AMENDMENT OF MODEL RULE 1.6: PROGRESS OR A STEP BACKWARD?[1]

Approved by the Board of Regents
2004

[1] The principal draftsperson of this paper was Chilton David Varner, FACTL, of Atlanta, Georgia, Chair of the Attorney-Client Relationships Committee of the College.

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AMENDMENT OF MODEL RULE 1.6: PROGRESS OR A STEP BACKWARD?

In the wake of the Enron collapse and other corporate accounting scandals, the ABA House of Delegates in 2003 adopted by a narrow margin a controversial amendment to Model Rule 1.6. The amendment permits attorneys to divulge confidential information obtained from the client in the course of the representation in order to prevent a "crime or fraud that is "reasonably certain" to result in "substantial financial injury" to another.

The ABA's adoption of the amendment is not self-executing. Each state retains authority over the ethical standards that govern the attorneys licensed to practice there. Some states had already adopted the substance of the amendment in advance of the action by the ABA House of Delegates; others have not. The American College of Trial Lawyers opposed the adoption of the amendment in the House of Delegates, and it encourages opposition to adoption of the amendment by the states. Indeed, the College encourages states that have already adopted the substance of the amendment to reconsider that action.

The reasons for the College's concern and deep-seated opposition are summarized below. More detailed materials in PowerPoint are available for Fellows of the College who wish to participate in their states' consideration of Model Rule 1.6.

The Amendment

The American College has historically been a vocal advocate for the attorney-client privilege and the benefits it provides to our society at large, as well as to attorneys and clients[1]. The activity involving the privilege that has recently received the most attention from the College is the ABA's adoption of amended Rules of Professional Responsibility, in particular, Model Rule 1.6. The issue prompting these amendments is whether to confer discretionary authority upon lawyers to decide for themselves whether and when to breach the ethical duty of confidentiality. The pertinent text of that amended Rule provides:

> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> (1) to prevent reasonably certain death or substantial bodily harm;
>
> (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;

[1] American College of Trial Lawyers, *The Erosion of the Attorney-Client Privilege and Work Product Doctrine in Federal Criminal Investigations* (Irvine, California March 2002)

(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.

In sum, amended Rule 1.6 permits, but does not require, lawyer disclosure to prevent, mitigate or rectify the consequences of client crimes or frauds

a) that threatens substantial financial harm to others

b) in which the lawyer's services were used.

In the negotiations in the House of Delegates, the "permit but does not require" feature was used to rebut opponents, who argued that the proposed amendment represented a troubling and profound change in the attorney-client relationship. Proponents argued that the amendment did not "require" the lawyer to do anything he or she did not want to do; it merely "permitted" disclosure by a concerned attorney. The College believes that this permissive language, while better than its mandatory counterpart, surely does not resolve the myriad problems raised by the amendment.

Other changes adopted by the ABA also introduced additional ambiguity into the lawyer's decision-making about the crucial issue of whether he/she should breach what has been called the most sacred privilege in the law. These are some of the terms used in the amended Rules:

- Disclosure can be justified if there is conduct that **"threatens"** financial harm that is **"substantial."**

- "Facts from which **a reasonable lawyer** would conclude" a crime or fraud is "imminent" will permit disclosure;

- Up-the-line reporting may be called for unless the lawyer concludes it is not in the **"best interests"** of the corporation;

- Disclosure outside the corporation is permitted to prevent **"substantial injury"** to the client;

- A lawyer who **"reasonably believes"** his/her discharge was retaliatory must report to the Board.

These terms, interpreted by different lawyers to mean different things, introduce substantial uncertainty into a decision that for most lawyers will rank as amongst their most grave.

The Position of the College

The ACTL has been a vocal and energetic opponent each time the ABA has considered this issue of attorney-client confidentiality. In 2001, for example, the College filed a comprehensive position statement opposing the same change to Model Rule 1.6 that finally passed in 2003[2]. That paper reflects the principles that have stirred the ACTL each time the ABA considered a discretionary rule of confidentiality. Its main points are summarized below:

- Over the years, the law may have imposed liability on lawyers who themselves knowingly made false statements of material fact, but not on lawyers who have stood upon their ethical duty of silence in order to obtain all relevant facts upon which to encourage compliance with the law.

- Disclosure may invite litigation, not prevent it. In our litigious society, claims for breach of confidentiality are an ever-present threat. At minimum, the amended rule creates the prospect for satellite litigation on the legal boundaries of liability and the factual basis for the disclosure.

- Ambiguity reigns. How far may or must the disclosing attorney go? Where is the line and what are the limits?

- The amendments ignore the increasingly global economy. Disclosures that fall within the bounds of Amended Rule 1.6 may in the European Community constitute a penal delinquency or a crime.

- Disclosure inevitably introduces an adversarial feature into the attorney-client relationship. Should the lawyer sacrifice the client to save the lawyer?

- The fundamental justifications for attorney-client confidentiality in the first place are so that "valid legal advice" can be given and compliance with the law" can be assured. ***Only knowledge of all relevant facts serves and enables these ends.***

- The privilege belongs to the client, not the lawyer.

- The amendment raises troubling issues of notice and timing. What must a lawyer tell the client about his/her duty of confidentiality before receiving confidences?

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[2] American College of Trial Lawyers, *Report of the Legal Ethics Committee of the American College of Trial Lawyers on Duties of Confidentially* (Irvine, California March 2001)

The College has also commented on the Sarbanes-Oxley SEC rule on confidentiality[3]. The refrain is similar: Under the SEC regulation and Model Rule 1.6, both of which confront the corporation with the prospect of attorney disclosure or withdrawal, the client may well be tempted to do one or more of these counterproductive things:

- To avoid consulting outside counsel;
- To select counsel thought less likely to give cautious advice; or
- In either case, to disclose to counsel fewer potentially troublesome facts.

This is the law of unintended consequences.

Conclusion

These are parlous times for the attorney-client privilege and the confidentiality that protects it. The media and non-lawyers are quick to condemn any spirited defense of confidentiality as "concealment" of corporate misbehavior. The position of the College and other opponents of the amended Rules is not always a popular one.

But for centuries the attorney-client privilege has served our profession -- and, more importantly, our larger communities -- by allowing good lawyers to counsel their clients about the legal and ethical boundaries beyond which they must not go.

The fundamental reasons for the College's opposition to Amend Rule 1.6 are first, that the amendments make it more, not less, difficult to assist the client in conforming his/her/its conduct with the law; and second, that they threaten to subtly move the focus of the lawyer's attention away from what is in the best interest of the client to what is in the best interest of the lawyer. These are not good results for anyone.

Additional Materials

Additional background materials and PowerPoint slides are available from the American College of Trial Lawyers website at www.actl.com/PDFs/ModelRule16Powerpoint.pdf.

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[3] American College of Trial Lawyers, *Statement Opposing SEC Proposed Part 205 Implementation of Standards of Professional Conduct for Attorneys (file No. 33-8150.WP* (Irvine, California)