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## Stitches for Snitches: Lawyers as Whistleblowers

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*This Article proves the lie of the prevailing wisdom that ethics rules forbid lawyers from blowing the whistle on a client's illegal conduct. It critically examines a high-profile case in New York that ruled a lawyer whistleblower violated his ethical obligations by revealing confidential information to stop his employer-client from engaging in an alleged tax fraud of epic proportions (indeed, an alleged fraud that resulted in \$35 billion in unpaid taxes). In particular, this Article argues that the court undertook a deficient analysis of New York ethics rules pertaining to permissive disclosure of confidential client information. Even if the lawyer whistleblower had violated his ethical obligations, the New York False Claims Act (the statute under which the whistleblower brought his action) expressly protects disclosure of confidential employer information made in furtherance of the statute. In addition to New York's statutory shield, federal courts have developed a public policy exception safeguarding whistleblowers who disclose confidential information that detects and exposes an employer's legal violations.*

*In challenging the previously unchallenged criticism of lawyer whistleblowers, this Article acknowledges the guttural appeal of that critique. The idea of a lawyer revealing a client's legal violations — particularly for a monetary award paid under a whistleblower statute — appears to threaten the attorney-client relationship. Nonetheless, lawyers have always had the discretion to disclose confidential information to prevent a client from committing certain crimes or frauds. Modern ethics rules further expand the circumstances under which a lawyer may reveal confidential client information, even if disclosure makes a lawyer eligible for financial awards.*

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## TABLE OF CONTENTS

INTRODUCTION .....	1457
I. THE VANGUARD CASE AND THE STANDARD OF REVIEW FOR WHISTLEBLOWER COMPLAINTS.....	1460
II. LAWYER WHISTLEBLOWERS AND NEW YORK ETHICS RULES....	1467
III. PROTECTING WHISTLEBLOWERS WHO DISCLOSE CONFIDENTIAL INFORMATION .....	1485
IV. A READILY DISTINGUISHABLE CASE AND A MISMATCHED LAWYER WHISTLEBLOWER .....	1499
V. A DEFECTIVE ETHICS OPINION PERTAINING TO LAWYER WHISTLEBLOWERS .....	1510
A. <i>Flawed Premises About How and Why Employees Blow             the Whistle</i> .....	1511
B. <i>Misrepresenting Lawyers' Eligibility Under the SEC             Whistleblower Program</i> .....	1520
C. <i>Misleading Analysis of SEC Ethics Rules vs. State Ethics             Rules</i> .....	1527
D. <i>Untenable Interpretation of Conflicts of Interest for             Lawyer Whistleblowers</i> .....	1537
CONCLUSION AND LESSONS LEARNED .....	1544
APPENDIX: DISCLOSURE EXCEPTIONS CONTAINED IN ETHICS RULES FROM ALL 50 STATES AND THE DISTRICT OF COLUMBIA COMPARED TO THE ABA MODEL RULES.....	1547

## INTRODUCTION

In November 2015, a New York state court ruled against a plaintiff-whistleblower in a case brought under New York's False Claims Act (FCA)<sup>1</sup> alleging that Vanguard Group, the world's largest provider of mutual funds, "has operated as an illegal tax shelter for nearly forty years."<sup>2</sup> The whistleblower's expert estimated that for the last eight of those years, Vanguard underpaid its federal tax liability by a staggering \$35 billion<sup>3</sup> and, relatedly, its state tax liabilities by billions of dollars more.<sup>4</sup> In dismissing the whistleblower's complaint,<sup>5</sup> the court never reached the merits of the underlying claims pertaining to defendant-Vanguard's alleged tax fraud. Instead, it considered whether the whistleblower could bring the claims in the first place. Why the special treatment? The whistleblower was a lawyer. Worse, he previously represented defendant-Vanguard. As such, according to the court, the whistleblower violated New York's ethical rules for attorneys by revealing and using Vanguard's confidential information

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<sup>1</sup> New York False Claims Act, N.Y. STATE FIN. LAW §§ 187–194 (2017). Like false claims statutes administered by other states, New York's permits the Attorney General, a local government, or an individual to file a lawsuit on behalf of the government against a person or company that obtains or withholds funds or property through false or fraudulent conduct. When an individual rather than the government brings suit under an FCA, the suit is known as a "*qui tam*" action and the individual is known as a *qui tam* plaintiff or "relator." The phrase, "*qui tam*," is shorthand for "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*" or "who brings the action for the king as well as himself." When individuals bring claims on behalf of the government under statutes other than false claims statutes, including the whistleblower programs administered by the Internal Revenue Service and Securities and Exchange Commission, those individuals are referred to as "whistleblowers." For sake of consistency and simplicity, this article refers to *qui tam* plaintiffs and non-*qui tam* informants as whistleblowers. Finally, subject to each statute's eligibility requirements and exceptions, whistleblowers are entitled to receive a percentage of the proceeds collected from an action. For more on New York's rules governing the receipt of monetary awards under its false claims statute, see *infra* notes 141–45 and accompanying text.

<sup>2</sup> Complaint at 2, *State ex rel. Danon v. Vanguard Grp., Inc.*, No. 100711/13, 2015 N.Y. Misc. LEXIS 4239 (N.Y. Sup. Ct. Nov. 13, 2015). The *Vanguard* whistleblower filed an appeal that, as of March 27, 2017, is proceeding under seal.

<sup>3</sup> Expert Report of Professor Reuven S. Avi-Yonah on the Estimated Federal Tax Liability of the Vanguard Group, Inc., Submitted to the Internal Revenue Service and the Securities and Exchange Commission in Connection with the Whistleblower Submissions of David Danon at 8 & tbl. 2 (Sept. 21, 2015) [hereinafter Expert Report of Professor Avi-Yonah].

<sup>4</sup> See *infra* note 116 and accompanying text.

<sup>5</sup> See *State ex rel. Danon v. Vanguard Grp., Inc.*, No. 100711/13, 2015 N.Y. Misc. LEXIS 4239, at \*1 (N.Y. Sup. Ct. Nov. 13, 2015).

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in attempting to stop the company from continuing to commit its alleged tax fraud.

This Article explains how the *Vanguard* court got it wrong. It examines the *Vanguard* case in detail, describing how the court erroneously found that the lawyer whistleblower impermissibly revealed confidential employer information under New York's ethics rules.<sup>6</sup> It explains how the court ignored the statutory protections contained in New York's FCA that explicitly safeguard whistleblowers, including lawyer whistleblowers, for disclosing confidential employer information.<sup>7</sup> And it highlights a judicially created public policy exception — which the court also ignored — that further protects whistleblowers for disclosing confidential information made in furtherance of detecting and exposing an employer's illegal conduct.<sup>8</sup> Additionally, the Article critically evaluates how the court, in ruling on a complaint brought under the New York FCA, relied almost exclusively on a readily distinguishable case involving an inapplicable federal statute and a mismatched lawyer whistleblower.<sup>9</sup>

From case specific to broad application, this Article considers the efficacy of lawyer whistleblowers writ large. It exposes fatal flaws in a widely cited ethics opinion — on which the *Vanguard* court relied and from which it reasoned — pertaining to lawyer whistleblowers.<sup>10</sup> The opinion, promulgated by the New York County Lawyers' Association (NYCLA), addressed lawyers disclosing client misconduct under the Securities and Exchange Commission (SEC) whistleblower program. The NYCLA opinion concluded that lawyers “presumptively may not ethically collect whistleblower bounties in exchange for disclosing confidential information about their clients.”<sup>11</sup> In reaching this conclusion, the opinion suffered from a battery of defects, some of which informed the *Vanguard* opinion, including: proceeding from faulty premises about how and why employees blow the whistle; misrepresenting lawyers' eligibility under the SEC program; offering a misleading analysis of the relationship between SEC ethics rules and state ethics rules; and tendering an untenable interpretation of disqualifying conflicts for lawyer whistleblowers.

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<sup>6</sup> See *infra* Parts I and II.

<sup>7</sup> See *infra* Part III.

<sup>8</sup> See *infra* Part III.

<sup>9</sup> See *infra* Part IV.

<sup>10</sup> See *infra* Part V.

<sup>11</sup> N.Y. Cty. Law. Ass'n (NYCLA), Comm. on Prof'l Ethics, Formal Op. 746, at 1 (2013).

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By way of further general application, the Article concludes with an Appendix that tabulates the disclosure exceptions contained in state ethics rules permitting lawyers to reveal confidential information to prevent a client from committing a crime or fraud. Specifically, it compares the disclosure exceptions in the rules of professional conduct from all fifty states and the District of Columbia to the exceptions contained in the American Bar Association's (ABA) Model Rules of Professional Conduct.

None of the foregoing necessarily means that the *Vanguard* whistleblower should prevail on the merits of his action. We still need more details, for example, about this particular whistleblower's efforts to remediate his employer's longstanding alleged tax fraud through its internal reporting procedures; how his employer responded to his efforts to stop the company from engaging in its alleged tax fraud; and whether he remained mindful of protecting his employer's confidential information when collecting evidence of its alleged tax fraud, submitting his whistleblower claims to the proper authorities, filing his complaint with the court, and, ultimately, prosecuting his action. Additionally, we need to consider (or, rather, a court will need to consider) the application of the judicially created public policy exception that protects whistleblowers for disclosing an employer's confidential information made in furtherance of detecting and exposing an employer's illegal conduct.

Nor does this Article argue that lawyers enjoy *carte blanche* to blow the whistle on client transgressions, either through false claims acts or other whistleblower programs. Not only is that characterization false as a matter of law and legal ethics, it fails to recognize the understandable ambivalence that some people have toward whistleblowers and whistleblower programs. That is, the uneasy or "icky" feeling associated with paying someone to do the right thing. And while policymakers and courts largely agree that providing incentives to whistleblowers results in more fraud being detected, exposed, and prosecuted, adding legal ethics to the mix exacerbates the feelings of uneasiness with additional concerns about how financial incentives to blow the whistle might interfere with the time-honored attorney-client relationship.

At the same time, it has long been true that a lawyer "is under no obligation to advocate iniquity"<sup>12</sup> nor to "conceal the wrongdoing" of a

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<sup>12</sup> GEORGE W. WARVELLE, *ESSAYS IN LEGAL ETHICS* 174 (2d ed. 1920) (originally published in 1902).

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client<sup>13</sup> who, if “actually engaged in committing a wrong can have no privileged witnesses.”<sup>14</sup> As importantly, modern ethics rules in nearly every U.S. jurisdiction permit lawyers to disclose confidential information to prevent a client from committing a crime and/or fraud.<sup>15</sup> This Article examines those disclosure exceptions and their application to lawyer whistleblowers, with special emphasis on New York’s rules, the ABA Model Rules, and the SEC rules. Ultimately, the Article concludes that lawyers have the discretion to reveal confidential client information in certain circumstances, even if that disclosure makes the lawyer eligible for a potential monetary award under a whistleblower statute or program.

I. THE VANGUARD CASE AND THE STANDARD OF REVIEW FOR WHISTLEBLOWER COMPLAINTS

This Section provides some background on the *Vanguard* case, and discusses how the court applied the wrong standard of review in evaluating the lawyer whistleblower’s complaint under New York’s False Claims Act. In particular, it provides a brief summary of the *Vanguard* whistleblower’s claims against Vanguard, the steps he took to raise his claims internally before filing his false claims action, and the court’s ultimate decision to dismiss his complaint. It also discusses how the *Vanguard* court ignored its obligation under New York’s civil practice rules to construe the pleadings liberally, and, if the claim involves fraud (which it did), to apply an even lower standard of notice pleading.

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David Danon, the lawyer whistleblower at the heart of the *Vanguard* matter, alleged in his *qui tam* action against his former employer, Vanguard Group, that the world’s largest provider of mutual funds “has operated as an illegal tax shelter for nearly forty years.”<sup>16</sup> According to Danon, Vanguard’s primary sheltering gambit involved

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<sup>13</sup> ABA Comm. on Prof’l Ethics & Grievances, Formal Op. 155 (1936).

<sup>14</sup> *Id.*

<sup>15</sup> All jurisdictions permit a lawyer to reveal confidential information to prevent a client from committing a criminal act that the lawyer believes “is likely to result in imminent death or substantial bodily harm.” Only six of those states (Alabama, California, Kentucky, Missouri, Montana, and Rhode Island) restrict disclosure to crimes under those circumstances. Meanwhile, the other forty-four states and the District of Columbia allow additional permissive disclosure of confidential information pertaining to a client’s crime and/or fraud. *See infra*, Appendix.

<sup>16</sup> Complaint, *supra* note 2.

failing to charge its affiliated mutual funds for investment advisory services; that is, by not dealing with them in an “arm’s length” manner as required by the U.S. Treasury Department’s transfer pricing rules.<sup>17</sup>

Vanguard’s alleged misconduct resulted in it substantially understating its federal and state income tax obligations. According to Danon’s complaint, Vanguard avoided paying \$1 billion in federal income tax and “at least \$20 million” in New York taxes over a ten-year period.<sup>18</sup> Danon’s subsequent submissions to the court indicated that Vanguard’s “tax dodge” was even more egregious than first alleged, costing New York “many tens of millions of dollars” and the federal government “billions of dollars.”<sup>19</sup> At last count, Danon’s expert witness — one of the country’s leading tax scholars and the pre-eminent expert on IRS transfer pricing rules — pegged Vanguard’s estimated unpaid federal income tax liability (including interest and penalties), at an astounding \$34.6 billion, a figure that covers only tax years 2007–14.<sup>20</sup> In fact, Danon’s expert is so certain that Vanguard’s historic tax practices are illegitimate that he has opined, “If the IRS were to pursue the matter, it *will prevail in court*” on the primary issue “of whether Vanguard should have charged its affiliated funds an arm’s length fee based on industry comparables for the investment management and advisory services Vanguard provided to the funds.”<sup>21</sup> The “will” opinion rendered by Danon’s expert reflects a predictive

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<sup>17</sup> Treas. Reg. § 1.482-9 (2011) (pertaining to methods to determine taxable income in connection with a controlled services transaction); *see also* Affidavit of David Danon in Support of Plaintiffs’ Opposition to Defendants’ Motion to Dismiss and for Disqualification of Danon and His Counsel ¶ 5, *State ex rel. Danon v. Vanguard Grp., Inc.*, No. 100711/13, 2015 N.Y. Misc. LEXIS 4239 (N.Y. Sup. Ct. Nov. 13, 2015) [hereinafter *Affidavit of Danon*] (“In the course of my work, I became aware of facts revealing that VGI was avoiding paying millions in state and federal taxes. VGI achieved this illegal tax avoidance by using its ‘at cost’ structure, in which Vanguard funds pay VGI at cost for its management services, as well as other irregularities that enabled Vanguard to avoid reporting taxable profits.”).

<sup>18</sup> Complaint, *supra* note 2.

<sup>19</sup> Plaintiffs’ Opposition to Defendants’ Motion to Dismiss the Complaint and for Disqualification of Danon and His Counsel at 1, *State ex rel. Danon v. Vanguard Grp., Inc.*, No. 100711/13, 2015 N.Y. Misc. LEXIS 4239 (N.Y. Sup. Ct. Nov. 13, 2015) [hereinafter *Plaintiff’s Opposition*].

<sup>20</sup> *See* Expert Report of Professor Avi-Yonah, *supra* note 3. The \$34.6 billion figure does not include taxes, interest, and penalties associated with Vanguard’s failure to include in income another \$1.5 billion parked in a contingency reserve that Vanguard charged to its affiliated funds. *See id.* at 1-2. For Expert Avi-Yonah’s analysis pertaining to (i) the transfer pricing issue, *see id.* at 4-8, and (ii) the contingency reserve fund, *see id.* at 8.

<sup>21</sup> *Id.* at 1 (emphasis added).

level of confidence that corresponds to a near-certainty of 95 percent or higher.<sup>22</sup>

In his complaint, Danon asserted that Vanguard's alleged tax fraud caused it to violate various sections of the New York False Claims Act. From those violations, Danon further asserted nine causes of action under New York's FCA,<sup>23</sup> and sought remedies on behalf of himself and the state of New York in the amount of three times damages sustained,<sup>24</sup> civil penalties of \$6,000 to \$12,000 for each violation of the FCA,<sup>25</sup> plus interest, and all reasonable costs and expenses for bringing the action, including attorney's fees.<sup>26</sup> Danon also sought for himself 30 percent of all proceeds collected from the action.<sup>27</sup> To prevail, Danon would need to demonstrate that Vanguard "knowingly" violated the law,<sup>28</sup> which includes possessing "actual knowledge" of the false information or acting in "deliberate ignorance" or "reckless disregard" of the truth or the falsity of the information.<sup>29</sup> The statute does not require Danon to prove specific intent to defraud.<sup>30</sup> Finally, New York's FCA covers the "reverse false claim," whereby "knowing" violations include not just acts of *submitting* false claims to obtain money or property from the government, but also acts of *avoiding* paying or transmitting money or property to the government,<sup>31</sup> including taxes.

Through his complaint and other court submissions (including an opposition to defendants' motion to dismiss and an affidavit

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<sup>22</sup> For the tax lawyer's standard of care in rendering probability assessments on the likelihood of success on the merits of a taxpayer-client's tax position or transaction, see Dennis J. Ventry, Jr. & Bradley T. Borden, *Probability, Professionalism, and Protecting Taxpayers*, 68 TAX LAW. 83, 88-90, 112-16 (2014).

<sup>23</sup> The causes of action against Vanguard allege that it: used false records or statements to avoid tax obligations; failed to pay required taxes to New York and local governments; falsely certified that it was in compliance with its state tax obligations; conspired to commit these wrongs; possessed property or money used by a governmental entity, and, intended to defraud such entity, by making or delivering the receipt without fully knowing of the veracity of the information contained therein; made false statements when applying for tax refunds; and retaliated against Danon for acting in furtherance of New York's FCA. See Complaint, *supra* note 2, at 28-38.

<sup>24</sup> See N.Y. STATE FIN. LAW § 189(1)(h) (2017).

<sup>25</sup> See *id.*

<sup>26</sup> See *id.* § 189(3).

<sup>27</sup> See *id.* § 190(6)(b).

<sup>28</sup> *Id.* §§ 189(1)(a)-(b), (f)-(h).

<sup>29</sup> *Id.* § 188(3)(a).

<sup>30</sup> See *id.* § 188(3)(b). At the same time, the New York FCA makes "acts occurring by mistake or as a result of mere negligence" a defense under the statute. *Id.*

<sup>31</sup> *Id.* § 189(1)(h).



supporting his opposition), Danon detailed Vanguard's alleged tax fraud.<sup>32</sup> He also outlined his "repeated unsuccessful efforts" to persuade Vanguard through internal channels to cease its longstanding fraud,<sup>33</sup> as well as Vanguard's attempt to silence his efforts to prevent it from continuing to commit its alleged tax fraud.<sup>34</sup>

With respect to his "repeated attempts to put a stop to [Vanguard's] unlawful practices,"<sup>35</sup> Danon "stated [his] belief" to higher-ups within Vanguard that the company's tax fraud "would likely result in substantial injury" to the organization.<sup>36</sup> In fact, Danon's "discomfort with Vanguard's illegal practices" and his attempts to stop those practices were widely known among Danon's colleagues in Vanguard's legal and tax departments.<sup>37</sup> Notwithstanding Danon's diligence in

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<sup>32</sup> Complaint, *supra* note 2, at 2-4 (alleging that Vanguard (i) failed to file tax returns in New York and pay tax on income generated in New York; (ii) filed false tax returns and reported "distorted and/or artificial income"; (iii) violated § 482 of the Internal Revenue Code and section 211(5) of New York Tax Law "as well as the laws of dozens of other jurisdictions" by providing services to its commonly controlled funds "at artificially low, 'at-cost' prices"; and (iv) "knowingly and fraudulently failed to report and pay tax on its \$1.5 billion 'Contingency Reserve,' avoiding approximately \$500 million of U.S. federal income tax and \$10 million of New York tax"); Complaint, *supra* note 2, ¶¶ 47, 69, 103, 105-07, 108-11, 135-37; Plaintiff's Opposition, *supra* note 19, at 1-2, 4-7, 11-28 (stating at 17-18, "Vanguard's at-cost pricing scheme violates Section 211(5), Section 482 and the laws of dozens of other states that require taxpayers to charge 'arms length' prices for transactions with commonly controlled parties and illegally avoids federal and state income taxes by (1) avoiding corporate level tax on Vanguard profit, (2) exploiting differences in tax rates applicable to corporations, individuals and investment returns taxed at preferential rates (e.g., qualified dividend income and long term capital gain), and (3) exploiting tax deferral on income realized through tax-deferred plans (i.e., retirement plans)."); Affidavit of Danon, *supra* note 17, ¶ 5 ("In the course of my work, I became aware of facts revealing that VGI was avoiding paying millions in state and federal taxes. VGI achieved this illegal tax avoidance by using its 'at cost' structure, in which Vanguard funds pay VGI at cost for its management services, as well as other irregularities that enabled Vanguard to avoid reporting taxable profits.").

<sup>33</sup> Plaintiff's Opposition, *supra* note 19, at 3; *see also infra* notes 35-38, 41 and accompanying text.

<sup>34</sup> *See infra* notes 39-40, 42-43 and accompanying text; *see also* Complaint, *supra* note 2, at 37 ¶¶ 201-03 ("As a result of Plaintiff-Relator Danon's lawful acts in furtherance of this action, and of Plaintiff-Relator Danon's efforts to stop, correct, or otherwise remedy the violations described in this Complaint, Defendants have demoted Plaintiff-Relator Danon . . . have discharged Plaintiff-Relator Danon . . . [and] have harmed Plaintiff-Relator Danon's career and ability to obtain employment."); Plaintiff's Opposition, *supra* note 19, at 29-30 (paragraphs pertaining to "The Complaint Alleges a Retaliation Claim").

<sup>35</sup> Affidavit of Danon, *supra* note 17, ¶ 5.

<sup>36</sup> *Id.* ¶ 6.

<sup>37</sup> *Id.* ¶ 8.

repeatedly alerting his superiors to the fraud and its potentially damaging effect on the company, Vanguard “continued its unlawful tax and securities fraud.”<sup>38</sup> Rather than investigate Danon’s allegations of fraud, the head of Vanguard’s legal tax group warned him that his “attempts to stop the illegal practices had harmed [his] relationship with important members of Vanguard’s tax department [and that] he should not put his concerns about costs in writing [and] two prior tax directors had suffered professional harm due to expressing [similar concerns].”<sup>39</sup>

Faced with his superior’s “refusal to act on clear violations of law,” in combination with their “attempts to silence [him] on the at-cost pricing issue,” Danon concluded that Vanguard’s historical tax practices “were not the result of an innocent misunderstanding of law.”<sup>40</sup> Rather, according to Danon, Vanguard “intentionally engaged in unlawful conduct and did not accept [his] efforts to stop its illegal activities.”<sup>41</sup> Shortly thereafter, Vanguard terminated Danon’s employment, effective in six months, a termination that Danon alleged had nothing to do with his job performance but rather was in retaliation for his “persistent and vocal questioning of [Vanguard’s] unlawful practices.”<sup>42</sup> Having exhausted all of his options to report the fraudulent conduct internally, and “facing retaliatory action”<sup>43</sup> in the form of termination, Danon “proceeded as reasonably necessary in the best interests of [Vanguard] to stop its illegal practices,”<sup>44</sup> ultimately deciding to report the wrongdoing outside the organization to appropriate authorities.<sup>45</sup> For the next six months, Danon assembled

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<sup>38</sup> *Id.* ¶ 9.

<sup>39</sup> *State ex rel. Danon v. Vanguard Grp., Inc.*, No. 100711/13, 2015 N.Y. Misc. LEXIS 4239, at \*33-34 (Sup. Ct. N.Y. Nov. 13, 2015) (alteration in original) (citing to ¶ 7 of Danon’s affidavit, which the court had redacted in Plaintiff’s Opposition). The warning likely rang true to Danon, whose affidavit describes an encounter with a former Vanguard lawyer whose own experience with expressing “deep concerns” about Vanguard’s tax fraud had led the lawyer to “leave Vanguard within a year due to professional harm from expressing his/her concerns.” Affidavit of Danon, *supra* note 17, ¶ 8.

<sup>40</sup> Affidavit of Danon, *supra* note 17, ¶ 8.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* ¶ 10.

<sup>43</sup> Plaintiff’s Opposition, *supra* note 19, at 7 (citing Affidavit of Danon, *supra* note 17, ¶ 17).

<sup>44</sup> Affidavit of Danon, *supra* note 17, ¶ 11.

<sup>45</sup> *Id.* ¶ 17. Danon’s court submissions allege that he reported Vanguard’s longstanding alleged fraud outside the organization and to appropriate authorities only after he was “unable to stop the fraudulent conduct.” *Id.* ¶ 18; *see also supra* notes 35–38, 41 and accompanying text; *infra* note 237 and accompanying text.

internal documents substantiating Vanguard's tax and securities fraud,<sup>46</sup> copies of which he transmitted to the IRS, SEC, and New York Attorney General's Office<sup>47</sup> "for the sole purpose of reporting [Vanguard's] fraudulent and illegal actions"<sup>48</sup> and not to unduly disclose Vanguard's confidential information.

If true, the facts alleged in Danon's complaint and supplemental submissions establish: (i) Vanguard was engaged in historical and ongoing tax fraud in violation of New York's False Claims Act; (ii) in light of his repeated and unavailing efforts to address internally Vanguard's alleged tax fraud, Danon did not violate New York's ethical rules by disclosing Vanguard's confidential tax information in either his FCA submission or his *qui tam* complaint;<sup>49</sup> and (iii) Danon did not disclose more than was reasonably necessary to prevent Vanguard from continuing to commit its alleged tax fraud.<sup>50</sup>

At this preliminary stage of the litigation — and assuming no reason to question the veracity of the facts alleged in Danon's complaint — Danon's facts as alleged were more than sufficient to survive a motion to dismiss under New York's civil practice rules.<sup>51</sup> These rules command that the "[p]leadings shall be liberally construed,"<sup>52</sup> and that New York courts must accept the facts alleged as true,<sup>53</sup> and "accord the plaintiff the benefit of every favorable inference."<sup>54</sup> Moreover, under New York's rules, courts "may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint."<sup>55</sup> At the same time, disputed issues of fact cannot form the

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<sup>46</sup> Affidavit of Danon, *supra* note 17, ¶ 11.

<sup>47</sup> *Id.* ¶ 19. Danon provided documents to those authorities, all of which administer and enforce their own whistleblower programs, "in order to further their interests in preventing securities and tax fraud." *Id.* ¶ 20.

<sup>48</sup> *Id.* ¶ 24.

<sup>49</sup> For a full discussion of this conclusion, see *infra* Part II.

<sup>50</sup> For a full discussion of this related conclusion, see *infra* Part II.

<sup>51</sup> See N.Y. C.P.L.R. 3211 (2017).

<sup>52</sup> N.Y. C.P.L.R. 3026 (2017); see also *Leon v. Martinez*, 638 N.E.2d 511, 513 (N.Y. 1994) (stating "the pleading is to be afforded a liberal construction" on a motion to dismiss).

<sup>53</sup> See *Morone v. Morone*, 413 N.E.2d 1154, 1155 (N.Y. 1980) (stating "[o]n a motion to dismiss a complaint we accept the facts alleged as true"); *Rovello v. Orofino Realty Co.*, 357 N.E.2d 970, 971 (N.Y. 1976) ("Under modern pleading theory, a complaint should not be dismissed on a pleading motion so long as, when the plaintiff is given the benefit of every possible favorable inference, a cause of action exists.").

<sup>54</sup> *People ex rel. Schneiderman v. Sprint Nextel Corp.*, 970 N.Y.S.2d 164, 170 (Sup. Ct. 2013).

<sup>55</sup> *Id.*; see *Rovello*, 357 N.E.2d at 972 (stating that "affidavits may be used freely to preserve inartfully pleaded, but potentially meritorious, claims"). Danon submitted

basis of dismissing a plaintiff's complaint.<sup>56</sup> Indeed, in a recent case involving the sufficiency of allegations contained in a whistleblower's complaint brought under the New York FCA (as well as under the federal FCA), the court declined to dismiss the complaint on grounds that it would be "inappropriate to discredit the factual allegations of a complaint merely because they are contradicted."<sup>57</sup> Finally, if the matter involves fraud perpetrated against the state of New York, the whistleblower is held to an even lower standard of notice pleading as expressly described in the state's False Claims Act.<sup>58</sup> These liberal standards for surviving a motion to dismiss are particularly appropriate where, as here, certain factual questions — due to their complexity and nuance — cannot be resolved on the pleadings.

Notwithstanding New York's clear standard of review on motions to dismiss — that is, liberal construction of the pleadings and notice pleading for claims involving fraud — the *Vanguard* court dismissed Danon's complaint. More specifically, it dismissed the complaint based on the court's conclusion that Danon violated the New York Rules of Professional Conduct by disclosing more confidential client information than was reasonably necessary to prevent Vanguard from

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such an affidavit as an Exhibit appended to his Opposition to Defendants' Motion to Dismiss. See Plaintiff's Opposition, *supra* note 19.

<sup>56</sup> See, e.g., *Basis Yield Alpha Fund (Master) v. Goldman Sachs Grp., Inc.*, 980 N.Y.S.2d 21, 26 (App. Div. 2014) ("[P]laintiff appears to be arguing that the documentary evidence simply raises 'disputed issues of fact,' which, as the plaintiff correctly asserts, is not enough for a dismissal under CPLR 3211(a)(7).").

<sup>57</sup> *United States ex rel. Ortiz v. Mount Sinai Hosp.*, No. 13 Civ. 4735 (RMB), 2015 U.S. Dist. LEXIS 153903, at \*19 (S.D.N.Y. Nov. 9, 2015).

<sup>58</sup> See N.Y. STATE FIN. LAW § 192(1-a) (2017) ("[T]he *qui tam* plaintiff shall not be required to identify specific claims that result from an alleged course of misconduct, or any specific records or statements used, if the facts alleged in the complaint, if ultimately proven true, would provide a reasonable indication that one or more violations of section one hundred eighty-nine of this article are likely to have occurred, and if the allegations in the pleading provide adequate notice of the specific nature of the alleged misconduct to permit the state or a local government effectively to investigate and defendants fairly to defend the allegations made."). By comparison, whistleblowers bringing claims under the federal FCA must plead fraud with particularity as articulated in Federal Rule of Civil Procedure 9(b). See *Gold v. Morrison-Knudsen Co.*, 68 F.3d 1475, 1477 (2d Cir. 1995) ("[C]laims brought under the [federal] FCA fall within the express scope of Rule 9(b).") Specifically, the federal Rule states that to meet the pleading requirements, "a party must state with particularity the circumstances constituting fraud or mistake." FED. R. CIV. P. 9(b). While the federal appeals courts agree that fraud must be pled with particularity in the context of the federal FCA, they disagree as to what constitutes "particularity." For a discussion of this disagreement, see *Ortiz*, 2015 U.S. Dist. LEXIS 153903, at \*12-14.

continuing to commit alleged tax violations.<sup>59</sup> In so doing, the *Vanguard* court failed to credit Danon's facts as presented, and it decided issues of disputed facts. Even worse, the court adopted defendant-Vanguard's version of disputed facts, as detailed in Parts II and IV.

The next Section describes how Danon comported his behavior to New York's Rules of Professional Conduct when he disclosed Vanguard's confidential information. In the process, it illustrates the multiple ways that the *Vanguard* court improperly decided issues of disputed facts in favor of defendant-Vanguard.

## II. LAWYER WHISTLEBLOWERS AND NEW YORK ETHICS RULES

In applying an improper standard of review when considering Danon's complaint, the *Vanguard* court resolved factual questions pertaining to a lawyer's ethical duties that simply cannot be resolved on the pleadings. Indeed, it barely scratched the surface with respect to, on the one hand, the complex and nuanced rules governing a lawyer's exercise of discretion in disclosing confidential information and, on the other hand, how Danon comported himself in relation to those rules. This Section argues that had the court conducted a more thorough analysis of New York's ethical rules alongside Danon's behavior under those rules (based on the facts alleged), it would have been forced to conclude that (i) Danon acted properly in disclosing Vanguard's confidential tax information to prevent it from committing its alleged ongoing tax fraud, and (ii) Danon disclosed no more than was reasonably necessary to prevent the alleged tax fraud from continuing.

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The *Vanguard* whistleblower is not just any whistleblower. He is also a lawyer. And in blowing the whistle on his client, he disclosed client confidences, an act that attorney ethics rules in every U.S. jurisdiction permit in only limited circumstances. New York's ethical

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<sup>59</sup> See *State ex rel. Danon v. Vanguard Grp., Inc.*, No. 100711/13, 2015 N.Y. Misc. LEXIS 4239, at \*24-27 (Sup. Ct. N.Y. Nov. 13, 2015) (finding: (i) "it cannot be said that bringing this *qui tam* action through revealing Vanguard's confidential material was reasonably necessary to prevent [] Vanguard from committing such a crime"; (ii) ". . . the extent of the disclosure of Vanguard's confidential information was broader than reasonably necessary to stop the alleged tax violations"; and (iii) ". . . such broad disclosure of confidential tax information related to past years as revealed in the *qui tam* complaint . . . was greater than reasonably necessary to prevent Vanguard from committing any alleged future tax violations"); see also *id.* at \*29.

rules provide fewer opportunities for a lawyer to disclose confidential information pertaining to a client's illegal conduct than many jurisdictions.<sup>60</sup> Under New York's restrictive disclosure rules, the *Vanguard* court evaluated Danon's actions to determine (i) if the ethical rules permitted him to disclose confidential information when reporting his client's alleged tax and securities fraud to authorities, and, (ii) if so, whether he disclosed more than was reasonably necessary to prevent the frauds from continuing.

Like all states, New York's ethics rules for attorneys<sup>61</sup> prohibit lawyers from revealing confidential information relating to the representation of a client<sup>62</sup> except in limited circumstances.<sup>63</sup> One of

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<sup>60</sup> See *infra* notes 382–94 and accompanying text.

<sup>61</sup> In April 2009, New York replaced its longstanding New York Code of Professional Responsibility (NY CPR) with the New York Rules of Professional Conduct (NY RPC), making it the last state to abandon the format of the ABA Model Code of Professional Responsibility, an architecture that the ABA itself abandoned in 1983 and that included binding disciplinary rules (DRs) and nonbinding ethical considerations (ECs) arranged under Canons. The New York RPC largely tracks the structure of the ABA Model Rules but “maintain[s] much of the language and substance” of the old Code. Roy Simon, *Comparing the New NY Rules of Professional Conduct to the NY Code of Professional Responsibility*, N.Y. PROF'L RESP. REP., <http://www.nysba.org/correlationchart/> (last visited Jan. 5, 2017). Still, there remain important differences between the New York RPC and the ABA Model Rules with respect to disclosure of confidential client information, which this article discusses at various points, including at *infra* notes 382–94.

<sup>62</sup> See N.Y. RULES OF PROF'L. CONDUCT r. 1.6(a) (2017) [hereinafter N.Y. RPC] (stating that a lawyer “shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person”). The general prohibition against lawyers revealing confidential client information in state attorney ethics rules has a long history in the United States with roots dating back at least as far as the early 19th century with the publication of David Hoffman's “Fifty Resolutions,” part of his deeply influential treatise, *A COURSE OF LEGAL STUDY* (2d ed. 1836), originally published in 1817. Hoffman penned his resolutions “for the assistance of the young practitioner,” according to the prominent legal ethicist, Henry Drinker. HENRY S. DRINKER, *LEGAL ETHICS* 338 n.1 (1953). One of Hoffman's resolutions outlined the lawyer's obligation to client fidelity that subsequently informed ethical rules for lawyers for the next two hundred years: “To my clients I will be faithful; and in their causes, zealous and industrious.” Hoffman, *supra*, at 758. It took another seventy years for a state bar association to promulgate its own code of professional ethics. But when Alabama's “Code of Ethics” appeared in 1887, it contained a number of provisions pertaining to the lawyer's duty “[t]o maintain inviolate the confidence, and, at every peril to themselves, to preserve the secrets of their clients.” CODE OF ETHICS Preamble (ALA. ST. BAR ASS'N 1887); *id.* r. 10 (“An attorney ‘owes entire devotion to the interest of his client, warm zeal in the maintenance and defense of his cause, and the exertion of the utmost skill and ability,’ to the end, that nothing may be taken or withheld from him, save by the rules of law, legally applied. No sacrifice or peril, even to loss of life itself, can absolve the fearless discharge of this duty.”); *id.* r. 21 (“Communications and

those instances permits a lawyer to “reveal or use confidential information to the extent that the lawyer reasonably believes necessary . . . to prevent the client from committing a crime.”<sup>64</sup> This

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confidence between client and attorney are the property and secrets of the client, and cannot be divulged, except at his instance; even the death of the client does not absolve the attorney from his obligation to secrecy.”); *id.* r. 22 (pertaining to Secrets of the Client Not to Be Divulged in the context of conflicts, “The duty not to divulge the secrets of clients extends further than mere silence by the attorney, and forbids accepting retainers or employment afterwards from others involving the client’s interests, in the matters about which the confidence was reposed.”). The Alabama Code of Ethics relied heavily on Hoffman’s fifty resolutions as well as on a series of published lectures delivered by George Sharswood who dedicated nearly one-fourth of his “Essay on Professional Ethics” to a section entitled, “Fidelity to Client.” See GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 76-125 (5th ed. 1896); see also *id.* at 85 n.2 (“A counsel, attorney, or solicitor, will in no case be permitted, even if he should be willing to do so, to divulge any matter which has been communicated to him in professional confidence.”); *id.* at 107 (“The truth he cannot disclose; the law seals his lips as to what has thus been communicated to him in confidence by his client.”). In turn, the original thirty-two Canons of Professional Ethics, which the ABA adopted in 1908, were based on the predecessor rules of conduct, particularly on Alabama’s Code of Ethics. The original ABA Canons included several references to the lawyer’s duty to preserve client confidences, including Canon 15 (How Far a Lawyer May Go in Advocating for a Client’s Cause), which was nearly identical to Alabama Code of Ethics Rule 10 with the exception of the last sentence (see above), and Canon 6 (Adverse Interests and Conflicting Interests), which stated that a lawyer has an “obligation to represent the client with undivided loyalty and not to divulge his secrets or confidences.” The obligation to preserve client confidences as reflected in Canon 6, “was restated more fully and more broadly by the addition of Canon 37” in 1928 pertaining to “Confidences of a Client.” DRINKER, *supra*, at 104; see also *Proceedings of the Fifty-Third Annual Meeting*, 53 ABA PROC. 130 (1928). In 1937, the ABA amended Canon 37 to include the opening sentence, “It is the duty of a lawyer to preserve his client’s confidences.” *Annual Report* 62 ABA PROC. 765 (1937).

<sup>63</sup> See N.Y. RPC, *supra* note 62, r. 1.6(a)(1)–(3) (pertaining to, respectively, (1) informed consent, (2) implied authorization, and (3) disclosure permitted by RPC 1.6(b), which, in turn, pertains to (1) preventing reasonably certain death or substantial bodily harm, (2) preventing the client from committing a crime, (3) withdrawing a written or oral opinion or representation given by the lawyer that the lawyer subsequently discovers was based on materially inaccurate information or is being used in furtherance of a crime or fraud and that the lawyer reasonably believes is still being relied upon by a third party; (4) securing legal advice about compliance with the New York RPC or other law by the lawyer, another lawyer from the lawyer’s firm, or the law firm itself; (5) defending the lawyer or the lawyer’s employees and associates against an accusation of wrongful conduct or to establish or collect a fee; and (6) to comply with the law or a court order or as permitted or required under the New York RPC).

<sup>64</sup> *Id.* r. 1.6(b)(2); see also N.Y. CODE OF PROF’L RESPONSIBILITY DR 4-101(C)(3) (2009) [hereinafter N.Y. CPR] (permitting a lawyer to reveal “[t]he intention of a client to commit a crime and the information necessary to prevent the crime”). The disclosure exception pertaining to a client’s intention to commit a crime traces its

exception to the general rule obligating lawyers to protect client confidences “recognizes that society has important interests in preventing a client’s crime.”<sup>65</sup> Such illegal conduct may be imminent

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roots to the ABA Canons of Professional Ethics, and in particular to Canon 37, Confidences of a Client, which provided “The announced intention of a client to commit a crime is not included within the confidences which [the lawyer] is bound to respect. [The lawyer] may properly make such disclosures as may be necessary to prevent the act or protect those against whom it is threatened.” See ABA CANONS OF PROF’L ETHICS Canon 37 (1937) [hereinafter ABA CANONS]. As indicated in *supra* note 62, the ABA adopted Canon 37 in 1928, twenty years after it adopted the original thirty-two Canons. In addition to a future crime exception permitting disclosure of client confidences, the Canons circumscribed lawyers’ general duty of confidentiality by prohibiting lawyers from committing “any manner of fraud or chicane” (Canon 15), requiring candor to the court (Canon 22), and obligating attorneys to reveal client fraud to an opposing party or counsel (Canon 41) as well as client perjury to prosecuting authorities (Canon 29). See DRINKER, *supra* note 62, at 104. The spirit and general outline of these ethical rules extended back into the nineteenth century, and were reflected, for instance, in Hoffman’s “Fifty Resolutions” discussed in *supra* note 62. See, e.g., HOFFMAN, *supra* note 62, at 757 Resolution No. 14 (“My client’s conscience, and my own, are distinct entities: and though my vocation may sometimes justify my maintaining as facts, or principles, in doubtful cases, what may be neither one nor the other, I shall ever claim the privileges of solely judging to what extent to go. In civil cases, if I am satisfied from the evidence that the fact is against my client, he must excuse me if I do not see as he does, and do not press it: and should the principle also be wholly at variance with sound law, it would be dishonorable folly in me to endeavor to incorporate it into the jurisprudence of the country, when, if successful, it would be a gangrene that might bring death to my cause of the succeeding day.”); *id.* at 765 Resolution No. 33 (“What is wrong, is not the less so from being common. And though few dare to be singular, even in a right cause, I am resolved to make my own, and not the conscience of others, my sole guide. What is morally wrong, cannot be professionally right, however it may be sanctioned by time or custom. It is better to be right with a few, or even none, than wrong though with a multitude.”).

<sup>65</sup> N.Y. RPC, *supra* note 62, r. 1.6 cmt. 6C. Codes of conduct for attorneys in the United States have long contained public policy exceptions to protecting confidential information, particularly when the client is engaged in behavior that harms the public, the profession, the courts, or the adversarial process. Indeed, in these circumstances, a lawyer “is under no obligation to advocate iniquity.” See WARVELLE, *supra* note 12, at 174. For the longstanding public policy exception permitting disclosure of a client’s intent to commit a crime, see, for example, ABA CANONS, *supra* note 64, Canon 29 (Upholding the Honor of the Profession, adopted in 1908) (“The counsel upon the trial of a cause in which perjury has been committed owe it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities.” The modern version of this mandatory disclosure rule is reflected in ABA Model Rule 3.3(a) (Candor toward the tribunal) and, in New York, RPC 3.3(a) (Conduct before a tribunal)); ABA Comm. on Prof’l Ethics & Grievances, Formal Op. 155 (1936) (“[T]here are some circumstances under which such a [confidential] communication is not privileged for reasons founded on sound public policy. In such cases the attorney may not remain silent.” For instance, “[w]hen the communication by the client to his attorney is in respect to the future commission of an unlawful act or to a



and/or ongoing.<sup>66</sup> In some situations, a lawyer may even reveal a client's past unlawful acts. According to New York's ethical rules, a lawyer may "reveal the client's refusal to bring an end to a continuing crime, even though that disclosure may also reveal the client's past wrongful acts, because refusal to end a continuing crime is equivalent to an intention to commit a new crime."<sup>67</sup>

Given the gravity of disclosing client confidences, the exercise of a lawyer's discretion under New York's permissive disclosure rules "requires consideration of a wide range of factors."<sup>68</sup> First, the lawyer must "reasonably believe[] that the client will carry out the threatened harm or crime"<sup>69</sup> Second, beyond considering the crime's imminence, the lawyer should also evaluate "the seriousness of the potential injury to others if the prospective harm or crime occurs," the "absence of any other feasible way to prevent the potential injury," whether the client "may be using the lawyer's services in bringing about the harm or crime," the circumstances surrounding how the lawyer learned of the client's "intent or prospective course of action," and "any other aggravating or extenuating circumstances."<sup>70</sup> In addition, before

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continuing wrong, the communication is not privileged. One who is actually engaged in committing a wrong can have no privileged witnesses, and public policy forbids that an attorney should assist in the commission thereof, or permit the relation of attorney and client to conceal the wrongdoing."); ABA Comm. on Prof'l Ethics & Grievances, Formal Op. 156 (1936) ("Information that a client has violated the terms of his parole is not privileged. Thus, when such information comes to the attention of the attorney he must advise his client of the consequences of his act and if the client persists the attorney must advise the proper authorities . . . Such information [that is, advising authorities of a client's conduct], even though coming to the attorney from the client in the course of his professional relations with respect to other matters in which he represents the defendant, is not privileged from disclosure. In such a case the attorney as an officer of the court must obey his own conscience and not that of his client."); ABA Comm. on Prof'l Ethics & Grievances, Formal Op. 202 (1940) (the general prohibition against disclosing client confidential information "does not apply, however, to communications concerning intended violations of the criminal law"); MODEL RULES OF PROF'L CONDUCT r. 1.6 cmt. 7 (AM. BAR. ASS'N 1983) [hereinafter ABA MODEL RULES] (explaining that, in the context of a client intending to commit a crime in furtherance of which the client has used or is using the lawyer's services, "[s]uch a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule").

<sup>66</sup> See N.Y. RPC, *supra* note 62, r. 1.6 cmt. 6D ("Some crimes, such as criminal fraud, may be ongoing in the sense that the client's past material false representations are still deceiving new victims. The law treats such crimes as continuing crimes in which new violations are constantly occurring.").

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* cmt. 6A.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*; see also ABA MODEL RULES, *supra* note 65, r 1.6 cmt. 17 ("In exercising the

disclosing the client's misconduct, "the lawyer's initial duty, where practicable, is to remonstrate with the client."<sup>71</sup> The lawyer's threat of disclosure "may persuade the client to take suitable action to obviate the need for disclosure."<sup>72</sup> Indeed, as the ABA observes in its Model Rules of Professional Conduct, the client "can, of course, prevent such disclosure by refraining from the wrongful conduct."<sup>73</sup>

discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question.").

<sup>71</sup> N.Y. RPC, *supra* note 62, r. 1.6 cmt. 6A.

<sup>72</sup> *Id.* r. 1.6 cmt. 14; ABA MODEL RULES, *supra* note 65, r. 1.6 cmt. 16.

<sup>73</sup> ABA MODEL RULES, *supra* note 65, r. 1.6 cmt. 7. New York RPC 1.13 provides procedures largely coextensive with New York RPC 1.6 for attorneys with organizational clients (both in-house attorneys and members of outside law firms serving organizational clients) in the event they become aware of unlawful conduct within a client organization. In particular, New York RPC 1.13 requires an attorney to "proceed as is reasonably necessary in the best interest of the organization" if the attorney "knows" of an ongoing or future "violation of a legal obligation to the organization or a violation of law that reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization." *See also* N.Y. RPC, *supra* note 62, r. 1.13(b). Moreover, much like the requirement in New York RPC 1.6 that an attorney consider "a wide range of factors" before disclosing confidential client information, New York RPC 1.13 commands attorneys to "give due consideration" to specific factors in determining how to proceed in the face of a client's unlawful activities. *Id.* These factors include "the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, [and] the policies of the organization concerning such matters." *Id.* After giving due consideration to these factors, "[a]ny measures" that the attorney decides to take "shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization." *Id.* Furthermore, to assist attorneys in deciding how to respond to misconduct within an organizational client, New York RPC 1.13 suggests several approaches, including asking the client to reconsider the matter, advising that a separate legal opinion on the matter be obtained and delivered to an appropriate authority in the organization, and reporting "up the ladder" to higher authority in the organization. *Id.* 1.13(b)(1)-(3). In the event higher authorities in the organization "insist[] upon action, or a refusal to act, that is clearly in violation of law and is likely to result in substantial injury to the organization," the lawyer may disclose confidential information as permitted by Rule 1.6 and may resign according to Rule 1.16, the latter of which can be tantamount to disclosure in some circumstances. *Id.* r. 1.13(c). For withdrawal (including but not limited to "noisy withdrawal") as tantamount to disclosure, see ABA Comm. on Ethics & Prof'l. Responsibility, Formal Op. 92-366 (1992) (concluding, "[a] lawyer who knows or with reason believes that her services or work product are being used or are intended to be used by a client to perpetrate a fraud must withdraw from further representation of the client, and may disaffirm documents prepared in the course of the representation that are being, or will be, used in furtherance of the fraud, even though such a 'noisy' withdrawal may have the collateral effect of inferentially

In the end, a lawyer's discretion over deciding whether to reveal a client's imminent or ongoing crime after careful deliberation "should . . . be given great weight."<sup>74</sup> New York's former Code of Professional Responsibility (effective until April 1, 2009) went even further than the current rules, and commanded that the lawyer's decision to disclose or not to disclose "should not be subject to reexamination. A lawyer is afforded the professional discretion," the Code elaborated, "to reveal the intention of a client to commit a crime and the information necessary to prevent the crime and cannot be subjected to discipline either for revealing or not revealing such intention or information."<sup>75</sup> At the same time, both the RPC and the Code are similarly clear that if a lawyer decides to disclose a client's intent to commit a crime, the disclosure "should be no greater than the lawyer reasonably believes necessary to prevent the threatened harm or crime."<sup>76</sup>

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revealing client confidences."); ABA Comm. on Ethics & Prof'l. Responsibility, Formal Op. 287 (1953) ("If the court asks the lawyer whether the clerk's statement is correct, the lawyer is not bound by fidelity to the client to tell the court what he knows to be an untruth, and should ask the court to excuse him from answering the question, and retire from the case, though this would doubtless put the court on further inquiry as to the truth."). It is important to note that New York RPC 1.13 neither limits nor expands the New York lawyer's responsibility under Rule 1.6, but rather articulates "authority and responsibility . . . concurrent with the authority and responsibility provided in other Rules." N.Y. RPC, *supra* note 62, r. 1.13 cmt. 6. While New York's version of Rule 1.13 is coextensive with Rule 1.6 as to disclosing confidential information, ABA Model Rule 1.13 and the majority of other states' versions of Rule 1.13 (specifically, 32 states' versions) provide independent and more expansive authority for lawyers to reveal confidential information when the client is an organization. For further discussion of Rule 1.13, under both the New York RPC and ABA Model Rules, see *infra* notes 384–94 and accompanying text. For an inventory of which states follow or go beyond the disclosure exceptions contained in ABA Model Rule 1.13, see *infra* Appendix.

<sup>74</sup> N.Y. RPC, *supra* note 62, r. 1.6 cmt. 6A.

<sup>75</sup> N.Y. CPR, *supra* note 64, Canon 4 at EC 4-7.

<sup>76</sup> N.Y. RPC, *supra* note 62, r. 1.6 cmt. 6A; see also *id.* cmt. 14 ("[P]ermits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary" to prevent the client from committing a crime.); N.Y. CPR, *supra* note 64, Canon 4 at EC 4-7 ("A lawyer is afforded the professional discretion to reveal . . . the information necessary to prevent the crime."); ABA MODEL RULES, *supra* note 65, r. 1.6 cmt. 16 ("[A] disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose."); N.Y. RPC, *supra* note 62, r. 1.13(b) (in the context of a lawyer in the representation of an organizational client reporting misconduct up the organizational chain, "[a]ny measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization."); ABA MODEL RULES, *supra* note 65, r. 1.13 cmt. 4 (same, but pertains to reporting the misconduct up the organizational chain as well as outside the

Based on the facts alleged in Danon's complaint, his efforts to prevent Vanguard from committing its alleged tax fraud, and his ultimate decision to disclose Vanguard's fraud to authorities, did not violate New York's ethics rules. New York's RPC permits attorneys "to prevent the client from committing a crime,"<sup>77</sup> an exception to a lawyer's general confidentiality obligations that is designed to protect society from a client's violations of the law,<sup>78</sup> and to protect organizational entities like Vanguard from internal misconduct.<sup>79</sup> Moreover, Vanguard's alleged misconduct was imminent as well as ongoing, with its historical tax fraud affecting both current and future tax years. And while the *Vanguard* court criticized Danon's disclosure of Vanguard's tax fraud from prior tax years,<sup>80</sup> New York's RPC permits disclosure of "past material false representations" that continue to deceive victims and that are tantamount to "continuing crimes in which new violations are constantly occurring."<sup>81</sup>

In addition, Danon's complaint and supplemental submissions indicate that he considered "a wide range of factors."<sup>82</sup> In deciding this case on the merits rather than on a motion to dismiss, a court would need to scrutinize the extent to which Danon gave due consideration to factors that the New York RPC considers important.<sup>83</sup> At this stage of the litigation, however, Danon's complaint indicates that he gave more than enough due consideration to survive Vanguard's motion to dismiss. First, Danon "reasonably believed" that Vanguard would carry out "the threatened harm or crime."<sup>84</sup> Indeed, Vanguard had perpetrated its allegedly massive tax fraud for nearly four decades, a strong indication that Vanguard intended to continue rather than cease

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organization); *id.* r. 1.13(c)(2) (in the context of a lawyer in the representation of an organization, having reported client misconduct up the organizational chain, considering reporting the misconduct outside the organization to appropriate authorities, "the lawyer may reveal information relating to the representation *whether or not Rule 1.6 permits such disclosure*, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization" (emphasis added)). For more discussion of Rule 1.13, under both the New York RPC and the ABA Model Rules, see *infra* notes 384–94 and accompanying text.

<sup>77</sup> *Supra* note 64 and accompanying text.

<sup>78</sup> *See supra* note 65 and accompanying text.

<sup>79</sup> *See supra* note 73 and accompanying text.

<sup>80</sup> *See infra* note 109.

<sup>81</sup> *Supra* notes 66–67 and accompanying text.

<sup>82</sup> *Supra* note 68.

<sup>83</sup> *See supra* notes 69–70 and accompanying text.

<sup>84</sup> *Supra* note 69; *see* Affidavit of Danon, *supra* note 17, ¶¶ 5–6, 8–9; *supra* text accompanying note 35.

violating the law.<sup>85</sup> But Danon did considerably more than simply rely on Vanguard's past, annual misconduct. He made "repeated unsuccessful efforts" to persuade his client to stop engaging in its longstanding tax fraud,<sup>86</sup> with each unsuccessful effort reinforcing the conclusion that his client had no intention to reverse its unlawful conduct. Moreover, Danon informed his superiors on multiple occasions that the company's fraud "would likely result in substantial injury" to Vanguard.<sup>87</sup> In other words, and in conformance with New York RPC 1.6, Danon remonstrated with his client,<sup>88</sup> again and again, but to no avail. He also informed his client of the "seriousness of the potential injury" both to Vanguard and to others, thereby comporting his conduct not only to RPC 1.6 but also to RPC 1.13.<sup>89</sup>

In the end, Danon decided to disclose his client's alleged unlawful activities to the appropriate authorities only after his client thwarted his internal reporting at every turn, and refused to take his concerns seriously.<sup>90</sup> Or, in the words of New York's RPC, in "the absence of any other feasible way to prevent the potential injury,"<sup>91</sup> Danon

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<sup>85</sup> See *supra* note 2 and accompanying text.

<sup>86</sup> *Supra* note 33; see also Affidavit of Danon, *supra* note 17, ¶¶ 5–6, 8–9; *supra* text accompanying note 35.

<sup>87</sup> Affidavit of Danon, *supra* note 17, ¶ 6.

<sup>88</sup> See *supra* notes 71–72 and accompanying text.

<sup>89</sup> See *supra* note 70 and accompanying text. Inexplicably, the *Vanguard* court failed to mention Rule 1.13 in its opinion even though both parties briefed the Rule. See, e.g., Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss the Complaint and for Disqualification of Danon and His Counsel at 12-13 n.5, State *ex rel.* Danon v. Vanguard Grp., Inc., No. 100711/13, 2015 N.Y. Misc. LEXIS 4239 (N.Y. Sup. Ct. 2015); Defendants' Reply Memorandum in Further Support of Their Motion to Dismiss at 1, 14, 18-20, State *ex rel.* Danon v. Vanguard Grp., Inc., No. 100711/13, 2015 N.Y. Misc. LEXIS 4239 (N.Y. Sup. Ct. 2015) [hereinafter Defendants' Reply Memo]. The court's omission is curious for several additional reasons, not least of which is that while New York's version of Rule 1.13 is coextensive with New York's version of Rule 1.6, New York's Rule 1.13 pertains to legal violations that need not rise to the level of a crime, while the disclosure exception in New York RPC 1.6 relevant to the *Vanguard* case (i.e., Rule 1.6(b)(2)) allows disclosure only "to prevent a client from committing a crime." See also *supra* notes 73 and 76. As importantly, the *Vanguard* court thought it relevant that Danon disclosed his client's confidential information "while employed by [Vanguard] as an attorney, and by supporting his claims against defendants through the use of confidential information that he obtained through [his] employment." State *ex rel.* Danon v. Vanguard Grp., Inc., No. 100711/2013, 2015 N.Y. Misc. LEXIS 4239, at \*13 (N.Y. Sup. Ct. Nov. 16, 2015). But New York RPC 1.13 clearly permits lawyers to report up (and, in certain circumstances, to report out) allegations of an organizational client's unlawful activity while still employed by the organizational client.

<sup>90</sup> See *supra* note 35, ¶¶ 5, 8–9, 18–20 and accompanying text.

<sup>91</sup> *Supra* note 70.

disclosed. In fact, not only had Vanguard rebuffed Danon's efforts to address and redress its alleged tax fraud, the company retaliated against Danon for acting in the best interests of the organization,<sup>92</sup> thereby creating "aggravating or extenuating circumstances"<sup>93</sup> that further justified Danon's decision to disclose Vanguard's misconduct. Indeed, Danon did everything asked of him by New York's ethical rules before disclosing Vanguard's allegedly historical and ongoing fraud. As a result, his decision to report out his client's alleged fraud was within the discretion granted to him by New York's RPC, and should have been given "great weight" by the *Vanguard* court.

Finally, Danon did not disclose more confidential client information than was reasonably necessary to prevent Vanguard from continuing to commit its alleged tax fraud. And while the *Vanguard* court concluded otherwise, its arguments were misinformed, and reflect the influence of defendant-Vanguard's court submissions rather than Danon's submissions whose facts the court was obligated to accept as true on a motion to dismiss.<sup>94</sup>

First, in finding that Danon acted unreasonably in disclosing Vanguard's confidential tax information, the *Vanguard* court observed that Danon had "alternate means of preventing the alleged tax violations."<sup>95</sup> Danon could have disclosed — and in fact did disclose — Vanguard's unlawful activities to the IRS or SEC whistleblower offices, neither of which, the court emphasized, "lack[s] the ability to redress the alleged fraud in the complaint."<sup>96</sup> The court's observation closely reflects a criticism leveled by the defendants in an attempt to persuade the court to dismiss Danon's cause of action. "In addition to filing a *qui tam* action," defendant-Vanguard wrote in one of its court submissions, "Danon also filed claims with the SEC and the IRS,

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<sup>92</sup> See *supra* notes 39–40, 42–43 and accompanying text. In addition, as Part III explains, Vanguard's alleged retaliation against Danon violated New York's False Claims Act, which protects his "lawful acts" made in furtherance of the statute.

<sup>93</sup> See *supra* note 44.

<sup>94</sup> See *supra* note 70 and accompanying text. In some jurisdictions, including New York, if the parties in a civil case submit affidavits or other submissions in addition to the pleadings, the court can convert a motion to dismiss into a summary judgment motion. See N.Y. C.P.L.R. 3211(c) (2006); see also David L. Ferstendig, N.Y. STATE BAR ASS'N CONTINUING LEGAL EDUC., *New York Civil Practice & Procedure Update* (Aug. 27, 2015), <http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=57618>. Even if the *Vanguard* court were to have treated the state of the record as a summary judgment, however, a defense summary judgment motion should be denied in this case because the conflicting submissions create a triable issue of fact.

<sup>95</sup> *State ex rel. Danon v. Vanguard Grp., Inc.*, No. 100711/2013, 2015 N.Y. Misc. LEXIS 4239, at \*24 (N.Y. Sup. Ct. Nov. 16, 2015).

<sup>96</sup> *Id.*

essentially admitting that also filing this lawsuit was unnecessary.”<sup>97</sup> In finding something of significance in the defendants’ insignificant criticism of Danon’s claim under New York’s FCA, the court effectively concluded that lawyer whistleblowers like Danon must exhaust all other legal remedies in all other jurisdictions before bringing a fraud claim under New York’s FCA. But that requirement appears nowhere in the New York statute.

In fact, the New York legislature included an explicit provision in its FCA indicating that it envisioned parallel investigations and prosecutions of legal violations also covered under the false claims statute. In particular, the statute “shall not preempt the authority, or relieve the duty, of other law enforcement agencies to investigate and prosecute suspected violations of law.”<sup>98</sup> Moreover, courts generally have a responsibility to make determinations with respect to claims based on substance and merits rather than on whether a claimant has alternative avenues of redress, particularly if the jurisdiction in which the court sits has an expressed interest in claimants bringing certain kinds of claims (as does New York with respect to fraud claims pertaining to tax<sup>99</sup>). Even if courts were permitted to close the courthouse door on claimants based solely on the availability of alternate means for seeking redress, the *Vanguard* court exercised that hypothetical power under the least appropriate circumstances; that is, in a case involving alleged tax fraud of unprecedented proportions being perpetrated on the state of New York rather than, for example, in a civil dispute between private litigants.

Second, in making a big deal about Danon having “alternate means of preventing the alleged tax violations,”<sup>100</sup> the court demonstrated its lack of knowledge with respect to those “alternate means.” Take the IRS whistleblower program, which the court said could satisfactorily redress *Vanguard*’s longstanding alleged tax fraud. For starters, the court assumes that the IRS program<sup>101</sup> necessarily uncovers tax fraud

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<sup>97</sup> Defendants’ Reply Memo, *supra* note 89, at 18 n.23.

<sup>98</sup> N.Y. STATE FIN. LAW § 193(1) (2017).

<sup>99</sup> See generally *infra* Parts II and III.

<sup>100</sup> *Danon*, 2015 N.Y. Misc. LEXIS 4239 at \*24.

<sup>101</sup> The IRS program, reflected in the Internal Revenue Code as 26 U.S.C. § 7623, is widely regarded as a success, particularly after Congress amended the statute in 2006. See Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, § 406, 120 Stat. 2922, 2958-60 (codified as amended at 26 U.S.C. § 7623). Between 2007 and 2015, the enhanced IRS whistleblower program recovered over \$3 billion in tax revenue, and paid out more than \$400 million in awards to whistleblowers. See I.R.S., U.S. DEP’T OF TREASURY, PUB. NO. 3241, IRS WHISTLEBLOWER PROGRAM: FISCAL YEAR 2015 ANNUAL REPORT TO THE CONGRESS 4 (2015) [hereinafter 2015 IRS ANNUAL REPORT]. For

associated with state taxation, the kind of tax fraud that the New York FCA targets and that the New York legislature wants to stop. But the IRS Whistleblower Office is charged with detecting, investigating, and prosecuting underpayments of *federal* tax issues<sup>102</sup> and violations of *federal* revenue laws.<sup>103</sup> It has no obligation to investigate or develop state tax issues that might be implicated in violations of federal tax law. Also, an IRS whistleblower's claim may include complex issues of state taxation with which federal examiners are unfamiliar or lack sufficient expertise such that the federal investigation of a whistleblower's claim would fail to uncover issues involving tax fraud or noncompliance pertaining to state taxes. The *Vanguard* court expresses no appreciation of these realities. Worse, it assumes incorrectly that if a state or federal tax agency fails to uncover noncompliance or fraud, the taxpayer must not be engaging in noncompliant or fraudulent conduct. Indeed, the court favorably summarizes the defendant's argument that Danon "appropriated and disclosed confidential information, even though the relevant government agencies could have resolved any alleged improper tax issues without use of that confidential information."<sup>104</sup> Perhaps. But in this particular case, and assuming the truth of Danon's allegations, the "relevant government agencies" failed over the course of forty years to identify, much less resolve, Vanguard's "improper tax issues."

Additionally, it can take years to process whistleblower claims under the IRS program, a fact that further undermines the court's belief in "alternate means" available to Danon for preventing Vanguard's ongoing alleged tax fraud. In fact, the average time between filing a claim and receiving an award under the IRS whistleblower program ranges between six and nine years.<sup>105</sup> In the intervening period, a New

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the successes (and a few failures) of the IRS whistleblower program, see generally Dennis J. Ventry, Jr., *Not Just Whistling Dixie: The Case for Tax Whistleblowers in the States*, 59 VILL. L. REV. 425, 490-97 (2014).

<sup>102</sup> See 26 U.S.C. § 7623(a)(1) (2006).

<sup>103</sup> See *id.* § 7623(a)(2).

<sup>104</sup> *Danon*, 2015 N.Y. Misc. LEXIS 4239, at \*18.

<sup>105</sup> See 2015 IRS ANNUAL REPORT, *supra* note 101, at 12 (reporting that it takes 6.02 years to process claims under § 7623(b) and 8.72 years to process claims under § 7623(a)). Keep in mind that this range is just an average such that the time between submission of a claim and payment of an award could be shorter or longer. There are a number of reasons why the time between a whistleblower's submission of a claim and the IRS paying out an award on the claim takes so long, including: (i) the IRS must receive and intake a submitted claim; (ii) evaluate whether it meets statutory and regulatory thresholds (including providing specific and credible information, not containing information already known by the IRS, dealing with issues that have federal tax effects, meeting the dollar threshold of \$2 million, etc.); (iii) the IRS must



York whistleblower waiting on the sidelines with an otherwise legitimate claim under New York's FCA (which contains a 10-year statute of limitations<sup>106</sup>) might find her claim invalidated before it can be evaluated on the merits. Also in the intervening period, New York (as well as any other affected states) would continue to lose revenue due to unrevealed and unprosecuted tax fraud that a *qui tam* action could have long since uncovered and prosecuted to a successful conclusion.<sup>107</sup>

Third, and lastly, Danon disclosed as much of Vanguard's confidential information as needed to stop Vanguard from continuing to commit its alleged tax fraud. For its part, the *Vanguard* court thought Danon disclosed too much, finding (i) that Danon's complaint went "well beyond articulating the tax implications" of Vanguard's at-cost corporate structure "with respect to future conduct alleging the continuation of a crime,"<sup>108</sup> (ii) that Danon's allegations of Vanguard's illegal conduct involved tax practices and filings from too many tax years, dating to 2004,<sup>109</sup> (iii) that he made "allegations concerning a broad range of tax issues,"<sup>110</sup> and (iv) that he impermissibly disclosed Vanguard's alleged tax fraud from prior years rather than concentrate on Vanguard's ongoing fraud.<sup>111</sup> The court seems to be saying that Danon (and presumably other lawyer whistleblowers acting in furtherance of New York's FCA) must limit disclosures to information

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open active investigations of claims; (iv) disseminate claims to the appropriate investigative units; (v) evaluate and assess field investigations for tax deficiencies and award purposes; (vi) conduct a final review of tax deficiencies and proposed award determinations; (vii) allow time for taxpayers to appeal tax deficiencies and, if necessary, to litigate tax deficiencies; and (viii) allow time for whistleblowers to appeal and, if necessary, to litigate award determinations. *Id.*

<sup>106</sup> See N.Y. STATE FIN. LAW § 192(1) (2017) ("A civil action under this article shall be commenced no later than ten years after the date on which the violation of this article is committed.").

<sup>107</sup> The *Vanguard* court was either ignorant of or unconcerned with the negative effects on whistleblowers and the state of New York that would accompany preventing lawyer whistleblowers from disclosing tax fraud perpetrated by New York taxpayers under New York's false claims statute. See *Danon*, 2015 N.Y. Misc. LEXIS 4239, at \*36 ("The only effect of these determinations [that is, preventing Danon from prosecuting his action alleging tax fraud perpetrated by Vanguard under New York FCA] is that Danon, Vanguard's prior in-house counsel for tax matters, may not proceed with, nor profit from, any disclosure of confidential information to bring this *qui tam* action in violation of New York State attorney ethics rules; nor may Danon or his counsel proceed with any subsequent related *qui tam* action.").

<sup>108</sup> *Id.* at \*26.

<sup>109</sup> See *id.* at \*26-27.

<sup>110</sup> *Id.* at \*26.

<sup>111</sup> See *id.* at \*26-27.

pertaining to one fraud (or, at most, a small number of frauds), and that past frauds are off limits. But New York's FCA does not restrict the number or longevity of frauds eligible for disclosure under the statute (except for its 10-year limitation statute, which is why Danon limited his allegations to the most recent ten years). Moreover, one of the disclosures that the court criticized as "concerning a broad range of tax issues"<sup>112</sup> involved Vanguard's alleged failure to include a whopping \$1.5 billion in income from a contingency reserve that it loaned to affiliate funds and that generated interest income for Vanguard (interest income which Vanguard also failed to include in its taxable income).<sup>113</sup> In addition, even though the *Vanguard* court condemned Danon's disclosure of Vanguard's past tax violations, New York's ethical rules expressly permit disclosure of a client's "past material false representations" that continue to deceive victims, because the ethical rules consider such past representations "continuing crimes in which new violations are constantly occurring."<sup>114</sup> The rule is sensible, and is particularly apropos in the *Vanguard* case where the defendant's past alleged tax fraud continues to affect present and future tax liability. Indeed, Vanguard's past violations of the law are part and parcel of its ongoing violations of the law.

Danon's disclosures of Vanguard's alleged tax fraud were extensive for two additional reasons. First, Vanguard's alleged fraud was massive. It went back forty years to the company's founding, and involved exorbitant amounts of unpaid tax liabilities. Danon revealed information pertaining to only ten of those forty years, eight of which involved Vanguard's largest tax violation, which Danon's expert estimated to have saved Vanguard \$35 billion in federal income taxes, interest, and penalties (a figure that grows daily due to accruing interest) on an estimated \$70.6 billion in underreported income.<sup>115</sup> Based on the \$35 billion and \$70.6 billion federal figures, Vanguard's unpaid state tax liability runs into the multi-billions of dollars.<sup>116</sup> And

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<sup>112</sup> *Id.* at \*26.

<sup>113</sup> See Expert Report of Professor Avi-Yonah, *supra* note 3 at 1-2, 4. Vanguard's contingency reserve is designed to cover unexpected (though not improbable) losses incurred by the affiliate funds or by Vanguard. Moreover, the reserve is funded by fees that Vanguard charges to the funds as one component of its larger "at-cost" management fee. *Id.* at 22.

<sup>114</sup> *Supra* note 66.

<sup>115</sup> See Expert Report of Professor Avi-Yonah, *supra* note 3, at Tables 1, 2.

<sup>116</sup> Forty-four states impose corporate income taxes, with top marginal rates ranging between 4.53 percent (North Dakota) and 12 percent (Iowa). For its part, New York imposes a corporate levy of 7.1 percent. And while Ohio, Texas, and Washington do not use corporate income taxes, they impose a gross receipts tax on

while the court seems to be saying that Danon should have restricted his disclosures to information involving a small number of imminent and large frauds, New York's FCA imposes no such restriction, either with respect to the number of frauds disclosed or their imminence. At the end of the day, Danon revealed a lot of confidential information about Vanguard's various alleged tax violations going back many years, precisely because Vanguard has been hiding a lot of alleged tax violations for a very long time.

Second, Danon disclosed Vanguard's extensive tax fraud because the New York FCA prompted him to do so. Under the statute, whistleblowers must submit to the state a "copy of the complaint and written disclosure of substantially all material evidence and information the person possesses."<sup>117</sup> The New York FCA's requirement of full disclosure reflects the similar practices in other prominent whistleblower programs, including the IRS and SEC programs and the federal FCA.<sup>118</sup> Indeed, under the IRS whistleblower statute, informants "must submit . . . specific and credible information that the whistleblower believes will lead to collected proceeds" from a taxpayer's underpayment of tax.<sup>119</sup> The whistleblower must also provide "substantive information" and "all available documentation" supporting the whistleblower's allegations, with failure to do so resulting in the whistleblower "bear[ing] the risk that this information might not be considered . . . for purposes of an award."<sup>120</sup> In fact, "non-specific, non-credible, or speculative allegations" comprise the number one reason (and 53 percent of all reasons) that the IRS Whistleblower Office closes or rejects a claim.<sup>121</sup> In addition, the IRS regulations lists eight "positive factors"<sup>122</sup> that can raise a whistleblower's award, six of which relate to the submission of detailed, specific, and credible information leading to the collection of

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businesses. Only Nevada, South Dakota, and Wyoming do not impose either corporate income taxes or gross receipts taxes. Jared Walczak, *State Corporate Income Tax Rates and Brackets for 2015*, TAX FOUND. (Apr. 21, 2015), <https://taxfoundation.org/state-corporate-income-tax-rates-and-brackets-2015>.

<sup>117</sup> N.Y. STATE FIN. LAW § 190(2)(b) (2017) (emphasis added).

<sup>118</sup> For the federal FCA, see 31 U.S.C. § 3730(b)(2) (2012) (requiring that a "copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government."). For the IRS and SEC whistleblower programs, see, respectively, *infra* notes 119-123, 124 and accompanying text.

<sup>119</sup> Treas. Reg. § 301.7623-1(c) (2014).

<sup>120</sup> *Id.*

<sup>121</sup> 2015 IRS ANNUAL REPORT, *supra* note 101, at 16-17.

<sup>122</sup> Treas. Reg. § 301.7623-4(b)(1).

unpaid taxes.<sup>123</sup> For its part, the SEC program also requires that whistleblowers provide detailed, specific, and credible information when submitting claims.<sup>124</sup>

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<sup>123</sup> See *id.* § 301.7623-4(b)(1)(ii)-(vii) (positive factors for increasing an award determination include (ii) the information provided “identified an issue or transaction of a type previously unknown to the IRS,” (iii) the IRS “was unlikely to identify [such information] or that [it] was particularly difficult to detect through the IRS’s exercise of reasonable diligence,” (iv) the information “presented the factual details of tax noncompliance in a clear and organized manner, particularly if the manner of the presentation saved the IRS work and resources,” (v) the whistleblower or the whistleblower’s representative provided “exceptional cooperation and assistance during the pendency” of the whistleblower’s action; (vi) the information “identified assets of the taxpayer that could be used to pay liabilities, particularly if the assets were not otherwise known to the IRS,” and (vii) the information “identified connections between transactions, or parties to transactions, that enabled the IRS to understand tax implications that might not otherwise have been understood by the IRS”).

<sup>124</sup> See Securities Whistleblower Incentives and Protection of the Securities Exchange Act of 1934, 15 U.S.C. § 78u-6(c)(2)(D) (2012) (denying awards for whistleblowers who “fail[] to submit information to the Commission in such form as the Commission may, by rule, require”); 17 C.F.R. § 240.21F-9(c) (2016) (requiring submissions to be “complete and accurate,” and further requiring that if a whistleblower wishes to submit information anonymously, she must do so through an attorney and ensure that her attorney reviews the submission for “completeness and accuracy”); *id.* § 240.21F-6(a)(1)–(3) (listing factors that may increase the amount of a whistleblower’s award, including the “significance of the information provided by a whistleblower to the success of the Commission action or related action”; the “nature of the information provided by the whistleblower and how it related to the successful enforcement action, including whether the reliability and completeness of the information provided to the Commission by the whistleblower resulted in the conservation of Commission resources”; whether the whistleblower “provided ongoing, extensive, and timely cooperation and assistance by, for example, helping to explain complex transactions, interpreting key evidence, or identifying new and productive lines of inquiry”; and as part of the SEC’s “programmatic interest in deterring violations of the securities laws by making awards to whistleblowers who provide information that leads to the successful enforcement” of the securities laws, the degree to which an award “encourages the submission of high quality information from whistleblowers by appropriately rewarding whistleblowers’ submission of significant information and assistance”); *id.* § 240.21F-12(a)(2) (as part of submitting claims to the SEC, whistleblowers must complete the required forms, and include “[m]aterials that may form the basis of an award determination and that may comprise the record on appeal” as well as any “attachments, and other related materials . . . to assist the Commission with the investigation or examination”); SEC, 2015 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM 16 (2015) [hereinafter SEC 2015 ANNUAL REPORT] (identifying “commonalities among the tips or complaints that were submitted by [] successful whistleblowers,” including most prominently that the information provided “was specific, in that the whistleblower identified particular individuals involved in the fraud, or pointed to specific documents that substantiated their allegations or explained where such documents

While the policies of neither the IRS nor SEC program are determinative in the *Vanguard* matter, they are certainly relevant guides to accepted practices and procedures for persons disclosing tax and securities fraud under other whistleblower statutes. Under both programs, whistleblowers generally get one bite at the apple, and they are rarely given an opportunity to perfect imperfect claims.<sup>125</sup> Indeed, at every turn, whistleblowers are told, “Don’t leave anything out.” Thus, it seems reasonable for persons seeking to disclose tax frauds under New York’s FCA — which only recently began permitting tax claims — to comport with the established “specific and credible” standard when submitting “written disclosure of substantially all material evidence and information the person possesses.”<sup>126</sup>

It is worth noting that the *Vanguard* court focused on Danon’s complaint and not on the written disclosures that the New York FCA compelled him to file simultaneously with the New York Attorney General’s Office.<sup>127</sup> In this respect, the “written disclosure” requirement of the New York FCA (as well as the federal FCA) is different than that of the IRS or SEC whistleblower programs, the latter of which require a one-time disclosure statement filed with the federal agencies and no subsequent filings, either to the agencies or to

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could be located. In some instances, the whistleblower identified specific financial transactions that evidenced the fraud.”).

<sup>125</sup> In fact, the IRS has adopted an explicit “one bite” rule when dealing with whistleblowers who provide information on a taxpayer who is also that whistleblower’s current employer. I.R.S., CHIEF COUNSEL NOTICE CC-2008-011 (Feb. 27, 2008). In a nutshell, the rule requires the IRS to be a “passive recipient” of a whistleblower’s initial submission of information and then to avoid any subsequent contact with the whistleblower for fear of being “perceived as encouraging or acquiescing to the informant’s actions,” which might have involved the removal and disclosure of confidential information as part of putting together a whistleblower submission. *Id.* As to whistleblowers who are also tax professionals (including lawyers, accountants, enrolled agents, and enrolled actuaries), the IRS has adopted a more preclusive rule, at least initially. “Under no circumstances,” according to the IRS Chief Counsel, “is it appropriate to accept any information from an informant in the informant’s capacity as an informant regarding a taxpayer . . . when the informant is also the taxpayer’s representative in any administrative matter pending before the Service . . . or in any litigation involving issues that the Service has an interest in . . .” *Id.* Such whistleblowers must cease representing the taxpayer. Moreover, any information provided by these whistleblowers “cannot be used by Service or Counsel employees in any matter concerning the taxpayer” until the whistleblower in fact withdraws from the representation. *Id.* Upon withdrawal from the representation, however, the IRS treats these tax-professional whistleblowers the same as any other whistleblower; see SEC 2015 ANNUAL REPORT, *supra* note 124, at 16.

<sup>126</sup> N.Y. STATE FIN. LAW § 190(2)(b) (2017).

<sup>127</sup> See *State ex rel. Danon v. Vanguard Grp., Inc.*, No. 100711/2013, 2015 N.Y. Misc. LEXIS 4239, at \*18-35 (N.Y. Sup. Ct. Nov. 16, 2015).

a court. With this distinction in mind, submitting a disclosure statement to the Attorney General's Office under the FCA model while filing a complaint with a court (and not the full disclosure statement), creates a layer of protection that helps prevent certain information from being disclosed for whatever reason. While a *qui tam* complaint filed with a court must sufficiently describe the elements of the alleged offense (a requirement subject to a court's procedural rules rather than anything contained in the FCA), the disclosure statement filed with the Attorney General's Office allows for considerably more disclosure, some speculation, and even informed connecting of the dots.<sup>128</sup> At the same time, in the context of false claims statutes, courts have refused to enforce confidentiality agreements against whistleblowers who revealed confidential information in their written disclosure statements to the government on grounds that the statute requires those same whistleblowers to provide "written disclosure of substantially all material evidence and information" upon bringing their *qui tam* action.<sup>129</sup>

None of the foregoing is to say that Danon should necessarily prevail on the merits of his whistleblower action against Vanguard. We still need to know more details about the factors that Danon considered before, during, and after blowing the whistle.<sup>130</sup> However,

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<sup>128</sup> I am indebted to Randy Fox for explaining how the "written disclosure" requirement differs as between the New York FCA and the IRS whistleblower program. Mr. Fox also explained that during his tenure as Chief of the New York Taxpayer Protection Bureau (which is charged with investigating and prosecuting frauds committed against the state of New York and New York local governments), the office permitted whistleblowers to supplement initial submissions with more facts and information as they subsequently learned of such facts and information. Email communication with Randy Fox on file with author.

<sup>129</sup> See, e.g., *United States ex. rel. Ruhe v. Masimo Corp.*, 929 F. Supp. 2d 1033, 1039 (C.D. Cal. 2012) (stating "public policy merits finding individuals such as Relators to be exempt from liability for violation of their nondisclosure agreement. Such an exemption is necessary given that the FCA requires that a relator turn over all material evidence and information to the government when bringing a *qui tam* action."); *United States ex. rel. Head v. Kane Co.*, 668 F. Supp. 2d 146, 152 (D.D.C. 2009) ("The FCA requires that relators serve upon the United States 'written disclosure of substantially all material evidence and information the person possesses' in order to enable the government's own investigation to proceed expeditiously. Enforcing a private agreement that requires a *qui tam* plaintiff to turn over his or her copy of a document, which is likely to be needed as evidence at trial, to the defendant who is under investigation would unduly frustrate the purpose of this provision." (citations omitted)).

<sup>130</sup> These considerations include (i) the likelihood that Vanguard would continue committing its alleged tax fraud, (ii) the potential injury to Vanguard as an organization and to others if the alleged tax fraud continued, (iii) other alternatives to

assuming that Danon behaved as described in his complaint (an assumption compelled by New York's civil practice rules in the absence of any reason to doubt the veracity of the facts alleged in the complaint), Danon properly and ethically blew the whistle on Vanguard under the New York Rules of Professional Conduct. Even if a court ultimately disagrees and concludes that Danon violated his ethical obligations, New York's False Claims Act authorizes whistleblowers like Danon to disclose an employer's confidential information when acting in furtherance of the statute. Moreover, and as discussed in the next Section, the statute explicitly protects whistleblowers from retaliation for disclosing that information.

### III. PROTECTING WHISTLEBLOWERS WHO DISCLOSE CONFIDENTIAL INFORMATION

New York's False Claims Act explicitly protects a whistleblower (including lawyer whistleblowers) from employer retaliation for disclosing confidential information.<sup>131</sup> At the same time, the New York FCA does not expressly permit disclosure of such information. However, it exhaustively defines "lawful acts" protected from retaliation to include, among other actions, disclosure of an employer's confidential information made in furtherance of the statute.<sup>132</sup> In this way, New York's FCA tacitly permits such disclosure, lest there be no acts of disclosure for the statute to protect. Moreover, courts have interpreted the *federal* FCA to authorize and protect as a matter of public policy disclosure of confidential information in furtherance of detecting and exposing fraud against the government.<sup>133</sup> Courts have crafted this public policy exception even though the federal statute does not explicitly authorize disclosure or contain a comprehensive definition of "lawful acts."

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disclosure that might have induced Vanguard to stop committing its alleged tax fraud, (iv) the extent to which Danon remonstrated with Vanguard over its alleged tax fraud, (v) how and when Danon reported his knowledge of Vanguard's alleged tax fraud to his superiors, (vi) how and when his superiors responded to Danon's reporting up of Vanguard's alleged tax fraud (that is, whether the responses were appropriate and timely), (vii) whether and to what extent his superiors threatened or attempted to silence Danon, and (viii) whether Danon was careful about protecting Vanguard's confidential information in accumulating documents related to the alleged tax fraud, submitting his whistleblower claim under New York's FCA, filing his *qui tam* action with the court, and prosecuting his action after the state declined to convert it into a civil enforcement action.

<sup>131</sup> N.Y. STATE FIN. LAW § 191(1) (2017).

<sup>132</sup> *See id.* § 191(2).

<sup>133</sup> *See infra* notes 189-194 and accompanying text.

The *Vanguard* court ignored the provision in New York's FCA that protects lawyer whistleblowers who disclose confidential information, as well as the statute's tacit approval of those disclosures. It further ignored the judicially created public policy exception that protects such disclosures irrespective of explicit statutory authorization. After omitting these authorities from its analysis of Danon's actions, the *Vanguard* court concluded that Danon improperly disclosed his employer's confidential information, and that he also failed to state a claim of retaliation for disclosing such information. In excluding any discussion of New York's statutory protections for whistleblowers, the *Vanguard* court failed to acknowledge the interest of the New York legislature, the State of New York, and New York taxpayers in detecting, exposing, and prosecuting Vanguard's alleged tax fraud.

On the one hand, it is partially understandable that the court flubbed the analysis of protected "lawful acts" under New York's FCA given the relatively new amendments enacted in 2010 and, furthermore, that only one other court has examined the meaning of "lawful acts" under the statute.<sup>134</sup> On the other hand, the interpretation of "lawful acts" is so critical to adjudicating Danon's rights and protections under New York's FCA that the court's failure to engage in any analysis of the statutory language was indefensible, particularly given the court's conclusion that Danon was not retaliated against by Vanguard.

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Like other states with false claims statutes,<sup>135</sup> New York's FCA allows "any person" to bring a *qui tam* civil action for violations of the statute "on behalf of the person and the people of the state of New York or a local government."<sup>136</sup> Also like other states with FCAs, New York's false claims statute allows persons to bring actions under the statute for claims involving "knowing" violations of the state's laws.<sup>137</sup> "Knowing" violations and acting "knowingly" include situations where the person or entity possesses "actual knowledge" of the false

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<sup>134</sup> See *infra* notes 183-188 and accompanying text.

<sup>135</sup> As of October 14, 2016, twenty-nine states had enacted False Claims Acts, including California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Rhode Island, Tennessee, Texas, Vermont, Virginia, and Washington. See Taxpayers Against Fraud Education Fund, *Success at the State Level*, <https://www.taf.org/success-at-state-level> (last visited Feb. 23, 2017).

<sup>136</sup> N.Y. STATE FIN. LAW § 190(2)(a) (2017).

<sup>137</sup> *Id.* §§ 189(1)(a)-(b), (f)-(h).



information. These statutory terms of art also include two lower threshold levels of knowledge, where the person acts either in “deliberate ignorance” or “reckless disregard” of the truth or falsity of the information.<sup>138</sup> Moreover, “knowing” and “knowingly” do not require proof of specific intent to defraud.<sup>139</sup> New York’s FCA also follows the federal False Claims Act by covering the “reverse false claim,” whereby “knowing” violations include not just acts of *submitting* false claims to obtain money or property from the government, but also acts of *avoiding* paying or transmitting money or property to the government.<sup>140</sup>

Until recently, New York’s FCA barred tax claims, as do most states’ FCAs and the federal FCA.<sup>141</sup> In 2010, the New York legislature unanimously amended the state’s False Claims Act,<sup>142</sup> authorizing whistleblowers to bring “claims, records, or statements made under the tax law.”<sup>143</sup> The statute allows whistleblowers, the state, and local governments to bring tax enforcement actions against taxpayers with net income or sales exceeding \$1 million and alleged damages

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<sup>138</sup> *Id.* § 188(3)(a). Some states include even more permissive definitions of “knowing” violations. For example, Michigan substitutes for “actual knowledge” a definition covering persons “in possession of facts under which he or she is aware or should be aware of the nature of his or her conduct and that his or her conduct is substantially certain to cause the payment of” unwarranted benefits. Michigan Medicaid False Claims Act, MICH. COMP. LAWS § 400.602(f) (2009) (emphasis added).

<sup>139</sup> N.Y. STATE FIN. LAW § 188(3)(b) (2017). At the same time, the New York FCA makes “acts occurring by mistake or as a result of mere negligence” a defense under the statute. *Id.*

<sup>140</sup> *Id.* § 189(1)(h). For the federal “reverse false claim,” see 31 U.S.C. § 3729(a)(1)(G) (2012).

<sup>141</sup> Only six states impose no bar on tax actions under their FCAs, including Delaware, Florida, Nevada, New Hampshire, New Jersey, and New York. And while Florida’s FCA does not contain an explicit tax bar, the Florida legislature added a provision to the state’s standalone tax whistleblower statute in 2002 that expressly disapproves of informant claims relating to taxes being brought under any statute other than the tax informant statute. FLA. STAT. § 213.30(3) (2016) (“This section is the sole means by which any person may seek or obtain any moneys as the result of, in relation to, or founded upon the failure by another person to comply with the tax laws of this state. A person’s use of any other law to seek or obtain moneys for such failure is in derogation of this section and conflicts with the state’s duty to administer the tax laws.”). Meanwhile three states impose partial bars on tax actions involving state income taxes, including Illinois and Indiana (barring claims based on all state income taxes) and Rhode Island (barring claims based on personal income taxes). For the federal bar against tax claims, see 31 U.S.C. § 3729(d) (prohibiting “claims, records, or statements under the Internal Revenue Code of 1986”).

<sup>142</sup> Press Release, Eric T. Schneiderman, Senator Eric T. Schneiderman Shepherds Historic Anti-Fraud Taxpayer Protection Measure Through Legislature (July 1, 2010).

<sup>143</sup> N.Y. STATE FIN. LAW § 189(4)(a) (2017).

exceeding \$350,000.<sup>144</sup> In addition, the statute makes losing taxpayer-defendants liable for treble damages based on total damages incurred by the state,<sup>145</sup> statutory penalties between \$6,000 and \$12,000 per claim,<sup>146</sup> and all reasonable costs and expenses for bringing the action, including attorney's fees.<sup>147</sup> Whistleblowers are entitled to as much as 30 percent of all proceeds collected from the action,<sup>148</sup> and the statute provides significant anti-retaliation protections for informants.<sup>149</sup> To assist in processing and investigating whistleblower submissions (including tax submissions), and to enforce the state's enhanced FCA, the New York Attorney General established the Taxpayer Protection Bureau.<sup>150</sup>

By all accounts, amending New York's False Claims Act to permit tax claims has been a huge success. In 2012, the state of New York sued telecommunications provider Sprint Nextel based on a whistleblower's submission under the state's FCA. In its complaint, the state alleged that Sprint "illegally avoided its New York sales tax obligations" by failing to collect sales taxes on its "flat-rate" calling plans and knowingly filing false tax returns,<sup>151</sup> actions for which New York sought damages exceeding \$300 million.<sup>152</sup> In June 2013, a New York Supreme Court denied Sprint's motion to dismiss after concluding that New York had sufficiently alleged violations of the

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<sup>144</sup> *Id.* § 189(4)(a)(i)–(ii).

<sup>145</sup> *Id.* § 189(1)(h).

<sup>146</sup> *Id.* The "per claim" penalty is significant in the tax context, where a single case may involve hundreds or even thousands of claims. *See, e.g.,* Jack Trachtenberg et al., *Applying False Claims Acts in State Taxation*, 64 ST. TAX NOTES, May 7, 2012, at 373, 374 ("If a tax case involves numerous transactions, invoices, or billings, each of those documents can be considered a false claim.").

<sup>147</sup> N.Y. STATE FIN. LAW § 189(3) (2017).

<sup>148</sup> *Id.* § 190(6)(b) (2017).

<sup>149</sup> *See id.* § 191(2) (2017).

<sup>150</sup> *See Taxpayer Protection Bureau*, N.Y. STATE OFFICE OF THE ATT'Y GEN., <http://www.ag.ny.gov/bureau/taxpayer-protection-bureau> (last visited Feb. 20, 2017). As a member of the New York State Senate, Schneiderman authored the 2010 amendments to the FCA. *See supra* note 142.

<sup>151</sup> Superseding Complaint at 1, *People ex rel. Schneiderman v. Sprint Nextel Corp.*, 970 N.Y.S.2d 164, 164 (N.Y. Sup. Ct. 2012) (No. 1039172011).

<sup>152</sup> Press Release, N.Y. State Office of the Att'y Gen., A.G. Schneiderman Files Groundbreaking Tax Fraud Lawsuit Against Sprint for Over \$300 Million (Apr. 19, 2012), <https://ag.ny.gov/press-release/ag-schneiderman-files-groundbreaking-tax-fraud-lawsuit-against-sprint-over-300-million>; *see also* John Buhl, *New York Sues Sprint for Alleged Sales Tax Fraud*, 64 ST. TAX NOTES, Apr. 23, 2012, at 211, 211. Subsequent to New York filing suit against Sprint, the SEC opened its own investigation of Sprint. *See* John Buhl, *SEC Investigating Sprint's Sales Tax Collection Practices*, 65 ST. TAX NOTES, Aug. 13, 2012, at 450, 450.

state's tax laws,<sup>153</sup> a decision unanimously affirmed by the Appellate Division in July 2014,<sup>154</sup> and affirmed yet again by the New York Court of Appeals in October 2015.<sup>155</sup> With its appeals exhausted, Sprint petitioned the U.S. Supreme Court in February 2016 for writ of certiorari, a petition that the court denied.<sup>156</sup> Sprint now must either litigate or settle the state's claims, with damages having grown to more than \$400 million.<sup>157</sup>

The New York Attorney General has brought additional tax cases under New York's enhanced FCA. Representative cases include a conviction of a New York City "tailor to the stars"<sup>158</sup> on felony tax evasion of sales and income taxes,<sup>159</sup> a multi-million dollar settlement with a medical imaging company for knowingly evading New York state and city taxes,<sup>160</sup> another settlement exceeding a million dollars with a prominent New Jersey appliance retailer for failing to collect and pay New York sales and corporate franchise taxes,<sup>161</sup> a million-dollar settlement with a well-known real estate mogul for abusing the "like-kind exchange" provisions contained in New York's tax law,<sup>162</sup>

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<sup>153</sup> *People ex rel. Schneiderman v. Sprint Nextel Corp.*, 970 N.Y.S.2d 164, 173 (Sup. Ct. 2012).

<sup>154</sup> *People v. Sprint Nextel Corp.*, 980 N.Y.S.2d 769, 769 (App. Div. 2014).

<sup>155</sup> *People v. Sprint Nextel Corp.*, 26 N.Y.3d 98, 98 (Ct. App. 2015).

<sup>156</sup> *Sprint Nextel Corp. v. New York*, 136 S. Ct. 2387 (2016).

<sup>157</sup> Gerald B. Silverman, *U.S. Supreme Court Won't Hear Sprint New York Tax Case*, BLOOMBERG BNA (June 1, 2016), <https://www.bna.com/us-supreme-court-n57982073390/>.

<sup>158</sup> Laura Italiano, *Tailor to Stars Mohan Ramchandani Pleads Guilty to Tax Evasion*, N.Y. POST (Mar. 6, 2013 5:00 AM), <http://nypost.com/2013/03/06/tailor-to-stars-mohan-ramchandani-pleads-guilty-to-tax-evasion/>. The tailor, Mohan "Mike" Ramchandani, outfitted, among others, Rudy Giuliani, Ed Koch, and New York Knicks legends Walt Frazier and Patrick Ewing. *Id.*

<sup>159</sup> As part of his settlement with the state, Ramchandani paid \$5.5 million in back taxes, interest, and penalties. See Press Release, N.Y. State Office of the Att'y Gen., A.G. Schneiderman Announces Arrest, Conviction and \$5.5 Million Settlement in Tax Fraud Case Against Prominent Tailor (Mar. 5, 2013), <https://ag.ny.gov/press-release/ag-schneiderman-announces-arrest-conviction-and-55-million-settlement-tax-fraud-case>.

<sup>160</sup> Press Release, N.Y. State Office of the Att'y Gen., A.G. Schneiderman Announces \$6.2 Million Settlement with Lantheus Medical Imaging and Bristol-Myers Squibb for Failing to Pay New York Corporate Income Taxes (Mar. 14, 2014), <https://ag.ny.gov/press-release/ag-schneiderman-announces-62-million-settlement-with-lantheus-medical-imaging-bristol>.

<sup>161</sup> See Press Release, N.Y. State Office of the Att'y Gen., A.G. Schneiderman Announces \$1.56 Million Settlement with New Jersey Appliance Retailer for Failing to Pay New York Taxes (Aug. 22, 2014), <https://ag.ny.gov/press-release/ag-schneiderman-announces-156-million-settlement-new-jersey-appliance-retailer-failing>.

<sup>162</sup> Press Release, N.Y. State Office of the Att'y Gen., A.G. Schneiderman Announces \$1.1 Million Settlement with Real Estate Mogul for Tax Abuses (Mar. 22, 2016),

allegations currently under seal involving more than a dozen private equity firms for illegally converting executive management fees charged to investors into personal stakes in fund investments to “substantially reduce or escape [] tax liabilities,”<sup>163</sup> and additional cases under investigation that could “dwarf” the Sprint prosecution.<sup>164</sup>

You would never know any of the foregoing based on the *Vanguard* court’s opinion. The opinion failed to explain, examine, or even acknowledge the 2010 amendments to New York’s FCA authorizing whistleblowers to bring and prosecute tax claims, an act through which the New York legislature expressed its interest in using whistleblowers to help the state detect, expose, and prosecute tax fraud.

Nor would you know from reading the opinion that New York’s FCA contains broad anti-retaliation protections for whistleblowers.<sup>165</sup> In fact, the statute’s protections are so broad that they insulate whistleblowers who disclose confidential information, a fact that the *Vanguard* court omitted from its analysis of whether a whistleblower can disclose confidential information in exposing an employer’s unlawful activities. Section 191 of New York’s FCA protects whistleblowers from retaliation for “lawful acts” committed “in furtherance of an action . . . to stop one or more violations” covered by the statute.<sup>166</sup> The section further defines “lawful acts” to include “obtaining or transmitting . . . documents, data, correspondence, electronic mail, or any other information, *even though such act may violate a contract, employment term, or duty owed to the employer or contractor*, so long as the possession and transmission of such documents are for the sole purpose of furthering efforts to stop one or more violations” of the FCA.<sup>167</sup> In other words, New York’s FCA protects whistleblowers who acquire, use, and disclose confidential information in submitting and prosecuting a *qui tam* action, even if disclosure of that information violates obligations ranging from

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<https://ag.ny.gov/press-release/ag-schneiderman-announces-11-million-settlement-real-estate-mogul-tax-abuses>.

<sup>163</sup> Amy Hamilton, *New York Attorney General Investigates Equity Firms*, 65 ST. TAX NOTES, Sept. 10, 2012, at 698; *see also* Dan Primack, *The New York AG’s “Scandal” That Isn’t*, FORTUNE (Feb. 23, 2016 7:12 AM PST), <http://fortune.com/2016/02/23/schneiderman-private-equity-scandal-donations/>.

<sup>164</sup> Pete Brush, *N.Y. Tees Up Tax FCA Suits that May Dwarf Sprint Case*, LAW360 (Mar. 13, 2013, 6:08 PM EDT), <https://www.law360.com/articles/423350/ny-tees-up-tax-fca-suits-that-may-dwarf-sprint-case>.

<sup>165</sup> *See* N.Y. STATE FIN. LAW § 191(1) (2017).

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* § 191(2) (emphasis added).

specific duties delineated in confidentiality agreements to broad duties of loyalty and confidentiality. Moreover, the statute does not exclude any particular employee-employer relationships or employee-employer duties from these broad protections, including attorney-client relationships.<sup>168</sup>

To put a finer point on the last paragraph, the whistleblower statute that the *Vanguard* court purported to analyze contains a provision that explicitly protects Danon for doing exactly what he did: disclose confidential employer information in order to further the statute's intent to root out and prosecute fraud, including tax fraud. Yet the *Vanguard* court inexplicably failed to acknowledge that provision.<sup>169</sup>

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<sup>168</sup> It is worth noting that defendant-Vanguard might invoke *ejusdem generis* to oppose a broad interpretation of protected "lawful acts. In particular, it might contend that since "contract" and "employment terms" connote duties undertaken by consensual agreement, the statute's reference to "duty" (listed after "contract" and "employment term") should be read narrowly and to exclude duties imposed by operation of law. In applying the principle of *ejusdem generis*, a court would have to conduct an analysis of statutory language and construction with respect to the New York FCA's definition of "lawful acts." The *Vanguard* court failed to conduct such an analysis.

<sup>169</sup> The *Vanguard* opinion contains other, though less significant, examples of the court's lack of familiarity with the statute it purports to analyze. For instance, the court observes more than once that the New York Attorney General declined "to convert or intervene" in Danon's whistleblower action, *State ex rel. Danon v. Vanguard Grp., Inc.*, No. 100711/13, 2015 N.Y. Misc. LEXIS 4239, at \*9, \*28 (N.Y. Sup. Ct. Nov. 13, 2015), electing instead to let Danon prosecute the case himself, a decision that defendant-Vanguard wants the court to believe reflects the state's judgment that Danon's action lacks merit. *See, e.g.*, Defendants' Memorandum of Law in Support of its Motion to Dismiss the Complaint and for Disqualification of Danon and His Counsel at 2, *Danon*, 2015 N.Y. Misc. LEXIS 4239 [hereinafter Defendants' Memo in Support of Motion to Dismiss] ("Danon is prosecuting this case himself because the New York State Attorney General . . . declined to intervene following an investigation."); *id.* at 6 and 25 (same); Defendants' Reply Memo, *supra* note 89, at 25 n.34 (same). And while a decision by the government not to convert a *qui tam* civil action into a civil enforcement action or to intervene in the action "so as to aid and assist the plaintiff," N.Y. STATE FIN. LAW § 190(2)(c)(i)-(ii) (2017), could indicate the government's belief that the claims lack merit, it might also reflect the government's discretion not to pursue all meritorious claims, or that the claims involve information already in the government's possession, or that the government lacks the resources to pursue the claims. Indeed, in this particular instance, the New York Attorney General's Office was in the throes of prosecuting its largest FCA tax case to date, *see supra* notes 151-57 and accompanying text, a prosecution that consumed considerable resources and personnel. In addition, and by way of example (albeit an imperfect one given the differences between the two programs), the IRS Whistleblower Office releases illuminating data on these determinations. For fiscal year 2015, the Whistleblower Office reported that a full 11 percent of the claims it denied (or 1,165 claims) were due to "information already known, or lack of resources, or survey other," with "survey other" indicating that the claim did not involve tax effects. 2015

While the *Vanguard* court ignored the most directly pertinent part of New York's FCA from its analysis of the statute, the New York legislature consciously and carefully crafted its broad definition of "lawful acts." Indeed, while all other False Claims Acts (including the federal FCA, the twenty-eight state-level FCAs, and the District of Columbia's FCA) protect whistleblowers for "lawful acts" made in furtherance of the statute,<sup>170</sup> only New York's provides a robust definition of the term. To be sure, a handful of states protect whistleblowers for engaging in "lawful" disclosure of employer information "to a State or law enforcement agency or in furthering a false claims action," but not one of these states elaborates on what it means by "lawful."<sup>171</sup> Only Vermont, the most recent state to enact an FCA,<sup>172</sup> provides any guidance whatsoever on what it considers "lawful acts," and its definition is restricted to prohibiting employers from requiring employees to accept or sign confidentiality agreements that limit or deny the rights of employees to "bring an action or provide information to a government or law enforcement agency" pursuant to its false claims statute.<sup>173</sup>

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IRS ANNUAL REPORT, *supra* note 101, at 17. Furthermore, with respect to New York's FCA, even if the state declines to convert or intervene in a whistleblower action initially, it can intervene at a later date "upon showing of good cause." § 190(5)(a). Moreover, if the New York Attorney General truly believes that a submission has no merit, the FCA permits the state to move for dismissal of the action, notwithstanding the objections of the whistleblower. § 190(5)(b)(i). In this case, the Attorney General may not have converted Danon's action into a civil enforcement action or intervened to assist Danon, but it also stepped aside and permitted Danon to prosecute the action on behalf of the state, which, if successful, could generate significant revenue for the state. Finally, courts have rightly noted that FCA claims, whether prosecuted by the government or by a whistleblower, reinforce one of the primary purposes of false claims statutes, that is, to expose fraud. *E.g.*, *United States ex rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514, 1520 (10th Cir. 1996) (stating "*qui tam* provisions seek to ensure that information bearing on potential fraud will come to light even if government officials should decide not to initiate proceedings based on information contained in government files").

<sup>170</sup> Nearly all state-level FCAs use the term, "lawful acts," while a handful use "lawful act," and one (Maryland) uses "acts lawfully in furtherance of an action." MD. CODE ANN., HEALTH-GEN. §2-607 (2017).

<sup>171</sup> See, e.g., New Jersey False Claims Act, 2A: 32C-10(b) (2017); N.M. STAT. ANN. § 44-9-11 (2017); TENN. CODE ANN. §4-18-105(b) (2016) (examples of state FCAs that do not provide a definition of "lawful.>").

<sup>172</sup> See Vermont False Claims Act, VT. STAT. ANN. tit. 32 §§ 630-642 (2017).

<sup>173</sup> VT. STAT. ANN. tit. 32, § 638(c) (2017). "Any such agreement," the Vermont FCA warns, "shall be void." *Id.* Vermont's prohibition against employment agreements limiting a whistleblower's ability to report unlawful conduct to the state reflects a similar policy under the SEC's whistleblower program, which targets companies that use "improperly restrictive language in confidentiality agreements with the potential

Even more indefensible than ignoring the part of New York's FCA that protects Danon for doing what the *Vanguard* court said he was prohibited from doing, the court dismissed Danon's retaliation claim without analyzing the FCA's anti-retaliation provisions. The *Vanguard* court stated that to properly state a claim of retaliation under New York's FCA, a whistleblower "must show that the employee engaged in conduct protected" under the statute.<sup>174</sup> But the court omitted any discussion of New York's FCA in dismissing Danon's retaliation claim,<sup>175</sup> citing no provisions from the statute, much less its anti-retaliation provisions which identify wide-ranging protected acts. Section 191 of New York's FCA guards employee-whistleblowers from being "discharged, demoted, suspended, threatened, harassed or in any other manner discriminated against in the terms and conditions of employment, or otherwise harmed or penalized by an employer, or a prospective employer, because of lawful acts done by the employee . . . [made] in furtherance of an action brought under this article or other efforts to stop one or more violations of this article."<sup>176</sup> As discussed in Part II and in earlier sections of Part III, Danon's complaint and supplemental materials outlined how he engaged in "lawful acts" protected by New York's FCA. In addition, Danon alleged that as a result of engaging in those protected acts in furtherance of New York's FCA, he was "discharged," "threatened," "harassed," "discriminated against in the terms and conditions of employment," and "otherwise harmed or penalized by" *Vanguard*,<sup>177</sup> retaliatory conduct that New

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to stifle the whistleblowing process." Press Release, U.S. Secs. and Exch. Comm'n, SEC: Companies Cannot Stifle Whistleblowers in Confidentiality Agreements (Apr. 1, 2015), <https://www.sec.gov/news/pressrelease/2015-54.html> (announcing the SEC's first enforcement action against a company for pressuring employees to sign confidentiality agreements that expressly stated employees could be disciplined or fired for discussing matters outside the company without the prior approval of the company's legal department; according to the SEC, these kind of confidentiality agreements violate whistleblower protection Rule 21F-17). The SEC program's robust anti-retaliation and disclosure provisions and policy "reflect the firm position the Commission has taken to protect whistleblowers from employment retaliation or actions that impede their ability to report to and cooperate with Commission staff. 'We want whistleblowers — and their employers — to know that employees are free to come forward without fear of reprisals.'" SEC 2015 ANNUAL REPORT, *supra* note 124, at 2 (quoting Sean McKessy, Chief of the SEC Office of the Whistleblower); *see also infra* note 400 and accompanying text.

<sup>174</sup> *Danon*, 2015 N.Y. Misc. LEXIS 4239 at \*32.

<sup>175</sup> *See id.* at \*32-35.

<sup>176</sup> N.Y. STATE FIN. LAW § 191(1) (2017).

<sup>177</sup> *See* Affidavit of Danon, *supra* note 17, ¶¶ 6–10, 21.

York's false claims statute explicitly prohibits and punishes.<sup>178</sup> The *Vanguard* court credited none of Danon's facts as alleged with respect to his anti-retaliation claim, and, so far as one can tell, never looked at the anti-retaliation provisions in New York's FCA. Worse, and as discussed in Part IV, the *Vanguard* court adopted the defendant's version of the facts in dismissing Danon's retaliation claim.

While the *Vanguard* court spent no time examining New York's expansive anti-retaliation protections, the defense bar has expressed anxiety over the provisions for years. Commentators have been particularly uneasy about the "extremely broad definition of 'lawful acts,'" and its inclusion of conduct that otherwise "constitutes a breach of a confidentiality agreement or employment term."<sup>179</sup> "Let that sink in," warned another practitioner in the aftermath of the 2010 amendments to New York's FCA that broadly defined "lawful acts."<sup>180</sup> "Under this new rule, an employee who pilfers documents from his employer to establish a false claim is protected from retaliation even if the employee violated a rule, contract, or duty owed to his employer when he took the documents."<sup>181</sup> Still other commentators fear the "immunity" and "encouragements" that the broad protections from employer retaliation for removing and disclosing confidential information might provide statutory encouragement to "current employees, contractors, and agents who steal confidential or otherwise sensitive documents from their workplace to help prove claims against their employers."<sup>182</sup>

To date,<sup>183</sup> only one court has considered the breadth of "lawful acts" under New York's FCA. In *U.S. ex rel. Ortiz v. Mount Sinai Hosp.*, an employer sought dismissal of a whistleblower complaint brought under both the federal FCA and New York FCA on grounds that the employee whistleblowers (none of whom were lawyers), violated confidentiality protections for patient and hospital information in bringing the action.<sup>184</sup> In ruling against dismissal, the District Court

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<sup>178</sup> N.Y. STATE FIN. LAW § 191(1) (2017).

<sup>179</sup> Lori L. Pines, Weil, Gotshal & Manges LLP, *State Qui Tam Statutes: Incentives, Differences, and Challenges*, presented at the ABA Section of State and Local Government Law, 2015 Spring Meeting and ABA Section of Public Contract Law, 10th Annual State and Local Procurement Symposium (slides 20, 23) (Apr. 24, 2015).

<sup>180</sup> Timothy P. Noonan & William Comiskey, *Calling All Whistleblowers: New York Wants You!*, 59 ST. TAX NOTES, Jan. 31, 2011, at 349, 353.

<sup>181</sup> *Id.*

<sup>182</sup> Billy Hamilton, *New York's Qui Tam Law: Jackpot Justice or Creative Tax Tool, or Both?*, 59 ST. TAX NOTES, Jan. 10, 2011, at 109, 111.

<sup>183</sup> As of March 27, 2017.

<sup>184</sup> *United States ex rel. Ortiz v. Mount Sinai Hosp.*, 2015 U.S. Dist. LEXIS 153903,



for the Southern District of New York found a “strong public policy in favor of protecting those who report fraud against the government.”<sup>185</sup> Furthermore, the court cited to additional cases that elevate the policy of detecting and exposing fraud against the government above protecting confidential information.<sup>186</sup> In addition, the whistleblowers in *Ortiz* encouraged the court to consider how New York’s FCA “explicitly makes lawful [i.e., disclosure of confidential information pertaining to an employer’s illegal conduct] what defendants call unlawful ‘misappropriation.’”<sup>187</sup> However, the court declined to opine on the full reach of “lawful acts” because the case was still in the early stages of litigation, and the parties had not yet undertaken discovery.<sup>188</sup>

While not in the context of the New York FCA, numerous other courts have examined what constitutes protected acts under false claims statutes. In the process, courts have developed a public policy exception permitting whistleblowers to disclose confidential employer information if done in furtherance of detecting and exposing an employer’s alleged unlawful activities. In so holding, these courts have evaluated a range of pertinent considerations in determining the extent of “lawful acts” undertaken by whistleblowers and their counsel, including: (i) widely recognized public policies that underlie whistleblower programs such as detecting and exposing fraud against the government, providing a deterrent effect for persons and companies otherwise predisposed to defrauding the government, and

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at \*9-10 (S.D.N.Y. 2015). A subsequent ruling in *Ortiz* involved a discovery dispute unrelated to the New York FCA’s use and definition of “lawful acts.” See *United States ex rel. Ortiz v. Mount Sinai Hosp.*, 2016 U.S. Dist. LEXIS 59727, at \*2 (S.D.N.Y. 2016).

<sup>185</sup> *Ortiz*, 2015 U.S. Dist. LEXIS 153903, at \*16.

<sup>186</sup> See, e.g., *United States ex rel. Ruhe v. Masimo Corp.*, 929 F. Supp. 2d 1033, 1039 (C.D. Cal. 2012) (holding where whistleblowers “sought to expose a fraud against the government and limited [taking] documents relevant to the alleged fraud . . . this taking and publication was not wrongful, even in light of nondisclosure agreements, given ‘the strong public policy in favor of protecting whistleblowers who report fraud against the government’”); *United States ex rel. Grandeau v. Cancer Treatment Ctrs. of Am.*, 350 F. Supp. 2d 765, 773 (N.D. Ill. 2004) (stating the whistleblower and the government “argue that the confidentiality agreement cannot trump the FCA’s strong policy of protecting whistleblowers who report fraud against the government,” and concluding “[t]heir position is correct”).

<sup>187</sup> Plaintiffs-Relators’ Memorandum of Law in Opposition to Defendants’ Motion to Dismiss at 3, *Ortiz v. Mount Sinai Hosp.*, No. 1:13-cv-04735, 2015 U.S. Dist. LEXIS 153903 (S.D.N.Y. Jan. 21, 2015).

<sup>188</sup> *Ortiz*, 2015 U.S. Dist. LEXIS 153903, at \*14-15 (holding that it was “premature to conclude defendants’ records were obtained improperly” by the whistleblowers).

complementing the investigative and enforcement efforts of state and federal law enforcement;<sup>189</sup> (ii) whether the whistleblower had access to the confidential information that she removed and disclosed in the ordinary course of her job responsibilities, and whether the whistleblower limited removal of documents relevant to the alleged

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<sup>189</sup> See, e.g., *United States ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1061-62 (9th Cir. 2011) (considering that public policy could merit finding whistleblowers to be exempt from liability for violation of their nondisclosure agreement); *Id.* at 1062 (also explaining that whistleblowers asserting a “public policy exception to confidentiality agreements” for removing and using confidential documents must “justify why removal of the documents was reasonably necessary to pursue an FCA claim”); *United States ex rel. Green v. Northrop Corp.*, 59 F.3d 953, 963, 966 (9th Cir. 1995) (refusing to enforce a pre-filing settlement agreement entered into by the whistleblower and the employer that released a whistleblower’s claims against the employer for alleged double billing, because it “would impair a substantial public interest,” and “threaten to nullify the incentives Congress intended to create in amending the provisions of the False Claims Act in 1986,” namely, “the filing of more private suits that Congress sought to encourage, both to increase enforcement and deterrence as well as to spur the government to undertake its own investigations”); *Ortiz*, 2015 U.S. Dist. LEXIS 153903, at \*16 (finding a “strong public policy in favor of protecting those who report fraud against the government”); *Siebert v. Gene Sec. Network*, No. 11-cv-01987-JST, 2013 U.S. Dist. LEXIS 149145, at \*25 (N.D. Cal. Oct. 13, 2013) (“The Court agrees that any alleged obligation by [the whistleblower] not to retain or disclose the confidential documents that form the basis of this action is unenforceable as a matter of public policy because it would frustrate Congress’ purpose in enacting the False Claims Act — namely, the public policy in favor of providing incentives for whistleblowers to come forward, file FCA suits, and aid the government in its investigation efforts.”); *Ruhe*, 929 F. Supp. 2d at 1039 (finding where relators “sought to expose a fraud against the government and limited [obtaining] documents relevant to the alleged fraud . . . this taking and publication was not wrongful, even in light of nondisclosure agreements, given ‘the strong public policy in favor of protecting whistleblowers who report fraud against the government,’” and finding further, “the strong public policy would be thwarted if [employers] could silence whistleblowers and compel them to be complicit in potentially fraudulent conduct”); *United States ex rel. Head v. Kane Co.*, 668 F. Supp. 2d 146, 152 (D.D.C. 2009) (“Enforcing a private agreement that requires a *qui tam* plaintiff to turn over his or her copy of a document, which is likely to be needed as evidence at trial, to the defendant who is under investigation would unduly frustrate the purpose of [the FCA].”); *Grandeau*, 350 F. Supp. 2d at 769-70, 773 (“From targeting massive contractor fraud during the Civil War to halting healthcare fraud today, the ability of individuals to serve as private attorneys general and to protect the interests of the government has and continues to serve vital purposes.”); *Id.* at 773 (“Relator and the government argue that the confidentiality agreement cannot trump the FCA’s strong policy of protecting whistleblowers who report fraud against the government. Their position is correct . . . .”); *X Corp. v. Doe*, 805 F. Supp. 1298, 1310 n.24 (E.D. Va. 1992) (“To the extent [a confidentiality agreement executed between in-house counsel and employer] prevented disclosure of evidence of a fraud on the government, that Agreement would be void as contrary to public policy.”).

misconduct rather than indiscriminately downloading documents;<sup>190</sup> (iii) whether the whistleblower and the whistleblower's counsel were mindful of protecting the employer's confidential information in developing, filing, and prosecuting an FCA action;<sup>191</sup> (iv) whether the

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<sup>190</sup> See, e.g., *Cafasso*, 637 F.3d at 1062 (affirming district court's dismissal of whistleblower's complaint and granting defendant summary judgment on counterclaim for breach of confidentiality agreement based on whistleblower's "vast and indiscriminate appropriation of [defendant's] files," her "wholesale stripping of a company's confidential documents," copying "nearly eleven gigabytes of data," and "grabbing . . . tens of thousands of documents"); *Walsh v. Amerisource Bergen Corp.*, No. 11-7584, 2014 U.S. Dist. LEXIS 82064, at \*22-23 (E.D. Pa. June 16, 2014) (refusing to dismiss defendants' counterclaims in the early stages of litigation when whistleblower was alleged to have taken "a large variety of confidential, proprietary and privileged information" and he failed "to make any kind of particularized showing" for why he took and disclosed the information); *Siebert*, 2013 U.S. Dist. LEXIS 149145, at \*26-27 (finding that although a confidentiality agreement was unenforceable as a matter of public policy, the court could not conclude "that the counterclaim in its entirety should be dismissed, because it is possible that [the whistleblower] also took confidential documents that bore no relation to his False Claims Act claim," while also stating "[i]t is possible that discovery will reveal that all of the confidential documents, if there are any, are adequately related to [the whistleblower's] FCA claims"); *United States ex rel. Wildhirt v. AARS Forever, Inc.*, No. 09 C 1215, 2013 U.S. Dist. LEXIS 133982, at \*15-16 (N.D. Ill. Sept. 19, 2013) ("Drawing a reasonable inference in Defendants' favor, the court will assume at the [motion to dismiss] stage that [whistleblowers'] retentions and disclosures went beyond the scope of those necessary to pursue their *qui tam* suit."); *Ruhe*, 929 F. Supp. 2d at 1039 (after finding that the whistleblowers "sought to expose a fraud against the government and limited their taking to documents relevant to the alleged fraud," the court concluded that "this taking and publication was not wrongful, even in light of nondisclosure agreements, given 'the strong public policy in favor of protecting whistleblowers who report fraud against the government'"); *JDS Uniphase Corp. v. Jennings*, 473 F. Supp. 2d 697, 702 (E.D. Va. 2007) (refusing to adopt a rule that subordinated confidentiality agreements to the public policy of detecting and exposing fraud against the government on grounds that such a rule "would effectively invalidate most confidentiality agreements, as employees would feel free to haul away proprietary documents, computers, or hard drives, in contravention of their confidentiality agreements, knowing they could later argue they needed the documents to pursue suits against employers under a variety of statutes protecting employees from retaliation for publicly reporting wrongdoing, such as" Sarbanes-Oxley and the False Claims Act); *Grandeau*, 350 F. Supp. 2d at 773 (holding that a relator was exempt from liability for breach of a confidentiality agreement for the disclosure to the government of documents that showed employer had engaged in fraudulent healthcare billing practices).

<sup>191</sup> See, e.g., *Cafasso*, 637 F.3d at 1062; *Walsh*, 2014 U.S. Dist. LEXIS 82064, at \*22-23; *Gotham City Online, LLC v. Art.com, Inc.*, No. C 14-00991 JSW, 2014 U.S. Dist. LEXIS 33680 (N.D. Cal. Mar. 13, 2014) (disqualifying counsel for misconduct involving the taking and use of defendants' privileged documents in the course of developing whistleblower's claims); *Siebert*, 2013 U.S. Dist. LEXIS 149145, at \*26; *United States ex rel. Hartpence v. Kinetic Concepts, Inc.*, No. CV 08-1885-GHK

whistleblower (or the government) engaged in tactics that undermined the adversarial process or the administration of justice;<sup>192</sup> (v) whether the defendant would experience any damage or harm as a result of the whistleblower's claim apart from it being called to task for alleged violations of the law or, stated differently, whether the defendant experienced any damages independent of its liability if found guilty of the misconduct alleged in the whistleblower's complaint;<sup>193</sup> and (vi) at

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(AGRx); CV 08-6403-GHK (AGRx), 2013 U.S. Dist. LEXIS 74833, at \*9-10 (C.D. Cal. May 20, 2013) (explaining "we are disqualifying [whistleblower's] counsel [for counsel's actions and not their clients'] because of what they did and did not do after [being exposed to opposing party's privileged communications]: they quoted privileged documents in the pleadings and did not take any 'reasonable remedial action,' such as consulting the court about what to do about privilege issues").

<sup>192</sup> See, e.g., *Cafasso*, 637 F.3d at 1053, 1059 (affirming district court's dismissal of whistleblower's complaint and granting defendant summary judgment on counterclaim for breach of confidentiality agreement on grounds that included whistleblower using the district court's "orders to disrupt the state court suit," filing a 733-page second amended complaint, seeking "to circumvent the district court's order limiting her *qui tam* claim to allegations relating to the 37 inventions identified in her [original] complaint," and, generally, "prejudic[ing] the opposing party and . . . show[ing] bad faith"); *Grandeau*, 350 F. Supp. 2d at 770-71 ("The FCA's protections are broad, but they are not infinite. We stretch those protections too far by imposing them on this situation, in which the government serves a subpoena on an individual employee [rather than on the employer allegedly engaged in misconduct] who then collects the desired information and then, under shroud of secrecy, delivers documents to the government. By taking this secretive approach, the government has stripped defendant of its right to address the subpoena, either by providing the requested documents, seeking to quash it or taking another approach.").

<sup>193</sup> See, e.g., *Mortgages, Inc. v. United States Dist. Court*, 934 F.2d 209, 214 (9th Cir. 1991) (barring FCA defendants from bringing third-party complaints against whistleblowers on grounds that defendants effectively sought contribution and indemnification for the FCA violations based on the relators' alleged role in the violations' commission); *United States ex rel. Notorfrancesco v. Surgical Monitoring Assoc.*, No. 09-1703, 2014 U.S. Dist. LEXIS 172044, at \*12 (E.D. Pa. Dec. 12, 2014) (denying whistleblower's motion to dismiss defendant's counterclaims for breach of confidentiality on grounds that defendant's claim for breach of contract is a claim for independent damages "because its success does not rely on a finding that [defendant] is liable under the FCA"); *Walsh*, 2014 U.S. Dist. LEXIS 82064, at \*21-22 (ruling that defendant's counterclaims for breach of contract, breach of fiduciary duty, implied contract, and promissory estoppel were not predicated on a finding of FCA liability and thus it survived the whistleblower's motion to dismiss); *United States ex rel. Battiata v. Puchalski*, 906 F. Supp. 2d 451, 453 (D.S.C. 2012) (dismissing all seven of defendants' counterclaims because they contain "no allegations of misuse of confidential information or resulting harm other than the use in and harm which may result from pursuit of this action"); *United States v. Campbell*, No. 08-1951, 2011 U.S. Dist. LEXIS 1207, at \*35 (D.N.J. Jan. 4, 2011) (denying defendant's counterclaims, which, "although worded to include allegations of fraud and misrepresentation, seek indemnification and contribution that obviously requires damage to [defendant] that is based on a finding that he is liable under the FCA"); *United States ex rel. Miller v.*

what stage in the litigation other courts have considered it appropriate to determine whether a whistleblower improperly obtained an employer's confidential information.<sup>194</sup>

#### IV. A READILY DISTINGUISHABLE CASE AND A MISMATCHED LAWYER WHISTLEBLOWER

As discussed in Part III, the *Vanguard* court failed to analyze the whistleblower's complaint under the statute that he brought his claim. Both with respect to Danon's disclosure of confidential information to prevent defendant-Vanguard's ongoing alleged tax fraud as well as defendant-Vanguard's alleged retaliation against Danon for those acts, the court ignored parts of New York's FCA that expressly protect

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Harbert Int'l Constr., Inc., 505 F. Supp. 2d 20, 26 (D.D.C. 2007) (stating "[t]he unavailability of contribution and indemnification for a defendant under the False Claims Act now seems beyond peradventure," listing a slew of supporting cases, and noting, "[t]hese courts have been alert to the likelihood that clever defendants will seek what federal law denies them under the guise of affirmative state law rights of action, and have held that 'there can be no right to assert state law counterclaims that, if prevailed on, would end in the same result'"); *Id.* at \*26-27 (also finding that courts have held "a *qui tam* defendant may maintain a claim for independent damages; that is, a claim that is not dependent on a finding that the *qui tam* defendant is liable," arguing that these courts rightly recognize that "not all counterclaims in FCA cases will be contrary to the statute's interests, and that there would be real due process concerns if *all* counterclaims were to be barred, particularly compulsory ones, which would be lost forever," and further suggesting substituting for "independent damages" a description of permissible claims as "not dependent on the fact of FCA liability"); *United States ex rel. Newsham v. Lockheed Missiles & Space Co., Inc.*, 779 F. Supp. 1252, 1253-54 (N.D. Cal. 1991) (dismissing defendant's counterclaims on grounds that "to permit defendant to pursue a counterclaim for breach of contract and breach of loyalty for the failure [of the whistleblower] to first raise its concerns with the alleged wrongdoer, would allow wrongdoers to retaliate against whistleblowers, and is contrary to legislative intent").

<sup>194</sup> See, e.g., *Ortiz*, 2015 U.S. Dist. LEXIS 153903, at \*14-17 (refusing to grant defendant-employer's motion to dismiss whistleblower's complaint without benefit of discovery and factual findings by stating that "it would be 'inappropriate to discredit the factual allegations of a complaint merely because they are contradicted'"); *United States ex rel. Kester v. Novartis Pharm. Corp.*, No. 11 CIV. 8196(CM), 2015 WL 109934, at \*22 (S.D.N.Y. Jan. 6, 2015) (stating "without evidence [the court] will not assume that relator took 'undisclosed formal discovery' in violation of the Federal Rules of Civil Procedure"); *Walsh*, 2014 U.S. Dist. LEXIS 82064, at \*25-26 (refusing to dismiss defendants' counterclaims in the early stages of litigation, while also acknowledging that discovery might "reveal that all of the confidential documents, if there are any, [were] adequately related to [the relator's] FCA claims"); *United States ex rel. Rector v. Bon Secours Richmond Health Corp.*, No. 11-CV-38, 2014 WL 66714, at \*5 (E.D. Va. Jan. 6, 2014) (holding defendant "must show that misconduct occurred by 'clear and convincing' evidence, as opposed to by a mere preponderance in order for the Court to exercise its inherent power to sanction").

Danon's disclosure and tacitly permit the same. Furthermore, the court neglected to consider the rich body of case law that over the years has formed a public policy exception permitting whistleblowers to disclose confidential employer information if done in furtherance of detecting and exposing unlawful activities. In lieu of acknowledging either the State of New York's expressed interest in protecting whistleblowers like Danon or courts' well-developed public policy exception further protecting whistleblowers like Danon, the *Vanguard* court refracted Danon's whistleblower action through the prism of a readily distinguishable case involving the federal False Claims Act and a dissimilar lawyer whistleblower. Moreover, the court in this particular case — much like the *Vanguard* court — ignored the robust case law evincing a public policy exception permitting whistleblowers to disclose confidential employer information.

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The *Vanguard* court relies heavily on one particular federal case to analyze under what circumstances, if any, a lawyer may reveal client confidences to prevent a client from committing a crime. In *United States v. Quest Diagnostics*,<sup>195</sup> the court found that a lawyer whistleblower violated his ethical duties to his former employer, for whom he had served as General Counsel (among other high-level positions), by disclosing confidential information that was “greater than reasonably necessary to prevent any alleged ongoing fraudulent scheme.”<sup>196</sup> In so holding, the court considered the “tension” between a lawyer's duty of confidentiality and the government's interest — as expressed through the federal False Claims Act — in encouraging whistleblowers to reveal legal violations that harm the government.<sup>197</sup> After weighing the competing interests, the Court of Appeals agreed with the District Court that the federal FCA “did not preempt applicable state ethical rules.”<sup>198</sup> To the contrary, it found that “[n]othing in the False Claims Act evinces a clear legislative intent to preempt state statutes and rules that regulate an attorney's disclosure of client confidences.”<sup>199</sup> Notably, the court ignored altogether the

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<sup>195</sup> *United States v. Quest Diagnostics*, 734 F.3d 154 (2d Cir. 2013), *affg* *United States ex rel. Fair Lab. Practices Assocs. v. Quest Diagnostics, Inc.*, No. 05 Civ. 5393 (RPP), 2011 U.S. Dist. LEXIS 37014 (S.D.N.Y. Mar. 24, 2011).

<sup>196</sup> *Id.* at 165.

<sup>197</sup> *Id.* at 157.

<sup>198</sup> *Id.* at 162.

<sup>199</sup> *Id.* at 163.

voluminous case law manifesting a public policy exception permitting whistleblowers to disclose confidential employer information.<sup>200</sup>

In its own opinion, the *Vanguard* court cited often to *Quest*. In fact, it cited the case seventeen times.<sup>201</sup> It also dedicated several consecutive pages to recite the facts of the case,<sup>202</sup> and it repeatedly attempted to analyze the *Vanguard* facts through the *Quest* prism. Beyond involving lawyer whistleblowers in the state of New York, however, the two cases could not be more different. The factual scenarios in *Quest* that led the court to conclude that the lawyer whistleblower violated New York's ethical rules simply do not apply in the *Vanguard* case.

The distinguishable characteristics of the two cases are particularly evident in two very important respects: first, the extent to which the state of New York (unlike the federal government) has expressed an interest in protecting whistleblowers who disclose confidential information made in furtherance of the state's FCA, and, second, the disparate profile and status of the two lawyer whistleblowers within their respective clients' organizations, both of which prevent any meaningful comparison of the two informants' ability to ethically disclose their clients' illegal conduct. A likely explanation for the *Vanguard* court's inapt analysis of the mismatched cases is that it decided disputed issues of fact on a motion to dismiss,<sup>203</sup> and thus did not have a sufficient factual basis on which to form its opinion. In *Quest*, both the District Court and Circuit Court derived and then analyzed facts only after the District Court authorized discovery on whether the lawyer whistleblower "had improperly used or disclosed [his former employer's] confidences in this lawsuit."<sup>204</sup> Comparatively, the *Vanguard* court eschewed discovery, failed to credit the non-moving party's facts as presented, adopted the moving party's version of the facts, and held the lawyer whistleblower to improperly high pleading standards.

The state of New York has expressed an explicit interest through its FCA in protecting whistleblowers such as Danon who disclose

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<sup>200</sup> For this case law, see *supra* notes 185–86, 188–89 and accompanying text.

<sup>201</sup> See *State ex rel. Danon v. Vanguard Grp., Inc.*, No. 100711/13, 2015 N.Y. Misc. LEXIS 4239, at \*15-18, \*23-24, \*27, \*29-30 (N.Y. Sup. Ct. Nov. 13, 2015) (\*15 (one cite), \*16 (three), \*17 (four), \*18 (three), \*23 (one), \*24 (two), \*27 (one), \*29 (one), and \*30 (one)).

<sup>202</sup> See *id.* at \*15-18.

<sup>203</sup> See *supra* Part II for prior discussion of the court's improper behavior in this regard.

<sup>204</sup> *Quest*, 734 F.3d at 161.

confidential information to prevent an employer's ongoing illegal activity.<sup>205</sup> It therefore follows that an analysis of Danon's whistleblower activity and the *qui tam* action that he brought under New York's FCA should focus on the policy and language of New York's whistleblower statute rather than on that of the federal whistleblower statute. Moreover, in 2010, the New York legislature unanimously amended the state's FCA to permit tax claims (which comprised the basis of Danon's allegations against defendant-Vanguard),<sup>206</sup> while the federal FCA bars tax claims.<sup>207</sup> Furthermore, while "nothing" in the federal FCA "evinces a clear legislative intent to preempt state statutes and rules that regulate an attorney's disclosure of client confidences,"<sup>208</sup> the New York FCA specially protects whistleblowers acting in furtherance of the statute "even though such act may violate a contract, employment term, or duty owed to the employer or contractor,"<sup>209</sup> statutory language that reasonably includes a lawyer's disclosure of confidential information.<sup>210</sup> Thus, the *Quest* court might be said to have reasonably concluded that the federal FCA does not express a clear legislative intent to preempt a state's rules protecting confidential client information.<sup>211</sup> But a New York court analyzing the above-quoted preemptive language contained in the *New York* FCA would have a very difficult time concluding that the statute does not preempt "a contract, employment term, or duty" pertaining to employees (lawyers or non-lawyers) designed to protect confidential information of employers (clients or non-clients).

Stated more emphatically, even if a court decides that Danon is prohibited under New York's ethical rules from disclosing client confidences through a *qui tam* action, the legislative intent and policy of New York's FCA protects Danon from disclosing that information, and public policy further protects his conduct.<sup>212</sup> The *Vanguard* court spent no time analyzing this palpable tension between, on the one hand, New York's FCA and courts' public policy exception permitting

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<sup>205</sup> See *supra* Part III.

<sup>206</sup> See *supra* notes 16–31 and accompanying text.

<sup>207</sup> See 31 U.S.C. § 3729(d) (2012) (excluding "claims, records, or statements made under the Internal Revenue Code of 1986").

<sup>208</sup> See *supra* note 199.

<sup>209</sup> See *supra* note 167.

<sup>210</sup> For additional discussion of New York FCA's definition of "lawful acts" and the statute's anti-retaliation protections, see *supra* Part III.

<sup>211</sup> *United States v. Quest Diagnostics, Inc.*, 734 F.3d 154, 163 (2d Cir. 2013).

<sup>212</sup> For the public policy protecting the disclosure of confidential employer information in detecting and exposing an employer's violations of the law, see *supra* notes 189–94 and accompanying text.



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disclosure of confidential information and, on the other hand, New York's ethical rules for lawyers. Indeed, at the end of the day, the court either missed the relevant applicable law or it quietly subordinated New York's FCA (written by the legislature to benefit the State of New York and its taxpayers) to New York's ethics rules (written by and for lawyers).

Yet another irreconcilable difference between the *Quest* and *Vanguard* cases involves the whistleblowers themselves. In *Quest*, the lawyer whistleblower held high-level positions that exposed him to supremely sensitive information within his employer's organization. For seven consecutive years, the *Quest* whistleblower served as Vice President, Executive Vice President, Secretary, and General Counsel.<sup>213</sup> During this time, he acted as his employer's sole in-house lawyer, "responsible for all of [its] legal and compliance affairs," facts that the Circuit Court in *Quest* considered "central to the issues presented on appeal."<sup>214</sup> In addition, and in violation of New York's ethical rules for attorneys, the lawyer whistleblower in *Quest* "never reported his concerns to [the] Board" involving his employer's alleged unlawful conduct before blowing the whistle.<sup>215</sup> New York Rule of Professional Conduct 1.13 states that a lawyer "shall proceed as is reasonably necessary in the best interest of the organization" if the lawyer knows of "a violation of a 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

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<sup>213</sup> *Quest*, 734 F.3d at 159.

<sup>214</sup> *Id.* The court does not specify why it considered the whistleblower's role as the client's top legal and compliance officer so important to its analysis. We can surmise, however, that the court considered the whistleblower's position and access to his client's most sensitive financial and legal information as imposing on him heightened obligations of trust and loyalty that exceeded the typical lawyer's duty to refrain from unduly disclosing confidential client communications and information when exposing a client's alleged illegal activities. It cannot be that the lawyer whistleblower's organizational role in and of itself prevented him from disclosing the client's illegal activities. Indeed, when a lawyer has regular access to the confidential information that ends up forming the basis of his false claims action, out of principle he is simply calling authorities' attention to something that came to his attention in the normal course of his work and there should be little objection to him qualifying for a whistleblower award (compared to going out of his way to access and remove the confidential information, which could suggest that his motivation was to qualify for an award rather than expose a fraud or crime). For courts considering the relevance of whether whistleblowers had access to the confidential information they retained and disclosed in their false claims actions, see *supra* note 190.

<sup>215</sup> *Quest*, 734 F.3d at 160.

organization.”<sup>216</sup> Remedial measures include reporting the violation up the organizational ladder “to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.”<sup>217</sup> Only after taking these corrective measures may a lawyer contemplate revealing confidential information as permitted by Rule 1.6 or withdrawing as permitted by Rule 1.16.<sup>218</sup> The *Quest* whistleblower “reported out” his employer’s alleged misconduct before “reporting up,” thereby violating New York RPC 1.13.<sup>219</sup> He also violated New York RPC 1.6, which contains its own obligatory procedures for attempting to remediate client misconduct before revealing or using confidential client information to prevent a client from committing a crime.<sup>220</sup>

In stark contrast, the whistleblower in *Vanguard* occupied a considerably lower profile within his employer’s organization. Danon was employed less than five years as a mid-level in-house attorney concentrating on tax matters.<sup>221</sup> Unlike the *Quest* whistleblower (who was “responsible for all of [his employer’s] legal and compliance affairs” and thus arguably owed his client a heightened duty to refrain from unduly disclosing confidential information when he exposed and prosecuted his client’s alleged illegal activities), Danon’s legal representation focused on discrete tax matters<sup>222</sup> and did not involve issues pertaining to *Vanguard*’s alleged tax fraud.<sup>223</sup> Also unlike the *Quest* whistleblower, Danon “made repeated efforts” to report his

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<sup>216</sup> N.Y. RPC, *supra* note 62, r. 1.13(b) (2016).

<sup>217</sup> *Id.* r. 1.13(b)(3).

<sup>218</sup> *See id.* r. 1.13(c). For additional discussion of New York RPC 1.13 and its relation to other states’ version and the ABA’s version of 1.13, see *infra* notes 384–96 and Appendix.

<sup>219</sup> For a discussion of Rule 1.13 in the context of the *Vanguard* case, see *supra* note 73 and accompanying text as well as *infra* note 362 and accompanying text. For a discussion of Rule 1.13 in the context of the SEC whistleblower law, see *infra* notes 326–31 and accompanying text.

<sup>220</sup> *See supra* notes 68–73 and accompanying text.

<sup>221</sup> Affidavit of Danon, *supra* note 17, at 2, 4 (stipulating that Danon was employed as in-house tax attorney for *Vanguard* from August 2008 to June 2013).

<sup>222</sup> *See id.* at 4 (reporting that Danon was focused on specific tax matters, and never represented *Vanguard* with respect to federal tax returns or New York City or state tax returns). Nor is there any evidence in the record to indicate that Danon necessarily went out of his way to access and remove confidential information other than that to which he had regular access during the normal course of his work, a factor that courts consider in ascertaining whether a whistleblower’s retentions and disclosures went beyond the scope of those necessary to pursue the false claims action. *See supra* note 190.

<sup>223</sup> Affidavit of Danon, *supra* note 17, at 4.

employer's alleged unlawful conduct to higher ups in the organization.<sup>224</sup> Moreover, he in fact reported the alleged tax fraud up the organizational ladder on multiple occasions.<sup>225</sup> Only after his superiors' "refusal to act on clear violations of law" as well as their attempts to "silence" his efforts to stop and remediate those violations, did Danon notify the government of Vanguard's alleged tax fraud.<sup>226</sup>

These facts, as alleged in Danon's complaint and supplemental materials, were available to the *Vanguard* court as it weighed Vanguard's motion to dismiss Danon's action. But the court gave them scant consideration, even though Danon was entitled to receive credit for facts as presented.<sup>227</sup> Indeed, even the *defendant* acknowledged that Danon, as the non-moving party, was entitled under New York law to have his facts credited as alleged.<sup>228</sup>

After failing to credit the non-moving party for facts as presented, the *Vanguard* court adopted the moving party's versions of the facts — both explicitly and implicitly — even when those facts were in dispute. By way of example, consider the court's response to Danon's claim that Vanguard retaliated against him, and ultimately fired him, for trying to prevent the company from committing tax fraud. In considering this claim, the court queried whether Danon had engaged in "protected conduct" that, under New York's FCA, would have prevented an employer from retaliating against him.<sup>229</sup> The court quoted extensively from Danon's affidavit, reporting that Danon "made repeated efforts to put a stop to [Vanguard's] unlawful practices,"<sup>230</sup> that notwithstanding his efforts, "VGI continued its unlawful tax and securities fraud,"<sup>231</sup> that Danon believed his

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<sup>224</sup> Affidavit of David Danon in Support of Plaintiffs' Opposition to Defendants' Application for a Temporary Restraining Order and Preliminary Injunction at 2, *State ex rel. Danon v. Vanguard Grp., Inc.*, No. 100711/13, 2015 N.Y. Misc. LEXIS 4239 (N.Y. Sup. Ct. Nov. 13, 2015).

<sup>225</sup> See Affidavit of Danon, *supra* note 17, at 2-3.

<sup>226</sup> *Id.* at 3-4; see also Plaintiffs' Opposition, *supra* note 19, at 12 n.5 ("The Complaint and Danon's Affidavit make clear that Danon complied with Professional Rule 1.13 by notifying the government of Vanguard's wrongdoing only after Vanguard ignored his concerns," and citing to the relevant documents). For additional discussion of Danon's efforts to remediate Vanguard's alleged tax fraud internally before reporting out to authorities, see *supra* notes 35-38, 41 and accompanying text.

<sup>227</sup> See *supra* notes 51-58 and accompanying text.

<sup>228</sup> See Defendants' Reply Memo, *supra* note 89, at 19 n.24 (stating "Danon's allegations must be accepted as true for purposes of this motion").

<sup>229</sup> *State ex rel. Danon v. Vanguard Grp., Inc.*, No. 100711/13, 2015 N.Y. Misc. LEXIS 4239, at \*32-35 (N.Y. Sup. Ct. Nov. 13, 2015).

<sup>230</sup> *Id.* at \*33 (citing to ¶ 6 of affidavit).

<sup>231</sup> *Id.* (citing to ¶ 9 of affidavit).

termination “was in retaliation for his ‘persistent and vocal questioning of VGI’s unlawful practices,’”<sup>232</sup> and that the head of Vanguard’s legal tax group warned Danon that his “attempts to stop the illegal practices had harmed [his] relationship with important members of Vanguard’s tax department [and that] he should not put his concerns about costs in writing [and] two prior tax directors had suffered professional harm due to expressing [similar concerns].”<sup>233</sup> The court then proceeded to discount entirely Danon’s description of his efforts to remediate and prevent Vanguard’s alleged unlawful activity as well as his description of Vanguard’s threatening response to his efforts.

In place of Danon’s version of these events, the court inserted the defendant’s. In its Reply Memo, Vanguard had stated that Danon “fail[ed] to allege anywhere in his affidavit that on January 7, 2013, when Vanguard told him that he needed to find employment elsewhere before July 2013, Vanguard knew that he was involved in any conduct protected by the NYFCA.”<sup>234</sup> The court’s rendition of this purportedly fatal flaw in Danon’s pleading reads much like the defendant’s version: “Neither the complaint, nor the additional submissions, contain any allegations that [Vanguard] knew in January 2013 that Danon was involved in protected conduct,”<sup>235</sup> and furthermore, “Notably, Danon does not indicate the dates when he expressed his concerns to Vanguard’s employees and, in particular, whether he did so before he was informed of his termination in January 2013.”<sup>236</sup>

To be sure, Danon’s timeline of events lacks specific dates. But his complaint and sworn affidavit very clearly proceed chronologically. In fact, any reading of Danon’s affidavit other than sequential defies reason.<sup>237</sup> As importantly, the affidavit clearly indicates that Vanguard

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<sup>232</sup> *Id.* (citing to ¶¶ 8, 10 of affidavit).

<sup>233</sup> *Id.* at \*33-34 (alteration in original) (citing to ¶ 7 of affidavit).

<sup>234</sup> Defendants’ Reply Memo, *supra* note 89, at 29.

<sup>235</sup> *Danon*, 2015 N.Y. Misc. LEXIS 4239, at \*33.

<sup>236</sup> *Id.* at \*34.

<sup>237</sup> After a few ministerial paragraphs, the affidavit states: Danon began his employment in August 2008; “[i]n the course of [his] work,” Danon “became aware of facts revealing that [Vanguard] was avoiding paying millions in state and federal taxes”; Danon made “repeated attempts to put a stop to [Vanguard’s] unlawful practices,” he “considered [Vanguard’s] fraud extremely serious,” and he “stated [his] belief that it would likely result in substantial injury to [Vanguard]”; the head of Vanguard’s legal tax group attempted to silence Danon; his “discomfort with Vanguard’s illegal practices” and his “attempt to stop them was known by many in the legal tax group and tax department”; Vanguard “continued its unlawful tax and

was on notice that Danon had been engaged in protected conduct for some time when Vanguard told him in January 2013 that he would be terminated in six months.<sup>238</sup> In addition, there is no question that Danon's allegations of retaliation for protected conduct satisfy New York's pleading standard for plaintiffs in situations where the government declines to convert a *qui tam* action into a civil enforcement action (as occurred in the *Vanguard* case). In fact, while the government must plead fraud with particularity in New York,<sup>239</sup> *qui tam* plaintiffs are held to lower standards of notice pleading.<sup>240</sup>

Finally, the *Vanguard* court purported to evaluate whether Danon's efforts to remediate and ultimately disclose Vanguard's alleged tax and securities fraud constituted conduct protected from retaliation under New York's False Claims Act.<sup>241</sup> As discussed in Part III, the *Vanguard* court omitted any discussion of New York's FCA in considering Danon's retaliation claim. In particular, it disregarded the statute's detailed and far-reaching definition of protected conduct.<sup>242</sup> And it further ignored the statute's harsh punishments for employers that violate or impinge upon an employee's protected activity.<sup>243</sup>

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securities fraud" despite Danon's efforts to stop it; Vanguard informed him in January 2013 that he would be terminated, an act that Danon believed "was in retaliation for my persistent and vocal questioning of [Vanguard's] unlawful practices"; upon learning that his employment with Vanguard would end in six months, Danon began assembling documents to substantiate his belief that Vanguard was engaged in tax and securities fraud; paragraphs 12–17 include general statements pertaining to Danon's work at Vanguard; Danon reported the alleged fraud to appropriate authorities only after he was "unable to stop the fraudulent conduct"; beginning in January 2013, Danon provided documents substantiating Vanguard's alleged tax and securities fraud to the IRS, SEC, and New York's Attorney General; Danon provided documents to those authorities "in order to further their interests in preventing securities and tax fraud"; Danon filed a New York *qui tam* action in May 2013; and Danon's employment at Vanguard terminated in June 2013. Affidavit of Danon *supra* note 17, at 2-5.

<sup>238</sup> See *id.* at 2-4.

<sup>239</sup> See N.Y. C.P.L.R. 3016(b) (2017) (providing that "[w]here a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail").

<sup>240</sup> See N.Y. STATE FIN. LAW § 192(1-a) (2017). For New York's general notice pleading standard, see N.Y. C.P.L.R. 3013 (2017), which states that a plaintiff need only provide "notice of the transactions, occurrences . . . to be proved."

<sup>241</sup> See *Danon*, 2015 N.Y. Misc. LEXIS 4239, at \*32 (stating that to properly state a claim of retaliation, whistleblowers "must show that . . . the employee engaged in conduct protected under the [FCA]").

<sup>242</sup> See N.Y. STATE FIN. LAW § 191(1)–(2) (2017).

<sup>243</sup> See *id.* § 191(1)(a)–(e).

Instead, the court evaluated Danon's retaliation claim wholly extrinsic to New York's FCA, and along the lines as suggested by defendant-Vanguard. After failing to cite or mention the FCA provisions covering activity protected under the statute, the *Vanguard* court concluded that Danon's "complaints"<sup>244</sup> to his superiors constituted part of his regular duties as a lawyer in Vanguard's legal department, and thus did not amount to "protected activity" under New York's FCA. Citing to a recent decision (which affirmed an opinion authored by the judge in the *Vanguard* case), the court wrote: "Here, Danon has not shown that his complaints 'went beyond the performance of his normal job responsibilities so as to overcome the presumption that he was merely acting in accordance with his employment obligation.'"<sup>245</sup> The problem with the court's analogy is that the lawyer whistleblower in the cited case looked nothing like Danon. Indeed, he served as Chief Financial Officer and Chief Operating Officer responsible for "managing the financial affairs of the company,"<sup>246</sup> positions so prominent within the organization and charged with such broad compliance duties, the court concluded that his "complaints and objections"<sup>247</sup> to the CEO did not extend beyond his job responsibilities.<sup>248</sup> Meanwhile, Danon served as a mid-level in-house lawyer at one of the world's largest investment companies with discrete job responsibilities. His extensive internal reporting pertaining to Vanguard's alleged tax and securities fraud<sup>249</sup> amounted to significantly more than what the *Vanguard* court characterized (on four occasions) as "complaints."<sup>250</sup> Danon's efforts far exceeded his "normal job responsibilities"<sup>251</sup> pertaining to monitoring his employer's compliance with state and federal tax laws. Here as elsewhere, the court improperly failed to credit Danon's facts as

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<sup>244</sup> *Danon*, 2015 N.Y. Misc. LEXIS 4239, at \*33, \*35 (referencing the "complaints" four times).

<sup>245</sup> *Id.* at \*35 (citing *Landfield v. Tamares Real Estate Holdings, Inc.*, 976 N.Y.S.2d 381 (App. Div. 2013) (affirming dismissal of a retaliation claim under New York's FCA)).

<sup>246</sup> *Landfield*, 976 N.Y.S.2d at 382.

<sup>247</sup> *Id.*

<sup>248</sup> The court also noted that depending on the particular circumstances of a case and a whistleblower's personal and professional characteristics, "internal complaints alone may constitute efforts to stop the violation of a false claims statute and thus rise to the level of protected conduct." *Id.*

<sup>249</sup> See *supra* notes 35–38, 41 and accompanying text.

<sup>250</sup> See *supra* note 244. It is worth pointing out that mere "complaints" do not typically constitute offenses that result in an employee's termination.

<sup>251</sup> *Supra* note 244.

presented, and instead substituted defendant-Vanguard's disputed version of the facts, which asserted that Danon failed to report up the ladder both far enough and vigorously enough,<sup>252</sup> and that he "was merely fulfilling his job functions and voicing his concerns' to his supervisor."<sup>253</sup>

These are precisely the kind of factual disputes that cannot be decided on a motion to dismiss, much less uniformly in the defendant's favor. Nor are they the kind of disputes that a court can reconcile by applying the wrong statute, by ignoring the statute under which the whistleblower brought his action, or by analogizing to an inapt and easily distinguishable case.

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<sup>252</sup> In its Reply Memo, defendant-Vanguard argued vociferously that Danon failed to meet the reporting up requirements of New York RPC 1.13. In fact, Vanguard accused Danon of lying about his efforts to alert higher-ups of Vanguard's alleged tax and securities fraud. Consider just a few examples: (i) "merely relating his concerns to his supervisor, as he claims, was no more than what Danon was required to do as part of his regular job duties and did not constitute the extraordinary measures required by Rule 1.13 before 'reporting out,'" Defendants' Reply Memo, *supra* note 89, at 25; (ii) claiming Danon's "purported efforts to comply with [Rule 1.13's reporting up] requirement fell far short of what was required," *id.* at 18; (iii) Danon's "specious claim that he told 'the head of the legal tax group and other senior members of Vanguard's tax department that [he] believed Vanguard's at-cost pricing illegally avoided taxes' is insufficient to comply with Rule 1.13," *id.* at 18-19; and (iv) criticizing "the vague and far-fetched allegations that [Danon] has fabricated in an effort to avoid dismissal and disqualification. His generic allegation that he informed 'the head of the legal tax group and other senior members of Vanguard's tax department' that he believed Vanguard's at-cost structure illegally avoided taxes carefully fails to provide any specifics," *id.* at 19 n.24. The court was persuaded by Vanguard's version of Danon's actions with respect to his reporting up obligations, while failing to credit Danon's facts as presented with respect to his reporting up efforts.

<sup>253</sup> Defendants' Reply Memo, *supra* note 89, at 28. In fact, the court effectively lifted its conclusion on Danon's actions vis-à-vis his job responsibilities from defendant-Vanguard's Reply Memo, which states ". . . even if [Danon] had reported to his supervisor, the head of the tax group in the Legal department, as he claims, that Vanguard's 'at-cost' pricing structure violated the tax laws, that would not constitute 'protected activity' under the NYFCA." *Id.* at 28. In strikingly similar fashion, the court concluded, "even assuming *arguendo* that Vanguard knew of internal complaints made by Danon prior to notifying him of his termination, under the circumstances here, complaints regarding Vanguard's 'at-cost' pricing structure do not constitute 'protected activity' for the purposes of the False Claims Act." *State ex rel. Danon v. Vanguard Grp., Inc.*, No. 100711/13, 2015 N.Y. Misc. LEXIS 4239, at \*35 (N.Y. Sup. Ct. Nov. 13, 2015).

V. A DEFECTIVE ETHICS OPINION PERTAINING TO LAWYER  
WHISTLEBLOWERS

As the last two Sections discussed, the *Vanguard* court failed to examine in any meaningful way the very statute under which Danon brought his whistleblower action and its claim of employer retaliation. Moreover, the *Vanguard* court attempted to fit the disputed facts into the four corners of a loosely related and inapposite case. That attempt failed not because the underlying case was necessarily unsound or wrongly decided,<sup>254</sup> but because the facts and circumstances surrounding the two cases were so dissimilar.

In concluding that Danon revealed more than was reasonably necessary to prevent a crime or fraud, the *Vanguard* court cited to — and, in many respects, adopted the reasoning of — an ethics opinion pertaining to lawyer whistleblowers. That opinion, promulgated by the New York County Lawyers' Association (NYCLA),<sup>255</sup> considered whether the New York Rules of Professional Conduct permit lawyers to receive monetary awards under the Securities and Exchange Commission's (SEC) whistleblower program for disclosing confidential information pertaining to a client's violations of federal securities laws. The opinion found "few circumstances, if any, in which . . . it would be reasonably necessary [] for a lawyer to pursue the steps necessary to collect a bounty as a reward for revealing confidential material."<sup>256</sup> It concluded that New York lawyers "presumptively may not ethically collect whistleblower bounties in exchange for disclosing confidential information about their clients"<sup>257</sup> under the SEC whistleblower program.

The NYCLA opinion's shortcomings are conspicuous as well as subtle, and add up to a fatally flawed analysis of whether lawyers can blow the whistle on clients. This Section discusses the opinion's defects, both as a way to undercut its legitimacy as an authority on the subject of lawyer whistleblowers and to highlight the *Vanguard* court's own defective analysis and conclusions in so far as it adopted the logic of the NYCLA opinion. Specifically, this Section discusses how the NYCLA opinion proceeds — much like the *Vanguard* court and

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<sup>254</sup> Which is not to say that the court's opinion in the case contained no flaws. Indeed, as noted in Part IV, the *Quest* court's opinion dismissing a lawyer whistleblower's complaint failed to consider the vast case law that has formed a public policy exception permitting whistleblowers to disclose confidential employer information in the furtherance of exposing employer misconduct.

<sup>255</sup> See NYCLA, *supra* note 11.

<sup>256</sup> *Id.* at 9.

<sup>257</sup> *Id.* at 1.



defendant-Vanguard — from faulty premises about how and why employees blow the whistle on employers. Moreover, the opinion misrepresents lawyers' eligibility under the SEC whistleblower program. And it provides a misleading analysis of the relationship between state ethics rules and the SEC's ethics rules as contained in SEC Rule Part 205 pertaining to standards of professional conduct for attorneys appearing and practicing before the SEC.<sup>258</sup> Notably, the NYCLA opinion fails to recognize that Part 205 expressly preempts state ethics rules, including New York's Rules of Professional Conduct, *and* that it subsequently protects lawyer whistleblowers from state bar discipline and breach of fiduciary duty claims. Finally, the NYCLA ethics opinion offers a defective analysis of the conflicts of interest that may arise when lawyers are permitted to receive monetary awards for blowing the whistle on clients engaged in unlawful conduct.<sup>259</sup> In fact, the NYCLA's conflicts analysis is so defective that it reads out nearly all of the disclosure exceptions to protecting confidential client information contained in New York's ethics rules.

A. *Flawed Premises About How and Why Employees Blow the Whistle*

In analyzing whether Danon's disclosure of confidential client information was reasonably necessary to prevent Vanguard's alleged tax fraud, the *Vanguard* court concluded that Danon's "broad disclosure of confidential tax information related to past years as revealed in the *qui tam* complaint, from which Danon stood to profit, was greater than reasonably necessary to prevent Vanguard from committing any alleged future tax violations."<sup>260</sup> As support for its conclusion, the court cited to *Quest*, hardly surprising given the number of times the court relied on the case throughout its opinion.<sup>261</sup> But the court also cited to a recent ethics opinion authored by the New

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<sup>258</sup> See Implementation of Standards of Professional Conduct for Attorneys, Securities and Exchange Commission Release Nos. 33-8185; 34-47276; 1C-25919; File No. S7-45-02, 17 C.F.R. § 205 (2003) [hereinafter Implementation of Standards of Professional Conduct for Attorneys].

<sup>259</sup> While the *Vanguard* court did not make any findings as to whether Danon violated New York state ethics rules pertaining to current (RPC 1.7) or former (RPC 1.9) clients (see *infra* note 265 and accompanying text), some of the relevant considerations under these rules permeate the court's analysis of RPC 1.6 and whether Danon's disclosure of Vanguard's confidential client information was more than reasonably necessary to prevent Vanguard's ongoing tax and securities violations.

<sup>260</sup> State *ex rel.* Danon v. Vanguard Grp., Inc., No. 100711/13, 2015 N.Y. Misc. LEXIS 4239, at \*26-27 (Sup. Ct. N.Y. Nov. 13, 2015) (emphasis added).

<sup>261</sup> See *supra* note 202 and accompanying text (detailing the seventeen times the *Vanguard* court cited to *Quest*).

York County Lawyers' Association, and quoted favorably the opinion's ultimate conclusion, "As a general principle, there are few circumstances, if any, in which . . . it would be reasonably necessary within the meaning of [Rule] 1.6(b) for a lawyer to pursue the steps necessary to collect a bounty as a reward for revealing confidential material."<sup>262</sup>

These are not the only two instances where the *Vanguard* court and the NYCLA ethics opinion express concern over how "bounties" awarded for disclosing confidential client information might adversely affect the attorney-client relationship, even in situations where the disclosed information reveals illegal activity.<sup>263</sup> Such a concern might be relevant when considering whether and to what extent the lure of cash "bounties" undermine a lawyer's independent professional judgment and client loyalty, thereby creating a potential personal conflict of interest between the lawyer and a current or former client.<sup>264</sup> But the *Vanguard* court made no findings with respect to whether Danon violated the applicable rules pertaining to conflicts of interest.<sup>265</sup> Even so, some of the usual considerations under the conflicts rules informed the court's analysis of whether Danon's disclosure of defendant-Vanguard's confidential client information was more than reasonably necessary to prevent Vanguard's unlawful activities.

It is hard to say with certainty how these inapt considerations made their way into the *Vanguard* opinion. A reasonable possibility — particularly given the court's adoption of defendant-Vanguard's version of disputed facts in other parts of its opinion<sup>266</sup> — is that they reflect the influence of defendant-Vanguard's court submissions. Indeed, defendant-Vanguard asserted on several occasions that Danon blew the whistle solely for personal gain. "Having breached the duties

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<sup>262</sup> *Danon*, 2015 N.Y. Misc. LEXIS 4239, at \*27 (alteration in original) (quoting NYCLA Opinion).

<sup>263</sup> *Id.* at \*36 (concluding its opinion by stating that Danon "may not proceed with, nor profit from, any disclosure of confidential information to bring this *qui tam* action in violation of New York State attorney ethics rules").

<sup>264</sup> See N.Y. RPC, *supra* note 62, r. 1.7(a)(2) (prohibiting a lawyer from representing a client "if a reasonable lawyer would conclude that . . . there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests").

<sup>265</sup> See *Danon*, 2015 N.Y. Misc. LEXIS 4239, at \*30 ("The court also need not reach whether Rule 1.7, relating to conflicts of interest with current clients, and/or Rule 1.9(a), relating to side-switching, were violated.")

<sup>266</sup> See *supra* notes 234–36, 252–53 and accompanying text.

of loyalty and confidentiality he owes Vanguard,” the defendant stated in one of its briefs, “Danon should not be permitted to continue with this action and thereby *profit from his singular focus on his own self-interest*.”<sup>267</sup> In another submission, defendant-Vanguard called Danon’s lawsuit “a brazen attempt by an in-house lawyer *to obtain a bounty as a whistleblower by suing his client* with respect to the very issues on which he provided legal advice to his client.”<sup>268</sup> Throughout its court submissions, defendant-Vanguard reminded the court that Danon stood to receive a sizeable “bounty” if he prevailed in the case.<sup>269</sup>

It is also possible that the *Vanguard* court was influenced by the NYCLA ethics opinion and its similar predisposition against cash rewards for lawyer whistleblowers. Indeed, the NYCLA opinion is saturated with references to whistleblower “bounties,” using the term “bounty” or “bounties” twenty-six times.<sup>270</sup> Furthermore, the NYCLA opinion refers to the SEC’s whistleblower program, established by Congress in 2010 as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank),<sup>271</sup> as the SEC’s “whistleblower bounty program”<sup>272</sup> and the “Dodd-Frank whistleblower bounty.”<sup>273</sup>

These references to whistleblower “bounties” and “bounty programs” — whether used by the *Vanguard* court, defendant-Vanguard, or the NYCLA — reflect clear pejorative connotations. And while such characterizations might be appropriate in a legal brief or other piece of advocacy, they are inappropriate and disrespectful when coming from a court of law or a bar association. Moreover, they are simply inaccurate with respect to the SEC whistleblower program in that they do not reflect the characterization of the Congress that enacted the program nor the agency that administers it. To be sure, neither Congress nor the SEC characterizes the “Securities and Whistleblower Incentives and Protection” program as a “bounty

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<sup>267</sup> Defendants’ Reply Memo, *supra* note 89, at 3.

<sup>268</sup> Defendants’ Memo in Support of Motion to Dismiss, *supra* note 169, at 1.

<sup>269</sup> See Defendants’ Reply Memo, *supra* note 89, at 17 n.20, 22; Defendants’ Memo in Support of Motion to Dismiss, *supra* note 169, at 1 (twice), 6, 12, and 17.

<sup>270</sup> See NYCLA, *supra* note 11, at 1 (three times), 2 (two), 3 (five), 5 (two), 9 (four), 10 (three), 11 (two), 12 (two), 13 (one), 14 (one), and 15 (one).

<sup>271</sup> See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, § 922, 124 Stat. 1376, 1841-49 (2010) (subsequently added to the Securities Exchange Act of 1934 as Section 21F, 15 U.S.C. § 78u-6, entitled “Securities Whistleblower Incentives and Protection.”).

<sup>272</sup> NYCLA, *supra* note 11, at 1-2.

<sup>273</sup> *Id.* at 10.

program.” Nor does Congress or the SEC refer to payments to whistleblowers under the program as “bounties.” Rather they are consistently identified as “awards.”<sup>274</sup> Indeed, the word “bounty” does not appear in Section 922 of Dodd-Frank,<sup>275</sup> nor in the regulations promulgated thereunder,<sup>276</sup> nor in the 2015 Annual Report to Congress on the SEC Whistleblower Program,<sup>277</sup> nor in the SEC’s 305-page Final Rule implementing the Whistleblower Provisions of 21F of the Securities Exchange Act of 1934,<sup>278</sup> nor anywhere on the website of the SEC’s Office of the Whistleblower.<sup>279</sup>

The repetitive use of the term “bounty” by the NYCLA, the *Vanguard* court, and defendant-*Vanguard* betrays a strong policy bias at odds with the policy preferences of the drafters of the SEC whistleblower program.

Far from a program designed to pay employees — lawyers or otherwise — for ratting out employers and clients, Congress established the SEC whistleblower program to supplement and enhance traditional securities enforcement. Congress extended “monetary awards to eligible individuals who voluntarily provide original information that leads to successful Commission enforcement actions . . . and successful related actions.”<sup>280</sup> As interpreted by the SEC, “the broad objective of the whistleblower program is to enhance the Commission’s law enforcement operations by increasing the financial incentives for reporting and lowering the costs and barriers to potential whistleblowers, so that they are more inclined to provide the Commission with timely, useful information that the Commission might not otherwise have received.”<sup>281</sup> Furthermore, assistance and information from whistleblowers of possible securities law violations “can be among the most powerful weapons in the [Commission’s] law enforcement arsenal.”<sup>282</sup> Indeed, whistleblowers “can help . . . identify possible fraud and other violations much earlier than might otherwise

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<sup>274</sup> See Dodd-Frank § 922(b)–(g), (i)–(j).

<sup>275</sup> See *id.*

<sup>276</sup> See 15 U.S.C. § 78u-6 (2010) (Securities Whistleblower Incentives and Protections).

<sup>277</sup> See SEC 2015 ANNUAL REPORT, *supra* note 124.

<sup>278</sup> See Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934; Release No. 34-64545, 7 C.F.R. §§ 240, 249 (2016) [hereinafter SEC Final Rule].

<sup>279</sup> See *Welcome to the Office of the Whistleblower*, U.S. SEC. & EXCH. COMM’N, <https://www.sec.gov/whistleblower/> (last visited Jan. 5, 2016).

<sup>280</sup> SEC 2015 ANNUAL REPORT, *supra* note 124, at 4.

<sup>281</sup> SEC Final Rule, *supra* note 278, at 105.

<sup>282</sup> *Welcome to the Office of the Whistleblower*, *supra* note 279.

have been possible,” thereby allowing the SEC “to minimize the harm to investors, better preserve the integrity of the United States’ capital markets, and more swiftly hold accountable those responsible for unlawful conduct.”<sup>283</sup>

Based on the goals and underlying mission of the SEC whistleblower program, lawyers are perfectly situated to participate in and knowledgeably reinforce Congressional intent to root out and prosecute securities violations. The New York County Lawyers’ Association feels differently, however. Blinded by the faulty premise that whistleblowers report alleged misconduct solely in pursuit of financial gain, and that whistleblowers further eschew internal reporting for the promise of lucrative cash awards from regulatory “bounty” programs,<sup>284</sup> NYCLA Formal Opinion 746 effectively concludes that lawyers can never participate in whistleblower programs if it involves revealing and using confidential client information.

According to the NYCLA, lawyer whistleblowers are in it only for the money. “[D]isclosure of confidential information *in order to collect a whistleblower bounty* is unlikely, in most instances, to be ethically justifiable,”<sup>285</sup> and “there are few circumstances, if any, in which . . . it would be reasonably necessary . . . for a lawyer to pursue the steps necessary to collect a bounty as a reward for revealing confidential material.”<sup>286</sup> But the faulty premise — that lawyer whistleblowers disclose client confidences “in order to collect a whistleblower bounty” — ignores the more reasonable premise that a lawyer concerned about her client’s illegal activities would disclose client confidences only, if ever, “to prevent the client from committing a

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<sup>283</sup> *Id.* In similar fashion, the IRS whistleblower program supplements and enhances traditional tax administration and enforcement. “It is without question that the Whistleblower Program makes an important contribution to the tax system,” the Director of the IRS Whistleblower Office wrote in his most recent annual report to Congress, “both by helping encourage compliance (through a deterrent effect on those who may otherwise engage in tax evasion or avoidance) and by contributing to tax gap reduction. In fact, submissions of valuable information have resulted in a wide range of audits and investigations yielding significant collections of unpaid taxes. The IRS is committed to maximizing the success of the Whistleblower Program.” 2015 IRS ANNUAL REPORT, *supra* note 101, at 3.

<sup>284</sup> To the extent that the NYCLA and other critics of whistleblower programs fear that employees will forego internal reporting to seek cash awards, that fear is absent in the *Vanguard* case. Indeed, David Danon performed such extensive internal reporting in the defendant’s eyes that he made a pest of himself, so much so that it fired him.

<sup>285</sup> NYCLA, *supra* note 11, at 9 (emphasis added).

<sup>286</sup> *Id.* (emphasis added).

crime.”<sup>287</sup> New York’s RPC permits such disclosure, because the exception “recognizes that society has important interests in preventing a client’s crime.”<sup>288</sup> Furthermore, the NYCLA’s faulty premise ignores that under New York ethics rules, “The lawyer’s exercise of discretion [in disclosing a client’s intent to commit a crime] . . . requires consideration of a wide range of factors and should therefore be given great weight.”<sup>289</sup> And the opinion ignores still further the old New York Code of Professional Responsibility’s conclusion that a lawyer “is afforded the professional discretion to reveal the intention of a client to commit a crime and the information necessary to prevent the crime and cannot be subjected to discipline either for revealing or not revealing such intention or information.”<sup>290</sup>

In the end, the NYCLA’s faulty premise prevents it from acknowledging that monetary awards under whistleblower programs are significantly more often an *effect* rather than a *cause* of blowing the whistle. A 2012 report published by the Ethics Resource Center<sup>291</sup> investigated whether potential financial awards offered by whistleblower programs encouraged employees to report alleged misconduct, either internally or to authorities outside the company.<sup>292</sup> The report found that employees were considerably more motivated to blow the whistle based on the severity of the perceived misconduct (82 percent would report if the crime were “big enough”) and its potential harm to others (76 percent would report if failing to do so might cause harm) rather than on the promise of a financial award (43 percent would report for the “potential to receive a substantial monetary reward”).<sup>293</sup> In addition, only 18 percent of respondents had

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<sup>287</sup> N.Y. RPC, *supra* note 62, r. 1.6(b)(2).

<sup>288</sup> *Id.* r. 1.6 cmt. 6C.

<sup>289</sup> *Id.* cmt. 6A.

<sup>290</sup> N.Y. CPR, *supra* note 64, at EC 4-7.

<sup>291</sup> The Ethics Resource Center is the research arm of the Ethics Compliance Initiative and a U.S.-based nonprofit organization that has compiled and analyzed organizational ethics and compliance data since 1922.

<sup>292</sup> See ETHICS RES. CTR., 2011 NATIONAL BUSINESS ETHICS SURVEY: WORKPLACE ETHICS IN TRANSITION 43 (2012) [hereinafter ERC 2011], <https://s3.amazonaws.com/berkeley-center/120101NationalBusinessEthicsSurvey2011WorkplaceEthicsinTransition.pdf>; ETHICS RES. CTR., INSIDE THE MIND OF A WHISTLEBLOWER: A SUPPLEMENTAL REPORT OF THE 2011 NATIONAL BUSINESS ETHICS SURVEY 13 (2012) [hereinafter ERC 2012], <http://www.corporatecomplianceinsights.com/wp-content/uploads/2012/05/inside-the-mind-of-a-whistleblower-NBES.pdf>. For another rigorous, though non-survey based, analysis of the costs and benefits of blowing the whistle, see Sachin S. Pandya, *Tax Liability for Wage Theft*, 3 COLUM. J. TAX L. 113, 132-40, 143 (2012) (examining whistleblowing in context of illegal wage underpayment by employers).

<sup>293</sup> ERC 2011, *supra* note 292, at 44; ERC 2012, *supra* note 292, at 14.

ever reported observed misconduct outside the company,<sup>294</sup> while 92 percent of that group did so only after first attempting to report internally.<sup>295</sup> A mere 3 percent of all whistleblowers went outside the company as a first resort.<sup>296</sup>

The upshot from these findings is clear: whistleblowers “are often motivated more by principle — that is to say, wanting to do the right thing — than by money.”<sup>297</sup> Moreover, they overwhelmingly report perceived misconduct internally as a first step, and they rarely, if ever, report misconduct to outside authorities.<sup>298</sup>

The NYCLA ethics opinion recognizes none of these realities. It also fails to appreciate the extent to which the SEC whistleblower program (the program that the NYCLA purports to analyze) encourages and rewards whistleblowers for reporting misconduct internally. Indeed, the SEC program “was designed to complement, rather than replace,

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<sup>294</sup> ERC 2012, *supra* note 292, at 11; *see also* ETHICS RES. CTR., NATIONAL BUSINESS ETHICS SURVEY OF THE U.S. WORKFORCE 29-30 (2013) [hereinafter ERC 2013], <https://www.ibe.org.uk/userassets/surveys/nbes2013.pdf>, (finding that only 20 percent of whistleblowers reported outside company).

<sup>295</sup> ERC 2013, *supra* note 294, at 29; *see also* ERC 2012, *supra* note 292, at 2 (finding that 84 percent first reported internally); NAT'L WHISTLEBLOWERS CTR., IMPACT OF QUI TAM LAWS ON INTERNAL COMPLIANCE: A REPORT TO THE SECURITIES EXCHANGE COMMISSION 4 (2010), <http://www.whistleblowers.org/storage/documents/DoddFrank/nwcreporttosecfinal.pdf> (finding that 89.7 percent of whistleblowers first reported internally).

<sup>296</sup> ERC 2011, *supra* note 292, at 43. Just 2 percent of whistleblowers went outside the company without ever reporting the misconduct to their employers. ERC 2012, *supra* note 292, at 2. Victims of retaliation are far more likely to report misconduct outside the company. *See* ERC 2011, *supra* note 292, at 37 (reporting that 90 percent of employees considered reporting outside the company after experiencing retaliation for reporting misconduct, compared to 69 percent of those who did not experience retaliation).

<sup>297</sup> Michael P. Dolan & Timothy J. McCormally, *Which Way the Wind Blows: Mitigating Whistleblowing Risk*, 139 TAX NOTES 1537, 1542 (2013).

<sup>298</sup> It is worth noting that Bradley Birkenfeld, a former employee of Swiss banking giant UBS and perhaps the most famous whistleblower in U.S. history, reported the massive fraud perpetrated by UBS to the U.S. government only after the company's compliance office repeatedly ignored his internal complaints. In September 2012, Birkenfeld received a \$104 million whistleblower award from the IRS for providing information that exposed how UBS actively concealed taxable income of U.S. clients for decades by hiding assets in secret offshore accounts. Birkenfeld's assistance, the IRS said in announcing the award, was “exceptional in both its breadth and depth” and allowed the U.S. government to pursue “unprecedented actions against UBS AG, with collateral impact on other enforcement activities.” Tax Analysts, *IRS Summary Award Report Recommends \$104 Million Payment to Whistleblower*, 2012 TAX NOTES TODAY 177-20 (Sept. 12, 2012).

existing corporate compliance programs.”<sup>299</sup> In fact, the program includes “a significant financial incentive for whistleblowers to report possible violations to internal compliance programs before, or at the same time, they report to” the SEC.<sup>300</sup> Moreover, the program’s financial incentives “both mitigate any diversion from internal reporting of individuals who would be predisposed to report internally in the absence of the whistleblower program, and incentivize new individuals who otherwise might never have reported internally to enter the pool of potential internal whistleblowers.”<sup>301</sup>

Finally, the NYCLA opinion ignores the economic and emotional costs associated with blowing the whistle on a client’s unlawful activity, costs that act as significant barriers to whistleblowing. “There is a 100 percent chance that you will be unemployed,” says Patrick Burns of Taxpayers Against Fraud; “the question is, Will you be forever unemployable?”<sup>302</sup> Whistleblowers “who try to flag wrongdoing in the workplace endure immense hardships and are often harmed in the process. In spite of safeguards, many are identified, driven from their jobs and branded as troublemakers in their industries,” which “makes it difficult for them to find new jobs.”<sup>303</sup> Moreover, they experience high rates of “bankruptcies . . . [h]ome foreclosures, divorce, suicide and depression.”<sup>304</sup> A financial reward for blowing the whistle must overcome these multiple and ever-present costs, a reality that the NYCLA disregards when considering

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<sup>299</sup> SEC 2015 ANNUAL REPORT, *supra* note 124, at 4 (citing to §§ 21F-4(b)(7), 21F-6(a)(4), 21F-6(b)(3)).

<sup>300</sup> SEC Final Rule, *supra* note 278, at 101 (discussing Rule 21F-4(c)(3)).

<sup>301</sup> *Id.* at 102-03. At the same time, the SEC believes that “internal compliance programs are not substitutes for rigorous law enforcement.” *Id.* at 97. “In some cases,” according to the SEC, “law enforcement interests will be better served if we know of potential fraud before the entities or individuals involved learn of our investigation. This is particularly true when there is a risk that an entity or individual may try to hinder or impede our investigation by, for example, destroying documents or tampering with witnesses. Similarly, there are circumstances where a whistleblower may have legitimate reasons for not wanting to report the information internally, for example, legitimate concerns about misconduct by the company’s management or within the internal compliance program, or a reasonable basis to fear retaliation or personal harm.” *Id.* at 104 (citation omitted).

<sup>302</sup> Paul Sullivan, *The Price Whistle-Blowers Pay for Secrets*, N.Y. TIMES (Sept. 21, 2012), <http://www.nytimes.com/2012/09/22/your-money/for-whistle-blowers-consider-the-risks-wealth-matters.html>.

<sup>303</sup> Gretchen Morgenson, *Monsanto Whistle-Blower: \$22 Million Richer, but Not Satisfied*, N.Y. TIMES (Sept. 9, 2016), <http://www.nytimes.com/2016/09/11/business/for-monsanto-whistle-blower-a-22-million-award-that-fell-short.html>.

<sup>304</sup> Sullivan, *supra* note 302 (quoting John Phillips of Phillips & Cohen).



whether a lawyer may ethically disclose client confidences “in order to collect a whistleblower bounty.”

Before discussing the NYCLA’s misrepresentation of lawyers’ eligibility under the SEC whistleblower program, it is worth highlighting one final consequence of the NYCLA’s faulty premise that whistleblowers are simply in it for the money. “Even when disclosure is permitted under the New York Rules,” the NYCLA opines, “for example, when clear corporate wrongdoing rising to the level of crime or fraud has been perpetrated through the use of the lawyer’s services, preventing wrongdoing is not the same as collecting a bounty.”<sup>305</sup> But it certainly can be, and New York’s ethical rules permit it. Indeed, the New York RPC allows lawyers to collect a “bounty” as a result of “preventing wrongdoing” so long as the motivation to report out client misconduct and to be in a position to collect an award involves stopping the client from committing a crime. For instance, a lawyer may have exhausted all internal reporting options yet the employer-client insists on engaging in the misconduct that forced the lawyer’s initial internal reporting.<sup>306</sup> In those instances, the lawyer may be faced with no other viable alternative but to report out due to the employer-client’s ongoing and damaging unlawful activity. Consequently, any future award becomes an *effect* of doing what is permitted under the ethical rules rather than a motivation for violating the rules.

The NYCLA’s phrase, “preventing wrongdoing is not the same as collecting a bounty,” also creates a false choice for lawyers. When faced with “clear corporate wrongdoing rising to the level of crime or fraud [that] has been perpetrated through the use of the lawyer’s services,” the NYCLA stops just short of saying that the lawyer has two choices: (i) refrain from disclosing the crime or fraud if the disclosure might result in a monetary award for the lawyer, or (ii) disclose the crime or fraud as a “tipster” rather than a whistleblower, and refrain from seeking or accepting a monetary award. In fairness to the NYCLA, and to acknowledge the root of some people’s ambivalence about whistleblowers, paying someone to do the right

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<sup>305</sup> NYCLA, *supra* note 11, at 9.

<sup>306</sup> Recall that New York RPC 1.13 obligates New York lawyers to act “in the best interest of the organization” when they know that an organizational client (through an officer, employee, or other person associated with the organization) “is engaged in action or intends to act or refuses to act in a matter related to the representation that (i) is a violation of a legal obligation to the organization or a violation of law that reasonably might be imputed to the organization, and (ii) is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization.” N.Y. RPC, *supra* note 62, r. 1.13(b).

thing might be considered unseemly. Without the overlay of legal ethics, policymakers and courts have largely agreed that providing incentives to whistleblowers results in more fraud being detected, exposed, and prosecuted. But throwing legal ethics into the mix prompts a set of new considerations involving the effect of financial incentives on the attorney-client relationship.<sup>307</sup> Nonetheless, either alternative suggested by the NYCLA — that is, refrain from disclosing a crime or fraud if disclosure might result in a monetary award or, alternatively, disclose the crime or fraud as a tipster without any expectation of payment — if based on the taint of a financial benefit for doing the right thing under the ethical rules, presents a choice that the ethical rules neither require nor contemplate. As we have already discussed<sup>308</sup> and as we will discuss again shortly,<sup>309</sup> a lawyer “is under no obligation to advocate iniquity”<sup>310</sup> nor to “conceal the wrongdoing of a client”<sup>311</sup> who, if “actually engaged in committing a wrong can have no privileged witnesses.”<sup>312</sup> The false choice that the NYCLA opinion presents New York lawyers becomes even less legitimate after accounting for the federal preemption of New York’s ethics rules in the context of a lawyer wishing to disclose confidential information pertaining to a client’s securities law violations.

*B. Misrepresenting Lawyers’ Eligibility Under the SEC Whistleblower Program*

Under its whistleblower program, the SEC pays monetary awards to persons — including lawyers<sup>313</sup> — who provide the Commission with “original information” leading to a successful enforcement action resulting in monetary sanctions exceeding \$1,000,000.<sup>314</sup> The SEC

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<sup>307</sup> Once more, I am indebted to Randy Fox for an informed and thoughtful suggestion, this time dealing with the issue of whether lawyers should be restricted to acting as tipsters versus whistleblowers.

<sup>308</sup> See *supra* notes 12–14 and 65 and accompanying text.

<sup>309</sup> See *infra* notes 413–15 and accompanying text.

<sup>310</sup> WARVELLE, *supra* note 12, at 174.

<sup>311</sup> ABA Formal Op. 155, *supra* note 65.

<sup>312</sup> *Id.*

<sup>313</sup> Lawyers are not listed as ineligible whistleblowers under the SEC whistleblower program. See Securities Whistleblower Incentives and Protections, 17 C.F.R. § 240.21F-8(c)(1)–(7) (2017) (identifying persons ineligible to participate in the program). Similarly, lawyers are eligible to participate in the IRS whistleblower program. See Treas. Reg. § 301.7623-1(b)(2) (2016) (failing to include lawyers as “[i]neligible whistleblowers”).

<sup>314</sup> 17 C.F.R. § 240.21F-3(a)(1)–(4).

defines “original information” as information (i) derived from the whistleblower’s “independent knowledge” or “independent analysis”<sup>315</sup> that is (ii) not already known to the SEC from other sources (unless the whistleblower is the original source of the information), (iii) not derived “exclusively” from publicly disclosed information, such as judicial or administrative hearings, the news media, or governmental reports, hearings, audits, or investigations (again, unless the whistleblower is the original source of the information), and (iv) submitted to the SEC subsequent to the passage of Dodd-Frank in 2010.<sup>316</sup>

In addition to describing what is considered “original information” for purposes of qualifying for a whistleblower award, the SEC takes great pains to describe what is *not* considered “original information.” In so doing, it delineates a handful of “exceptions”<sup>317</sup> or “exclusions”<sup>318</sup> to its definition of “original information.” The first two exceptions include information obtained by lawyers in the representation of issuer clients: (i) information obtained through privileged attorney-client communications,<sup>319</sup> and (ii) information obtained during the course of legal representation of a client on whose behalf the lawyer or her firm or employer is rendering services.<sup>320</sup> The

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<sup>315</sup> In turn, the SEC defines “[i]ndependent knowledge” as “factual information in your possession that is not derived from publicly available sources. You may gain independent knowledge from your experiences, communications and observations in your business or social interactions.” 17 C.F.R. § 240.21F-4(b)(2). The SEC further defines “[i]ndependent analysis” as one’s “own analysis, whether done alone or in combination with others. Analysis means your examination and evaluation of information that may be publicly available, but which reveals information that is not generally known or available to the public.” *Id.* § 240.21F-4(b)(3).

<sup>316</sup> *See id.* § 240.21F-4(b)(1)(i)–(iv).

<sup>317</sup> *See* SEC Final Rule, *supra* note 278, at 19-20.

<sup>318</sup> *See id.* at 61.

<sup>319</sup> *See* 17 C.F.R. § 240.21F-4(b)(4)(i) (stating that information provided by a whistleblower will not be considered derived from one’s independent knowledge or independent analysis (and thus not “original information”) if the whistleblower obtained the information “through a communication that was subject to the attorney-client privilege, unless disclosure of that information would otherwise be permitted by an attorney pursuant to § 205.3(d)(2) of this chapter, the applicable state attorney conduct rules, or otherwise”).

<sup>320</sup> *See id.* § 240.21F-4(b)(4)(ii) (stating that information provided by a whistleblower will not be considered derived from one’s independent knowledge or independent analysis (and thus not “original information”) if the whistleblower 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, unless disclosure would otherwise be permitted by an attorney pursuant to § 205.3(d)(2) of

SEC has been clear that neither exception applies “where the attorney is already permitted to disclose the substance of a communication that would otherwise be privileged.”<sup>321</sup> The SEC has been equally clear that the relevant authorities governing permissive disclosure of privileged and confidential client communications include (i) SEC ethics rules as reflected in Part 205<sup>322</sup> (i.e., the SEC’s “minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers”<sup>323</sup>), (ii) “applicable state attorney conduct rules,” or (iii) “otherwise” (such as where a client waives privilege<sup>324</sup>).<sup>325</sup>

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this chapter, the applicable state attorney rules, or otherwise”).

<sup>321</sup> SEC Final Rule, *supra* note 278, at 25.

<sup>322</sup> More specifically, the whistleblower regulations specify 17 C.F.R. § 205.3(d)(2) as the relevant authority in Part 205 authorizing lawyers to disclose confidential client information. *See* 17 C.F.R. § 240.21F-4(b)(4)(i)–(ii). For when § 205.3(d)(2) permits disclosure of confidential client information, *see infra* notes 326–331 and accompanying text.

<sup>323</sup> Sarbanes-Oxley Act of 2002, Pub. L. 107-204, § 307, 116 Stat. 745, 784 (July 30, 2002) (codified as amended at 15 U.S.C. § 7245) (requiring the SEC to “issue rules, in the public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers”). *See generally* SEC Final Rule, *supra* note 278.

<sup>324</sup> For informed consent confirmed in writing as falling under the category of “otherwise,” *see* SEC Final Rule, *supra* note 278, at 25–26 (describing “circumstances where the privilege has been waived, or where disclosure of confidential information to the Commission without the client’s consent is permitted pursuant to either 17 CFR § 205.3(d)(2) or the applicable state bar ethical rules”).

<sup>325</sup> *See* 17 C.F.R. § 240.21F-4(b)(4)(i)–(ii). For discussion of “appearing and practicing” before the Commission, *see infra* notes 343–52 and accompanying text. It is worth pointing out that while the sources of permitted disclosure (i.e., Part 205.3, state ethics rules, or otherwise) are listed disjunctively in the general rules and regulations of the Securities Exchange Act of 1934, the Final Rule implementing the Whistleblower Provisions of 21F of the Exchange Act contains a statement indicating that more than one of the sources of permitted disclosure would have to be met for attorneys to become eligible for whistleblower awards under the SEC program. “The changes to the final rule clarify our intention that all attorneys — whether specifically retained or working inhouse — are eligible for awards only to the extent that their disclosures to us are consistent with their ethical obligations and our Rule 205.3.” SEC Final Rule, *supra* note 278, at 27. Given the disjunctive language contained in 17 C.F.R. § 240.21F-4(b)(4)(i)–(ii) of the Exchange Act, this statement reflects a clear drafting error. Moreover, a conjunctive requirement would create conflicts between the broad disclosure exceptions in 17 C.F.R. § 205, *see infra* notes 326–31 and accompanying text, and restrictive exceptions contained in some states’ rules of professional conduct for attorneys. *See infra* Part V.C. In any event, for practical purposes the statement is irrelevant given that 17 C.F.R. § 205.1 states that the standards of professional conduct for attorneys appearing and practicing before the SEC (including § 205.3(d)(2), pertaining to circumstances where an attorney may

Thus for lawyers, the presumption under the SEC program is that they are eligible to receive whistleblower awards for providing privileged and confidential information so long as they are permitted to disclose such information under at least one of the three listed authorities. In the event a lawyer is not permitted to disclose privileged or confidential information under any of the applicable authorities — and that lawyer in fact discloses such information to the SEC in a whistleblower submission — the lawyer’s information falls under one of the exceptions to “original information” and does not qualify the lawyer for an award under the SEC whistleblower program.

Permitting lawyers to disclose privileged and confidential information in furtherance of the SEC whistleblower statute reinforces the Commission’s ethics rules as reflected in Part 205. According to those rules, lawyers may blow the whistle on organizational clients’ illegal activity. More specifically, under § 205.3(d)(2) (which the SEC whistleblower regulations identify as the relevant authority in Part 205 authorizing lawyers to disclose confidential client information<sup>326</sup>), lawyers “may reveal to the Commission, *without the issuer’s consent*, confidential information related to the representation”<sup>327</sup> of issuer clients under several circumstances: (i) to prevent a client from “committing a material violation that is likely to cause substantial injury to the financial interest or property” of the company or investors,<sup>328</sup> (ii) to prevent the client in an SEC proceeding from committing perjury, suborning perjury, or committing any act likely to perpetrate a fraud upon the SEC,<sup>329</sup> or (iii) to rectify the consequences of a material violation” by the client that “caused, or may cause, substantial injury to the financial interest or property” of the company or investors “in the furtherance of which the attorney’s services were used.”<sup>330</sup> Moreover, “material violation” is defined broadly under Part 205 to include “a material violation of an applicable United States *federal or state* securities law, a material

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“report out” without a client’s consent “confidential information related to the representation”) preempt state ethics rules: “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.” 17 C.F.R. § 205.1 (2016); see also *infra* notes 332, 374–75 and accompanying text for a discussion of how 17 C.F.R. § 205 preempts state ethics rules.

<sup>326</sup> See *supra* note 322 and accompanying text.

<sup>327</sup> 17 C.F.R. § 205.3(d)(2) (2016) (emphasis added).

<sup>328</sup> *Id.* § 205.3(d)(2)(i).

<sup>329</sup> *Id.* § 205.3(d)(2)(ii).

<sup>330</sup> *Id.* § 205.3(d)(2)(iii).

breach of fiduciary duty arising under United States *federal or state* law, or a similar violation of any United States *federal or state* law.”<sup>331</sup>

Beyond authorizing whistleblowers to blow the whistle on various forms of client misconduct, Part 205 states that its standards of professional conduct are the only standards that matter. Indeed, as enunciated in Part 205, the SEC ethics rules (i) preempt all state ethics rules (including state rules with more restrictive disclosure exceptions, such as New York’s),<sup>332</sup> (ii) protect a lawyer from discipline by state bar associations for disclosing confidential client information (made in furtherance of Part 205) in violation of a lawyer’s state bar rules,<sup>333</sup> (iii) further protect a lawyer (and that lawyer’s law firm) from private causes of action based on a lawyer’s (or her law firm’s) compliance or non-compliance with Part 205,<sup>334</sup> and (iv) protect a lawyer still further from retaliation by employers and clients for disclosing confidential information in furtherance of the SEC whistleblower statute.<sup>335</sup> We will discuss these preemptive and protective features of the SEC ethics rules in more detail in Part C of this Section. At this point, suffice it to say that lawyers have the unquestionable discretion to blow the whistle on organizational clients subject to SEC regulation. With equal certainty, the SEC is prepared to protect lawyer whistleblowers for disclosing legal violations of organizational clients subject to its oversight.

The NYCLA begs to differ. According to Formal Opinion 746, the SEC’s whistleblower rules “exclude from the definition of ‘original information’ most material that lawyers, in-house or retained, are likely to gain in the course of their professional representation of clients, and thus generally preclude attorneys, in most instances, from receiving a bounty for revealing such information.”<sup>336</sup> The opinion also states that the SEC’s exceptions to the definition of “original information”<sup>337</sup> acknowledge “the importance of the attorney-client privilege, as well as state ethics rules, and *presumptively excludes the use of privileged or confidential information from the definition of eligible*

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<sup>331</sup> *Id.* § 205.2(i) (2016) (emphasis added).

<sup>332</sup> *See id.* § 205.1 (2016).

<sup>333</sup> *See id.* § 205.6(c) (2016).

<sup>334</sup> *See id.* § 205.7 (2016).

<sup>335</sup> *See, e.g.*, § 21F(h)(1)(A) of the Exchange Act of 1934 (15 U.S.C. § 78u-6); 17 C.F.R. §§ 240.21F-2(b), 240.21F-7; SEC Final Rule, *supra* note 278, at 4-9 and 122-24; Interpretation of the SEC’s Whistleblower Rules under Section 21F of the Securities Exchange Act of 1934, Exchange Act Release No. 34-75592, (Aug. 4, 2015).

<sup>336</sup> NYCLA, *supra* note 11, at 3.

<sup>337</sup> *See supra* notes 314–25 and accompanying text.

*original information under the whistleblower rule.* Indeed,” the NYCLA opinion emphasizes, “the SEC warns lawyers that there will be no financial benefit to lawyers who disclose such information in violation of the attorney-client privilege or their ethical requirements.”<sup>338</sup>

The NYCLA rightly observes that the rules governing the SEC whistleblower program are solicitous of protecting the attorney-client privilege<sup>339</sup> and confidential client information.<sup>340</sup> The NYCLA also correctly states that the SEC will not pay awards to lawyer whistleblowers for disclosing privileged or confidential client information unless the disclosure is authorized under the applicable ethical rules.<sup>341</sup>

But the NYCLA is simply wrong in describing what the SEC considers “original information” and permissible lawyer participation under the SEC whistleblower statute.

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<sup>338</sup> NYCLA, *supra* note 11, at 3 (emphasis added).

<sup>339</sup> While this article focuses on permissive disclosure of confidential client information under prevailing ethical rules and codes of conduct rather than on the crime-fraud exception to the attorney-client privilege, it is worth noting that the crime-fraud exception has also developed broad contours over time. Indeed, in some respects, the exception is so broad that it permits discovery of any communication that the client engaged in to facilitate an ongoing or future crime or fraud. *See, e.g.*, *United States v. Zolin*, 491 U.S. 554, 572, 574-75 (1989) (holding that the applicability of the crime-fraud exception can be resolved by courts through *in camera* inspection of the allegedly privileged material — rather than without reference to the content of the contested communications themselves, which is what many courts held prior to *Zolin* — and that the evidentiary threshold “to trigger *in camera* review . . . need not be a stringent one” but rather merely one “sufficient to support a reasonable belief that *in camera* review may yield evidence that establishes the exception’s applicability”).

<sup>340</sup> *See, e.g.*, SEC Final Rule, *supra* note 278, at 25 (“The proposed exclusions in 21F-4(b)(4)(i) and (ii) recognized the prominent role that attorneys play in all aspects of practice before the Commission and the special duties they owe to clients. We observed that compliance with the Federal securities laws is promoted when individuals, corporate officers, and others consult with counsel about possible violations, and the attorney-client privilege furthers such consultation. 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.”) (citation omitted).

<sup>341</sup> *See* NYCLA, *supra* note 11, at 5-8; *see also, e.g.*, SEC Final Rule, *supra* note 278, at 27 (“With regard to the comments that we ensure that whistleblowers are not providing us with privileged information, we believe that Rules 21F-4(b)(4)(i) and (ii) sufficiently address this concern because these rules make clear that we will not reward attorneys or others for providing us with information that could not otherwise be provided to us consistent with an attorney’s ethical obligations and Rule 205.3.”); *id.* (“In our view, 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.”).

First, the NYCLA falsely opines that the SEC's whistleblower rules "exclude from the definition of 'original information' most material that lawyers" might acquire in representing clients subject to U.S. securities law.<sup>342</sup> On the contrary, securities lawyers and bar associations have long worried about the "expansive reach" of Part 205,<sup>343</sup> which the SEC expressly incorporated into its whistleblower rules.<sup>344</sup> Pursuant to § 205.2(a), the SEC considers attorneys subject to its rules of professional conduct when they transact business or communicate directly with the Commission<sup>345</sup> or when they represent clients in an SEC proceeding.<sup>346</sup> But attorneys are also subject to Part 205 ethics rules when they perform considerably less direct and seemingly innocuous work on behalf of clients, including providing advice on federal securities law concerning *any* document that the attorney has notice will be submitted to the SEC<sup>347</sup> as well as advising

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<sup>342</sup> NYCLA, *supra* note 11, at 3.

<sup>343</sup> See State Bar of Cal., *The New SEC Attorney Conduct Rules v. California's Duty of Confidentiality*, ETHICS HOTLINER, Spring 2014, at 1, 3-4, [https://ethics.calbar.ca.gov/portals/9/documents/Publications/EthicsHotliner/Ethics\\_Hotliner-SEC\\_Ethics\\_Alert-Spring\\_04.pdf](https://ethics.calbar.ca.gov/portals/9/documents/Publications/EthicsHotliner/Ethics_Hotliner-SEC_Ethics_Alert-Spring_04.pdf) (describing the "Expansive Reach of the Part 205 Rules" and noting "many attorneys may not realize that their interactions with clients are potentially subject to the Part 205 Rules," and describing how those rules conflict with California law pertaining to protecting confidential client information); see also Nick Morgan & Haley Greenberg, *Is the SEC Encouraging Unethical Whistleblowing by Counsel?*, 20 No. 8 WESTLAW J. SEC. LITIG. & REG. 1, 2 (Aug. 21, 2014) (noting that "appearing and practicing" before the SEC is "broadly defined," and includes "merely advising on a U.S. 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 SEC"); LATHAM & WATKINS, WHITE PAPER NO. 1596, WILL AWARD-SEEKING WHISTLEBLOWER LAWYERS BE CAUGHT BETWEEN CONFLICTING SEC AND STATE ETHICS RULES? 2 (Oct. 21, 2013), <https://www.lw.com/thoughtLeadership/SEC-whistleblower-ethics-conflict> (discussing the "broadly defined" Part 205 rules for "appearing and practicing" before the SEC as including "merely advising on a U.S. 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"); WOMBLE CARLYLE SANDRIDGE & RICE, SEC ADOPTS FINAL RULES REGARDING MINIMUM STANDARDS OF PROFESSIONAL CONDUCT FOR ATTORNEYS 2, 6 (Feb. 20, 2003), <http://www.wcsr.com/resources/pdfs/csmemo27.pdf> (describing Part 205's "expansive view of those who are deemed to appear or practice before the SEC" and thus covered by the Rule, and further considering the "potential . . . conflict between the provisions of Part 205 and state ethics requirements," particularly Part 205's permissive exceptions to protecting confidential client information and the SEC's clear statement that in the event of a conflict between the SEC rules and state ethics rules, "Part 205 will govern").

<sup>344</sup> See 17 C.F.R. § 240.21F-4(b)(4)(i)-(ii) (2016); SEC Final Rule, *supra* note 278, at 25-27.

<sup>345</sup> See 17 C.F.R. § 205.2(a)(1)(i) (2016).

<sup>346</sup> See *id.* § 205.2(a)(1)(ii).

<sup>347</sup> See *id.* § 205.2(a)(1)(iii).



clients “as to whether information or a statement, opinion, or other writing” must be submitted to or filed with the SEC.<sup>348</sup> Thus, for example, Part 205 covers attorneys who merely provide written summaries for inclusion in a Form 10-K Report of significant pending litigation,<sup>349</sup> or of physical assets of the client,<sup>350</sup> or of executive compensation,<sup>351</sup> or of fees paid for professional services pertaining to tax compliance, advice, or planning.<sup>352</sup> Without question, a significantly larger population of attorneys is covered by Part 205 than the NYCLA ethics opinion acknowledges.

Second, the NYCLA states that the SEC rules “presumptively exclude[] the use of privileged or confidential information from the definition of eligible original information.”<sup>353</sup> Quite the opposite. The rules presumptively *include* the use of privileged or confidential information in the definition of original information so long as use of that information is permitted pursuant either to Part 205, state ethics rules, or otherwise.<sup>354</sup> Moreover, the SEC has stated very clearly that the two *exceptions* to the presumption pertaining to privileged and/or confidential client information — rather than the presumption itself — prohibit lawyers from “submitting information in violation of an attorney’s ethical obligations.”<sup>355</sup>

In other words, what the NYCLA opinion identifies as the SEC’s presumption is actually the Commission’s exception. Far from presumptively barring lawyers from participating in the program, the SEC program welcomes lawyer participation, a policy that recognizes ethical behavior as including disclosure of confidential information related to a client’s misconduct as permitted by applicable rules of professional conduct, including most prominently Part 205.

### C. *Misleading Analysis of SEC Ethics Rules vs. State Ethics Rules*

After incorrectly stating that the SEC whistleblower program presumptively bars lawyers from using privileged or confidential

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<sup>348</sup> *Id.* § 205.2(a)(1)(iv).

<sup>349</sup> SEC. EXCH. COMM’N, FORM 10-K, ANNUAL REPORT PURSUANT TO SEC. 13 OF 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934, at 8 (describing information to be included in Item 3, Part I of Form 10-K).

<sup>350</sup> *Id.* (describing information to be included in Item 2, Part I).

<sup>351</sup> *Id.* at 10 (describing information to be included in Item 11, Part III).

<sup>352</sup> *See id.* at 10-11 (describing information to be included in Item 14, Part III).

<sup>353</sup> NYCLA, *supra* note 11, at 3.

<sup>354</sup> *See supra* notes 314–25 and accompanying text.

<sup>355</sup> SEC Final Rule, *supra* note 278, at 27; *see also supra* note 341 and accompanying text.

information to form the basis of a whistleblower action, the NYCLA engages in a distorted analysis of the relationship between SEC standards of conduct for attorneys and state ethics rules. According to the NYCLA, the disclosure obligations under the SEC rules and the New York rules diverge only in “limited circumstances.”<sup>356</sup> In reality, a gulf separates the two sets of ethical standards when it comes to disclosing client confidences. Not only are the SEC rules more permissive with respect to disclosure, but in situations where the SEC rules and the New York rules conflict, the SEC rules expressly preempt New York’s ethics rules.<sup>357</sup> Furthermore, the SEC rules protect from discipline lawyers who “compl[y] in good faith” with the SEC standards due to “inconsistent standards” imposed by any state or U.S. jurisdiction where the affected lawyer is admitted or practices.<sup>358</sup>

To be fair, NYCLA Formal Opinion 746 acknowledges two of the differences pertaining to permissive disclosure of client information as between SEC Part 205 and the New York Rules of Professional Conduct. First, the New York rules permit an attorney to disclose confidential information to prevent a client from committing a “crime,”<sup>359</sup> while Part 205 permits disclosure of confidential information to prevent a client from committing a “material violation” of federal or state securities law.<sup>360</sup> Not all material violations of federal or state securities laws amount to crimes, however, as Formal Opinion 746 points out.<sup>361</sup> For example, lawyers have been charged civilly and administratively with registration or record-keeping violations.<sup>362</sup> Second, New York rules permit lawyers to disclose client

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<sup>356</sup> NYCLA, *supra* note 11, at 5.

<sup>357</sup> See 17 C.F.R. § 205.1 (2016) (discussed *infra* notes 374–75 and accompanying text).

<sup>358</sup> 117 C.F.R. § 205.6(c) (2016) (discussed *infra* note 376 and accompanying text).

<sup>359</sup> N.Y. RPC, *supra* note 62, r. 1.6(b)(2).

<sup>360</sup> 17 C.F.R. § 205.3(d)(2)(i) (2016); see also *id.* § 205.2(i) (2016) (defining “material violation” for purposes of Part 205 as “a material violation of an applicable United States federal or state securities law, a material breach of fiduciary duty arising under United States federal or state law, or a similar material violation of any United States federal or state law”); *id.* § 205.2(d) (defining “breach of fiduciary duty” as “any breach of fiduciary or similar duty to the issuer recognized under an applicable Federal or State statute or at common law, including but not limited to misfeasance, nonfeasance, abdication of duty, abuse of trust, and approval of unlawful transactions”).

<sup>361</sup> NYCLA, *supra* note 11, at 6.

<sup>362</sup> The NYCLA opinion provides two examples of general counsels being prosecuted for securities law violations where it was “at least arguable that the lawyers’ conduct . . . even if violations of securities law, did not rise to the level of

confidences where the lawyer's services have been used to perpetrate a crime or fraud,<sup>363</sup> while Part 205 allows lawyers to disclose confidences whether or not the lawyer's services were used in furtherance of the unlawful activity.<sup>364</sup> After acknowledging these two differences, Formal Opinion 746 rightly observes, "To the extent that SEC Rule 205 permits (but does not require) reporting out of client confidences that amount to a material violation of the securities laws, regardless of whether the client's conduct amounts to a crime or whether the lawyer's services were used, it is broader than, and inconsistent with, the New York RPC exceptions to the confidentiality requirement."<sup>365</sup>

But that is as far as the NYCLA goes in recognizing the differences between the SEC rules and the New York rules. Other than those two discrepancies — which, by themselves, might be enough to conclude that the rules conflict in more than "limited circumstances" — the NYCLA perceives synchronicity between the SEC rules and New York's rules with respect to disclosing confidential client information. According to the NYCLA, the SEC rules "implicitly assume a side-by-side coexistence of the RPC and Rule 205," because they "explicitly reference 'attorney-client privilege' and 'applicable state attorney conduct rules.'"<sup>366</sup> Moreover, the NYCLA notes that the SEC has acknowledged the importance of following and applying state ethics rules in its enforcement proceedings.<sup>367</sup> And it further observes that disclosing client confidences outside the organization under the SEC rules "is a last resort, not a first step"<sup>368</sup> and a "permissive, not mandatory"<sup>369</sup> course of action, two truths that the NYCLA interprets as meaning that Part 205 "does not require a lawyer to report out corporate wrongdoing and, therefore, such reporting is not reasonably necessary within the meaning of RPC 1.6(b)."<sup>370</sup> "For the same reason" (i.e., no mandatory reporting out under the SEC rules), the

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crime or fraud for the purpose of state ethics rules." *Id.* at 6-7 (citing to Isselmann, Securities Act Release No. 34-50428 (Sept. 23, 2004) and Drummond, Securities Act Release No. 33-8523 (Jan. 13, 2005)).

<sup>363</sup> N.Y. RPC, *supra* note 62, r. 1.6(b)(3).

<sup>364</sup> See 17 C.F.R. §§ 205.3(d)(2)(i)–(iii) (2016).

<sup>365</sup> NYCLA, *supra* note 11, at 7.

<sup>366</sup> *Id.* at 6. Notably, the NYCLA fails to explain how referencing attorney-client privilege and state ethics rules add up to the SEC "assum[ing] a side-by-side coexistence" of its conduct rules alongside New York's.

<sup>367</sup> *Id.*

<sup>368</sup> *Id.* at 4.

<sup>369</sup> *Id.* at 7.

<sup>370</sup> *Id.* at 8.

NYCLA concludes without elaboration that “the state and federal regulatory schemes are not mutually antagonistic. . . . If federal regulations required reporting out, we might be in a different situation.”<sup>371</sup>

The NYCLA is wrong once more. We *are* in a different situation. Not because the SEC rules require lawyers to report out, but because Part 205 provides for more permissive disclosure of confidential information and then expressly protects lawyers who disclose confidential information even if such disclosure violates state ethics rules. Indeed, despite the NYCLA’s assertions to the contrary, the SEC rules and the New York rules coexist only to the extent the SEC rules say so.

As noted above,<sup>372</sup> Part 205 provides “minimum standards of professional conduct” for attorneys appearing and practicing before the SEC in the representation of clients subject to federal and state securities law. 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.”<sup>373</sup> Moreover, and something the NYCLA inexplicably omitted from Formal Opinion 746, “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.”<sup>374</sup> *In other words, the SEC’s ethics rules preempt all state ethics rules, including New York’s.*<sup>375</sup>

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<sup>371</sup> *Id.* at 8 n.17.

<sup>372</sup> *See supra* note 322 and accompanying text.

<sup>373</sup> *Supra* note 322 and accompanying text; *see also* Implementation of Standards of Professional Conduct for Attorneys, *supra* note 258 (stating the final rule “clarifies that this part does not preempt ethical rules in United States jurisdictions that establish more rigorous obligations than imposed by this part”).

<sup>374</sup> 17 C.F.R. § 205.1 (2016).

<sup>375</sup> Implementation of Standards of Professional Conduct for Attorneys, *supra* note 258 (reiterating “its rules shall prevail over any conflicting or inconsistent laws of a state or other United States jurisdiction in which an attorney is admitted or practices”). In adopting the final rule, the SEC discussed its authority to preempt state ethics rules. Relying in part on a comment letter received from a group of law professors, the SEC wrote that the Commerce Clause “grants the federal government the power to regulate the securities industry, that the Sarbanes-Oxley Act requires the Commission to establish rules setting forth minimum standards of conduct for attorneys appearing and practicing before it, and that, under the Supremacy Clause, duly adopted Commission rules will preempt conflicting state rules.” *Id.* For a similar analysis and conclusion, see Bruce Green & Jordan Thomas, *Balancing Conscience and Confidentiality for Attorney Whistleblowers*, CORP. COUNS. (June 6, 2012) (stating, “There is little doubt that Rule 205.3 was validly enacted by the SEC because

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Congress required the agency to set minimum attorney-conduct rules in Section 307 of the Sarbanes-Oxley Act. Moreover, Rule 205 clearly manifests the SEC's intention to preempt conflicting state attorney-conduct rules with the rules set forth in Rule 205, including the disclosure rules of Rule 205.3. Accordingly, our view is that an attorney may disclose confidential information in accordance with Rule 205.3 without regard to conflicting state confidentiality rules." It is worth noting that immediately after the SEC adopted Part 205, two state bar associations (those of California and Washington) challenged the SEC's claims that Part 205 preempted state rules of attorney conduct and also protected lawyers from state bar discipline when they complied with SEC rules but violated a conflicting state rule. In 2003, the Washington State Bar Association adopted an interim opinion disputing the SEC's assertion of preemption. See ETHICS 2003 COMMITTEE OF THE WASH. STATE BAR ASS'N, INTERIM FORMAL ETHICS OPINION, RE: THE EFFECT OF THE SEC'S SARBANES-OXLEY REGULATIONS ON WASHINGTON ATTORNEYS' OBLIGATIONS UNDER THE RPCS (2003). Meanwhile, the California State Bar authored a detailed analysis of the SEC's authority to preempt state ethics rules, and concluded that a California lawyer "relying upon the SEC's safe harbor in disclosing client confidences to the SEC would be doing so at his or her own peril." Corps. Comm. of the Bus. Law Section of the Cal. State Bar, *Conflicting Currents: The Obligation to Maintain Inviolable Client Confidences and the New SEC Attorney Conduct Rules*, 32 PEPP. L. REV. 89, 149 (2004). In response, the SEC stood by its conclusion that "the Commission's rules will take precedence over any conflicting provision of RPC 1.6." Letter from Giovanni P. Prezioso, Gen. Counsel, Sec. and Exch. Comm'n, to J. Richard Manning, President, Wash. State Bar Ass'n, and David W. Savage, President-Elect, Wash. State Bar Ass'n (July 23, 2003), <http://www.sec.gov/news/speech/spch072303gpp.htm>. In addition, the SEC encouraged lawyer whistleblowers to report misconduct in reliance on the SEC's ethics rules, and indicated that "the Commission would be favorably disposed to supporting attorneys seeking to rely on the preemptive effect of its rules." Giovanni P. Prezioso, Gen. Counsel, Sec. and Exch. Comm'n, Remarks Before the American Bar Association Section of Business Law 2004 Spring Meeting (Apr. 3, 2004), <http://www.sec.gov/news/speech/spch040304gpp.htm>. In short order, the tension over the preemptive effect of the Part 205 rules subsided, partially because the Washington State Bar withdrew its interim opinion several years later when it adopted more permissive versions of Rules 1.6 and 1.13, and also partially because the California State Bar chose not to pursue the issue any further. Even more important, other states began amending their ethics rules during the 2000s to reflect disclosure exceptions more in line with those contained in Part 205 and ABA Model Rules 1.6 and 1.13. See *infra* Appendix for an inventory of disclosure exceptions in all fifty states and the District of Columbia compared to ABA Model Rules 1.6 and 1.13. Equally important, the underlying law pertaining to preemption was (and remains) on the side of the SEC. See Implementation of Standards of Professional Conduct for Attorneys, *supra* note 258; Green & Thomas, *supra* note 375; Roy Simon, *Washington State Bar Takes on SEC*, N.Y. PROF. RESP. REP. (Oct. 1, 2003), <http://www.newyorklegalethics.com/washington-state-bar-takes-on-sec> (stating that the Washington State Bar's interim ethics opinion "did not take issue with the SEC's interpretation of preemption law . . . did not cite a single preemption case, or make any attempt to analyze preemption doctrine . . . [or] attempt to show that the new SEC regulations are beyond the statutory authority of the SEC, or are unreasonable interpretations of the Sarbanes-Oxley Act," and thus, without any legal authority for its opposition to preemption, "the opinion of the Washington State Bar is far off base and essentially meritless").

In addition to preempting state ethics rules, Part 205 expressly protects lawyers from discipline by state bar associations for disclosing more than permitted under a state's ethics rules, another critical component of Part 205 that Formal Opinion 746 omits. Section 205.6(c) provides that any attorney "who complies in good faith with the provisions" of Part 205 "shall not be subject to discipline or otherwise liable under inconsistent standards imposed by any state" or other U.S. jurisdiction "where the attorney is admitted or practices."<sup>376</sup> Also, § 205.7 protects lawyers (and law firms) from private causes of action brought under Part 205 based on a lawyer's (or a law firm's) compliance or non-compliance with the SEC ethics rules.<sup>377</sup>

The effect of Part 205 on state ethics rules for attorneys is staggering. Indeed, the SEC's permissive disclosure rules, alongside its express preemption of state ethics rules and subsequent protection of lawyer whistleblowers from state bar discipline and breach of fiduciary duty claims render state ethics rules largely irrelevant for lawyers who blow the whistle on material violations of federal or state securities law. Somehow, the NYCLA failed to discuss any of these implications of the SEC ethics rules on a lawyer's ability to blow the whistle on an issuer client engaged in unlawful activities. Such a glaring omission of a directly relevant (and preemptive) consideration further undermines the legitimacy of Formal Opinion 746.

If that were not enough to undercut the authority of NYCLA Formal Opinion 746, consider that Part 205 permits disclosure of confidential information "without the issuer's consent."<sup>378</sup> More specifically, § 205.3(d)(2) provides that a lawyer "may reveal to the [SEC], without the issuer's consent, confidential information related to the

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<sup>376</sup> 17 C.F.R. § 205.6(c) (2003). In its adopting release, the SEC stated that it drafted § 205.6(c) "to apply only to an attorney's liability for violating inconsistent standards of a state or other U.S. jurisdiction," and did not apply in situations where the state or other jurisdiction "imposes additional requirements on the attorney that are consistent with the Commission's rules." Implementation of Standards of Professional Conduct for Attorneys, *supra* note 258.

<sup>377</sup> See 17 C.F.R. § 205.7(a) (2003) ("Nothing in this part is intended to, or does, create a private right of action against any attorney, law firm, or issuer based upon compliance or noncompliance with its provisions."); see also Implementation of Standards of Professional Conduct for Attorneys, *supra* note 258 (stating with respect to extending the protection to law firms and to both compliance and non-compliance with Part 205, "The Commission is of the view that the protection of this provision should extend to any entity that might be compelled to take action under this part; thus it extends to law firms and issuers. The Commission is also of the opinion that, for the safe harbor to be truly effective, it must extend to both compliance and non-compliance under this part.").

<sup>378</sup> 17 C.F.R. § 205.3(d)(2) (2003).

representation to the extent the attorney reasonably believes necessary”<sup>379</sup> and under all the various circumstances described in Part V.B.<sup>380</sup> Permitting lawyers to reveal confidential information without the client’s consent represents a significant relaxation of New York’s ethics rules pertaining to disclosure of confidential client information under Rule 1.6(b), as well as to overcoming conflicts of interest with respect to current and former clients under Rules 1.7 and 1.9 (discussed in Part V.D). Without explanation, however, and like its earlier omissions, NYCLA Formal Opinion 746 fails to discuss or even acknowledge the implications of the federal preemptive rule, and how it affects a New York attorney’s rights to disclose confidential information when blowing the whistle on a client’s unlawful activity.<sup>381</sup>

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<sup>379</sup> *Id.*

<sup>380</sup> See *supra* notes 326–31 and accompanying text.

<sup>381</sup> The NYCLA failed to discuss several other pertinent differences between the SEC rules and the New York rules with respect to disclosing confidential information when reporting up and reporting out a client’s misconduct. First, § 205.3(b)(1) triggers a lawyer’s duty to report misconduct up the ladder when the lawyer “becomes aware of evidence of a material violation,” which Part 205 defines under § 205.2(e) as “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.” Meanwhile, New York ethics rules only require a lawyer to act when the lawyer “knows” of a “violation of a legal obligation to the organization or a violation of law that reasonably might be imputed to the organization,” and “is likely to result in substantial injury to the organization.” N.Y. RPC, *supra* note 62, r. 1.13(b). In its advisory release implementing Part 205, the SEC expressly rejected thresholds to obligatory action imposed by states like New York as too stringent. “[T]he rule’s definition of ‘evidence of a material violation’ makes clear that the initial duty to report up-the-ladder is not triggered only when the attorney ‘knows’ that a material violation has occurred or when the attorney ‘conclude[s] there has been a violation, and no reasonable fact finder could conclude otherwise.’ That threshold for initial reporting within the issuer is too high.” Implementation of Standards of Professional Conduct for Attorneys, *supra* note 258. Second, if a lawyer’s obligation to report up the ladder is triggered, § 205.3(b)(1) requires the lawyer to report evidence of a material violation immediately to the company’s chief legal officer or to both the company’s chief legal officer and its chief executive officer. New York ethics rules, on the other hand, only require a lawyer whose duty to act has been triggered to “proceed as is reasonably necessary in the best interest of the organization,” with no affirmative duty to report up the ladder, and with suggested proactive measures including “asking reconsideration of the matter,” “advising that a separate legal opinion on the matter be sought for presentation to an appropriate authority in the organization,” and “referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.” N.Y. RPC, *supra* note 62, r. 1.13(b)(1)–(3). Third, § 205.3(b)(3) requires that if the reporting attorney does not

Before discussing the NYCLA's analysis of conflicts in the context of lawyer whistleblowers, it is worth pointing out that New York's ethics rules are more restrictive than other states when it comes to providing avenues for lawyers to blow the whistle on a client's unlawful activities. With respect to Rule 1.6 (or what is almost universally reflected in states' ethics rules as Rule 1.6) thirty-five states and the District of Columbia have more permissive disclosure exceptions for revealing confidential client information than New York.<sup>382</sup> Half of those jurisdictions' rules contain disclosure exceptions that are identical or nearly identical to those contained in ABA Model Rule 1.6, while the other half have adopted even more permissive disclosure exceptions than those reflected in ABA Rule 1.6.<sup>383</sup> Meanwhile, with respect to Rule 1.13, which aligns closely with the disclosure exceptions in SEC Rule Part 205, thirty-two states have more permissive disclosure exceptions than those reflected in New York's RPC 1.13. Thirty-one of those states use a rule that looks like ABA Model Rule 1.13, while one state (Vermont) permits even more permissive disclosure than the ABA Model Rule.<sup>384</sup>

Concentrating on Rule 1.13, New York's version obligates lawyers aware of misconduct constituting a "violation of a legal obligation to the organization or a violation of law that reasonably might be imputed to the organization" and that "is likely to result in substantial injury to the organization" to "proceed as is reasonably necessary in the best interest of the organization."<sup>385</sup> In the event the lawyer chooses to report the misconduct up the corporate ladder to the

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reasonably believe she received an appropriate and timely response from the chief legal officer or chief executive officer, the reporting attorney must continue to report evidence of a material violation up the corporate ladder. By comparison, New York ethics rules only require lawyers whose duty to act has been triggered to, again, "proceed as is reasonably necessary in the best interest of the organization," which does not necessarily include reporting up the ladder. Furthermore, if a New York lawyer decides to report up the ladder, she has no additional obligations to continue reporting up the ladder, even if she receives no response, an untimely response, or an inappropriate response. See N.Y. RPC, *supra* note 62, r. 1.13(b).

<sup>382</sup> See *infra* Appendix.

<sup>383</sup> *Infra* Appendix.

<sup>384</sup> *Infra* Appendix. Vermont's Rule 1.13(c)(1) requires reporting out confidential information if also required by Rule 1.6(b), which also provides more expansive disclosure exceptions than any other jurisdiction, including mandatory disclosure under certain circumstances "to prevent the client from committing a crime or fraud" and "to prevent, mitigate or rectify substantial injury to the financial interests or property of another." *Infra* Appendix note 48.

<sup>385</sup> N.Y. RPC, *supra* note 62, r. 1.13(b).



“highest authority that can act on behalf of the organization,”<sup>386</sup> and that authority “insists upon action, or a refusal to act, that is clearly in violation of law and is likely to result in a substantial injury to the organization, the lawyer may reveal confidential information *only if permitted by Rule 1.6.*”<sup>387</sup> Thus, as the NYCLA explained in Formal Opinion 746, “reporting out is circumscribed under New York law to those instances permitted in RPC 1.6(b),”<sup>388</sup> which, as reported above,<sup>389</sup> contains more restrictive disclosure of confidential client information than thirty-five states and the District of Columbia.

For its part, ABA Model Rule 1.13 (along with thirty-two states<sup>390</sup>) greatly expands the instances in which a lawyer may report out confidential information beyond the strictures of Rule 1.6. In fact, the ABA’s version of Rule 1.13 “supplements Rule 1.6(b) by providing an additional basis upon which the lawyer may reveal information relating to the representation.”<sup>391</sup> Specifically, under ABA Rule 1.13, where a lawyer reports misconduct up the corporate ladder to the highest authority that can act on behalf of the organization and that person fails to act on a clear violation of law that the lawyer reasonably believes will result in substantial injury to the organization, the lawyer “may reveal information relating to the representation *whether or not Rule 1.6 permits such disclosure.*”<sup>392</sup>

The takeaway is clear: While would-be lawyer whistleblowers in New York are generally limited to the state’s restrictive disclosure exceptions in Rule 1.6, lawyers in the overwhelming majority of jurisdictions may report out under more expansive versions of Rule 1.6, and, following ABA Model Rule 1.13,<sup>393</sup> may disclose confidential

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<sup>386</sup> *Id.* r. 1.13(b)(3).

<sup>387</sup> *Id.* r. 1.13(c) (emphasis added).

<sup>388</sup> NYCLA, *supra* note 11, at 8; *see also* N.Y. RPC, *supra* note 62, r. 1.13 cmt. 6 (“The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer’s responsibility under Rule 1.6, Rule 1.8, Rule 1.16, Rule 3.3 or Rule 4.1. Rules 1.6(b)(2) and (b)(3) may permit the lawyer in some circumstances to disclose confidential information. In such circumstances Rule 1.2(d) may also be applicable, in which event withdrawal from the representation under Rule 1.16(b)(1) may be required.”).

<sup>389</sup> *Supra* notes 382–83 and accompanying text.

<sup>390</sup> *Supra* note 73; *infra* Appendix.

<sup>391</sup> ABA MODEL RULES, *supra* note 65, r. 1.2(d) cmt. 6.

<sup>392</sup> *Id.* r. 1.13(c) (emphasis added).

<sup>393</sup> ABA Model Rule 1.13 further expands Rule 1.6 by providing “[i]t is not necessary that the lawyer’s services be used in furtherance of the violation” which is the subject of the disclosure, only that “the matter be related to the lawyer’s representation of the organization.” *Id.* r. 1.13 cmt. 6. This disclosure rule is more

client information irrespective of Rule 1.6 (assuming the requirements of Rule 1.13 are otherwise met).<sup>394</sup> As described above,<sup>395</sup> the *Vanguard* whistleblower permissibly disclosed confidential client information under New York's restrictive Rules 1.6 and 1.13, and not just under ABA Rules 1.6 and 1.13.

One final observation about lawyers who blow the whistle on securities violations is worth highlighting. As already noted, the vast majority of states have adopted the ABA's version of Rule 1.13, which includes reporting and disclosure options closely aligned with SEC Part 205.<sup>396</sup> Those are the states that the SEC had in mind when it excepted certain attorneys from receiving whistleblower awards for violating their ethical obligations under the SEC rules or "*applicable state attorney conduct rules*."<sup>397</sup> Indeed, when discussing these sources of authority for permitted disclosure of confidential information in its advisory release implementing the whistleblower program, the SEC cited to ABA Model Rule 1.13, which, again, the overwhelming majority of states followed.<sup>398</sup> Moreover, in its 2003 advisory release implementing Part 205, the SEC noted that the disclosure rules under Part 205 "follow[] the permissive disclosure rules already in place in most jurisdictions" and that any conflict with state ethics rules containing more stringent disclosure requirements "is unlikely to arise in practice."<sup>399</sup> In the event such a conflict arose, however — such as between the SEC's ethics rules and, say, New York's rules — the SEC adopted a clear rule of preemption and a related rule protecting lawyer

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permissive than ABA Model Rules 1.6(b)(2) and 1.6(b)(3), both of which permit disclosure of confidential information associated with a client's commission or future commission of a crime or fraud only when the lawyer's services have been used (or will be used) in furtherance of the crime or fraud.

<sup>394</sup> It should be noted that other New York Rules of Professional Conduct (as well as other ABA Model Rules and state ethics rules) require lawyers to take certain actions that directly or indirectly reveal confidential client information, including Rule 1.2(d) (pertaining to refraining from counseling a client to engage, or assisting a client, in conduct that the lawyer knows is criminal or fraudulent), Rule 1.16(a) (pertaining to mandatory withdrawal from representing a client, the act of which, depending on the circumstances, can be tantamount to disclosure). See ABA Formal Ops. 92-287, *supra* note 73; ABA Formal Ops. 92-366, *supra* note 73; ABA MODEL RULES, *supra* note 65, r. 3.3 (pertaining to candor toward the tribunal); *id.* r. 4.1 (pertaining to truthfulness in statements to others).

<sup>395</sup> See *supra* Part II.

<sup>396</sup> *Supra* note 384 and accompanying text.

<sup>397</sup> See *supra* notes 322–25 and accompanying text.

<sup>398</sup> SEC Final Rule, *supra* note 278, at 57 n.123.

<sup>399</sup> Implementation of Standards of Professional Conduct for Attorneys, *supra* note 258.

whistleblowers from retaliation from their employers and clients as well as from their state bar associations.<sup>400</sup>

*D. Untenable Interpretation of Conflicts of Interest for Lawyer Whistleblowers*

The NYCLA saved its sharpest condemnation of lawyers participating in the SEC whistleblower program for the potential conflicts of interest that arise when a lawyer seeks and receives “bounty” payments for disclosing client misconduct. “An additional and even more significant ethical issue is presented by the bounty provisions of Dodd-Frank,” the NYCLA opined, namely, “Is a conflict of interest under RPC 1.7 presented when a corporate lawyer, functioning as a lawyer, seeks to collect a whistleblower bounty? Our answer is presumptively yes.”<sup>401</sup> In fact, Formal Opinion 746 concludes that New York lawyers “presumptively may not ethically collect whistleblower bounties in exchange for disclosing confidential information about their clients under the [SEC program] because doing so generally gives rise to a conflict between the lawyers’ interests and those of their clients.”<sup>402</sup>

With respect to conflicts involving current clients under RPC 1.7, the NYCLA concluded that the “prospect of a government payment to a whistleblower” creates a conflict in the “overwhelming majority of cases” that can be overcome only by a client’s waiver of the conflict.<sup>403</sup> Moreover, the NYCLA identified potential awards exceeding \$100,000 as “giv[ing] rise to a conflict of interest between the lawyer’s personal interest and that of the client.”<sup>404</sup> With respect to conflicts pertaining

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<sup>400</sup> See *supra* notes 357–58, 374–76 and accompanying text. For the SEC’s robust anti-retaliation protections for whistleblowers under its whistleblower award program (as opposed to the anti-retaliation protections under Part 205), including the program’s “heightened confidentiality provisions” for whistleblowers (SEC Final Rule, *supra* note 278, at 13), see § 21F(h) of the Exchange Act of 1934, 15 U.S.C. § 78u-6 (2010); 17 C.F.R. §§ 240.21F-2(b), -7 (2011), and as explained in the SEC’s Final Rule implementing the whistleblower provisions of § 21F(h) of the Exchange Act of 1934 (SEC Final Rule, *supra* note 278, at 8-20 and 126-33); Implementation of Standards of Professional Conduct for Attorneys, *supra* note 258.

<sup>401</sup> NYCLA, *supra* note 11, at 10.

<sup>402</sup> *Id.* at 1.

<sup>403</sup> *Id.* at 11. NYCLA Opinion 746 only covers “permissive whistleblowing,” and does not address “the rare and exceptional situation” of mandatory disclosure when the lawyer is “affirmatively required by law or the rules of professional conduct to report out the client’s misconduct.” *Id.*

<sup>404</sup> *Id.* The NYCLA’s use of a \$100,000 ceiling to determine ethically impermissible awards for lawyer whistleblowers is arbitrary and uninformed. Moreover, it reads out

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to former clients under RPC 1.9, the NYCLA stated that lawyers “may not seek bounties” as whistleblowers, because the confidentiality provisions in RPC 1.9 “incorporate those of RPC 1.6,”<sup>405</sup> and, as the opinion had already concluded, it was not reasonably necessary for lawyer whistleblowers to disclose confidential information under the enumerated disclosure exceptions contained in 1.6(b).<sup>406</sup>

The NYCLA’s analysis of what creates a conflict for lawyers in the context of the SEC whistleblower program is as unsound as it is bewildering.

First, recall that the SEC attorney conduct rules in Part 205 permit disclosure of confidential information “without the issuer’s consent.”<sup>407</sup> Furthermore, Part 205, unlike New York RPC 1.6(b), permits lawyers to disclose confidential information to prevent client misconduct that does not rise to the level of a crime,<sup>408</sup> and about which the lawyer only needs “credible evidence” before acting on the alleged misconduct rather than actual knowledge.<sup>409</sup> Therefore, under the SEC rules, lawyers need not receive client consent to overcome purported conflicts of interest associated with receiving monetary awards for blowing the whistle on a client’s unlawful activity. Moreover, the threshold for revealing client misconduct, and disclosing confidential information in the process, is lower under the SEC rules than under the New York rules, thereby creating still more instances of purported conflicts of interest that, under the SEC rules, lawyer whistleblowers can overcome without client consent. What’s more, as already discussed in Part V.C, to the extent the SEC rules conflict with state attorney conduct rules, the SEC rules preempt state

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of the New York RPC nearly all permissive disclosure exceptions to protecting client confidentiality. For a full critique of the NYCLA’s untenable \$100,000 threshold, see *infra* notes 418–25 and accompanying text.

<sup>405</sup> NYCLA, *supra* note 11, at 13. New York RPC 1.9(c) provides that a lawyer who previously represented a client “shall not . . . (1) use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client, except as these Rules would permit or require with respect to a current client or when the information has become generally known; or (2) reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client.”

<sup>406</sup> See *supra* notes 285–86 and accompanying text.

<sup>407</sup> *Supra* notes 326–31, 378–80 and accompanying text.

<sup>408</sup> See *supra* notes 359–65, 326–31 and accompanying text.

<sup>409</sup> See *supra* note 381.

rules,<sup>410</sup> and further protect lawyer whistleblowers from bar discipline and breach of fiduciary duty claims.<sup>411</sup>

Second, the NYCLA states (and then restates) a false premise about what gives rise to conflicts of interest for lawyer whistleblowers. Formal Opinion 746 concludes that New York lawyers “presumptively may not ethically collect whistleblower bounties in exchange for disclosing confidential information about their clients under the [SEC program] because doing so generally gives rise to a conflict between the lawyers’ interests and those of their clients.”<sup>412</sup> But the NYCLA has it backwards. The client’s unlawful activity “gives rise” to the conflict, *not* the lawyer making herself eligible to receive “bounties” for disclosing her client’s violations of the law. Stated more pointedly, to the extent a conflict is created by permitting lawyer whistleblowers to collect awards for disclosing client misconduct, the client creates the conflict by breaking the law. And the prevailing rule has always been that lawyers need not — indeed, they are prohibited from — allowing a client to use their services in the furtherance of a crime or fraud.<sup>413</sup>

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<sup>410</sup> See *supra* notes 332, 374–75 and accompanying text.

<sup>411</sup> See *supra* notes 333–34, 358, 376 and accompanying text.

<sup>412</sup> NYCLA, *supra* note 11, at 1. As to restating the false premise that financial incentives to report client misconduct create an insurmountable conflict of interest for a lawyer whistleblower, see *id.* at 10–11 (opining that “a financial incentive might tend to cloud a lawyer’s professional judgment”); *id.* at 11 (“The prospect of financial benefit could place the attorney’s personal interests in potential conflict with those of the client.”); *id.* at 14 (concluding that “undertaking this otherwise permissible disclosure [as permitted by Rule 1.6(b)] in a manner that results in a bounty for the attorney raises a significant risk that the attorney’s judgment in determining whether disclosure is ‘reasonably necessary’ will be adversely affected and presents a conflict of interest that is beyond what Rule 1.9 was intended to allow”).

<sup>413</sup> ABA MODEL RULES, *supra* note 65, r. 1.2(d) (prohibiting a lawyer from counseling or assisting a client in committing a crime or fraud). The ethical prohibition against assisting a client in the commission of a crime goes back more than 125 years to the Code of Ethics promulgated in 1887 by the Alabama State Bar Association, a precursor to the ABA Canons of Professional Ethics adopted in 1908. See Alabama Code of Ethics, *supra* note 62, at Rule 10 (“Nevertheless, it is steadfastly to be borne in mind that the great trust is to be performed within, and not without the bounds of the law which creates it. The attorney’s office does not destroy man’s accountability to his Creator, or loosen the duty of obedience to law, and the obligation to his neighbor; and it does not permit, much less demand, violation of law, or any manner of fraud or chicanery, for the client’s sake.”); see also ABA CANONS, *supra* note 64, Canon 15 (pertaining to “[h]ow far may a lawyer go in supporting a client’s cause.”) “But it is steadfastly to be borne in mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicanery. He must obey his own conscience and not that of his client.” *Id.*

Such clients are not worthy of having their confidences protected,<sup>414</sup> and a lawyer owes lesser — and perhaps no — fidelity to clients who act in bad faith.<sup>415</sup>

Third, and most importantly, were the NYCLA correct about what creates conflicts for lawyer whistleblowers, the conflict provisions contained in ethics rules would swallow the exceptions to the disclosure provisions. In fact, under the NYCLA's interpretation of what constitutes a conflict when lawyers blow the whistle on criminal or fraudulent clients, attorney whistleblowers would *never* be permitted to disclose a client's intent to commit a crime or fraud, particularly in those jurisdictions that have not adopted the ABA's version of Rule 1.13(c)<sup>416</sup> and/or flout the authority of SEC Part 205. Following the NYCLA's reasoning, a client could tell its lawyer that it intended to commit a crime or fraud, thereby tying the lawyer's hands and preventing her from disclosing the client's illegal activities to the SEC, to the IRS, to the New York Attorney General, or to any other authority that administers an award program for whistleblowers. *Ultimately, the NYCLA's analysis renders irrelevant New York RPC 1.6(b)(2) at the whim of a client's stated intent to commit a crime.* Such a result reflects the indefensible and unsubstantiated conclusion that the conflict provisions contained in New York's ethics rules trump the provisions pertaining to permissive disclosure of confidential information.

Beyond Rule 1.6(b)(2), the NYCLA's interpretation of what constitutes a conflict in the context of lawyers blowing the whistle on miscreant clients reads out additional disclosure rules in New York's

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<sup>414</sup> See, e.g., ABA Formal Op. 155, *supra* note 65 (“When the communication by the client to his attorney is in respect to the future commission of an unlawful act or to a continuing wrong, the communication is not privileged. One who is actually engaged in committing a wrong can have no privileged witnesses, and public policy forbids that an attorney should assist in the commission thereof, or permit the relation of attorney and client to conceal the wrongdoing.”).

<sup>415</sup> See, e.g., ABA Formal Op. 287, *supra* note 73 (stating in a situation where a court would be relying on a lawyer's silence as corroborating what is in fact an untruth, and the lawyer reveals the untruth to the court, “the client's bad faith . . . made the lawyer's action necessary”); ABA CANONS, *supra* note 64, Canon 32 (“No client, corporate or individual, however powerful, nor any cause, civil or political, however important, is entitled to receive nor should any lawyer render, any service or advice involving disloyalty to the law whose ministers we are . . . .”); *id.* Canon 15 (“The attorney's office does not destroy the man's accountability to the Creator, or loosen the duty of obedience to law, and the obligation to his neighbor; and it does not permit, much less demand, violation of law, or any manner of fraud or chicanery, for the client's sake.”).

<sup>416</sup> See *supra* notes 382–94 and accompanying text.

RPC. For the same reason that the NYCLA argues that an attorney would be prohibited from disclosing a client's intent to commit a crime under the SEC whistleblower program, an attorney would also be prohibited from disclosing under Rule 1.6(b)(3). That rule permits attorneys to "reveal or use" confidential client information to "withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud."<sup>417</sup> According to the logic of Formal Opinion 746, a lawyer would be barred from disclosing both the materially inaccurate information contained in her previously rendered opinion as well as the fact that her client is or has been using the opinion in furtherance of a crime or fraud, simply because the lawyer might receive a monetary award for alerting authorities to her client's crime or fraud.

Still more disclosure provisions in the New York RPC disappear under on the reasoning contained in Formal Opinion 746. Recall that the NYCLA identified potential whistleblower awards exceeding \$100,000 as presumptively "giv[ing] rise to a conflict of interest between the lawyer's personal interest and that of the client."<sup>418</sup> To the extent the NYCLA is concerned about the lure of financial awards creating a conflict of interest vis-à-vis clients, then under the same reasoning — i.e., financial incentives taint a lawyer's independent professional judgment — a lawyer would be prohibited from revealing or using confidential information to defend against accusations of wrongful conduct (as permitted in Rule 1.6(b)(5)(i)) or to establish or collect a fee (as permitted in Rule 1.6(b)(5)(ii)) if the damages associated with, respectively, the wrongful conduct suit or the unpaid fees exceeded \$100,000.

In fact, the reasoning contained in Formal Opinion 746 could even deny the application of Rule 1.6(b)(1), which permits a lawyer to reveal or use confidential information "to prevent reasonably certain death or substantial bodily harm."<sup>419</sup> Specifically, if a whistleblower award program offered payments exceeding \$100,000 for information that would prevent such atrocities, the logic of Formal Opinion 746 would presumptively prohibit a lawyer from disclosing such information if it involved disclosing client confidences.

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<sup>417</sup> N.Y. RPC, *supra* note 62, r. 1.6(b)(3).

<sup>418</sup> NYCLA, *supra* note 11, at 11; *supra* note 404 and accompanying text.

<sup>419</sup> N.Y. RPC, *supra* note 62, r. 1.6(b)(1).

Several additional implications of the NYCLA's use of a \$100,000 ceiling to determine ethically permissible awards for lawyer whistleblowers deserve highlighting. First, the use of a monetary ceiling reflects (yet again) the NYCLA's disproven premise that employees blow the whistle on employers' unlawful activity just for the money.<sup>420</sup> Second, it erroneously assumes that blowing the whistle is a costless venture.<sup>421</sup> Third, even if we were to contemplate a ceiling on potential whistleblower awards to prevent purported conflicts of interest for lawyers, we would want to account for the tax treatment of the award. After taxes, a \$100,000 award for most New York attorneys would yield considerably less than its face value, probably closer to \$50,000, and certainly not enough to tip the balance in favor of blowing the whistle on perceived client misconduct.

One final word on the NYCLA's untenable \$100,000 ceiling on potential awards for lawyer whistleblowers reporting client misconduct: the legal profession has *always* balanced duties to clients alongside additional duties to the administration of justice, to fellow lawyers, to oneself, and to society.<sup>422</sup> As discussed in Part II, the New York RPC "requires consideration of a wide range of factors"<sup>423</sup> before disclosing client information, including whether the lawyer "reasonably believes that the client will carry out the threatened harm or crime,"<sup>424</sup> an evaluation of the "seriousness of the potential injury to others if the prospective harm or crime occurs," the "absence of any other feasible way to prevent the potential injury," whether the client "may be using the lawyer's services in bringing about the harm or crime," the circumstances surrounding how the lawyer learned of the client's "intent or prospective course of action," and "any other aggravating or extenuating circumstances."<sup>425</sup> Perversely, the NYCLA's use of a \$100,000 threshold for whistleblower awards, above which a lawyer would be prohibited from disclosing client misconduct, imposes a significant constraint on New York RPC's reasoned and balanced approach to evaluating permissible disclosure of client information. Even more perversely, under the NYCLA's approach, lawyers would be prohibited from reporting the biggest crimes and the most egregious frauds, at least to the extent those legal violations produce the largest monetary awards. Such an approach reflects

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<sup>420</sup> See *supra* notes 291–97 and accompanying text.

<sup>421</sup> See *supra* notes 302–04 and accompanying text.

<sup>422</sup> See *supra* notes 64–65 and accompanying text.

<sup>423</sup> *Supra* note 68.

<sup>424</sup> *Supra* note 69.

<sup>425</sup> *Supra* note 70.



precisely the opposite methodology adopted by the New York RPC (and nearly every other states' ethics rules), which considers the extent of a client's crime or fraud and the "seriousness of the potential injury to others if the prospective harm or crime occurs" as salient aggravating circumstances authorizing disclosure over silence.

None of the foregoing is to say that real conflicts do not arise in the context of lawyer whistleblowers. But they have little to do with disclosing confidential information pertaining to a client's commission of a crime. Indeed, the NYCLA's definition of what constitutes a conflict of interest (potential payments for disclosing a client's unlawful conduct) is not the kind of conflict contemplated by the New York RPC or other jurisdictions' ethical rules. This is especially true of lawyers disclosing confidential information under the SEC whistleblower program, which preempts state ethics rules with respect to disclosing client confidences,<sup>426</sup> and which permits attorneys to "reveal to the Commission, without the issuer's consent, confidential information related to the representation."<sup>427</sup>

Potential conflicts still exist for lawyer whistleblowers, but in most situations "the representation would be unaffected by the attorney's status as whistleblower."<sup>428</sup> For instance, if a lawyer reports client misconduct to the SEC, the lawyer would certainly be prohibited from advising her client on how to respond to any subsequent SEC investigation, because the lawyer could benefit financially from an SEC enforcement action that collected more than \$1,000,000 in sanctions against the client, 10 to 30 percent of which may be awarded to the whistleblower.<sup>429</sup> According to two leading legal ethicists, if the lawyer in this situation served as in-house counsel for the client, she should request reassignment to matters unrelated to the client's unlawful activity, while if she were outside counsel, she could withdraw from the representation (or decline the matter if not yet

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<sup>426</sup> *Supra* notes 374–75 and accompanying text.

<sup>427</sup> *Supra* note 327 and accompanying text.

<sup>428</sup> Green & Thomas, *supra* note 375.

<sup>429</sup> See § 21F(h) of the Exchange Act of 1934, 15 U.S.C. § 78u6(b)(1)(A)–(B) (2010) (stating that in a "covered judicial or administrative action" (defined in § 21F(a)(1) as "any judicial or administrative action brought by the Commission under the securities laws that results in monetary sanctions exceeding \$1,000,000"), the SEC "shall pay an award or awards to 1 or more whistleblowers who voluntarily provided original information . . . that led to the successful enforcement of the covered judicial or administrative action, or related action, in an aggregate amount equal to not less than 10 percent . . . and not more than 30 percent . . . of what has been collected of the monetary sanctions imposed in the action or related actions").

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acting in a representative capacity).<sup>430</sup> In neither situation, however, is the lawyer presumptively conflicted out due to the prospect of receiving a whistleblower award for disclosing her client's criminal or fraudulent activity.

While the promise of a financial award may not (indeed, shall not) form the basis of disclosing client confidences under the prevailing ethical rules, no jurisdiction makes it per se unethical for a lawyer to receive a financial award for disclosing a client's unlawful activities. But Formal Opinion 746 presumptively prohibits *all* disclosure of client misconduct that qualifies a lawyer for a whistleblower award, unless the lawyer's actions "are required by the law or the RPC,"<sup>431</sup> a flatly inaccurate interpretation of the New York RPC that reads out the permissive disclosure provisions in Rule 1.6(b) and, by extension, Rule 1.13(c).

Notwithstanding NYCLA Formal Opinion 746, New York's ethics rules absolutely permit disclosure of a client's crime or fraud under a variety of circumstances subject to certain conditions, even if disclosure results in a monetary award — big or small — for the lawyer.

#### CONCLUSION AND LESSONS LEARNED

This Article examined a high-profile case of a lawyer blowing the whistle on a client's alleged illegal conduct. In the process, it offers several lessons learned, both for lawyer whistleblowers and for lawyers and judges evaluating the conduct of lawyer whistleblowers.

First, in an increasing number of circumstances, lawyers may disclose client misconduct. Over the last several decades, state ethics rules, the ABA Model Rules, and federal and state law have significantly expanded a lawyer's professional obligations beyond client fidelity to include affirmative obligations to the public. To fulfill these obligations, ethics rules and substantive law now provide broad disclosure alternatives for lawyers to reveal a client's illegal acts.

Second, the legal profession has been reluctant to recognize — much less embrace — the evolution in discretionary disclosure for lawyers. Both judges and practicing lawyers cling to a hackneyed understanding of when a lawyer may blow the whistle on client misconduct. Some of those judges and lawyers graduated from law school prior to the American Bar Association's mandate that law schools require students to pass a course in professional

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<sup>430</sup> Green & Thomas, *supra* note 375.

<sup>431</sup> NYCLA, *supra* note 11, at 13.

responsibility.<sup>432</sup> Whatever a lawyer's vintage, the stubborn refusal of the legal profession to appreciate, understand, and act on the growing number of circumstances under which a lawyer may reveal a client's crimes and frauds directly conflicts with the increasingly permissive exceptions to client confidentiality reified in ethics rules and substantive law. One hopes that the profession, particularly those members wearing black robes, begins to acknowledge that modern ethics rules provide for extensive discretionary disclosure of client misconduct.

Third, and perhaps most important, when considering whether to disclose a client's refusal to forego, cease, or rectify an illegal act, a lawyer *must* follow the proper procedures under the ethical rules applicable to that lawyer's conduct. Like other standards of care for professionals, the rules governing lawyers — whether promulgated by a state bar association or a federal agency — demand strict adherence to process. In the context of lawyer whistleblowers, procedurally proper behavior includes, at a minimum, (i) attempting to dissuade the client from engaging in the illegal conduct (assuming the conduct has not begun or has not already ceased); (ii) remediate and rectify the client's illegal conduct (assuming the conduct has occurred or is ongoing), (iii) report the client's illegal conduct up the organizational hierarchy (if such a hierarchy exists), (iv) continue remonstrating with the client, (v) request an appropriate and timely response from the client as to how the client intends to address and/or redress the illegal conduct, (vi) evaluate the appropriateness of the client's response, and (vii) if the client refuses to cease and rectify the illegal conduct such that disclosing confidential information pertaining to the misconduct is the only viable alternative for addressing its adverse consequences, (viii) remain supremely mindful of protecting the client's confidential information in collecting evidence of the illegal conduct and in revealing the illegal

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<sup>432</sup> One of those judges is Joan A. Madden, the New York Supreme Court judge who dismissed David Danon's whistleblower complaint in November 2015 — and as this Article describes — without evaluating on the merits Mr. Danon's claims. Judge Madden graduated from Fordham School of Law in 1973. Meanwhile, the ABA began mandating satisfactory completion of a professional responsibility course for law students following the Watergate scandal, which ended in Richard Nixon's resignation in August 1974. For the ABA's professional responsibility requirement, see AMERICAN BAR ASSOCIATION, COUNCIL ON ABA SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, 2015-16, STANDARD 303(A)(1) 16 (2015) (requiring law schools to “offer a curriculum that requires each student to satisfactorily complete . . . one course of at least two credit hours in professional responsibility that includes substantial instruction in the history, goals, structure, values, and responsibilities of the legal profession and its members”).

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conduct to the proper authorities. In a forthcoming article entitled, *How to Ethically Blow the Whistle on Client Misconduct*, I explore these procedures in further detail and in the context of the most prominent whistleblower programs: the IRS and SEC whistleblower statutes and federal and state False Claims Acts.

In the particular case under study in this Article, we do not know whether the lawyer whistleblower adhered to proper procedures under the applicable ethical rules. Indeed, as this Article described, no court has analyzed whether the whistleblower's behavior was procedurally proper. Instead, the courts have perpetuated the false assumption that a lawyer may disclose a client's illegal conduct only in the most extreme circumstances. Whatever the outcome of the case discussed in this Article, modern-day lawyer whistleblowers have not just history on their side but also robust ethical rules and substantive law pertaining to discretionary disclosure.

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APPENDIX: DISCLOSURE EXCEPTIONS CONTAINED IN ETHICS RULES FROM ALL 50 STATES AND THE DISTRICT OF COLUMBIA COMPARED TO THE ABA MODEL RULES

The below table compares the disclosure exceptions pertaining to protecting confidential client information contained in ABA Model Rules 1.6(b)(2)–(3) and 1.13(c) to analogous disclosure exceptions reflected in the rules of professional conduct from all fifty states and the District of Columbia. It indicates whether a jurisdiction’s disclosure exceptions are “More Restrictive” than the comparable ABA Model Rule, “More Permissive” than the ABA Rule, or the “Same As” the ABA Rule. The endnotes provide further explanation for why particular jurisdictions’ rules have been placed in one category versus another, and they also provide additional relevant information pertaining to certain jurisdictions’ rules.

The task of comparing a state’s permissive disclosure rules against the ABA Model Rules is easier for some states than for others. For instance, for states with disclosure exceptions that are identical (or nearly identical) to those reflected in Model Rules 1.6(b)(2)–(3), it is not hard to categorize them “Same as ABA Rule.” See, for example, Alaska RPC 1.6(b)(2)–(3). Likewise, it is easy to classify states with disclosure exceptions patently more “More Restrictive” (e.g., California RPC 3-100(B)) or patently “More Permissive” (e.g., Vermont RPC 1.6(b)–(c)) than the Model Rules. But some states’ disclosure exceptions are both a bit more restrictive than the Model Rules and a bit more permissive. Those states require balancing what is gained against what is lost with respect to permissive disclosure.

Take New Jersey, for example, which is categorized in the table below “Same as ABA Rule” for Model Rules 1.6(b)(2)–(3). On the one hand, New Jersey’s analogous Rules 1.6(b)(1)–(2) are limited to disclosure of prospective crimes, fraud, or illegal acts, a “loss” of permissive disclosure for not allowing disclosure to rectify or mitigate past violations of the law. On the other hand, New Jersey Rules 1.6(b)(1)–(2) reflect a number of “gains” that justify placing them in the “Same as ABA Rule” category, including (i) not requiring the lawyer’s services to be used in furtherance of the crimes, fraud, or illegal acts, (ii) countenancing broader categories of illegal activities subject to permissive disclosure (that is, covering not just crimes and fraud), and (iii) applying both to the behavior of a client as well as to “other persons.”

For another example, Virginia RPC 1.6(c)(1) is classified as “More Restrictive” than Model Rules 1.6(b)(2)–(3) even though Virginia *requires* a lawyer to “promptly reveal . . . the intention of a client, as

stated by the client, to commit a crime and the information necessary to prevent the crime,” while also not requiring the lawyer’s services to be used in furtherance of the intended crime. The disclosure “gain” associated with mandatory disclosure and no requirement that the lawyer’s services be used in the commission of the client’s crime is counteracted by the “loss” associated with the Rule (i) only applying to future crimes, (ii) not applying to non-criminal fraud, and (iii) requiring that the lawyer learn of the client’s intent directly from the client. In addition, Virginia RPC 1.6 contains no other disclosure provisions, mandatory or permissive, thereby omitting circumstances involving past crimes or fraud, including efforts to rectify or mitigate past crimes or fraud.

ABA Model Rules 1.6(b)(2)–(3) <sup>1</sup>			ABA Model Rule 1.13(c) <sup>2</sup>		
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	More Restrictive	Same as ABA Rule	More Permissive	More Restrictive	Same as ABA Rule	More Permissive
AL	ARPC 1.6(b) <sup>3</sup>			ARPC 1.13(c) <sup>4</sup>		
AK		ARPC 1.6(b)(2)–(3)			ARPC 1.13(c)	
AZ			ARPC ER 1.6(c)–(d) <sup>5</sup>		ARPC ER 1.13(c)	
AR		ARPC 1.6(b)(2)–(3)			ARPC 1.13(c)	
CA	CRPC 3-100(B); CBPC § 6068 (e)(2) <sup>6</sup>			CRPC 3-600(C) <sup>7</sup>		
CO			CRPC 1.6 (b)(2)–(4) <sup>8</sup>		CRPC 1.13(c)	
CT			CRPC 1.6(c)(1)–(2) <sup>9</sup>		CRPC 1.13(c)	
DE		DLRPC 1.6(b)(2)–(3)		DLRPC 1.13(c) <sup>10</sup>		
DC		DCRPC 1.6(d)(1)–(2)		DCRPC 1.13(b) <sup>11</sup>		

	More Restrictive	Same as ABA Rule	More Permissive	More Restrictive	Same as ABA Rule	More Permissive
FL	FRPC 4-1.6(b)(1) <sup>12</sup>			FRPC 4-1.13(c) <sup>13</sup>		
GA	GRPC 1.6(b)(1)(i) & (b)(2) <sup>14</sup>				GRPC 1.13(c) <sup>15</sup>	
HI			HRPC 1.6(b)-(c) <sup>16</sup>		HRPC 1.13(c)	
ID			IRPC 1.6(b)(1) & (b)(3) <sup>17</sup>		IRPC 1.13(c)	
IL			IRPC 1.6(b)(1)-(3) <sup>18</sup>		IRPC 1.13(c)	
IN		IRPC 1.6(b)(2)-(3)			IRPC 1.13(c)	
IA		IRPC 32:1.6(b)(2)-(3)			IRPC 32:1.13(c)	
KS	KRPC 1.6(1) <sup>19</sup>			KRPC 1.13(c) <sup>20</sup>		
KY	SCR 3.130 (1.6(b)(1)) <sup>21</sup>				SCR 3.130 (1.13(c)) <sup>22</sup>	
LA		LRPC 1.6(b)(2)-(3)			LRPC 1.13(c)	
ME		MRPC 1.6(b)(2)-(3)		MRPC 1.13(c) <sup>23</sup>		
MD		MLRPC 1.6(b)(2)-(3)			MLRPC 1.13(c)	
MA			MRPC 1.6(b)(2)-(3) <sup>24</sup>		MRPC 1.13(c)	
MI		MRPC 1.6(c)(3)-(4) <sup>25</sup>			MRPC 1.13(c)	

	More Restrictive	Same as ABA Rule	More Permissive	More Restrictive	Same as ABA Rule	More Permissive
MN			MRPC 1.6(b)(4)–(5) <sup>26</sup>	MRPC 1.13(c) <sup>27</sup>		
MS		MRPC 1.6(b)(2)–(3)		MRPC 1.13(c) <sup>28</sup>		
MO	MRPP 4-1.6(b) <sup>29</sup>			MRPC 4-1.13(c) <sup>30</sup>		
MT	MRPC 1.6(b) <sup>31</sup>			MRPC 1.13(c) <sup>32</sup>		
NE	NRPC § 3-501.6(b)				NRPC § 3-501.13 <sup>33</sup>	
NV		NRPC 1.6(b)(2)–(3)			NRPC 1.13(c)	
NH	NRPC 1.6(b)				NRPC 1.13(c) <sup>34</sup>	
NJ		NJRPC 1.6(b)(1)–(2) <sup>35</sup>			NJRPC 1.13(c)	
NM		NMRPC 16-106			NMRPC 16-113	
NY	NYRPC 1.6(b)(2)–(3) <sup>36</sup>			NYRPC 1.13(c) <sup>37</sup>		
NC			NCRPC 1.6(b)(2) & (4) <sup>38</sup>	NCRPC 1.13(c) <sup>39</sup>		
ND		NDRPC 1.6(c)(1)–(2)			NDRPC 1.13(c)	
OH		ORPC 1.6(b)(2)–(3) <sup>40</sup>		ORPC 1.13(c) <sup>41</sup>		
OK			ORPC 1.6(b)(2)–(3) <sup>42</sup>		ORPC 1.13(c)	
OR	ORPC 1.6(b)(1) <sup>43</sup>				ORPC 1.13(c)	
PA			PRPC 1.6(c)(2)–(3) <sup>44</sup>	PRPC 1.13(c) <sup>45</sup>		



	More Restrictive	Same as ABA Rule	More Permissive	More Restrictive	Same as ABA Rule	More Permissive
RI	RIRPC 1.6(b) <sup>46</sup>				RIRPC 1.13(c) <sup>47</sup>	
SC			SCRPC 1.6(b)(1), (3) & (4) <sup>48</sup>		SCRPC 1.13(c)	
SD	SDRPC 1.6(b)(4)			SDRPA 1.13(c) <sup>49</sup>		
TN			TRPC 1.6(b)(1)-(3) <sup>50</sup>	TRPC 1.13(c) <sup>51</sup>		
TX			TDRPC 1.05(c)(7)-(8) <sup>52</sup>	TDRPC 1.12(d) <sup>53</sup>		
UT		URPC 1.6(b)(2)-(3)			URPC 1.13(c)	
VT			VRPC 1.6(b) & (c) <sup>54</sup>			VRPC 1.13(c) <sup>55</sup>
VA	VRPC 1.6(c)(1) <sup>56</sup>			VRPC 1.13(c) <sup>57</sup>		
WA			WRPC 1.6(b)(2)-(3) <sup>58</sup>		WRPC 1.13(c)	
WV		WVRPC 1.6(b)(2)-(3)			WVRPC 1.13(b)	
WI			WRPC 20:1.6(b)-(c) <sup>59</sup>		WRPC 20:1.13(c)	
WY			WRPC 1.6(b)(1)-(3) <sup>60</sup>		WRPC 1.13(c)	
TOTAL	15	18	18	19	31	1

SUMMARY

(1) Of the 51 jurisdictions surveyed, 36 contain disclosure exceptions that are as permissive or more permissive than those contained in ABA Model Rule 1.6.

(2) Of the 51 jurisdictions surveyed, 32 contain disclosure exceptions that are as permissive or more permissive than those contained in ABA Model Rule 1.13.

<sup>1</sup> Under ABA Model Rules 1.6(b)(2) and (b)(3), “A lawyer may reveal client information as the lawyer reasonably believes necessary:

(2) to prevent the client from committing a crime or 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;

(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 or fraud in furtherance of which the client has used the lawyer’s services.” MODEL RULES OF PROF’L CONDUCT r. 1.6(b) (AM. BAR ASS’N 1983).

<sup>2</sup> ABA Model Rule 1.13(c) permits disclosure of an organizational client’s confidential information under the following circumstances:

“(c) Except as provided in paragraph (d), if

(1) despite the lawyer’s efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,

then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.” *Id.* r. 1.13(c).

<sup>3</sup> Alabama is one of only six states that restrict disclosure of confidential information “to prevent reasonably certain death or substantial bodily harm” (or some nearly identical formulation). ALA. RULES OF PROF’L CONDUCT r. 1.6(b) (2016). The other five states include California, Kentucky, Missouri, Montana, and Rhode Island. See CAL. BUS. & PROF. CODE § 6068(e)(2) (2016); KY. RULES OF PROF’L CONDUCT r. SCR 3.130(1.6(b)(1)) (2016); MO. RULES OF PROF’L CONDUCT r. 4-1.6(b) (2016); MONT. RULES OF PROF’L CONDUCT r. 1.6(b) (2016); R.I. RULES OF PROF’L CONDUCT r. 1.6(b) (2016).

<sup>4</sup> Limited to withdrawal and disclosure as provided by other Rules, including 1.2(d), 1.6, 1.8, 1.16 (noisy withdrawal), 3.3, and 4.1. See ALA. RULES OF PROF’L

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CONDUCT r. 1.13(c) cmt. (2016) (Relation to Other Rules).

<sup>5</sup> Goes beyond ABA Model Rules 1.6(b)(2) and (b)(3) by permitting a lawyer to “reveal the intention of the lawyer’s client to commit a crime and the information necessary to prevent the crime,” without also requiring the lawyer’s services to be used in furtherance of the intended crime. ARIZ. RULES OF PROF’L CONDUCT r. ER 1.6(c)–(d) (2016).

<sup>6</sup> California is one of only six states that restrict disclosure of confidential information to prevent reasonably certain death or substantial bodily harm (or some nearly identical formulation). CAL. BUS. & PROF. CODE § 6068(e)(2). The other five states include Alabama, Kentucky, Missouri, Montana, and Rhode Island. See ALA. RULES OF PROF’L CONDUCT r. 1.6(b); KY. RULES OF PROF’L CONDUCT r. SCR 3.130(1.6(b)(1)); MO. RULES OF PROF’L CONDUCT r. 4-1.6(b); MONT. RULES OF PROF’L CONDUCT r. 1.6(b); R.I. RULES OF PROF’L CONDUCT r. 1.6(b).

<sup>7</sup> Limited to withdrawal as covered in California RPC Rule 3-700. CAL. RULES OF PROF’L CONDUCT r. 3-600(C) (2016).

<sup>8</sup> Goes beyond ABA Model Rules 1.6(b)(2) and (b)(3) by permitting a lawyer to “reveal the client’s intention to commit a crime and the information necessary to prevent the crime,” without also requiring the lawyer’s services to be used in furtherance of the intended crime. COLO. RULES OF PROF’L CONDUCT r. 1.6(b)(2) (2016).

<sup>9</sup> Goes beyond ABA Model Rules 1.6(b)(2) and (b)(3) by permitting a lawyer to reveal confidential information to “[p]revent the client from committing a criminal or fraudulent act that the lawyer believes is likely to result in substantial injury to the financial interest of property of another” without also requiring the lawyer’s services to be used in furtherance of the intended crime. CONN. RULES OF PROF’L CONDUCT r. 1.6(c)(1) (2016).

<sup>10</sup> Limited to withdrawal and disclosure as provided by other Rules, including 1.2(d), 1.6, 1.8, 1.16 (noisy withdrawal), 3.3, and 4.1. See DEL. RULES OF PROF’L CONDUCT r. 1.13 cmt. 5 (2016).

<sup>11</sup> Limited to disclosure as provided by other Rules, including 1.2(e), 1.6, 1.8, 1.16 (noisy withdrawal), 3.3, and 4.1. See D.C. RULES OF PROF’L CONDUCT r. 1.13 cmt. 7 (2016).

<sup>12</sup> Even though Florida RPC 4-1.6(b)(1) goes beyond the ABA Model Rules by *requiring* a lawyer to reveal confidential information “to prevent a client from committing a crime” without also requiring the lawyer’s services to be used in furtherance of the intended crime, the remaining permissive disclosure Rules do not apply at all to a client’s past crimes or to future or past frauds (non-criminal). FLA. RULES OF PROF’L CONDUCT r. 4-1.6(b)(1) (2016).

<sup>13</sup> Limited to disclosure as provided by other Rules, including 4-1.2(d), 4-1.6, 4-1.8, 4-1.16 (noisy withdrawal), 4-3.3, and 4-4.1. See *id.* r. 4-1.13(b)(1) cmt. (Relation to other rules).

<sup>14</sup> While Georgia RPC 1.6(b)(1)(i) permits disclosure “to avoid or prevent harm or substantial financial loss to another as a result of client criminal conduct or third party criminal conduct clearly in violation of the law,” it applies largely prospectively (“In a situation described in paragraph (b)(1), if the client has acted at the time the lawyer learns of the threat of harm or loss to a victim, use or disclosure is permissible only if the harm or loss has not yet occurred.”), it omits non-criminal fraud, and it requires that the criminal misconduct be “clearly in violation of the law” rather than “reasonably certain” to occur, as required under ABA Model Rules 1.6(b)(2) and (b)(3). GA. RULES OF PROF’L CONDUCT r. 1.6(b) (2016).

<sup>15</sup> Georgia is one of only six states with more restrictive disclosure exceptions than the ABA with respect to Rule 1.6, but equally permissive disclosure exceptions as the ABA with respect to Rule 1.13. *Id.* r. 1.13(c) (2016). The other five states include Kentucky, Nebraska, New Hampshire, Oregon, and Rhode Island. *See* KY. RULES OF PROF'L CONDUCT r. 3.130(1.13(c)) (2016); NEB. RULES OF PROF'L CONDUCT r. 3-501.13(b) (2016); N.H. RULES OF PROF'L CONDUCT r. 1.13(c) (2016); OR. RULES OF PROF'L CONDUCT r. 1.13(c) (2016); R.I. RULES OF PROF'L CONDUCT r. 1.13(c) (2016).

<sup>16</sup> Goes beyond ABA Model Rules 1.6(b)(2) and (b)(3) by *requiring* a lawyer to reveal information "that clearly establishes a criminal or fraudulent act of the client in the furtherance of which the lawyer's services had been used, to the extent reasonably necessary to rectify the consequences of such act, where the act has resulted in substantial injury to the financial interests or property of another." HAW. RULES OF PROF'L CONDUCT r. 1.6(c) (2016). Furthermore, Hawaii permits disclosure to prevent the client from committing a criminal or fraudulent act "that the lawyer reasonably believes is likely to result in death or substantial bodily harm, or in substantial injury to the financial interests or property of another" without also requiring the lawyer's services to be used in furtherance of the intended crime. *Id.* r. 1.6(b)(1).

<sup>17</sup> Goes beyond ABA Model Rules 1.6(b)(2) and (b)(3) by permitting a lawyer to reveal confidential information "to prevent the client from committing a crime, including disclosure of the intention to commit a crime" without also requiring the lawyer's services to be used in furtherance of the intended crime. IDAHO RULES OF PROF'L CONDUCT r. 1.6(b)(1) (2016).

<sup>18</sup> Goes beyond ABA Model Rules 1.6(b)(2) and (b)(3) by permitting a lawyer to reveal confidential information "to prevent the client from committing a crime" without also requiring the lawyer's services to be used in furtherance of the intended crime. ILL. RULES OF PROF'L CONDUCT r. 1.6(b)(1) (2016).

<sup>19</sup> Limited to disclosure only to "prevent the client from committing a crime," excluding non-criminal fraudulent conduct from disclosure, and covering only prospective crimes. KAN. RULES OF PROF'L CONDUCT r. 1.6(b)(1) (2016).

<sup>20</sup> Under Kansas RPC 1.13, the lawyer *must* withdraw from representation if the conditions described in 1.13(b) are met. Additional actions are limited to disclosure as provided by other Rules, including 1.2(d), 1.6, 1.8, 1.16 (noisy withdrawal), 3.3, and 4.1. *See id.* r. 1.13 cmt. 6.

<sup>21</sup> Kentucky is one of only six states that restrict disclosure of confidential information "to prevent reasonably certain death or substantial bodily harm" (or some nearly identical formulation). KY. RULES OF PROF'L CONDUCT r. SCR 3.130(1.6(b)(1)) (2016). The other five states include Alabama, California, Missouri, Montana, and Rhode Island. *See* ALA. RULES OF PROF'L CONDUCT r. 1.6(b) (2016); CAL. BUS. & PROF. CODE § 6068(e)(2) (2016); MO. RULES OF PROF'L CONDUCT r. 4-1.6(b) (2016); MONT. RULES OF PROF'L CONDUCT r. 1.6(b) (2016); R.I. RULES OF PROF'L CONDUCT r. 1.6(b) (2016).

<sup>22</sup> Kentucky is one of only six states with more restrictive disclosure exceptions than the ABA with respect to Rule 1.6, but equally permissive disclosure exceptions as the ABA with respect to Rule 1.13. KY. RULES OF PROF'L CONDUCT r. SCR 3.130(1.13(c)). The other five states include Georgia, Nebraska, New Hampshire, Oregon, and Rhode Island. *See* GA. RULES OF PROF'L CONDUCT r. 1.13(c) (2016); NEB. RULES OF PROF'L CONDUCT r. 3-501.6(b) (2016); N.H. RULES OF PROF'L CONDUCT r. 1.13(c) (2016); OR. RULES OF PROF'L CONDUCT r. 1.13(c) (2016); R.I. RULES OF PROF'L CONDUCT r. 1.13(c) (2016).

<sup>23</sup> Limited to withdrawal and to "mak[ing] such disclosures as are consistent with

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Rule 1.6, Rule 3.3, Rule 4.1, and Rule 8.3.” ME. RULES OF PROF'L CONDUCT r. 1.13(c)(2) (2016). To the extent the lawyer's services are being used by the organizational client to further a crime or fraud, Rule 1.6(b) may also be applicable. *See id.* r. 1.13 cmt. 6.

<sup>24</sup> Goes beyond ABA Model Rules 1.6(b)(2) and (b)(3) by permitting a lawyer to reveal confidential information “to prevent the commission of a criminal or fraudulent act that the lawyer reasonably believes is likely to result in substantial injury to property, financial, or other significant interests of another” without also requiring the lawyer's services to be used in furtherance of the intended crime. MASS. RULES OF PROF'L CONDUCT r. 1.6(b)(2) (2016).

<sup>25</sup> This is a tough call. While Michigan's RPC does not permit disclosure of intended non-criminal frauds, it allows disclosure to reveal “the intention of a client to commit a crime and the information necessary to prevent the crime” without also requiring the lawyer's services to be used in furtherance of the intended crime. MICH. RULES OF PROF'L CONDUCT r. 1.6(c)(3) (2016). Therefore, on balance, the disclosure exceptions can be said to be on par with ABA Model Rule 1.6.

<sup>26</sup> Goes beyond ABA Model Rules 1.6(b)(2) and (b)(3) by permitting a lawyer to reveal confidential information “to prevent the commission of a crime” without also requiring the lawyer's services to be used in furtherance of the intended crime. MINN. RULES OF PROF'L CONDUCT r. 1.6(b)(4) (2016).

<sup>27</sup> Limited to withdrawal and to disclosing confidential information “in accordance with Rule 1.6.” *Id.* r. 1.13(c). Moreover, the Rule “does not limit or expand the lawyer's responsibility” under Rules 1.2(d), 1.6, 1.8, 1.16 (noisy withdrawal), 3.3, and 4.1. *See id.* r. 1.13 cmt. 6.

<sup>28</sup> Limited to withdrawal and disclosure as provided by other Rules, including 1.2(d), 1.6, 1.8, 1.16 (noisy withdrawal), 3.3, and 4.1. *See* MISS. RULES OF PROF'L CONDUCT r. 1.13 cmt. (2016) (Relation to Other Rules).

<sup>29</sup> Missouri is one of only six states that restrict disclosure of confidential information “to prevent reasonably certain death or substantial bodily harm” (or some nearly identical formulation). MO. RULES OF PROF'L CONDUCT r. 4-1.6(b) (2016). The other five states include Alabama, California, Kentucky, Montana, and Rhode Island. *See* ALA. RULES OF PROF'L CONDUCT r. 1.6(b) (2016); CAL. BUS. & PROF. CODE § 6068(e)(2) (2016); KY. RULES OF PROF'L CONDUCT r. SCR 3.130(1.6(b)(1)) (2016); MONT. RULES OF PROF'L CONDUCT r. 1.6(b) (2016); R.I. RULES OF PROF'L CONDUCT r. 1.6(b) (2016).

<sup>30</sup> Limited to withdrawal and disclosure as provided by other Rules, including 1.2(d), 1.6, 1.8, 1.16 (noisy withdrawal), 3.3, and 4.1. *See* MO. RULES OF PROF'L CONDUCT r. 4-1.6 cmt. 5 (2016).

<sup>31</sup> Montana is one of only six states that restrict disclosure of confidential information “to prevent reasonably certain death or substantial bodily harm” (or some nearly identical formulation). MONT. RULES OF PROF'L CONDUCT r. 1.6(b) (2016). The other five states include Alabama, California, Kentucky, Missouri, and Rhode Island. *See* ALA. RULES OF PROF'L CONDUCT r. 1.6(b) (2016); CAL. BUS. & PROF. CODE § 6068(e)(2) (2016); KY. RULES OF PROF'L CONDUCT r. SCR 3.130(1.6(b)(1)) (2016); MO. RULES OF PROF'L CONDUCT r. 4-1.6(b) (2016); R.I. RULES OF PROF'L CONDUCT r. 1.6(b) (2016).

<sup>32</sup> Limited to withdrawal and disclosure as provided by other Rules. *See* MONT. RULES OF PROF'L CONDUCT r. 1.13(c) (2016).

<sup>33</sup> Nebraska is one of only six states with more restrictive disclosure exceptions than the ABA with respect to Rule 1.6, but equally permissive disclosure exceptions as the ABA with respect to Rule 1.13. NEB. RULES OF PROF'L CONDUCT r. 3-501.6(b)

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(2016). The other five states include Georgia, Kentucky, New Hampshire, Oregon, and Rhode Island. *See* GA. RULES OF PROF'L CONDUCT r. 1.13(c) (2016); KY. RULES OF PROF'L CONDUCT r. SCR 3.130(1.13(c)) (2016); N.H. RULES OF PROF'L CONDUCT r. 1.13(c) (2016); OR. RULES OF PROF'L CONDUCT r. 1.13(c) (2016); R.I. RULES OF PROF'L CONDUCT r. 1.13(c) (2016).

<sup>34</sup> New Hampshire is one of only six states with more restrictive disclosure exceptions than the ABA with respect to Rule 1.6, but equally permissive disclosure exceptions as the ABA with respect to Rule 1.13. N.H. RULES OF PROF'L CONDUCT r. 1.13(c) (2016). The other five states include Georgia, Kentucky, Nebraska, Oregon, and Rhode Island. *See* GA. RULES OF PROF'L CONDUCT r. 1.13(c) (2016); KY. RULES OF PROF'L CONDUCT r. SCR 3.130(1.13(c)) (2016); NEB. RULES OF PROF'L CONDUCT r. 3–501.6(b) (2016); OR. RULES OF PROF'L CONDUCT r. 1.13(c) (2016); R.I. RULES OF PROF'L CONDUCT r. 1.13(c) (2016).

<sup>35</sup> While New Jersey RPC 1.6(b)(1) and (b)(2) are limited to disclosure of prospective crimes, fraud, or illegal acts, (i) they do not require the lawyer's services to be used in furtherance of the crimes, fraud, or illegal acts, (ii) they countenance broader categories of illegal activities subject to permissive disclosure, and (iii) they apply to the behavior of a client or "other person." N.J. RULES OF PROF'L CONDUCT r. 1.6(b) (2016). Therefore, on balance, the disclosure exceptions can be said to be on par with ABA Model Rule 1.6.

<sup>36</sup> Disclosure permitted only to prevent a client from committing a (future or ongoing) crime and to withdraw a lawyer's opinion where the lawyer discovers that her opinion was based on materially inaccurate information or is being used to further a crime or fraud. *See* N.Y. RULES OF PROF'L CONDUCT r. 1.6(b)(2)–(3) (2016).

<sup>37</sup> Limited to withdrawal and disclosure as provided by other Rules, including 1.2(d), 1.6, 1.8, 1.16 (noisy withdrawal), 3.3, and 4.1. *See id.* r. 1.13 cmt. 6.

<sup>38</sup> Disclosure permitted to prevent, mitigate, or rectify the consequences of a client's criminal or fraudulent act "in the commission of which the lawyer's services were used" and to prevent the client from committing a crime without regard to whether the lawyer's services were used. N.C. RULES OF PROF'L CONDUCT r. 1.6(b)(2), (b)(4) (2016).

<sup>39</sup> Limited to withdrawal and disclosure as provided by other Rules, including 1.2(d), 1.6, 1.8, 1.16 (noisy withdrawal), 3.3, and 4.1. *See id.* r. 1.13 cmt. 6.

<sup>40</sup> While Ohio RPC 1.6(b)(2) and (b)(3) do not permit disclosure of a client's intent to commit a non-criminal fraud, they allow disclosure to prevent the client or "other person" from committing a crime without regard to whether the lawyer's services are used. OHIO RULES OF PROF'L CONDUCT r. 1.6(b)(2)–(3) (2016). Therefore, on balance, the disclosure exceptions can be said to be on par with ABA Model Rule 1.6.

<sup>41</sup> Limited to "the same discretion and obligation to reveal information relating to the representation to persons outside the client as any other lawyer, as provided in Rule 1.6(b) and (c) (which incorporates Rules 3.3 and 4.1 by reference)." *Id.* r. 1.13 cmt. 6.

<sup>42</sup> Goes beyond ABA Model Rules 1.6(b)(2) and (b)(3) by permitting a lawyer to reveal confidential information "to prevent the client from committing a crime" without also requiring the lawyer's services to be used in furtherance of the intended crime. OKLA. RULES OF PROF'L CONDUCT r. 1.6(b)(2)(i) (2016).

<sup>43</sup> Only permits a lawyer "to disclose the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime." OR. RULES OF PROF'L CONDUCT r. 1.6(b)(1) (2016).

<sup>44</sup> Goes beyond ABA Model Rules 1.6(b)(2) and (b)(3) by permitting a lawyer to

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reveal confidential information “to prevent the client from committing a criminal act that the lawyer believes is likely to result in substantial injury to the financial interests or property of another” without also requiring the lawyer’s services to be used in furtherance of the intended crime. PA. RULES OF PROF’L CONDUCT r. 1.6(c)(2) (2016).

<sup>45</sup> Limited to withdrawal and disclosure as provided by other Rules, including 1.2(d), 1.6, 1.8, 1.16 (noisy withdrawal), 3.3, and 4.1. *See id.* r. 1.13 cmt. 5.

<sup>46</sup> Rhode Island is one of only six states that restrict disclosure of confidential information “to prevent reasonably certain death or substantial bodily harm” (or some nearly identical formulation). R.I. RULES OF PROF’L CONDUCT r. 1.6(b) (2016). The other five states include Alabama, California, Kentucky, Missouri, and Montana. *See* ALA. RULES OF PROF’L CONDUCT r. 1.6(b) (2016); CAL. BUS. & PROF. CODE § 6068(e)(2) (2016); KY. RULES OF PROF’L CONDUCT r. SCR 3.130(1.6(b)(1)) (2016); MO. RULES OF PROF’L CONDUCT r. 4-1.6(b) (2016); MONT. RULES OF PROF’L CONDUCT r. 1.6(b) (2016).

<sup>47</sup> Rhode Island is one of only six states with more restrictive disclosure exceptions than the ABA with respect to Rule 1.6, but equally permissive disclosure exceptions as the ABA with respect to Rule 1.13. R.I. RULES OF PROF’L CONDUCT r. 1.13(c). The other five states include Georgia, Kentucky, Nebraska, New Hampshire, and Oregon. *See* GA. RULES OF PROF’L CONDUCT r. 1.13(c) (2016); KY. RULES OF PROF’L CONDUCT r. SCR 3.130(1.13(c)) (2016); NEB. RULES OF PROF’L CONDUCT r. 3-501.6(b) (2016); N.H. RULES OF PROF’L CONDUCT r. 1.13(c) (2016); OR. RULES OF PROF’L CONDUCT r. 1.13(c) (2016).

<sup>48</sup> Goes beyond ABA Model Rules 1.6(b)(2) and (b)(3) by permitting a lawyer to reveal confidential information “to prevent the client from committing a criminal act” without also requiring the lawyer’s services to be used in furtherance of the intended crime. S.C. RULES OF PROF’L CONDUCT r. 1.6(b)(1) (2016).

<sup>49</sup> Limited to withdrawal and disclosure as provided by other Rules. *See* S.D. RULES OF PROF’L CONDUCT r. 1.13(c) (2016).

<sup>50</sup> Goes beyond ABA Model Rules 1.6(b)(2) and (b)(3) by permitting a lawyer to reveal confidential information “to prevent the client or another person from committing a crime” without also requiring the lawyer’s services to be used in furtherance of the intended crime. TENN. RULES OF PROF’L CONDUCT r. 1.6(b)(1) (2016).

<sup>51</sup> Limited to withdrawal and disclosure “only to the extent permitted” by “RPCs 1.6 and 4.1” as well as other Rules, including 1.2(d), 1.8, 1.16 (noisy withdrawal), and 3.3. *Id.* r. 1.13(c); *see* TENN. RULES OF PROF’L CONDUCT r. 1.13 cmt. 6 (2016).

<sup>52</sup> Goes beyond ABA Model Rules 1.6(b)(2) and (b)(3) by permitting a lawyer to reveal confidential information “to prevent the client from committing a criminal or fraudulent act” without also requiring the lawyer’s services to be used in furtherance of the intended crime. TEX. DISCIPLINARY RULES OF PROF’L CONDUCT r. 1.05(c)(7) (2016).

<sup>53</sup> Limited to withdrawal with “any further obligations of the lawyer” after withdrawing from the representation being “determined by Rule 1.05” (that is, the rule pertaining to protecting confidential information). *Id.* r. 1.12(d).

<sup>54</sup> Vermont’s RPC contain the most robust disclosure exceptions of any U.S. jurisdiction. Specifically, they *require* lawyers to reveal confidential information “to prevent the client from committing a crime or 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.” VT. RULES OF PROF’L CONDUCT r. 1.6(b)(2) (2016). And “to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably

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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." *Id.* r. 1.6(b)(3). Vermont's Rules also permit disclosure "to prevent the client from committing a crime in circumstances other than those in which disclosure is required" by the mandatory disclosure provisions. *Id.* r. 1.6(c)(1).

<sup>55</sup> Vermont Rule 1.13(c)(1) requires reporting out confidential information if also required by Rule 1.6(b), which, as discussed in *supra* note 54, provides expansive mandatory disclosures. *Id.* r. 1.13(c)(1) (2016). Moreover, Rule 1.13(c)(2) permits disclosure in additional circumstances "whether or not Rule 1.6 requires or permits such disclosure." *Id.* r. 1.13(c)(2).

<sup>56</sup> Virginia Rule 1.6(c)(1) requires a lawyer to "promptly reveal . . . the intention of a client, as stated by the client, to commit a crime and the information necessary to prevent the crime," while not requiring the lawyer's services to be used in furtherance of the intended crime. VA. RULES OF PROF'L CONDUCT r. 1.6(c)(1) (2016). Although the disclosure provision is mandatory, it only applies to future crimes, does not apply to non-criminal fraud, and requires that the lawyer learn of the client's intent from the client. In addition, Virginia RPC 1.6 does not contain any other disclosure provisions, mandatory or permissive, thereby omitting circumstances involving past crimes or fraud as well as mitigation of past crimes or fraud. *See id.* r. 1.6(c).

<sup>57</sup> Limited to withdrawal and disclosure as provided by other Rules, including 1.2(d), 1.6, 1.8, 1.16 (noisy withdrawal), 3.3, and 4.1. *See id.* r. 1.13 cmt. 6.

<sup>58</sup> Goes beyond ABA Model Rules 1.6(b)(2) and (b)(3) by permitting a lawyer to reveal confidential information "to prevent the client from committing a crime" without also requiring the lawyer's services to be used in furtherance of the intended crime. WASH. RULES OF PROF'L CONDUCT r. 1.6(b)(2) (2016).

<sup>59</sup> Goes beyond ABA Model Rules 1.6(b)(2) and (b)(3) by *requiring* a lawyer to reveal confidential information "to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in . . . substantial injury to the financial interest or property of another" without also requiring the lawyer's services to be used in furtherance of the intended crime. WIS. RULES OF PROF'L CONDUCT r. 20:1.6(b) (2016).

<sup>60</sup> Goes beyond ABA Model Rules 1.6(b)(2) and (b)(3) by permitting a lawyer to reveal confidential information "to prevent the client from committing a criminal act" without also requiring the lawyer's services to be used in furtherance of the intended crime. WYO. RULES OF PROF'L CONDUCT r. 1.6(b)(1) (2016).