SARBANES-OXLEY,
THE ABA MODEL RULES AND
STATE "WHISTLEBLOWING" DUTIES:
THE UNTOLD STORY

Thomas E. Spahn
McGuireWoods LLP

Copyright 2006
In the frenzy that followed Enron and other corporate failures, Congress acted with rare speed and bipartisanship in passing corrective legislation. The new law (bearing the unfortunately awkward name "Sarbanes-Oxley") contains a number of new requirements for public companies, their boards of directors, and their auditors.

**Sarbanes-Oxley Section 307**

For lawyers, the most important Sarbanes-Oxley provision contains just 21 lines, but has generated a vigorous debate among bars, scholars and practitioners. Section 307 of Sarbanes-Oxley directs the Securities and Exchange Commission ("SEC") to issue regulations requiring lawyers "appearing and practicing" before the SEC who possess any "evidence" of a "material" securities law violation, breach of fiduciary duty, or "similar violation" to: (1) report the evidence to the company's chief legal or executive officer; and (2) if that officer does not "appropriately respond," report the evidence to the company's audit committee, independent directors, or the full board.

The SEC's original proposed regulations would have covered a large number of lawyers (many of whom would not even know that they were "appearing and practicing" before the SEC), demanded extensive record-keeping, and sometimes required lawyers whose corporate clients engaged in misconduct to withdraw, and disavow tainted work product.

After a flurry of criticism, the SEC dropped most of these dramatic proposals.

The final rules only cover lawyers: transacting business with the SEC; representing parties or witnesses in connection with an SEC investigation or proceeding; providing securities law advice about any document that the lawyer has notice will be filed with or submitted to the
SEC; or providing advice about whether an issuer must make such a filing. The new regulations explicitly exclude lawyers who engage in activities other than providing legal services.

The rules require covered lawyers to report "up the ladder" if they have "evidence of a material violation" of particular corporate wrongdoing. For obvious reasons, the linchpin of the entire regulatory scheme is the meaning of "evidence of a material violation."

Trying to follow the SEC's changing definition of that term provides an illuminating and humorous (if intellectually deadening) insight into Washington bureaucracy. As one popular humorist writes, "I am not making this up."

The SEC's first proposed rule defined "evidence of a material violation" as:

information that would lead an attorney reasonably to believe that a material violation has occurred, is occurring, or is about to occur

(emphasis added). The SEC offered this helpful definition of "reasonable belief":

[what] an attorney, acting reasonably, would believe.

Perhaps worried that this meaning was too straightforward, the SEC switched to the following definition in its final rule:

Evidence of a material violation means credible evidence, based upon which it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that it is reasonably likely that a material violation has occurred, is ongoing, or is about to occur.

(emphasis added). The final rule also switched the definition of "reasonable." Instead of defining "reasonable belief" as what an attorney would believe when "acting reasonably" (as in the proposed rule), the final rule describes "reasonable" conduct as:

Conduct that would not be unreasonable for a prudent and competent attorney.
That certainly clears things up.

In any event, a company’s chief legal officer learning of such evidence must then investigate, and assure that the corporation either has not engaged in wrongdoing or stops it. There are a number of ways that management's "appropriate response" to such an internal report may include the assertion of defenses rather than a change in course.

On the critical issue of "whistleblowing" outside the corporation, the regulations allow (but do not require) a lawyer to reveal information to the SEC to prevent the corporation from engaging in some wrongdoing likely to cause substantial injury to the financial interest or property of the issuer or investor, or from defrauding the SEC. The regulations would also allow disclosure to rectify consequences of such wrongdoing, if the lawyer's services were used in furtherance of the wrongdoing.

The SEC has asked for additional comments on a provision that would require lawyers whose clients are not deterred from engaging in ongoing or future wrongdoing to: withdraw from the representation; notify the SEC of the withdrawal; and disaffirm any tainted documents (in-house lawyers would not have to withdraw from the representation, but would have to take the other steps). As an alternative, the SEC has proposed a regulation that would compel the issuer (rather than the lawyer) to notify the SEC of the facts and circumstances of the lawyer's withdrawal.

Given the SEC’s dramatic retreat from its initial bold proposals, one could expect a further watering down of any whistleblowing obligations.
**Lawyers' Criticism of Section 307**

As soon as Congress passed Sarbanes-Oxley, bar groups, academicians, and practicing lawyers started a drumbeat of criticism. These attacks intensified after the SEC issued its proposed regulations, and reached a crescendo as the SEC was considering scaling back some of its proposed regulations.

The lawyers critical of Sarbanes-Oxley and the SEC's regulations have focused on both process and substance.

First, the critics worry that Section 307 will begin the "federalization" of lawyer ethics rules. Lawyers are not only one of the last self-regulated professions, but also look almost exclusively to state rather than federal law in determining their ethics obligations. There are no nationwide ethics rules. The widely quoted ABA Model Rules do not govern a single lawyer's conduct -- they merely reflect a voluntary bar association's suggested guidelines. The ABA Model Rules mean nothing unless a state bar adopts them in whole or in part to guide lawyers within that state. The critics of Section 307 worry that having a nationwide ethics obligation (even one this narrow) starts us down a slippery slope. They also fret because Congress has imposed this new obligation by statute -- in most states, the courts take the primary responsibility for adopting ethics rules.

These worries might make sense in general, but not in the context of Section 307. Government agencies, commissions, and other entities before whom lawyers practice have always prescribed rules for those lawyers. The Internal Revenue Service, the United States Patent and Trademark Office, the Securities and Exchange Commission itself, and other agencies regulate lawyers appearing before them, and Section 307 simply follows this tradition.
Second, critics of Section 307 argue that the reporting requirement will "chill" a corporate lawyer's relationship with a client's employees. They reason that company employees will not share information with the company's lawyer, for fear that the lawyer will reveal their conversations up the corporate ladder.

On this issue, some lawyers' blasts at Sarbanes-Oxley have become remarkably shrill. For instance, a New York lawyer started a column appearing in the March 23, 2003 Washington Times with the following paragraph: "April may well be the cruelest month for lawyers practicing before the Securities and Exchange Commission; that is, if the Commission has its way with a new rule, set for adoption for April 7, that many believe would strike a dagger to the heart of the attorney client relationship" (emphasis added). This is pretty harsh language -- even for a lawyer.

This criticism ignores a basic tenet of all ethics rules. When a lawyer represents an organization, the organization itself -- the institution -- is the lawyer's client. Model Rule 1.13(a). A corporation's employees merely act as agents for the institutional client. In fact, when lawyers deal with a company employee in situations where the lawyer "knows or reasonably should know" that the employee's interests are adverse to the organization's interests, the lawyer must explain the "identity of the client."

Thus, lawyers sharing information they learned from company employees with company management are merely serving the institutional client -- as they must. If the critics of Section 307 believe that the reporting requirement will deter corporate employees from sharing secrets with company lawyers, they must be advocating a system in which a company lawyer may keep secret from management any material information that the lawyer learns from company
employees. This is not only contrary to well settled ethics and agency principles, it is both inconceivable to a lawyer owing a duty of loyalty to the institution, and unworkable on a day-to-day basis.

For all of these reasons, criticism of Section 307 seems to miss the mark.

**ABA Model Rule 1.13**

If Sarbanes-Oxley Section 307 sounds familiar to practitioners, it should. The concept of reporting corporate wrongdoing up the hierarchical chain has been part of the ABA Model Rules for many years.

Under the long-standing version of Model Rule 1.13, lawyers have been required to take some action if: (1) they "know" of any action by company employees that violates their legal obligation to the corporation or is a "violation of law" which could be imputed to the corporation; (2) that is related to the lawyer's representation; and (3) could subject the company to "substantial injury." When deciding how to proceed, lawyers have had to consider a number of factors listed in the Rule. Model Rule 1.13 offered suggested courses of conduct, including reporting up the corporate ladder all the way to the board of directors (if necessary). The lawyer "may" resign if the corporation's "highest authority" insisted upon action (or "a refusal to act") that is "clearly" a legal violation and is likely to result in "substantial injury" to the company. Model Rule 1.13(c).

In the post-Enron reevaluation that many American institutions undertook, the ABA appointed a Task Force to examine possible revisions to Model Rule 1.13. As with the SEC's watering down of the Sarbanes-Oxley regulations, the ABA Task Force came in like a lion and went out largely like a lamb.
The Task Force's initial July 16, 2002 proposals suggested three dramatic changes in Model Rule 1.13. First, the Task Force wanted to change the knowledge standard triggering a lawyer's up-the-ladder disclosure requirements from "know" to "reasonably should know." That would have moved away from a requirement of actual knowledge toward a negligence standard, which of course would have created a duty to investigate. The final Task Force proposal (April 29, 2003) dropped that change, and kept the "know" standard.

Second, the Task Force's initial proposal would have required lawyers to report the specified wrongdoing even it was unrelated to the lawyer's representation -- again widening the lawyer's duties of investigation and disclosure. The final Task Force proposal retained the current "related to the representation" standard.

The third material change in the Task Force's initial proposal was the only one to survive. That proposal allows (but does not require) a lawyer to reveal (outside the company) violations by one of the corporation's constituents of a "legal obligation to the organization" or a "violation of law" that might be imputed to the organization -- if the lawyer believes the violation is "reasonably certain to result in substantial injury to the organization." Model Rule 1.13 (b) (c).

In addition to this important change (which parallels the Task Force's proposed change to Model Rule 1.6 -- discussed below), the final Task Force report recommended some fine-tuning to Model Rule 1.13.

For instance, the Task Force recommended changing some language in Model Rule 1.13 to reiterate that lawyers must take some action upon learning of reportable wrongdoing. The Task Force also suggested that parts of Model Rule 1.13 be rewritten to eliminate comments that could be interpreted as diminishing the duty of disclosure. For instance, old Model Rule 1.13
Comment [3] formerly explained that a lawyer needed "clear justification" to go over the head of a corporate constituent with whom the lawyer deals. The Task Force's final proposal eliminated such discouraging language.

The ABA Task Force also recommended that corporations adopt policies in which general counsel periodically meet with independent board members (to discuss possible corporate wrongdoing), and that outside counsel should likewise establish a direct line of communication with the general counsel to discuss possible corporate wrongdoing.

The ABA House of Delegates adopted the final Task Force recommendation in August, 2003. Although the vote was not very close (unlike the vote on the changes to Model Rule 1.6, discussed below), some lawyers continued to resist any provision allowing lawyers to reveal information outside their organizational client. One well known Washington, DC lawyer reportedly argued that the new provision was "utterly wicked."
The Real Issue:
Should There Be a "Whistleblower" Duty?

The furor over Sarbanes-Oxley Section 307 misses one obvious point.

Most of the debate about a lawyer's obligation under Section 307 (or under Model Rule 1.13, for that matter) involves internal reporting within an institutional client. The idea that a lawyer representing a corporation would tell those running the corporation about what is going on within the corporation not only seems logical, it seems painfully self-obvious. Any other concept would violate the most basic agency principles.

The real issue raised by recent corporate scandals is whether the lawyer must do more than simply tell the corporation's bosses what the underlings are doing. Should the lawyer be obligated to "blow the whistle" on corporate wrongdoing to authorities outside the company?

In assessing the possibility of such a "whistleblower duty," it is worth considering both the key ABA Model Rules and state ethics rules -- because they dramatically differ from one another.

ABA Model Rule 1.6

The ABA's adoption of the Model Rules in 1983 triggered a two-decade long debate about whether lawyers should be free to, or obligated to, tell someone if their client is committing a wrongdoing or about to commit a wrongdoing. (Old ABA Model Code, in existence from 1969 until 1983, indicated that a lawyer was free to -- but did not have to -- report a client's intent to commit any crime. DR 4-101(C)(3))

The original version of Model Rule 1.6 indicated that a lawyer may reveal information relating to the lawyer's representation of a client only to prevent "reasonably certain death or
substantial bodily harm." Think about that for a minute. Under the ABA Model Rules, if you seriously believe that one of your clients is about to murder someone, you do not have a duty to report your client's intent. And some wonder why lawyers have a bad reputation.

Another element of the long-standing version of Model Rule 1.6 that has more relevance to the current debate was the absence of any reference to a client's crimes (or frauds) that could harm someone financially. The possible inclusion of such discretionary disclosure authority periodically came before the ABA, and lost each time. For instance, the Ethics 2000 ABA Task Force suggested the addition of such wrongdoing to the discretionary disclosure provision of Model Rule 1.6, but the ABA House of Delegates rejected the recommendation.

Given Model Rule 1.6's extreme position, the Model Rules had to contain some kind of pressure valve. It appears in Comment [14], which requires a lawyer to withdraw from a representation if the lawyer's services are being used to further a crime or fraud. Comment [14] also allows the lawyer to give notice of the withdrawal, and to disaffirm any earlier opinion, document, etc. that the lawyer issued as part of the representation. In other words, a lawyer may not reveal a corporate client's ongoing or intended wrongdoing that might cause financial harm, but the lawyer must withdraw if his or her services are being used to further the wrongdoing, and is free to tell the world that the lawyer disavows earlier opinions, deal documents, etc. This process has come to be known as a "noisy withdrawal."

The ABA's recognition of such "noisy withdrawals" has generated intense debate over the years. "Purists" among the ABA leaders tend to see the "noisy withdrawal" notion as a sneaky effort by the ABA's Standing Committee on Ethics and Professional Responsibility (which
writes the ABA's legal ethics opinions) to work around the ABA House of Delegates' repeated rejection of any "whistleblowing duties," and impose such a duty by citing the Comment.

For instance, in ABA LEO 366 (8/8/92) the ABA wrestled with a hypothetical dilemma involving a lawyer who represented a small business. The lawyer issued an opinion in connection with a loan transaction, but later learned that the company's senior executives had been fraudulently overstating the company's financial condition -- which, of course, meant that the opinion was incorrect when the lawyer issued it. The company's executives confessed to the lawyer, but indicated that they would not reveal the fraud to the independent auditors, and that they intended to retain a new law firm which was not aware of the fraud. The lawyer took the matter to the board, but the directors asked her not to reveal the fraud. The lawyer worried that the company would continue to use her opinion to continue its fraud and perhaps to defraud others. She thought that she would be "assisting" that fraud by not withdrawing her opinion. She even worried that continuing to represent the company in unrelated matters might "lull" the bank into believing that the company was in sound financial health.

In ABA LEO 366, the ABA Committee's majority indicated that the lawyer must withdraw from representing the company in any matters related to the opinion or the fraud. Although the lawyer might not be obligated to withdraw from the entire representation, that might be the "preferred course" to avoid any possibility of assisting the client's ongoing fraud. The majority then discussed the "noisy withdrawal" issue. Although such a "noisy withdrawal" would not be appropriate in situations involving permissible rather than mandatory withdrawal (or if the client is guilty only of a completed fraud and does not intend to "make further fraudulent use of the lawyer's services"), a "noisy withdrawal" was appropriate in this
hypothetical. The Committee majority explained that the lawyer's "disavowal" of her opinion may be the only way of making her withdrawal effective.

The dissenting members of the ABA Committee issued a surprisingly intemperate dissenting opinion -- especially for a Committee supposedly dedicated to advancing professionalism. The dissenters accused the majority of ignoring the literal language of Model Rule 1.6, and using an analysis that "founders on the shoals of the English language." They argued that the majority was trying to improperly add a "whistleblower" duty to the Model Rules by relying on a "lexicographic coup" and "an act of linguistic prestidigitation" to support reasoning of "gelatinous consistency." The dissenters reminded the majority that the ABA House of Delegates had twice rejected the effort to add a "rectification provision" to Model Rule 1.6.

Things obviously have changed in the decade since the ABA issued ABA LEO 366. The same Task Force that recommended modifications to Model Rule 1.13 also proposed changes to Model Rule 1.6. However, as with the Sarbanes-Oxley regulations and the ABA Task Force's recommended changes to Model Rule 1.13, the Task Force scaled back its original bold proposals.

The July 16, 2002 ABA Task Force recommendations would have required disclosure of some client confidences -- to prevent a client's future crime that would cause serious financial loss to another. The final Task Force Report dropped that recommendation.

Still, the Task Force's proposed changes represented a substantial shift in the ABA's approach. First, the Task Force recommended that lawyers be permitted to reveal confidential information (relating to the representation) necessary to prevent the client from committing a crime or fraud "reasonably certain" to result in "substantial injury to the financial interests or
property of another" (if the client "has used or is using the lawyer's services" in furtherance of the crime or fraud). Second, the Task Force recommended that lawyers be permitted to make the same discretionary disclosure to "prevent, mitigate or rectify substantial injury to the financial interests or property of another."

This first recommendation allows lawyers to try to stop future crimes or fraud, while the second allows lawyers to make necessary disclosures about past crimes or frauds. In both instances, the disclosure could only relate to crimes or fraud in which the lawyer's services had been or were being used.

The ABA House of Delegates adopted these changes in August 2003, but the debate provided a fascinating insight into just how far the House of Delegate members were out of line with the mainstream of American judicial and bar attitudes. The final Task Force changes to Model Rule 1.6 were reportedly approved by 12 ABA presidents, all 50 state Chief Justices and the American Corporate Counsel Association. Yet the proposals sparked a vigorous debate with the usual rhetorical flourishes. With linguistic hyperbole reminiscent of William Jennings Bryan's famous "Cross of Gold" speech at the 1896 Democratic National Convention, one former ABA President urged the delegates not to "barter away a piece of our soul to gain public approval."

After all of the debate, the House of Delegates finally passed the Task Force's final proposed changes -- but only by a vote of 218 to 201.
Other ABA Model Rules

While most lawyers naturally look to Model Rule 1.6 (the core confidentiality rule) to determine their possible duties of disclosure, other ABA Model Rules sometimes apply. As with the rest of the ABA's post-Enron reform proposals, the ABA Task Force has abandoned its originally proposed changes to these other rules as well.

Model Rule 1.2(d) prohibits a lawyer from counseling a client to commit any acts that the lawyer knows to be a crime or fraud. Model Rule 4.1(a) prohibits a lawyer from knowingly making any false statements.

In its original proposal, the ABA Task Force recommended that these Rules' obligations (or prohibitions) be triggered by a lawyer's "reasonably should know" standard, rather than the current "know" standard. As with the ABA Task Force's retreat on this issue in Model Rule 1.13, the new proposal does not recommend this change.

Other specific Model Rules govern a lawyer's activities when dealing with a tribunal. As you would expect, a lawyer shall not "knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." Model Rule 3.3(9a)(1). Similarly, a lawyer shall not "knowingly . . . offer evidence that the lawyer knows to be false." Model Rule 3.3(a)(3). That Model Rule also provides that if the lawyer, the client or a witness called by the lawyer has offered material evidence that the lawyer later learns was incorrect, "the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." Comment [10] explains that a lawyer may be required to reveal otherwise-protected information as part of such "reasonable remedial measures" -- if the lawyer cannot withdraw, or if withdrawal will not "undo the effect of
the false evidence." These Model Rule 3.3 duties continue "to the conclusion of the proceeding," and trump the confidentiality principles of Model Rule 1.6.

One often-overlooked provision could have a dramatic effect in certain circumstances. Model Rule 4.1(b) prohibits a lawyer from knowingly failing to disclose information "when disclosure is necessary to avoid assisting" a client's crime or fraud. This affirmative duty of disclosure could arise in a number of circumstances, and could have an important effect if it outweighed the Model Rule 1.6 duty of confidentiality. However, on its face this Model Rule does not trump the normal confidentiality rule, meaning that lawyers may not reveal a client's confidences (absent consent or some other disclosure requirement) under this standard. As indicated below, some states have removed this restriction, therefore giving real meaning to this provision.

State Ethics Rules

The greatest irony in American legal ethics is that the largest variation in states' ethics rules occurs in the precise area where lawyers most need uniform and easy-to-follow guidance -- when deciding whether they must "blow the whistle" on their client's wrongdoing.

There is no more dramatically difficult decision that lawyers must make. If they report a client's wrongdoing when not obligated to (or, especially, when prohibited from doing so), they have not only breached their duties of loyalty and confidentiality, they have also unnecessarily condemned their client to punishment. On the other hand, if a lawyer fails to reveal information about some client wrongdoing that the ethics rules requires to be revealed, the lawyer obviously has assisted in covering up the wrongdoing. This does not violate a lawyer's duties of loyalty or
confidentiality, but that would be little consolation to a lawyer whose license has been revoked, or who is facing indictment.

Yet states' approach to this critical issue reflect an astounding degree of variation. Even the scholars can't agree on the tallies for each approach. Most say that about 35 states generally follow the ABA approach (with some permissible disclosure provisions), while about ten states prohibit any "whistleblowing," and about four states require "whistleblowing."

States continue to deal with this issue, with some following the ABA's lead in liberalizing lawyers' ability to reveal client confidences for what could be seen as a greater societal benefit. For instance, as of July 1, 2004, California for the first time adopted a statutory provision allowing discretionary disclosure of confidential information "relating to the representation of a client" if the lawyer "reasonably believes the disclosure is necessary to prevent a criminal act that the [attorney] reasonably believes is likely to result in death of, or substantial bodily harm to, an individual." California Rule 3-100(B). Before doing so, California lawyers must try to persuade the client "not to commit or to continue their criminal act," and must also "inform the client, at an appropriate time, of the [lawyer's] ability or decision to reveal" the information to prevent the criminal act. Id. at (B)(1). The disclosure must be no broader than required. Id. at (D). Comment [11] explains that the lawyer must advise the client of the disclosure, unless the lawyer "has a compelling interest in not informing the client, such as to protect the [lawyer], the [lawyer's] family or a third person from the risk of death or substantial bodily harm." The same Comment indicates that a lawyer making such a disclosure must withdraw from the representation, absent the client's informed consent to continue the representation.
Consider my firm -- McGuireWoods, LLP. Many of our lawyers work in Virginia -- which is the only state in which I am licensed.

Virginia takes a unique approach to the "whistleblowing" issue. No other state even comes close.

First, Virginia lawyers "may" reveal information about their client's fraud on third parties during the course of, and related to, the representation. Virginia Rule 1.6 (b)(3). However, the fraud must be "clearly established," which the Virginia Bar has interpreted to require a client confession (although the Rule on its face does not require such a narrow reading, and courts have not interpreted the term that narrowly either).

Second, Virginia lawyer must "promptly reveal" a client's fraud on a tribunal that occurred in the course of, and was related to, the representation. Virginia Rule 1.6 (c)(2). This explicit disclosure duty covers fraud during depositions and on bankruptcy courts, and apparently lasts forever (unlike the parallel ABA Model Rule, which indicates that any duty to disclose a client's perjury continues only "to the conclusion of the proceeding"). On the other hand, the Virginia Bar has recently indicated that a lawyer's duty to "blow the whistle" on a client's fraud on a tribunal arises only if the client acknowledges the fraud. Virginia LEO 1777 (6/13/03).

Third, Virginia lawyers "shall" promptly reveal" a client's intent to commit any crime, however slight. Virginia Rule 1.6 (c)(1). This seemingly broad mandatory requirement provision is tempered somewhat by other provisions. The criminal intent must be "stated by the client." Before revealing the client's intent, a lawyer must discuss the issue with the client, and "advise the client that the attorney must reveal the client's criminal intention unless thereupon
abandoned." At first reading, this Rule therefore seems to apply only to lawyers whose clients are doubly stupid -- who not only tell their lawyer about their intent to commit a crime, but then can't take the hint when the lawyer replies, in essence, "if you don't abandon that criminal intent, I will have to reveal it; but if you tell me now that you have abandoned the intent, then I will keep it a secret."

It is difficult to imagine rules that are more different from each other than the ABA Model Rules and the Virginia Rules. The ABA Model Rules currently prohibit a lawyer from revealing a client's fraud on a third party unless the fraud would cause "substantial injury to the financial interests or property of another" -- Virginia allows lawyers to reveal such fraud, however slight. The ABA Model Rules do not always require lawyers to reveal a client's fraud on a tribunal during the lawyer's watch (and any implicit duty to do so ends when the proceedings end) -- Virginia always requires such disclosure, and the duty apparently lasts forever. The ABA Model Rules grant lawyers the discretion to reveal their client's criminal intent, but only for crimes involving death, serious bodily harm, or substantial financial injury -- Virginia requires the disclosure of a client's criminal intent (if "stated by the client"), regardless of the crime.

The same dramatic differences appear in the peripheral confidentiality rules (which are discussed below, in connection with differing state approaches to those peripheral rules).

The ABA Model Rules and the Virginia Rules clearly stand at either end of the "whistleblowing" spectrum. To make matters more confusing, various states seem to take every position in between.
McGuireWoods has offices in ten states, and the District of Columbia. As McGuireWoods' "ethics guy," I must become familiar with all of our jurisdictions' "whistleblowing" provisions.

Here they are:

- California Rule 3-100(B) says that a lawyer may reveal a client's confidential information "to prevent a criminal act that the lawyer reasonably believes is likely to result in death of, or substantially bodily harm to, an individual" (with no mention of lesser crimes, fraud, or financial loss).

- Florida Rule 4-1.6 says that a lawyer "shall" reveal information necessary to prevent a client from committing any crime, or to prevent another's death or substantial bodily harm (with no mention of fraud or financial loss).

- Georgia Rule 1.6 says that a lawyer "may" reveal information necessary to prevent another's death or serious bodily harm, or to avoid or prevent "harm or substantial financial loss" to another caused by criminal conduct by the client or by "third party criminal conduct" (with no mention of fraud). Georgia is unique among the ten states because it permits lawyers to reveal client confidential information to prevent "third party criminal conduct," short of that causing death or substantial bodily harm.

- Illinois Rule 1.6 says that a lawyer "shall" reveal information to prevent someone's "death or substantial bodily harm," and "may" reveal the client's intention to commit any other crime (presumably including cases causing financial loss, but not including fraud).

- Maryland Rule 1.6 says that a lawyer "may" reveal information necessary: to prevent a client's crime; to prevent any criminal act by the client; to "prevent, mitigate or rectify" the consequences of a client's crime or fraud in which the lawyer's services
were used; "to prevent reasonably certain death or bodily harm." North Carolina is unique among the ten states because it allows lawyers to reveal client confidences to prevent any (not just "substantial") bodily harm.

- Pennsylvania Rule 1.6 says that a lawyer "may" reveal information necessary: to "prevent reasonably certain death or substantial bodily harm"; to prevent the client from committing a crime that likely would result in "substantial injury to the financial interests or property of another"; to "prevent, mitigate or rectify" the consequence of a client's crime or fraud in which the lawyer's services "are being or had been used." Pennsylvania is unique among the ten states because it allows lawyers to reveal client confidences to prevent a client's future criminal conduct that is likely to result in substantial injury to the financial interests or property of another, or to prevent any future client crime or fraud if the client has used the lawyer's services.

- Virginia is discussed above.

- Washington D.C. Rule 1.6 [as of February 1, 2007] says that a lawyer "may" reveal information necessary to prevent a criminal act that is likely to result in death or substantial bodily harm; or to prevent the client from committing a crime or fraud reasonably certain to result in substantial injury to the financial interest or property of another (if the client has used the lawyer's services).

Just these handfuls of states' ethics rules provide a remarkable set of permutations. Some states prohibit disclosure of certain client wrongdoing, while some states permit disclosure, and some require disclosure -- of the same conduct. States have differing rules covering none, some or all of the following misconduct: (1) all criminal activity; (2) crimes involving death; personal injury and financial loss; or (3) just crimes involving death or bodily harm. Some states require disclosure just of a client's intended crime, while others require disclosure of intended crimes by clients or third parties. Some states include fraud in the type of wrongdoing that lawyers may sometimes disclose, while other states do not. Some (but not all) of the states' rules contain "rectification" provisions. Some of these provisions only apply to client wrongdoing in which the lawyer's services were used, while others apply if the lawyer's services "are being or had been used" in such client conduct. The variations are essentially endless.
Most or all of these state ethics rules also contain the peripheral rules discussed above (such as a prohibition on a lawyer's lying or counseling a client to engage in wrongdoing, an obligation to disclose confidences if silence would assist a client's crime or fraud, etc.), but even those rules differ from state to state.

Consider the following variations just among two of these peripheral rules:

- Most states' ethics rules require lawyers to take "reasonable remedial measures" if they learn that they have presented false material evidence to a tribunal (following ABA Model Rule 3.3(a)(3)). But how long does this duty last? A lawyer's duty lasts only until the "conclusion of the proceedings" in Georgia, Maryland, North Carolina, Pennsylvania, and Washington D.C. In contrast, the lawyers' duty lasts beyond the conclusion of the proceedings in Florida and Virginia.

- Most states have a provision requiring lawyers to speak up if their silence would assist a client's crime or fraud (following ABA Model Rule 4.1(b)). Does this duty outweigh the normal provisions protecting client confidences? It is not difficult to recognize what a huge difference this makes. If the duty to speak up in these circumstances outweighs the normal duty of confidentiality, it provides an entirely separate mandatory disclosure obligation that might require lawyers to "blow the whistle" on their clients' intended wrongdoing. Do states recognize that this duty to speak up trumps the standard confidentiality duty? The answer is no in Florida, Georgia, Illinois, Pennsylvania, and Washington, D.C. In contrast, the answer is yes in Maryland and Virginia.

All of these state variations may sound confusing, but the real difficulty arises where the "rubber meets the road" -- when a lawyer must decide what to do.

Consider McGuireWoods again.

If one of my partners were to ask how they should respond to a client's intent to commit a future crime that could result in substantial financial loss to another (and the information involves a client confidence), how would I answer? I would say that my partner: (1) must reveal it in Virginia (if the intention is "stated by the client") and in Florida; (2) may reveal it (if the lawyer chooses to) in Georgia, Illinois, Maryland (if the client has used or is using the lawyer's
services), New York, North Carolina (if the client has used or is using the lawyer's services), Pennsylvania, and Washington D.C. (if the client has used or is using the lawyer's services); and (3) cannot reveal it in California.

If one of my partners asked how they should respond to a client's intent to commit a future crime that is not serious enough to cause substantial financial loss to another, this would be my answer: my partner (1) must reveal it in Virginia (if the intention is "stated by the client") and Florida; (2) may reveal it (if the lawyer chooses to) in Georgia, Illinois, New York, North Carolina and Pennsylvania; and (3) cannot reveal it in Maryland and Washington, D.C.

**Conclusion**

What lessons can be drawn from this dizzying variation among state ethics rules -- the ones that lawyers must actually follow? First, lawyers trying to comply with their ethical requirement cannot "follow their moral compass" or "use the smell test." Second, we as a profession obviously have difficulty deciding where to draw the line between preserving client confidences and protecting society by revealing our clients' ongoing or future wrongdoing. These are tough issues, and the American approach to ethics allows each state to handle them differently. Third, and perhaps most importantly, the critics' dire predictions of doom based on the final Sarbanes-Oxley regulations seem misplaced. Lawyers go to work every day in states requiring far more disclosure of client wrongdoing. All in all, the American ethics system works well, and Sarbanes-Oxley will not destroy it.