

The Duty to Report Up the Chain

Wendy Gerwick Couture
Associate Professor
University of Idaho College of Law

Rule 1.13

**SEC Rule
17 C.F.R. §
205.1 *et seq.***

**The Duty to
Report Up the
Chain**

```
graph TD; A([Rule 1.13]) --> C([The Duty to Report Up the Chain]); B([SEC Rule 17 C.F.R. § 205.1 et seq.]) --> C;
```

Rule 1.13

**SEC Rule
17 C.F.R. §
205.1 *et seq.***

**The Duty to
Report Up the
Chain**

- Approved by ABA House of Delegates in August 2003.
- Effective in Idaho on July 1, 2004.

- Sarbanes-Oxley Act § 307 enacted on July 30, 2002.
- SEC rules effective on August 5, 2003.

Rule 1.13

**SEC Rule
17 C.F.R. §
205.1 *et seq.***

**The Duty to
Report Up the
Chain**

**Report of the ABA Task Force on
Corporate Responsibility at 14-15
(March 31, 2003):**

“The competition to acquire and keep client business, or the desire to advance within the corporate executive structure, may induce lawyers to seek to please the corporate officials with whom they deal rather than to focus on the long-term interest of their client, the corporation.”

**Senator John Edwards’ comments
during the floor debate re: Section 307
of SOX:**

“This amendment is about making sure those lawyers, in addition to the accountants and executives in the company, don't violate the law and, in fact, more importantly, ensure that the law is being followed.”

148 Cong. Rec. S6552 (July 10, 2002)

Rule 1.13

**SEC Rule
17 C.F.R. §
205.1 *et seq.***

The Duty to Report Up the Chain

Initial Reporting Duty

**Duty to Continue Reporting
Up the Chain**

Option to Report Out

Withdrawal

Notification of Discharge

Anti-Retaliation Protections

Rule 1.13

**SEC Rule
17 C.F.R. §
205.1 *et seq.***

**The Duty to
Report Up the
Chain**

What should an attorney do if both rules are triggered and are not identical?

Rule 1.13

**SEC Rule
17 C.F.R. §
205.1 *et seq.***

The Duty to Report Up the Chain

What should an attorney do if both rules are triggered and are not identical?

- If one rule is more stringent than the other, the attorney must comply with the more stringent rule.

17 C.F.R. § 205.1 (“These standards supplement applicable standards of any jurisdiction where an attorney is admitted or practices and are not intended to limit the ability of any jurisdiction to impose additional obligations on an attorney not inconsistent with the application of this part.”).

Rule 1.13

**SEC Rule
17 C.F.R. §
205.1 *et seq.***

The Duty to Report Up the Chain

What should an attorney do if both rules are triggered and are not identical?

- If one rule is more stringent than the other, the attorney must comply with the more stringent rule.
- If the state rule prohibits something that the SEC rule requires, the attorney must comply with the SEC rule.

17 C.F.R. § 205.1 (“Where the standards of a state or other United States jurisdiction where an attorney is admitted or practices conflict with this part, this part shall govern.”).

Rule 1.13

**SEC Rule
17 C.F.R. §
205.1 *et seq.***

The Duty to Report Up the Chain

What should an attorney do if both rules are triggered and are not identical?

- If one rule is more stringent than the other, the attorney must comply with the more stringent rule.
- If the state rule prohibits something that the SEC rule requires, the attorney must comply with the SEC rule.
- If the state rule prohibits something that the SEC rule permits, the attorney may probably do what the SEC rule permits, as long as in good faith.

North Carolina State Bar 2005 Formal Ethics Opinion 9 (“[A] North Carolina attorney may, without violating the NC RPC, disclose confidential information as permitted by Rule 205 although such disclosure would not otherwise be permitted by NC Rule.”).

Rule 1.13

**SEC Rule
17 C.F.R. §
205.1 *et seq.***

The Duty to Report Up the Chain

Initial Reporting Duty

**Duty to Continue Reporting
Up the Chain**

Option to Report Out

Withdrawal

Notification of Discharge

Anti-Retaliation Protections

Rule 1.13

Initial Reporting Duty

**SEC Rule
17 C.F.R. §
205.1 *et seq.***

Rule 1.13

Initial Reporting Duty

IF lawyer for organization knows that:

- officer, employee, or other person associated with the organization is engaged in action, intends to act, or refuses to act
- in a matter related to representation
- that is a violation of legal obligation to the organization OR a violation of law that reasonably might be imputed to the organization
- that is likely to result in substantial injury to the organization

**SEC Rule
17 C.F.R. §
205.1 *et seq.***

Rule 1.13

Initial Reporting Duty

THEN shall proceed as is reasonably necessary in the best interest of the organization



IF lawyer for organization knows that:

- officer, employee, or other person associated with the organization is engaged in action, intends to act, or refuses to act
- in a matter related to representation
- that is a violation of legal obligation to the organization OR a violation of law that reasonably might be imputed to the organization
- that is likely to result in substantial injury to the organization

**SEC Rule
17 C.F.R. §
205.1 *et seq.***

Rule 1.13

Initial Reporting Duty

THEN shall proceed as is reasonably necessary in the best interest of the organization

IF lawyer for organization knows that:

- officer, employee, or other person associated with the organization is engaged in action, intends to act, or refuses to act
- in a matter related to representation
- that is a violation of legal obligation to the organization OR a violation of law that reasonably might be imputed to the organization
- that is likely to result in substantial injury to the organization

UNLESS lawyer reasonably believes that isn't necessary in the best interest of the organization to do so, lawyer shall refer the matter to higher authority in the organization

SEC Rule
17 C.F.R. §
205.1 *et seq.*

Rule 1.13

Initial Reporting Duty

THEN shall proceed as is reasonably necessary in the best interest of the organization

IF lawyer for organization knows that:

- officer, employee, or other person associated with the organization is engaged in action, intends to act, or refuses to act
- in a matter related to representation
- that is a violation of legal obligation to the organization OR a violation of law that reasonably might be imputed to the organization
- that is likely to result in substantial injury to the organization

UNLESS lawyer reasonably believes that isn't necessary in the best interest of the organization to do so, lawyer shall refer the matter to higher authority in the organization

SEC Rule 17 C.F.R. § 205.1 *et seq.*

IF an attorney,
appearing and practicing before the SEC,
becomes aware of evidence of:

- a material violation
- by the issuer or by any officer, director, employee, or agent of the issuer

Rule 1.13

Initial Reporting Duty

THEN shall proceed as is reasonably necessary in the best interest of the organization

IF lawyer for organization knows that:

- officer, employee, or other person associated with the organization is engaged in action, intends to act, or refuses to act
- in a matter related to representation
- that is a violation of legal obligation to the organization OR a violation of law that reasonably might be imputed to the organization
- that is likely to result in substantial injury to the organization

UNLESS lawyer reasonably believes that isn't necessary in the best interest of the organization to do so, lawyer shall refer the matter to higher authority in the organization

SEC Rule 17 C.F.R. § 205.1 *et seq.*

IF an attorney, appearing and practicing before the SEC, becomes aware of evidence of:

- a material violation
- by the issuer or by any officer, director, employee, or agent of the issuer

THEN shall report such evidence to:

- the issuer's chief legal officer, OR
- the issuer's chief legal officer and the CEO, OR
- the issuer's "qualified legal compliance committee," if formed

Rule 1.13

Initial Reporting Duty

THEN shall proceed as is reasonably necessary in the best interest of the organization

IF lawyer for organization knows that:

- officer, employee, or other person associated with the organization is engaged in action, intends to act, or refuses to act
- in a matter related to representation
- that is a violation of legal obligation to the organization OR a violation of law that reasonably might be imputed to the organization
- that is likely to result in substantial injury to the organization

UNLESS lawyer reasonably believes that isn't necessary in the best interest of the organization to do so, lawyer shall refer the matter to higher authority in the organization

SEC Rule 17 C.F.R. § 205.1 *et seq.*

includes providing advice on securities laws re: any document to be submitted to SEC

IF an attorney, appearing and practicing before the SEC, becomes aware of evidence of:

- a material violation
- by the issuer OR by any officer, director, employee, or agent of the issuer

means a public company

THEN shall report such evidence to:

- the issuer's chief legal officer, OR
- the issuer's chief legal officer and the CEO, OR
- the issuer's "qualified legal compliance committee," if formed

Rule 1.13

denotes actual knowledge of the fact in question, which may be inferred from circumstances

THEN shall proceed as is reasonably necessary in the best interest of the organization

IF lawyer for organization knows that:

- officer, employee, or other person associated with the organization is engaged in action, intends to act, or refuses to act
- in a matter related to representation
- that is a violation of legal obligation to the organization OR a violation of law that reasonably might be imputed to the organization
- that is likely to result in substantial injury to the organization

UNLESS lawyer reasonably believes that isn't necessary in the best interest of the organization to do so, lawyer shall refer the matter to higher authority in the organization

SEC Rule 17 C.F.R. § 205.1 *et seq.*

IF an attorney, appearing and practicing before the SEC, becomes aware of evidence of:

- a material violation
- by the issuer OR by an officer, director, employee, or agent of the issuer

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

THEN shall report such evidence to:

- the issuer's chief legal officer, OR
- the issuer's chief legal officer and the CEO, OR
- the issuer's "qualified legal compliance committee," if formed

Rule 1.13

Initial Reporting Duty

THEN shall proceed as is reasonably necessary in the best interest of the organization

IF lawyer for organization knows that:

- officer, employee, or other person associated with the organization is engaged in action, intends to act, or refuses to act
- in a matter related to representation
- that is a violation of legal obligation to the organization OR a violation of law that reasonably might be imputed to the organization
- that is likely to result in substantial injury to the organization

UNLESS lawyer reasonably believes that isn't necessary in the best interest of the organization to do so, lawyer shall refer the matter to higher authority in the organization

SEC Rule 17 C.F.R. § 205.1 *et seq.*

IF an attorney, appearing and practicing before the SEC, becomes aware of evidence of:

- a material violation
- by the issuer OR by any officer, director, employee, or agent of the issuer

means a material violation of a federal or state securities law, a material breach of fiduciary duty arising under federal or state law, or a similar material violation of any federal or state law

THEN shall report such evidence to:

- the issuer's chief legal officer, OR
- the issuer's chief legal officer and the CEO, OR
- the issuer's "qualified legal compliance committee," if formed

Rule 1.13

Initial Reporting Duty

THEN shall proceed as is reasonably necessary in the best interest of the organization

IF lawyer for organization knows that:

- officer, employee, or other person associated with the organization is engaged in action, intends to act, or refuses to act
- in a matter related to representation
- that is a violation of legal obligation to the organization OR a violation of law that reasonably might be expected to result in substantial injury to the organization
- that is likely to result in substantial injury to the organization

UNLESS lawyer reasonably believes that isn't necessary in the best interest of the organization to do so, lawyer shall refer the matter to higher authority in the organization

allows lawyer more flexibility under some circumstances, such as a constituent's innocent misunderstanding of the law, which the lawyer can correct by advising constituent

SEC Rule
17 C.F.R. §
205.1 *et seq.*

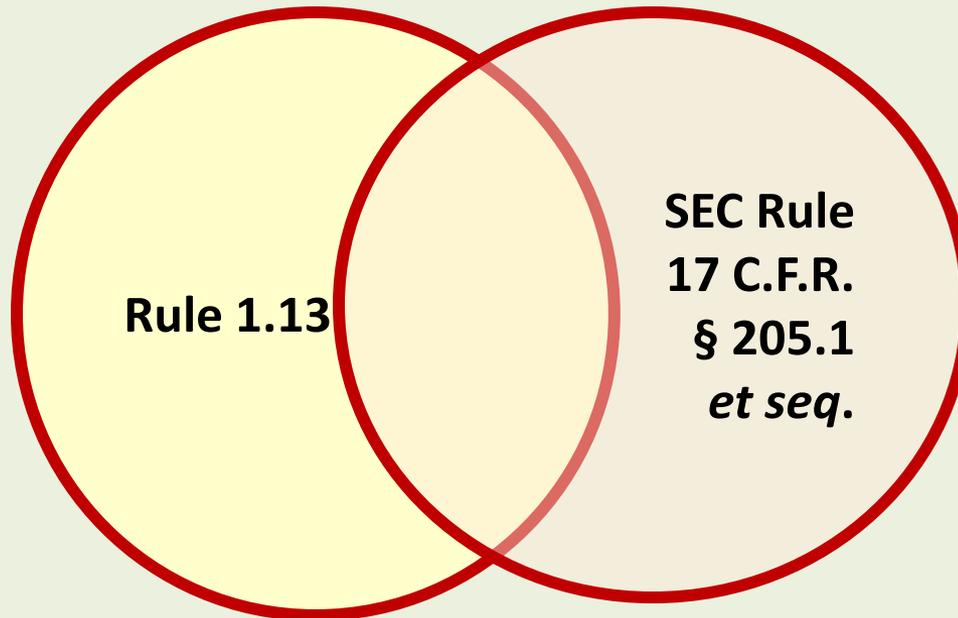
IF an attorney, appearing and practicing before the SEC, becomes aware of evidence of:

- a material violation
- by the issuer OR by any officer, director, employee, or agent of the issuer

THEN shall report such evidence to:

- the issuer's chief legal officer, OR
- the issuer's chief legal officer and the CEO, OR
- the issuer's "qualified legal compliance committee," if formed

Initial Reporting Duty



Rule 1.13

**SEC Rule
17 C.F.R. §
205.1 *et seq.***

The Duty to Report Up the Chain

Initial Reporting Duty

**Duty to Continue Reporting
Up the Chain**

Option to Report Out

Withdrawal

Notification of Discharge

Anti-Retaliation Protections

Rule 1.13

Duty to Continue Reporting Up the Chain

**SEC Rule
17 C.F.R. §
205.1 *et seq.***

Rule 1.13

Duty to Continue Reporting Up the Chain

Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, **including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.**

SEC Rule
17 C.F.R. §
205.1 *et seq.*

Rule 1.13

Duty to Continue Reporting Up the Chain

Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, **including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.**

“ordinarily will be the board of directors or similar governing body”

SEC Rule
17 C.F.R. §
205.1 *et seq.*

Rule 1.13

Duty to Continue Reporting Up the Chain

Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, **including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.**

“ordinarily will be the board of directors or similar governing body”



SEC Rule 17 C.F.R. § 205.1 *et seq.*

- If attorney made report to QLCC, no duty to report up the chain.

Rule 1.13

Duty to Continue Reporting Up the Chain

Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, **including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.**

← “ordinarily will be the board of directors or similar governing body”

SEC Rule 17 C.F.R. § 205.1 *et seq.*

- If attorney made report to QLCC, no duty to report up the chain.
- Otherwise, unless an attorney who has made a report reasonably believes that the chief legal officer or the CEO of the issuer has provided an appropriate response within a reasonable time, the attorney shall report the evidence of a material violation to:

Rule 1.13

Duty to Continue Reporting Up the Chain

Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, **including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.**

← “ordinarily will be the board of directors or similar governing body”

SEC Rule 17 C.F.R. § 205.1 *et seq.*

- If attorney made report to QLCC, no duty to report up the chain.
- Otherwise, unless an attorney who has made a report reasonably believes that the chief legal officer or the CEO of the issuer has provided an appropriate response within a reasonable time, the attorney shall report the evidence of a material violation to:

- audit committee of board of directors; OR
- another committee consisting solely of independent directors; OR
- board of directors (if no committee consisting solely of independent directors)

Rule 1.13

Duty to Continue Reporting Up the Chain

Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, **including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.**

← “ordinarily will be the board of directors or similar governing body”

SEC Rule 17 C.F.R. § 205.1 *et seq.*

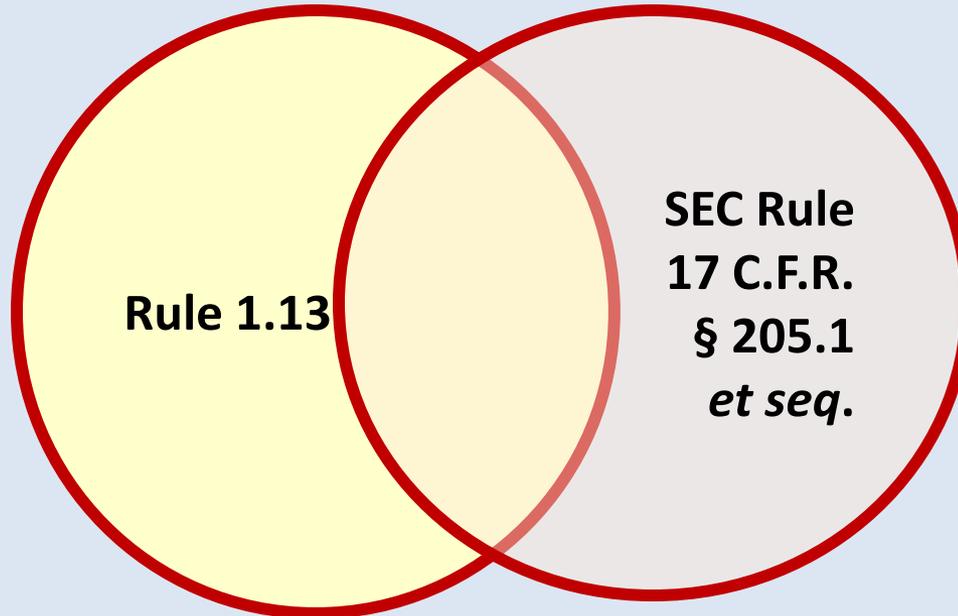
- If attorney made report to QLCC, no duty to report up the chain.
- Otherwise, unless an attorney who has made a report reasonably believes that the chief legal officer or the CEO of the issuer has provided an appropriate response within a reasonable time,

means that the attorney reasonably believes:

- no material violation occurred, is ongoing, or is about to occur; OR
- the issuer has adopted appropriate remedial measures; OR
- the issuer has retained counsel to review the reported evidence AND (i) substantially implemented counsel’s remedial recommendations, or (ii) been advised that counsel may assert colorable defense

-
- audit committee of board of directors; OR
 - another committee consisting solely of independent directors; OR
 - board of directors (if no committee consisting solely of independent directors)

Duty to Continue Reporting Up the Chain



Rule 1.13

**SEC Rule
17 C.F.R. §
205.1 *et seq.***

The Duty to Report Up the Chain

Initial Reporting Duty

**Duty to Continue Reporting
Up the Chain**

Option to Report Out

Withdrawal

Notification of Discharge

Anti-Retaliation Protections



Option to Report Out

Lawyer may reveal information to extent lawyer reasonably believes necessary:

Rule
1.6(b)(2)

Rule
1.6(b)(3)

Rule
1.13(c)

17 C.F.R. §
205.3(d)
(2)(i)

17 C.F.R. §
205.3(d)
(2)(iii)

Option to Report Out

Lawyer may reveal information to extent lawyer reasonably believes necessary:

Rule
1.6(b)(2)

Rule
1.6(b)(3)

Rule
1.13(c)

17 C.F.R. §
205.3(d)
(2)(i)

17 C.F.R. §
205.3(d)
(2)(iii)

- to prevent substantial injury to the organization
- after lawyer reported constituent's action or intention to act;
- highest authority that can act on behalf of organization failed to address in timely & appropriate manner;
- action or inaction is a clear violation of law

Option to Report Out

Lawyer may reveal information to extent lawyer reasonably believes necessary:

Rule 1.6(b)(1)

- to prevent client from committing a crime

Rule 1.6(b)(3)

Rule 1.13(c)

- to prevent substantial injury to the organization
- after lawyer reported constituent's action or intention to act;
- highest authority that can act on behalf of organization failed to address in timely & appropriate manner;
- action or inaction is a clear violation of law

17 C.F.R. § 205.3(d) (2)(i)

17 C.F.R. § 205.3(d) (2)(iii)

Option to Report Out

Lawyer may reveal information to extent lawyer reasonably believes necessary:

Rule 1.6(b)(1)

- to prevent client from committing a crime

Rule 1.6(b)(3)

- 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
- in furtherance of which the client has used the lawyer's services

Rule 1.13(c)

- to prevent substantial injury to the organization
- after lawyer reported constituent's action or intention to act;
- highest authority that can act on behalf of organization failed to address in timely & appropriate manner;
- action or inaction is a clear violation of law

17 C.F.R. § 205.3(d)(2)(i)

17 C.F.R. § 205.3(d)(2)(iii)

Option to Report Out

Lawyer may reveal information to extent lawyer reasonably believes necessary:

Rule 1.6(b)(2)

- to prevent client from committing a crime

Rule 1.6(b)(3)

- 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
- in furtherance of which the client has used the lawyer's services

Rule 1.13(c)

- to prevent substantial injury to the organization
- after lawyer reported constituent's action or intention to act;
- highest authority that can act on behalf of organization failed to address in timely & appropriate manner;
- action or inaction is a clear violation of law

17 C.F.R. § 205.3(d) (2)(i)

- to prevent issuer from committing a material violation
- that is likely to cause substantial injury to the financial interest or property of the issuer or investors
- may reveal to SEC only

17 C.F.R. § 205.3(d) (2)(iii)

Option to Report Out

Lawyer may reveal information to extent lawyer reasonably believes necessary:

Rule 1.6(b)(2)

- to prevent client from committing a crime

Rule 1.6(b)(3)

- 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
- in furtherance of which the client has used the lawyer's services

Rule 1.13(c)

- to prevent substantial injury to the organization
- after lawyer reported constituent's action or intention to act;
- highest authority that can act on behalf of organization failed to address in timely & appropriate manner;
- action or inaction is a clear violation of law

17 C.F.R. § 205.3(d)(2)(i)

- to prevent issuer from committing a material violation
- that is likely to cause substantial injury to the financial interest or property of the issuer or investors
- may reveal to SEC only

17 C.F.R. § 205.3(d)(2)(iii)

- to rectify the consequences of a material violation by the issuer
- that has caused, or may cause, substantial injury to the financial interest or property of the issuer or investors
- in furtherance of which the attorney's services were used
- may reveal to SEC only

Option to Report Out

Lawyer may reveal information to extent lawyer reasonably believes necessary:

Rule 1.6(b)(2)

- to prevent client from committing a crime

Rule 1.6(b)(3)

- 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
- in furtherance of which the client has used the lawyer's services

Rule 1.13(c)

- to prevent substantial injury to the organization
- after lawyer reported constituent's action or intention to act;
- highest authority that can act on behalf of organization fails to address in timely & appropriate manner;
- action or inaction is a clear violation of law

17 C.F.R. § 205.3(d)(2)(i)

- to prevent issuer from committing a material violation
- that is likely to cause substantial injury to the financial interest or property of the issuer or investors
- may reveal to SEC only

17 C.F.R. § 205.3(d)(2)(iii)

- to rectify the consequences of a material violation by the issuer
- that has caused, or may cause, substantial injury to the financial interest or property of the issuer or investors
- in furtherance of which the attorney's services were used
- may reveal to SEC only

Option to Report Out

Lawyer may reveal information to extent lawyer reasonably believes necessary:

Rule 1.6(b)(2)

- to prevent client from committing a crime

Rule 1.6(b)(3)

- 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
- in furtherance of which the client has used the lawyer's services

Rule 1.13(c)

- to prevent substantial injury to the organization
- after lawyer reported constituent's action or intention to act;
- highest authority that can act on behalf of organization fails to address in timely & appropriate manner;
- action or inaction is a clear violation of law

17 C.F.R. § 205.3(d)(2)(i)

- to prevent issuer from committing a material violation
- that is likely to cause substantial injury to the financial interest or property of the issuer or investors
- may reveal to SEC only

17 C.F.R. § 205.3(d)(2)(iii)

- to rectify the consequences of a material violation by the issuer
- that has caused, or may cause, substantial injury to the financial interest or property of the issuer or investors
- in furtherance of which the attorney's services were used
- may reveal to SEC only

Option to Report Out

Lawyer may reveal information to extent lawyer reasonably believes necessary:

Rule 1.6(b)(2)

- to prevent client from committing a crime

Future crime

Rule 1.6(b)(3)

- 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
- in furtherance of which the client has used the lawyer's services

Past crime

Rule 1.13(c)

- to prevent substantial injury to the organization
- after lawyer reported constituent's
- Future or ongoing violation** that can act on behalf of organization fails to address in timely & appropriate manner;
- action or inaction is a clear violation of law

17 C.F.R. § 205.3(d)(2)(i)

- to prevent issuer from committing a material violation
- that is likely to cause
- Future violation** or property of the issuer or investors
- may reveal to SEC only

17 C.F.R. § 205.3(d)(2)(iii)

- to rectify the consequences of a material violation by the issuer
- that has caused, or
- Past violation** interest or property of the issuer or investors
- in furtherance of which the attorney's services were used
- may reveal to SEC only

Option to Report Out

Lawyer may reveal information to extent lawyer reasonably believes necessary:

Rule 1.6(b)(2)

- to prevent client from committing a crime

Rule 1.6(b)(3)

- 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
- in furtherance of which the client has used the lawyer's services

Rule 1.13(c)

- to prevent substantial injury to the organization
- after lawyer reported constituent's action or intention to act;
- highest authority that can act on behalf of organization fails to address in timely & appropriate manner;
- action or inaction is a clear violation of law

17 C.F.R. § 205.3(d)(2)(i)

- to prevent issuer from committing a material violation
- that is likely to cause substantial injury to the financial interest or property of the issuer or investors
- may reveal to SEC only

17 C.F.R. § 205.3(d)(2)(iii)

- to rectify the consequences of a material violation by the issuer
- that has caused, or may cause, substantial injury to the financial interest or property of the issuer or investors
- in furtherance of which the attorney's services were used
- may reveal to SEC only

Option to Report Out

Lawyer may reveal information to extent lawyer reasonably believes necessary:

Rule 1.6(b)(2)

- to prevent client from committing a crime

Rule 1.6(b)(3)

- 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
- in furtherance of which the client has used the lawyer's services

Rule 1.13(c)

- to prevent substantial injury to the organization
- after lawyer reported constituent's action or intention to act;
- highest authority that can act on behalf of organization fails to address in timely & appropriate manner;
- action or inaction is a clear violation of law

17 C.F.R. § 205.3(d)(2)(i)

- to prevent issuer from committing a material violation
- that is likely to cause substantial injury to the financial interest or property of the issuer or investors
- may reveal to SEC only

17 C.F.R. § 205.3(d)(2)(iii)

- to rectify the consequences of a material violation by the issuer
- that has caused, or may cause, substantial injury to the financial interest or property of the issuer or investors
- in furtherance of which the attorney's services were used
- may reveal to SEC only

Option to Report Out

Lawyer may reveal information to extent lawyer reasonably believes necessary:

Rule 1.6(b)(2)

- to prevent client from committing a crime

Future crime

Rule 1.6(b)(3)

- 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
- in furtherance of which the client has used the lawyer's services

Past crime

Rule 1.13(c)

- to prevent substantial injury to the organization
- after lawyer reported constituent's
- Future or ongoing violation** that can act on behalf of organization fails to address in timely & appropriate manner;
- action or inaction is a clear violation of law

17 C.F.R. § 205.3(d)(2)(i)

- to prevent issuer from committing a material violation
- that is likely to cause
- Future violation** or property of the issuer or investors
- may reveal to SEC only

17 C.F.R. § 205.3(d)(2)(iii)

- to rectify the consequences of a material violation by the issuer
- that has caused, or
- Past violation** interest or property of the issuer or investors
- in furtherance of which the attorney's services were used
- may reveal to SEC only

Option to Report Out

Lawyer may reveal information to extent lawyer reasonably believes necessary:

Rule 1.6(b)(2)

- to prevent client from committing a crime

Rule 1.6(b)(3)

- 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
- in furtherance of which the client has used the lawyer's services

Rule 1.13(c)

- to prevent substantial injury to the organization
- after lawyer reported constituent's action or intention to act;
- highest authority that can act on behalf of organization fails to address in timely & appropriate manner;
- action or inaction is a clear violation of law

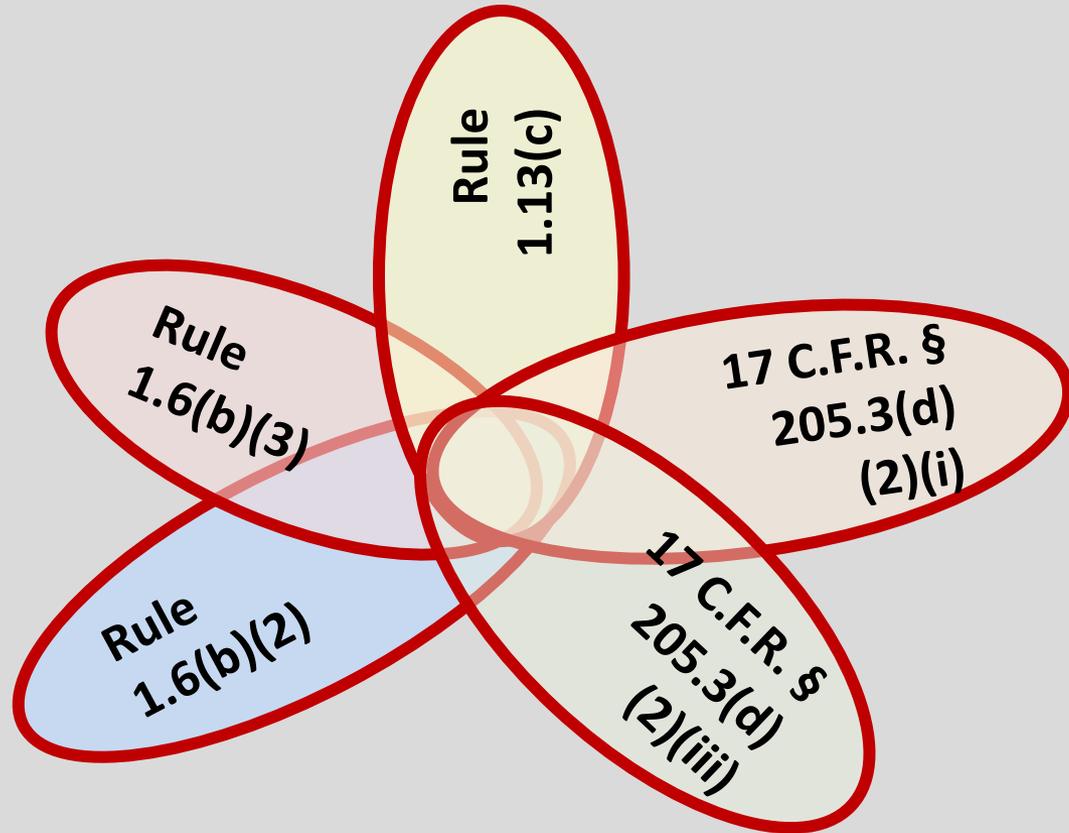
17 C.F.R. § 205.3(d)(2)(i)

- to prevent issuer from committing a material violation
- that is likely to cause substantial injury to the financial interest or property of the issuer or investors
- may reveal to SEC only

17 C.F.R. § 205.3(d)(2)(iii)

- to rectify the consequences of a material violation by the issuer
- that has caused, or may cause, substantial injury to the financial interest or property of the issuer or investors
- in furtherance of which the attorney's services were used
- may reveal to SEC only

Option to Report Out



Rule 1.13

**SEC Rule
17 C.F.R. §
205.1 *et seq.***

The Duty to Report Up the Chain

Initial Reporting Duty

**Duty to Continue Reporting
Up the Chain**

Option to Report Out

Withdrawal

Notification of Discharge

Anti-Retaliation Protections

Idaho Rules

Withdrawal

SEC Rule
17 C.F.R. §
205.1 *et seq.*

IF effect is that lawyer is assisting client in conduct that the lawyer knows is criminal or fraudulent



Lawyer **MUST** withdraw
1.2(d); 1.16 (a)(1).

Idaho Rules

Withdrawal

SEC Rule
17 C.F.R. §
205.1 *et seq.*

IF effect is that lawyer is assisting client in conduct that the lawyer knows is criminal or fraudulent

IF client persists in course of action involving lawyer's services that lawyer "reasonably believes is criminal or fraudulent"

OR

client has "used the lawyer's services to perpetrate a crime or fraud"

OR

client "insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement"

Lawyer **MUST** withdraw
1.2(d); 1.16 (a)(1).

Lawyer **MAY** withdraw
1.16 (b).

Idaho Rules

Withdrawal

SEC Rule
17 C.F.R. §
205.1 *et seq.*

IF effect is that lawyer is assisting client in conduct that the lawyer knows is criminal or fraudulent

IF client persists in course of action involving lawyer's services that lawyers "reasonably believes is criminal or fraudulent"

OR

client has "used the lawyer's services to perpetrate a crime or fraud"

OR

client "insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement"

Lawyer **MUST** withdraw
1.2(d); 1.16 (a)(1).

Lawyer **MAY** withdraw
1.16 (b).

If a lawyer withdraws under circumstances that trigger the initial reporting duty or the option to report out, the lawyer **shall** proceed as the lawyer reasonably believes necessary "to assure that the organization's highest authority is informed" of the lawyer's withdrawal.

Rule 1.13

**SEC Rule
17 C.F.R. §
205.1 *et seq.***

The Duty to Report Up the Chain

Initial Reporting Duty

**Duty to Continue Reporting
Up the Chain**

Option to Report Out

Withdrawal

Notification of Discharge

Anti-Retaliation Protections

Idaho Rules

Notification of Discharge

SEC Rule
17 C.F.R. §
205.1 *et seq.*

IF “lawyer reasonably believes that he or she has been discharged because of the lawyer’s actions taken pursuant to paragraphs (b) and (c)”



The lawyer **shall** proceed as the lawyer reasonably believes necessary “to assure that the organization’s highest authority is informed” of the lawyer’s discharge. 1.13(e).

Idaho Rules

Notification of Discharge

SEC Rule
17 C.F.R. §
205.1 *et seq.*

IF “lawyer reasonably believes that he or she has been discharged because of the lawyer’s actions taken pursuant to paragraphs (b) and (c)”



The lawyer **shall** proceed as the lawyer reasonably believes necessary “to assure that the organization’s highest authority is informed” of the lawyer’s discharge. 1.13(e).

IF an attorney who has reported evidence of a material violation under this part reasonably believes that he or she has been discharged for doing so



The lawyer **may** notify the issuer’s board of directors or any committee thereof. 17 C.F.R. § 205.3(b)(10).

Rule 1.13

**SEC Rule
17 C.F.R. §
205.1 *et seq.***

The Duty to Report Up the Chain

Initial Reporting Duty

**Duty to Continue Reporting
Up the Chain**

Option to Report Out

Withdrawal

Notification of Discharge

Anti-Retaliation Protections

Idaho Protection of Public Employees

Act. I.C. § 6-2101 *et seq.* (“An employer may not take adverse action against an employee because the employee . . . communicates in good faith the existence of . . . a violation or suspected violation of a law, rule or regulation . . . Such communication shall be made at a time and in a manner which gives the employer reasonable opportunity to correct the waste or violation.”).

Idaho Protection of Public Employees

Act. I.C. § 6-2101 *et seq.* (“An employer may not take adverse action against an employee because the employee . . . communicates in good faith the existence of . . . a violation or suspected violation of a law, rule or regulation . . . Such communication shall be made at a time and in a manner which gives the employer reasonable opportunity to correct the waste or violation.”).

Common law claim for retaliatory discharge in violation of public policy.

See *Bollinger v. Fall River Rural Elec. Coop.*, 152 Idaho 632, 641 (2012) (“This public policy exception is triggered only where an employee is terminated for engaging in some protected activity, which includes (1) refusing to commit an unlawful act, (2) performing an important public obligation, or (3) exercising certain legal rights and privileges.”).

Idaho Rules

Anti-Retaliation Protections

SEC Rules

Idaho Protection of Public Employees

Act. I.C. § 6-2101 *et seq.* (“An employer may not take adverse action against an employee because the employee . . . communicates in good faith the existence of . . . a violation or suspected violation of a law, rule or regulation . . . Such communication shall be made at a time and in a manner which gives the employer reasonable opportunity to correct the waste or violation.”).

Common law claim for retaliatory discharge in violation of public policy.

See *Bollinger v. Fall River Rural Elec. Coop.*, 152 Idaho 632, 641 (2012) (“This public policy exception is triggered only where an employee is terminated for engaging in some protected activity, which includes (1) refusing to commit an unlawful act, (2) performing an important public obligation, or (3) exercising certain legal rights and privileges.”).

Sarbanes-Oxley § 806. 18 U.S.C. § 1514A.

- No reporting issuer or agent thereof may “discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee to provide information”
- Regarding any conduct the employee reasonably believes constitutes a violation of §§ 1341, 1343, 1344, or 1348; any rule or regulation of the SEC; or any provision of federal law re: fraud against shareholders
- To a federal regulatory or law enforcement agency, to Congress, or to a person with supervisory authority over the employee.

Idaho Rules

Anti-Retaliation Protections

SEC Rules

Idaho Protection of Public Employees

Act. I.C. § 6-2101 *et seq.* (“An employer may not take adverse action against an employee because the employee . . . communicates in good faith the existence of . . . a violation or suspected violation of a law, rule or regulation . . . Such communication shall be made at a time and in a manner which gives the employer reasonable opportunity to correct the waste or violation.”).

Common law claim for retaliatory discharge in violation of public policy.

See *Bollinger v. Fall River Rural Elec. Coop.*, 152 Idaho 632, 641 (2012) (“This public policy exception is triggered only where an employee is terminated for engaging in some protected activity, which includes (1) refusing to commit an unlawful act, (2) performing an important public obligation, or (3) exercising certain legal rights and privileges.”).

Sarbanes-Oxley § 806. 18 U.S.C. § 1514A.

- No reporting issuer or agent thereof may “discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee to provide information”
- Regarding any conduct the employee reasonably believes constitutes a violation of §§ 1341, 1343, 1344, or 1348; any rule or regulation of the SEC; or any provision of federal law re: fraud against shareholders
- To a federal regulatory or law enforcement agency, to Congress, or to a person with supervisory authority over the employee.

Dodd-Frank § 922; 17 C.F.R. § 240 *et seq.*

- Mimics SOX § 806 anti-retaliation provision.
- AND**
- No employer may discriminate against a whistleblower in the terms and conditions of employment because of any act in providing information to the SEC regarding a possible securities act violation

Rule 1.13

**SEC Rule
17 C.F.R. §
205.1 *et seq.***

The Duty to Report Up the Chain

Initial Reporting Duty

**Duty to Continue Reporting
Up the Chain**

Option to Report Out

Withdrawal

Notification of Discharge

Anti-Retaliation Protections

The Duty to Report Up the Chain

Thank you!

Wendy Gerwick Couture
Associate Professor
University of Idaho College of Law
wgcouture@uidaho.edu