fraud exception allows a court to compel the lawyer to disclose the content of confidential communications between the lawyer and client.

The ethical rules governing lawyer confidentiality and the evidentiary law of attorney-client privilege are overlapping but separate. The comments to the Model Rules explain the relationship this way:

The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.

Thus, even if the privilege is waived, intentionally or inadvertently, the duty of confidentiality may remain intact.
The question may arise whether a waiver of the privilege or exception to the privilege could undo a previously applicable exclusion from award eligibility because the information was obtained through a communication that was subject to the attorney-client privilege. We think that despite the commentary in the final rule release mentioned above, the answer is no, if the information was obtained by the attorney when the privilege was still intact. This is because the SEC’s exclusionary rule says “was subject to the attorney-client privilege” and not “is subject to the attorney-client privilege”: “you” — the would-be whistleblower — are excluded from award eligibility “[i]f you obtained the information through a communication that was subject to the attorney-client privilege . . .”

Even if the privilege did not apply at the time the information was received, and the attorney avoids that exclusion, the other exclusion is still likely to apply: “you” — the would-be whistleblower — are excluded from award eligibility “[i]f you obtained the information in connection with the legal representation of a client on whose behalf you or your employer or firm are providing services, and you seek to use the information to make a whistleblower submission for your own benefit. . .”

C. “Otherwise”

Beyond the Part 205 and state ethics rules described above, it is not easy to imagine a law or court order or rule that as a practical matter will permit or require an attorney to report out to the SEC and become an award-seeking whistleblower. But the SEC rules refer to that possibility and include it in the exceptions to the two attorney-focused eligibility exclusions.

If the “otherwise” exception ever becomes relevant in a particular case, the attorney should look to see if an admonition like that found in Comment 12 to Model Rule 1.6 has been adopted in the pertinent state. That Comment says that an attorney required by “other law” to disclose information about a client “must discuss the matter with the client to the extent required by Rule 1.4.” Rule 1.4 generally provides that the lawyer must keep the client reasonably informed.

IX. ATTORNEY WHISTLEBLOWERS AND THE USUAL INAPPLICABILITY OF OTHER EXCLUSIONS AND EXCEPTIONS, INCLUDING THE 120-DAY WAITING PERIOD

In the SEC whistleblower rules, certain exclusions from award eligibility (exclusions three through six in Section VI above), and the exceptions to those exclusions, apply to persons with compliance responsibilities. These compliance-related rules could theoretically apply to an attorney, but only if the attorney obtained the relevant information other than through a privileged communication or in connection with a legal representation.

Under these compliance-related exclusions, conditionally eligible persons include officers, directors, trustees, or partners of an entity; individuals associated with compliance or internal audit; individuals associated with a firm retained to conduct an inquiry or investigation into possible violations of law; and individuals associated with a public accounting firm performing certain types of engagements. For those persons, exceptions apply and award-seeking reporting out is permitted (a) if there is ongoing misconduct at the relevant entity that might cause substantial injury to the financial interest or property of the entity or investors, and the person reasonably believes that disclosing information to the SEC is necessary to stop the misconduct; (b) if the person reasonably believes that the relevant entity is obstructing an internal or SEC investigation; or (c) if at least 120 days have elapsed since the individual learned that those responsible for the entity’s compliance had information about the possible violation.

Again, these particular exceptions for persons with compliance responsibilities, including the potentially very important 120-day rule, will not typically apply to attorneys because attorneys will typically have obtained the relevant information not via a situation covered by exclusions three through six but through a privileged communication or in connection with a legal representation, which are exclusions one and two in Section VI above.
X. ATTORNEY WHISTLEBLOWERS AND THE USUAL INAPPLICABILITY OF THE SEC’S PROHIBITION ON USING CONFIDENTIALITY AGREEMENTS TO IMPEDE WHISTLEBLOWING

SEC Whistleblower Rule 21F-17(a) provides that no person may take any action to impede a whistleblower from communicating directly with the Commission about a possible securities law violation, including by enforcing or threatening to enforce a confidentiality agreement with respect to such communications. However, consistent with the whistleblower rules’ stricter treatment of attorneys, unless disclosure of information to the Commission would otherwise be permitted by an attorney as discussed above, Rule 21F-17(a) expressly carves out, and therefore implicitly allows, enforcement or threats to enforce confidentiality agreements dealing with information obtained through a communication subject to the attorney-client privilege or in connection with the legal representation of a client on whose behalf the person or their employer or firm are providing services, if the person seeks to use the information to make a whistleblower submission for his or her own benefit.

XI. CONCLUSIONS

The circumstances that allow a lawyer to disclose confidential information to the SEC without client consent are quite limited. In most situations, state ethics rules prohibit disclosing client confidences and the SEC’s rules do not affect that prohibition.

However, the circumstances allowing disclosure are not as limited as one would think from studying only applicable state ethics rules or only the SEC’s Part 205 rules. To assess a real-world situation, one must look at all the applicable rules.

XII. STEPS COMPANIES CAN TAKE TO REDUCE ATTORNEY WHISTLEBLOWER RISK

• First and foremost, respond promptly and appropriately to apparent misconduct so no observer can reasonably conclude that the company intends to act improperly or avoid remediation.

• Ensure that in-house lawyers are trained regarding state ethics rules that generally prohibit them from disclosing confidential client information without implicit or explicit company authorization.

• Keep in mind the special SEC exception applicable to attorney whistleblowers with respect to enforcing or threatening to enforce confidentiality agreements. Although it is good practice to avoid confidentiality agreements and corporate policies that could be reasonably interpreted as prohibiting or impeding protected whistleblowing, protected whistleblowing does not include disclosure of confidential client information by attorneys without client consent unless disclosure to the Commission is permitted by special circumstances, as explained in detail above.

• Assure any lawyer representing the company who raises concerns about the company’s reaction to misconduct that the company is committed to doing the right thing. Then act accordingly and document everything. Part 205 may apply and require certain actions. If appropriate, communicate to the lawyer what you did. If the lawyer might report out anyway, apply all applicable reporting-out rules to the circumstances and determine — perhaps with advice of outside counsel — whether it is appropriate to warn the lawyer that reporting out is not permitted and what the adverse consequences could be.

• Interview lawyers leaving the company and ask if they have any concerns about how the company handled past or ongoing misconduct. If the answer is yes, follow up appropriately.
Each of these two exclusions also applies to non-attorneys who happen to obtain information in the specified way. For the exceptions applicable to exclusions three through six, see section IX below.

Comment 3-5, Model Rule 1.6.

Attorneys potentially subject to California ethics rules should be aware that committees of the California bar have asserted that Part 205 might not preempt California state rules when the state rules forbid disclosure and Part 205 permits disclosure. See Ethics Alert, The New SEC Attorney Conduct Rules v. California’s Duty of Confidentiality (Spring 2004), available at http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=7xTdWYE C3%3D&tabid=834. The Washington State Bar issued an interim formal ethics opinion that drew a similar conclusion, but the Washington opinion was withdrawn following that state’s 2006 adoption of the Model Rule versions of Rules 1.6 and 1.13. Private communication from Washington State Bar Association (March 5, 2013).

Under the SEC rules, when an attorney has a duty to report information to the Commission, that duty results in exclusion of the attorney from whistleblower award eligibility. But state ethics rules do not specify to whom disclosure must be made. Therefore, the fact that disclosure is required by state ethics rules will not make an attorney that discloses to the SEC ineligible for an SEC whistleblower award. See Final Whistleblower Rule Release at 36.

Some jurisdictions treat non-criminal frauds differently from crimes in their “reporting out” admonitions, but the SEC does not make this distinction, perhaps because any violation of the federal securities laws can be prosecuted not only civilly but criminally. Although the SEC can only bring civil cases, egregious securities fraud cases are often brought civilly by the SEC and criminally by the Department of Justice in parallel. The SEC whistleblower award rules anticipate this situation. When the DOJ and the SEC both recover money due to “original information” provided by a whistleblower, and the SEC recovers more than $1 million, the SEC must pay the whistleblower anywhere from 10 percent to 30 percent of amounts recovered in both the SEC and DOJ actions.

“Tribunal” means a court, an arbitrator in a binding arbitration proceeding, or a legislative body, administrative agency, or other body acting in an adjudicative capacity. See Model Rule 1.0(m).

Final Whistleblower Rule Release at 59.

Comment 3, Model Rule 1.6.

Attorneys may, for example, be permitted (or required) to disclose confidential client information without client consent relating to a controversy with the client or former client, related to cash transactions exceeding $10,000 to the IRS, or related to abuse of a child or vulnerable adult, but in those instances it is hard to imagine it being appropriate for the attorney to choose to disclose to the SEC.

See our alert entitled “Encouraging Internal Reporting, and Its Limits” (April 26, 2013).
If you have any questions about this primer, which was written by Lawrence West and Abigail Raish of Latham’s Washington, D.C. office and Eric Swibel of Latham’s Chicago office, please contact Mr. West at lawrence.west@lw.com / +1.202.637.2135 or Mr. Swibel at eric.swibel@lw.com / +1.312.777.7185.

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