American College
of
Trial Lawyers

REPORT OF THE LEGAL ETHICS COMMITTEE OF THE AMERICAN COLLEGE OF TRIAL LAWYERS

ON

DUTIES OF CONFIDENTIALITY

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Approved by the Board of Regents
March, 2001

American College of Trial Lawyers

The American College of Trial Lawyers is one of the premier legal associations in America. Founded in 1950 by the Honorable Emil Gumpert, it is composed of the best of the trial bar from the United States and Canada. Fellowship in the College is extended by invitation only, after careful investigation, to those experienced trial lawyers who have mastered the art of advocacy and those whose professional careers have been marked by the highest standards of ethical conduct, professionalism and civility. Lawyers must have a minimum of 15 years' experience before they can be considered for Fellowship. There are currently more than 5,000 Fellows across the United States and Canada. Membership in the College cannot exceed 1% of the total lawyer population of any state or province. Qualified lawyers are called to Fellowship in the College from all branches of trial practice. Fellows are carefully selected from among those who represent plaintiffs and those who represent defendants in civil cases; those who prosecute and those who defend persons accused of crime. The College is thus able to speak with a balanced voice on important issues affecting the administration of justice.

The College's dedication to improving the standards of trial practice is illustrated through its many publications and monographs such as the ***Code of Trial Conduct.*** This handbook has been adopted by many federal and state courts and by other professional organizations. The ***Code of Trial Conduct*** is the only document to have ever received an endorsement from the United States Supreme Court. The College strives to improve and elevate the standards of trial practice, the administration of justice and the ethics of the trial profession. It brings together members of the profession who are qualified and who, by reason of integrity and ability, will contribute to the accomplishments and good fellowship of the College.

"*In this select circle, we find pleasure and charm in the illustrious company of our contemporaries and take the keenest delight in exalting our friendships.*"

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I. Overview

Consistent with a lawyer's duty to maintain the confidences of a client, consistent with a lawyer's duty of loyalty to a client, consistent with the principles which are at the heart of the attorney-client privilege and consistent with the indispensable need in a free society for an independent bar, the American College of Trial Lawyers maintains its support of American Bar Association Model Rule of Professional Conduct 1.6 in its present form, unchanged by proposals of the current ABA Ethics 2000 Commission regarding a lawyer's duty of confidentiality.

In the early 1980s the Commission on Evaluation of Professional Standards of the American Bar Association (commonly known as the Kutak Commission) recommended changes in ethical standards to be embodied in the then proposed Model Rules of Professional Conduct. In general, these proposals would have conferred discretionary authority upon attorneys to decide for themselves whether and when they might violate principles of confidentiality in order to disclose client fraud and misconduct.

Through two initial written public statements, the College spoke directly in opposition to the proposal.[1] The Kutak Commission's proposals as to client confidentiality were not adopted.

Again in 1991 proponents of the rejected changes renewed their proposal. Again the College, through its leadership, successfully opposed the proposal.[2]

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[1] April 2, 1982 *Report of the Legal Ethics Committee on the May 30, 1981 Proposed Draft of the Model Rules of Professional Conduct,* approved by the Board of Regents on April 2, 1982 and the January 14, 1983 *Report and Recommendation of the Executive Committee on the Final Draft of the Kutak Commission Proposed Model Rules of Professional Conduct.*

[2] A proponent's partisan view of the decision and debate before the ABA House of Delegates, criticizing the views of the College, is expressed in Geoffrey C. Hazard, Jr., *Lawyers and Client Fraud: They Still Don't Get It,* 6 Geo. J. of Legal Ethics, 701 (1993), hereinafter cited as Hazard, *Lawyers and Client Fraud.* Professor Hazard is a member of the Ethics 2000 Commission.

The ABA Ethics 2000 Commission again revisits the issue of client confidentiality with a proposal for change in Model Rule 1.6. This proposal, if adopted, would expand exceptions to the duty of confidentiality, with provisions, among others, permitting a lawyer, without client consent, to decide to disclose past, present or future intended client crimes or frauds to "prevent, mitigate or rectify" injury to the financial interests of another.

The College opposes the ABA Ethics 2000 Commission proposals on this subject.

II. The Commission's Proposed Revision To Rule 1.6 On Confidentiality Of Information:[3]

(a) A lawyer shall not reveal information relating to the representation of a client unless the client [ ] **gives informed consent, the disclosure** is impliedly authorized in order to carry out the representation, [ ] **or the disclosure is permitted** by subparagraph (b).

(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;

(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;

(4) to secure legal advice about the lawyer's compliance with these Rules;

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[3] Proposed deletions from the current text are indicated by [ ]; proposed additions to the text are in bold type.

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyers' representation of the client; **or**

(6) to comply with other law or a court order.[4]

Analysis of the Proposed Wording

It is important to note a critical limitation under subparagraphs (b)(2) and (b)(3), namely, that information may only be disclosed if the client is using or has used a lawyer's services in the commission of the crime or fraud. Mere knowledge by the lawyer of criminal or fraudulent conduct by the client which does not involve the use of the lawyer's services could not be disclosed under this rule.[5]

Paragraph (a) is worded somewhat differently than the current rule but does not appear to make a substantive change. The reason for the change in language is that "informed consent" has been defined in a proposed Rule 1.0(e). The current version permits disclosure "after consultation." It is to be noted that paragraph (a) is an absolute prohibition on the revelation of information relating to the representation of a client absent informed consent.

The first phrase in paragraph (b) does not appear to be a substantive change from the prior wording. It appears to be intended to clarify that the information which a lawyer may reveal must relate to the representation of a client. Although not new language, it is to be noted that paragraph (b) is permissive. At least on the face of the rule, a lawyer is not required to reveal information under the circumstances contemplated within the rule. Paragraph (b) protects a lawyer from a claim of unethical conduct if the lawyer chooses to disclose information covered in that rule.

The second point to be noted about paragraph (b) is that the lawyer may reveal information only "to the extent the lawyer reasonably believes necessary." Again, this is not new language, but

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4 Report on the Evaluation of the Model Rules of Professional Conduct, A.B.A. Ethics 2000 Commission Rule 1.6 (Nov. 2000) [hereinafter ETHICS 2000 REPORT].

5 *See* RESTATEMENT § 67 cmt. *e.*

it is a limitation on what the lawyer may do under the circumstances contemplated within the rule. Although not specifically stated in the rule, arguably the lawyer has a duty to attempt to persuade the client to take the necessary action or make the necessary disclosures before undertaking to reveal the information himself.[6] This will be discussed further below.

Subparagraph (b)(1) has been modified and expanded. The current version of subparagraph (b)(1) is limited to disclosures to prevent a client from committing a "criminal act" which is likely to result in "imminent death or substantial bodily harm." Under the proposed rule, the information which may be disclosed is no longer limited by the qualification that it be a criminal act which the client plans to commit. This should be contrasted with proposed subparagraphs (b)(2) and (3) which, on their face, are limited to criminal or fraudulent conduct. Therefore, any conduct of the client which will result in reasonably certain death or substantial bodily harm is covered by the rule. Furthermore, subparagraph (b)(1) does not limit the information which may be disclosed to the confidences of the client. The information could have been received from any source. An example of this could be a consulting psychiatrist.

It is also to be noted that in contrast to subparagraphs (b)(2) and (b)(3), in subparagraph (b)(1) the death or substantial bodily harm which the lawyer is seeking to prevent is not limited to the death or bodily harm to third persons. In other words, under the current version, a lawyer could not disclose information to prevent his own client from committing suicide or substantially physically harming himself unless that conduct was a crime in the relevant jurisdiction. Under the proposed rule, the lawyer could disclose information to prevent the client from committing suicide or otherwise substantially harming himself.

In addition, the temporal element of (b)(1) has been changed from "imminent" to "reasonably certain." This is clearly meant to bring within the rule future but not imminent death or substantial bodily harm which is "reasonably certain." The example given is the discharging of toxic waste into a public water supply which is reasonably certain to cause harm at a later date. Proposed Comment 6.

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[6] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. 4 (1983) [hereinafter MODEL RULES]; RESTATEMENT OF LAW GOVERNING LAWYERS § 67(3) (2000) [hereinafter RESTATEMENT].

Subparagraphs (b)(2) and (b)(3) are both new and are related. The principal difference between the two is the timing of the client conduct giving rise to the potential injury. Subparagraph (b)(2) is aimed at preventing the client from committing the crime or fraud. Subparagraph (b)(3) focuses on preventing, mitigating or rectifying the injury after the crime or fraud has been committed. In either event, the information which may be disclosed under subparagraphs (b)(2) and (b)(3) could not be disclosed under the current rule. [Such information would also be prohibited from disclosure under Model Code 4-101(B)(1).]

Both subparagraphs (b)(2) and (b)(3) on their face allow disclosure when the "financial interests or property of another" are threatened with "substantial injury." Substantial injury is not defined. Furthermore, it is not all conduct which may result in injury which triggers the permissive disclosure. The conduct is limited to that which is criminal or fraudulent.

The limitation that the client must have used or be using the lawyer's services does not require that the lawyer's services themselves be criminal or fraudulent. While it is fairly clear that these sections would include a situation in which the client provided false or misleading information to the lawyer that is included in an opinion letter or some other documentation, the rule is not so limited. Arguably, the rule would also cover situations where the criminal or fraudulent conduct is distinct from the lawyer's services, but the client is using the lawyer's services in furtherance of the fraud or criminal conduct. For example, it could be argued that using the services of a prestigious law firm to legitimize a transaction would come within this rule even though no document prepared by the firm contains incorrect or misleading material.

Subparagraph (b)(2) contemplates that it is the lawyer's intent "to prevent" the crime or fraud whereas subparagraph (b)(3) contemplates that it is the lawyer's intent "to prevent, mitigate or rectify" the injury. What those verbs mean is necessarily case specific and the proposed comments offer little guidance. However, some generalizations can be made. How the lawyer reveals the information is specifically limited "to the extent the lawyer reasonably believes necessary." The obvious first step is to request the client to take necessary action.[7] Assuming the client has not undertaken to prevent, mitigate or rectify either the conduct or the injury at the lawyer's

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[7] *See* RESTATEMENT § 67(3).

request, the lawyer should take the course of action which is the minimum necessary to achieve the result. Although not spelled out in the rule, it may be that the minimum action is to withdraw from representation which may be required by Rule 1.16 in any event. Commentators have suggested that the lawyer may make a so-called "noisy withdrawal" under such circumstances. A "noisy withdrawal" is one in which the lawyer not only withdraws from representation but disavows his work product.[8] The effect of a "noisy withdrawal" is that it is obvious that the client has done something with which the lawyer cannot be associated and this, in and of itself, may alert the potential victim. It may be necessary for the lawyer to go further and disclose information directly to the victim so that the victim can take steps to lessen the damage or recover assets of the lawyer's client.[9] The rule does not contemplate that the lawyer be permitted to take on the cause of the victim in opposition to the lawyer's client.

Subparagraph (b)(4) makes it clear that a lawyer may consult with another lawyer in order to ensure that the lawyer is complying with the rules. This is new in the rule but arguably is a right which a lawyer already had.[10] Under current Rule 1.6(a), a lawyer cannot reveal to another lawyer information concerning the representation of a client without client consent. However, a lawyer could have sought advice by the use of hypotheticals which would not disclose the client's identity to the other lawyer. Under proposed Rule 1.6(b)(4), it does not appear that a lawyer would need to disclose client specific information to another lawyer even for the purpose of obtaining advice on compliance with the rules. However, in those cases where it is impossible not to make known to the other lawyer the identity of the client, subparagraph (b)(4) provides a safe harbor.

Subparagraph (b)(5) is not new. It is simply renumbered.

Subparagraph (b)(6) is new but arguably was a right which already exists. Under the current version of Rule 1.6, Comment 20 and 21 specifically provide for disclosure of information when required by law or court order.[11]

Implicit in the duty to keep information confidential unless otherwise permitted, is that the attorney use reasonable precautions to

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[8] *See* ABA Formal Opinion 92-366.

[9] *See* RESTATEMENT § 67, Cmt. f.

[10] *See* ETHICS 2000 Report Rule 1.6 cmts. [4] and [9].

[11] *See* RESTATEMENT § 63.

safeguard information. Proposed Comment 17 makes it clear that in the use of e-mail, a lawyer need not require "special security measures" if there is a "reasonable expectation of privacy."

III. Recommendations and Analysis of the College

The College opposes the proposed changes to Rule 1.6 paragraphs (b)(2) and (b)(3) which, in general, would permit a lawyer to breach client confidences to "prevent, mitigate or rectify" financial injury to another.

The duty of confidentiality arises from broadly accepted societal norms and public policy. In the attorney-client and fiduciary duty context it arises

> where one person reposes special confidence in another, or where a special duty exists on the part of one person to protect the interests of another, or when there is a reposing of faith, confidence, and trust, and the placing of reliance by one person on the judgment and advice of another.[12]

The proposed changes in paragraphs (b)(2) and (b)(3) contradict each of these values. They are counter intuitive. More specifically, they are contrary to the inherent relationship of trust and confidence which must exist between an attorney and a client. They transform the concept of confidentiality to the point that it bears little resemblance to its original meaning.

Nevertheless, proponents of the broad-based proposal for change claim that damage to the relationship of trust and confidence is justified (1) because of an unquantifiable and academic view of a relatively few instances of actual rectifiable abuse and (2) a plea to the self-interest of lawyers to prevent the possibility of misguided litigation charging them with complicity in their clients' misconduct.

Response to the Self-Interest Argument

Proponents of the amendments to Rule 1.6 contend that the substantive law is trending toward increased imposition of civil liability on lawyers who do not disclose client fraud. Thus, they argue,

[12] Lank v. Steiner, 213 A.2d 848 (Del. Ch. 1965).

the amendments merely conform to the growing "reality" of substantive law as pronounced by legislatures and the courts. They characterize the organized bar's concepts of the norms of the profession, as expressed in rules of conduct, as irrelevant, because the courts, legislatures, and regulatory agencies harbor quite different views that, given those bodies' enhanced status, represent "reality." In other words, the argument goes, the organized bar may as well face up to the reality of what society expects of the profession.[13]

The contention is ill-premised. The courts for years have imposed liability on lawyers in non-litigation contexts who knowingly make false statements of material fact intending that third parties (clients or nonclients) rely on them.[14] Likewise, liability to certain nonclients in non-litigation contexts for negligent misrepresentation has long been recognized by a majority of jurisdictions, which either have adopted Section 552 of the RESTATEMENT (SECOND) OF TORTS or otherwise have permitted liability in substantially the same limited circumstances.[15] The proponents, therefore, appear to suggest a trend imposing civil liability on lawyers for silence in the face of client fraud. The validity of that premise, however, is questionable.

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13 See, e.g., Hazard, Lawyers and Client Fraud, supra note 2.

14 See Likover v. Sunflower Terrace II Ltd., 696 S.W.2d 468, 472 (Tex. Ct. App. 1985) (citing Poole v. Houston & T.C. Ry., 58 Tex. 134 (1882)); Goodman v. Kennedy, 556 P.2d 737, 745 (Cal. 1976); see also 1 RONALD E. MALLEN & JEFFREY M. SMITY, LEGAL MALPRACTICE § 6.9 & n.1 (5th ed. 2000) (citing cases from 28 states and the District of Columbia) [hereinafter MALLEN & SMITH]; cf. MODEL RULES Rule 1.2(d) (1983) (duty to avoid assisting client crime or fraud), id. Rule 4.1 (duty of truthfulness in statement to others).

15 See, e.g.:

Cal.—Roberts v. Ball, Hunt, Hart, Brown & Baerwitz, 128 Cal. Rptr. 901, 905-06 (Ct. App. 1976) (opinion letter provided to client's prospective lender; applying California's multicriteria balancing test).

Colo.—Mehaffy, Rider, Windholz & Wilson v. Central Bank Denver, N.A., 892 P.2d 230, 236 (Colo. 1995) (opinion letter provided to purchaser of bonds; applying § 552;).

Ill.—Greycas, Inc. v. Proud, 826 F.2d 1560, 1564-65 (7th Cir. 1987) (opinion letter provided to client's lender indicating UCC search revealed no liens; accepting § 552;), cert. denied, 484 U.S. 1043, 108 S. Ct. 775 (1988).

Md.—Flaherty v. Weinberg, 492 A.2d 618 (Md. 1985) (third-party-beneficiary theory).

Mass.—One Nat'l Bank v. Antonellis, 80 F.3d 606, 612 (1st Cir. 1996) ("foreseeable-reliance" doctrine).

Mich.—Molecular Tech. Corp. v. Valentine, 925 F.2d 910, 916 (6th Cir. 1991) (offering circular for private placement; applying traditional negligence rule

Liability for fraud will not be predicated on mere silence or inaction absent a special duty to disclose-which usually requires a confidential or fiduciary relationship.[16] Thus, the failure to disclose a client's scheme to defraud, standing alone, will not result in tort liability to third parties. This lack of duty, punctuated by a lawyer's duty to preserve client confidences, also precludes claims against lawyers for conspiracy to commit fraud absent some express

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of foreseeability, citing Williams v. Polgar, 215 N.W.2d 149 (Mich. 1974) (title abstractor)).

N.J.—Petrillo v. Bachenberg, 655 A.2d 1354, 1360 (N.J. 1995) (composite report of percolation tests provided to purchaser; citing § 552).

N.M.—Stotlar v. Hester, 582 P.2d 403, 406 (N.M. Ct. App.) (adopting § 552), cert. denied, 585 P.2d 324 (N.M. 1978).

N.Y.—Prudential Ins. Co. v. Dewey, Ballantine, Bushby, Palmer & Wood, 605 N.E.2d 318, 320, 590 N.Y.S.2d 831, 833 (1992) (opinion letter by borrower's lawyer provided to lender; citing landmark decisions in Ultramares Corp. v. Touche, 174 N.E. 91 (N.Y. 1931), and Glanzer v. Shepard, 135 N.E. 275 (N.Y. 1922), establishing exception to privity requirement).

Pa.—Eisenberg v. Gagnon, 766 F.2d 770, 779-80 (3d Cir. 1985) (inaccurate financial projections furnished to purchasers of securities; applying § 552).

Tenn.—Menuskin v. Williams, 145 F.3d 755, 762-63 (6th Cir. 1998) (deed warranting absence of liens; citing Tartera v. Palumbo, 453 S.W.2d 780, 784-85 (Tenn. 1970), as having adopted § 552).

Tex.—McCamish, Martin, Brown & Loeffler v. F. E. Appling Interests, 991 S.W.2d 787, 791-95 (Tex. 1999) (representation re enforceability of settlement agreement; adopting § 552 and abrogating Bell v. Manning, 613 S.W.2d 335 (Tex. Ct. App. 1981)).

Wash.—Haberman v. Washington Pub. Power Supply Sys., 744 P.2d 1032, 1067-68 (Wash. 1987) (liability of bond counsel under state securities act for negligently furnished misinformation in connection with bond issue; adhering to § 552), amended, 750 P.2d 254 (Wash. 1988), appeal dismissed, 488 U.S. 805, 109 S. Ct. 35 (1988).

See generally 1 MALLEN & SMITH, supra note 13, § 7.14.

[16] See, e.g., Lesikar v. Rappeport, 33 S.W.3d 282, 319-20 (Tex. Ct. App. 2000) (lawyer not liable for not revealing information about client to third party when client perpetrating "a nonviolent, purely financial fraud through silence"); Wall Street Transcript Corp. v. Ziff Communications Co., 638 N.Y.S.2d 640, 641 (1996); Bernstein v. Portland Sav. & Loan Ass'n, 850 S.W.2d 694, 701-02 (Tex. Ct. App. 1993) (ethical rule that lawyer "may" reveal intent to commit crime creates no ethical or other legal duty to do so), disapproved on other grounds, Crown Life Ins. Co. v. Casteel, 22 S.W.3d 378 (Tex. 2000); L & H Airco, Inc. v. Rapistan Corp., 446 N.W.2d 372, 380 (Minn. 1989); National Westminster Bank USA v. Weksel, 511 N.Y.S.2d 626, 628 (App. Div.), appeal denied mem., 519 N.Y.S.2d 1027 (1987); Goodman v. Kennedy, 556 P.2d at 745.

agreement or understanding between the lawyer and the client to cooperate in the fraudulent scheme; mere knowledge and silence by the lawyer are insufficient.[17]

Likewise, no accessorial liability lies absent intent by the lawyer to aid the client in the commission of fraud; again, mere inaction absent a special duty (e.g., fiduciary duty) is insufficient to support aider-and-abetter liability.[18] The United States Supreme Court's landmark decision in Central Bank v. First Interstate Bank, holding that no private right of action for aiding and abetting exists under Section 10(b) of the Securities Exchange Act of 1934, has all but eliminated the fraudulent-silence specter for lawyers involved in securities transactions.[19] In addition, a lawyer has no civil liability under Section 12(2) of the Securities Act of 1933 for preparing disclosure documents or providing other assistance to a seller of securities unless the lawyer participated in the selling effort.[20] Likewise, because the portion of a registration statement prepared by an attorney is not "expertised",[21] except to the extent that it includes legal opinions, an attorney does not have the same exposure to liability under Section 11 as an accountant has with respect to financial statements.[22]

Similar results lie in cases of alleged negligent misrepresentation. Liability for negligent misrepresentation typically arises in a transactional context in which, as a condition of the transaction, one party's lawyer supplies information knowing or expecting a third party to rely on it.[23] Again, mere inaction will not suffice. In no

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[17] See, e.g., Lesikar, 33 S.W.3d at 318; Bernstein, 850 S.W.2d at 706; National Westminster Bank, 511 N.Y.S.2d at 628-29 (but predating Wall Street Transcript Corp., 638 N.Y.S.2d at 641 (holding New York does not recognize tort of civil conspiracy)).

[18] *See, e.g., National Westminster Bank,* 511 N.Y.S.2d at 629-30 (ethical rule that lawyer "may" reveal intent to commit crime creates no duty to do so).

[19] 511 U.S. 164, 188, 114 S. Ct. 1439, 1454 (1994). The reasoning of *Central Bank* has been extended to preclude civil liability for aiding and abetting RICO violations. See Rolo v. City Investing Co., 155 F.3d 644 (3d Cir. 1998). Professor Hazard's article cited in note 2, *supra,* predates *Central Bank*.

[20] *See* Pinter v. Dahl, 468 U.S. 622, 646-47, 108 S. Ct. 2063, 2078 (1988).

[21] *See* Securities Act of 1933 § 11(c).

[22] *See* Escott v. BarChris Constr. Corp., 283 F. Supp. 643, 683 (S.D.N.Y. 1968).

[23] *See supra* note 14 and accompanying text.

event will such liability obtain in an adversarial context.[24] The courts are particularly sensitive to the tension between a lawyer's ethical duties of loyalty and zealous advocacy and a lawyer's ethical duty of fairness and candor to third persons, regularly favoring the former over the latter in cases of nondisclosure.[25]

Thus, the self-interest notion coupled with the claim that the proposed amendments to Rule 1.6 merely conform to "reality" is unfounded. Also, there are other (a) logical flaws and (b) serious impracticalities in the self-interest/"reality" argument:

(1) Avoidance of claims against an attorney by encouraging what the client will consider a breach of confidentiality is not assured. Claims for breach of confidentiality are likewise a threat.[26] At the very least, the proposal creates the prospect for litigation of both the legal boundaries of liability and the factual basis for the claims asserted in defense in breach of confidence claims.

(2) The proposed changes do not address the actual role envisioned for the attorney who makes an un-consented disclosure. How far may or should the disclosing attorney, go in providing aid, comfort, documents or testimony to the client's adversaries? As a practical matter, what are the limits on the breadth, nature, and

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[24] *See, e.g.,* Lesikar v. Rappeport, 33 S.W.3d 282, 318-19 (Tex. Ct. App. 2000) (litigation) (distinguishing transactional context of McCamish, Martin, Brown & Loeffler v. F. E. Appling Interests, 991 S.W.2d 787 (Tex. 1999); Mehaffy, Rider, Windholz & Wilson v. Central Bank Denver, N.A., 892 P.2d 230, 235, 237 (Colo. 1995) (arms-length business transaction); L & H Airco, Inc. v. Rapistan Corp., 446 N.W.2d 372, 378-79 (Minn. 1989) (nondisclosure of prior contacts between client and arbitrator); Garcia v. Rodey, Dickason, Sloan, Akin & Robb, 750 P.2d 118, 122-23 (N.M. 1988) (litigation); Page v. Frazier, 445 N.E.2d 148, 153-54 (Mass. 1983) (conflicting duty to client); Beeck v. Kapalis, 302 N.W.2d 90, 96-98 (Iowa 1981) (litigation).

[25] *See, e.g.,* Flaherty v. Weinberg, 492 A.2d 618, 626 (Md. 1985) (third-party-beneficiary exception to privity requirement "should have limited application in adversarial proceedings because our Code of professional Responsibility requires that a lawyer represent his client zealously within the bounds of the law . . . and that the lawyer ordinarily not represent or act for conflicting interests in a transaction"); *L & H Airco,* 446 N.W.2d at 379 ("Any duty imposed upon an attorney to protect an interest of the client's adversary would necessarily conflict with the duty owed by the attorney to his or her client."); *Garcia,* 750 P.2d at 122.

[26] *See e.g.* Alan B. Vickery, *Breach of Confidence: An Emerging Tort, 82* Colum. L. Rev. 1426 (1982); Molex, Inc. v. Nolen, 759 F.2d 474, 479 (5th Cir. 1985) (breach of fiduciary duty through corporate employee's misuse of confidential information).

extent of the confidential information to be disclosed? What criteria, given the open-ended nature of the terms "financial interests," "property" and "substantial injury", is the lawyer to use to determine whether disclosure is permitted?[27] If litigation follows, should the fact finder be informed that the source of accusatory information is the client's own former attorney?

(3) In these times of a shrinking global economy, the notion overlooks the reality of expectations in other countries, especially those members of the European Community where such disclosures constitute a penal delinquency or crime.[28] Furthermore, such a notion ignores the fundamental policy considerations underlying the ethical obligation to maintain a client's secrets and the more narrow evidentiary privilege not to disclose communications with a client. The contention seems to suggest that a lawyer should be able to sacrifice a client whenever reasonably necessary to save the lawyer.[29] This flouts the long-standing justifications for the obligation of confidentiality.[30]

(4) It has been suggested that other provisions of the Model Rules already permit limited breaches of confidentiality. *E.g.*

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[27] Under the present Model Rule 1.6(b)(1), a lawyer can readily determine the key terms: a criminal act likely to result in imminent death or substantial bodily harm. No such ready determination can be made under proposed Rule 1.6(b)(2) and 1.6(b)(3) of a substantial injury to the financial interests or property of another. This vagueness, with its resulting unfairness to a lawyer, is compounded by the absence of any criteria or guidance to the lawyer as to when and under what circumstances the lawyer is to exercise his/her "permission" to disclose. Should the lawyer not disclose, is there an unwarranted risk that the lawyer may be held accountable as an aider or abettor to a crime or fraud? Under the present model rule which does not permit disclosure, there should be no such risk. *See* text, *supra,* p. 10 and notes 16 and 17.

[28] *See* EDNA SELAN EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE & THE WORK-PRODUCT DOCTRINE 283 (3d ed. 1997).

[29] A particularly ugly example appears in three related Seventh Circuit decisions in which a lawyer, upon being enticed by the suggestion of sentencing leniency for himself, became a confidential informant on his former clients to help the government prove that the clients engaged in bankruptcy fraud. See United States v. White, 879 F.2d 1509 (7th Cir. 1989); United States v. White, 950 F.2d 426 (7th Cir. 1991); United States v. White, 970 F.2d 328 (7th Cir. 1992).

[30] The attorney-client privilege is the oldest of the testimonial privileges protecting confidential communications, having been accepted as early as the reign of Elizabeth I. *See* EPSTEIN, *supra* note 26, at 2; *accord,* Upjohn Co. v. United States, 449 U.S. 383, 389, 101 S. Ct. 677, 682 (1981) ("The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law.") (citing 8 J. WIGMORE, EVIDENCE § 2290 (McNaughton rev.

(1) Model Rule 3.3(a)(4) requiring a lawyer to take reasonable remedial measures if the lawyer has offered material evidence subsequently become known to be false and (2) Model Rule 1.6(b)(2) allowing a lawyer to reveal confidential information in a controversy between the lawyer and a client or to establish a defense to civil or criminal charges against the lawyer based upon conduct in which the client was involved. However, these exceptions are limited in scope, narrowly applied and subject to procedural safeguards.[31] They should not be used as an excuse for a frontal attack, conducted under ill-defined standards, upon basic values of confidentiality and loyalty. These values are recognized as entitled to substantive and procedural judicial protection.[32]

(5) The fundamental policy justifications for maintaining the confidences of a client are "valid legal advice" and "effecting compliance with the law."[33] Only knowledge of all relevant facts can serve as the foundation for valid legal advice. If the client fears disclosure, the client may limit what information he or she gives the lawyer. A lawyer's advice is of dubious value if not based on a full and free disclosure of all relevant facts. In addition, by promoting a client's freedom of consultation with a lawyer, the privilege fosters voluntary compliance with regulatory laws and facilitates the effective administration of the laws.[34]

(6) The evidentiary privilege belongs to the client, not the lawyer. Likewise, a lawyer's ethical obligation of confidentiality can be waived only by the client. Of course, the client's decision to invoke or waive these benefits inevitably is based on the lawyer's

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1961)).

[31] *E.g.* The Committee on Professional Ethics of the Association of the Bar of the city of New York, Opinion 1986-8 (1986) suggests that a lawyer disclosing confidential information to collect a fee should do so only to the court in camera with a request that the information be kept under seal.

[32] *E.g.* these values, as embodied in the attorney-client privilege, are protected from standardless attempts to overcome the privilege. *Titmas v. Superior Court,* 104 Cal. Rptr. 2d 803 (Ct. app. 2001) ("[W]e hold that when there is a prima facie claim of attorney-client privilege, the trial judge must accord a full hearing, *with* oral argument, before ordering the revelation of client confidences...") (Emphasis in original).

[33] *See* EPSTEIN, *supra* note 28, at 4-9.

[34] *See Upjohn,* 449 U.S. at 389, 101 S. Ct. at 682 (purpose of privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice"); Fisher v. United States, 425 U.S. 391, 403, 96 S. Ct. 1569, 1577 (1976).

own evaluation and advice. If the lawyer may benefit personally from disclosure, a conflict of interest exists between the lawyer and the client. Ultimately, the proposed amendments, by granting disclosure discretion to the lawyer in matters of fraud, return the privilege to the lawyer when convenient to preserve the lawyer's personal liberty or honor[35]—under the rubric that the client has abused the lawyer-client relationship.[36]

(7) The testimonial privilege and the ethical obligation exist to protect the client, not to protect the lawyer. Rule 1.6 as it exists today strikes the proper balance. It recognizes the overriding interest in life and physical integrity, and it recognizes the fairness in permitting a lawyer to disclose confidences when a dispute arises between the lawyer and the client and when the lawyer is criminally or civilly charged for conduct in which the client was involved.[37] Rule 3.3 mandates candor toward the tribunal and, depending upon the circumstances, requires or permits a lawyer to take "reasonable remedial measures" to prevent or unwind false evidence, including, if necessary, disclosure to the tribunal.[38] In all

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[35] The original purpose of the privilege was to prevent the lawyer's being compelled to violate his honor as a gentleman by testifying against one to whom loyalty was owed. Accordingly, the lawyer, not the client, held and asserted the privilege. *See* EPSTEIN, *supra* note 26, at 2.

[36] *See* ETHICS 2000 REPORT Rule 1.6 cmt. [7] & reporter's notes. Support for the proposed amendments is claimed from the fact that eight jurisdictions permit disclosure when clients threaten crimes or frauds likely to result in substantial injury to the financial or property interests of another, twenty-five jurisdictions permit a lawyer to reveal the intention of a client to commit a crime, and thirteen jurisdictions permit disclosure to rectify the consequences of a crime or fraud in the commission of which the client used the lawyer's services. The Commission also notes that its proposals are in accord with Section 67 of the Restatement of the Law Governing Lawyers. Permitting a lawyer to reveal the intention of a client to commit a crime has been long-standing, predating the 1983 Model Rules. Even so, only one half of jurisdictions permit it. Those who permit broader disclosures are distinctly in the minority.

[37] Indeed, one of the proposed amendments to Rule 1.6 broadens the circumstances in which a lawyer may disclose a client's confidences to prevent death or substantial bodily injury. *See* ETHICS 2000 REPORT Rule 1.6(b)(1); *id.* Rule 1.6 cmt.[6] & Reporter's Note re 1.6(b)(1).

[38] The Ethics 2000 Commission's proposed amendments to Rule 3.3 strengthen or enhance the lawyer's duties not to permit introduction of false evidence and to take remedial measures when the lawyer comes to know that material evidence offered by the client or by a witness called by the lawyer is false. *See* E. Norman Veasey, "Chair's Introduction and Executive Summary," ETHICS 2000 REPORT § 11; *cf.* MODEL RULES Rule 1.2(d) (duty to avoid assisting client crime or fraud); *id.* Rule 4.1 (duty of truthfulness in statement to others).

other circumstances, "[t]he social good derived from the proper performance of the functions of lawyers acting for their clients is believed to outweigh the harm that may come from the suppression of the evidence in specific cases."[39]

(8) Also not adequately addressed by the Commission's proposal is the nature of the advice a lawyer will be required to provide a potential client seeking counsel. If the lawyer's advice will have to include the proposed amendments to the Rules with their ill-defined standards, this will inevitably deter and restrict the client's disclosure of all relevant facts to counsel. If the lawyer does not disclose the proposed amendments to the rules to a client and subsequently makes a "permissive" disclosure of privileged communications, the lawyer may well have serious exposure to his/her (likely former) client. This exposure will be even more serious if the lawyer's determination that his/her services were used to further a crime or fraud is erroneous.

Disclosure of Client Fraud-Actual Experience

The ABA Ethics 2000 Commission justifies permitting disclosure of client fraud by "recognizing that a number of state jurisdictions have already moved in this direction."[40] Specifically, the Commission finds support for the proposals in "the eight jurisdictions that permit disclosure when clients threaten crimes or frauds likely to result in substantial injury to the financial or property interest of another and the 25 jurisdictions that permit a lawyer to reveal the intention of a client to commit any crime," as well as "the 13 jurisdictions that permit disclosure to rectify the consequences of a crime or fraud in the commission of which the client used the lawyer's services.[41]

Indeed, forty-two of the states and District of Columbia appear to have adopted some version of the Model Rules,[42] and their treatment of disclosure of client confidences varies widely.

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[39] United States v. United Shoe Mach. Corp., 89 F. Supp. 347, 358 (D. Mass. 1950) (quoting MODEL CODE OF EVIDENCE Rule 210 cmt.).

[40] Veasey, *supra* note 34.

[41] *See* ETHICS 2000 REPORT Rule 1.6 reporter's notes.

[42] *See* Veasey, *supra* note 36.

It is misleading, however, to claim as support for broadening the scope of permissible disclosure the fact that twenty-five jurisdictions permit disclosure to prevent any crime (regardless of likely consequences). The Model Code of Professional Responsibility, adopted in most states well before the Model Rules came into existence, permitted such disclosure.[43] Of the remaining twenty-six jurisdictions, six permit disclosure to prevent a crime likely to result in substantial injury to financial or property interests,[44] and ten permit disclosure to prevent a fraud likely to result in substantial injury to financial or property interests.[45] Further, only thirteen of all fifty-one jurisdictions require or permit disclosure to rectify the consequences of a fraud in which the lawyer's services were used.[46] This hardly seems a mandate.

In addition, the sense of the Legal Ethics Committee of the College, based upon the collective experience of its members, is that lawyers rarely voluntarily disclose client fraud. Court decisions—or, more accurately, the absence of them—tend to verify this. One would think that voluntary disclosure of client fraud would give rise to grievances and malpractice claims. Yet, although malpractice liability can be predicated on the breach of a confidence,[47] cases involving disclosure of intended or completed client fraud are practically nonexistent. Typically, disciplinary and malpractice cases arising out of disclosure of confidential information involve conflicts of interest,[48] self-protection against physical harm,[49]

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[43] *See* MODEL RULES Canon 4, DR 4-101(C)(3).

[44] They are Connecticut, Georgia, New Hampshire, New Mexico (mandatory), Pennsylvania, and Wisconsin (mandatory).

[45] They are Alaska, Hawaii, Maryland, Massachusetts, Nebraska, New Jersey (mandatory), North Dakota, Utah, Vermont (mandatory), and Virginia. Four (Nebraska, New Jersey, Vermont, and Virginia) limit the disclosure to instances in which the lawyer's services were or are being used.

[46] They are Connecticut, Hawaii (mandatory), Maryland, Massachusetts, Mississippi, Nebraska, North Carolina, North Dakota, Pennsylvania, South Dakota, Tennessee (proposed new rules), Utah, and Wisconsin. In addition, New York permits the disclaimer of a prior opinion.

[47] 2 MALLEN & SMITH § 14.6, at 557.

[48] *See, e.g.,* In re Anonymous, 654 N.E.2d 1128 (Ind. 1995) (impermissibly disclosing to welfare agency prospective welfare client's husband's expected inheritance); Dessel v. Dessel, 431 N.W.2d 359 (Iowa 1988) (use of information as basis for breach-of-fiduciary-duty claim).

[49] *See, e.g.,* In re Goebel, 703 N.E.2d 1045 (Ind. 1045) (impermissibly revealing another client's address to threatening criminal client, who subsequently murdered other client's spouse).

preventing physical harm to third parties,[50] disclosing intent to commit perjury,[51] exacting revenge,[52] using confidential information for personal economic gain,[53] or using such information to gain sexual favors.[54] The dearth of malpractice cases involving permissible disclosures may be due simply to lack of sympathy for the claim or for the fraudulent client. The absence of reported disciplinary actions and malpractice cases, however, more likely results from lawyers' intuitive preference in real and actual practice, for the traditional solution of advising a client to refrain from or rectify the objectionable conduct and, if the advice is not followed, withdrawing from all further representation of the client, whether the withdrawal be "noisy" or otherwise.[55]

Implications Regarding the Adversary System

Paragraphs (b)(2) and (b)(3) of proposed Rule 1.6 should be rejected because they contradict and undermine foundational premises of the American legal system and impair its proper functioning.

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[50] *See, e.g.,* State v. Hansen, 862 P.2d 117 (Wash. 1993) (permissibly disclosing client's threat to murder judge; client asserting attorney-client privilege).

[51] *See, e.g.,* State v. Jones, 923 P.2d 560 (Mont. 1996) (defendant denied effective assistance of counsel by denial of motion to withdraw by counsel who disclosed defendant's merely possible intent to commit perjury without confirming client's persistence in that intent, citing MONT. R. PROF. CONDUCT 1.16(b)(1) (lawyer may withdraw if client "persists" in a course of action that the lawyer reasonably believes is criminal or fraudulent)); *cf.* Nix v. Whiteside, 475 U.S. 157, 106 S. Ct. 988 (1986) (defendant not denied effective assistance of counsel when counsel refuses to permit defendant to testify falsely).

[52] *See, e.g.,* Hooper v. Gil, 557 A.2d 1349 (Md. 1989) (revealing confidences to assist prosecution of client for Medicaid fraud because lawyer had not been paid); Sherman v. Klopfer, 336 N.E.2d 219 (1975) (disclosing information to IRS).

[53] *See, e.g.,* In re Marick, 554 N.W.2d 204 (Wis. 1996) (impermissibly using confidential information regarding client's proposed acquisition of another company to profit through purchase of shares in that company); Tri-Growth Centre City, Ltd. v. Silldorf, Burdman, Duignan & Eisenberg, 265 Cal. Rptr. 330 (Ct. App. 1989) (acquiring property that firm's client was negotiating to purchase); *cf.* United States v. O'Hagan, 521 U.S. 642, 117 S. Ct. 2199 (1997) (criminal liability lies under § 10(b) of Securities Exchange Act for misappropriating confidential information for personal gain).

[54] *See, e.g.,* Tante v. Herring, 453 S.E.2d 686 (Ga. 1994).

[55] *See* MODEL RULES Rule 1.16(b)(1)(2); *id.* Rule 3.3(2)(3).

Our courts utilize an adversary system to produce just resolutions of disputes. The adversarial model is based upon the political and philosophical belief that courts can best achieve fair outcomes when all concerned parties present their strongest arguments for impartial judicial consideration. As the law became more complex historically, parties who lacked specialized legal knowledge required assistance from skilled professional practitioners who could advocate on their behalf. It is in this sense that attorneys "represent" their clients.

If the attorney does not truly stand in the place of the client, the client is unrepresented and the adversarial model does not work. Our judicial system thus depends upon two conditions. First, the ethical duty of loyalty to the client is paramount. By definition, an attorney cannot represent a client's interests and simultaneously represent interests opposed to the client. Clients who are unskilled in legal matters are unheard and unrepresented to the extent that their legal counsel represents the interests of others; in that situation, the adversary model is compromised and its promise of fairness is unfulfilled. Second, the law has recognized for centuries that competent legal representation in an adversary system requires an open disclosure of information between attorney and client and the confidentiality that makes that possible.

Any retreat from the loyalty and confidentiality that our adversary model requires can only be justified by considerations that are so important that they justify the resultant impairment of our legal system. For example, the law has always accorded special importance to an individual's right to be protected from death or substantial bodily harm; the right to bodily integrity is uniquely and ultimately incapable of social compromise. The present Rule 1.6 incorporates those values, but it properly refuses to abandon loyalty and confidentiality, and the adversary system that they make possible, in order to reduce purely monetary injuries. It should not be changed.

Important Policy Considerations

1. Trust and Disclosure.

The attorney-client relationship is founded on trust. An attorney cannot represent the client and render competent legal services unless the client communicates all relevant facts. "The obligation is predicated on the assumption that a lawyer can best advise a client when the client is free to discuss all information relating to his legal matter, even information that may be embarrassing or damaging, without fear of reprisal."[56] The Model Rules and the Code of Professional Responsibility foster trust between client and attorney by placing no duty on the attorney to discover and prevent illegal conduct and by prohibiting disclosure of a client's secrets in all but the most extreme and carefully limited instances. Under these circumstances the client can be confident that the attorney represents only the client's interests and that all relevant information can be freely communicated.

The College continues to adhere to the tenet that disclosure should be prohibited in all but the most extreme and carefully defined instances, such as preventing imminent death or substantial bodily harm. By contrast, the proposed changes to Model Rule 1.6 undermine the attorney-client relationship by endorsing attorney disclosure of confidences in a variety of ill-defined and poorly reasoned circumstances.

Client confidentiality is a foundational prerequisite to competent and zealous legal representation and has been honored in courts of law for centuries. The attorney-client privilege was already established at the time of the reign of Elizabeth I in the 16th century and the "origin of the legal duty to preserve secrets, as distinct from the evidentiary privilege, has been traced back at least as far as the mid-19th century in England."[57] The essential importance of attorney-client confidentiality has been frequently and consistently recognized in American judicial decisions. The Supreme Court stated in 1866:

> But it is out of regard to the interest of justice, which cannot be upholden, and to the administration of justice, which cannot go on, without the aid of men skilled in jurisprudence - in the practice of courts - and in those matters affecting the rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist, at all, every one would be thrown upon his own legal resources. Deprived of all professional assistance, a man would not venture

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[56] ABA/BNA Lawyer's Manual on Professional Conduct, 55:302.

[57] ABA/BNA Lawyers' Manual on Professional Conduct, 55:301.

> to consult any skillful person, or would only dare to tell his counsel half the case.[58]

The Supreme Court's relatively recent pronouncement in Upjohn Co. v. United States[59] reiterated the fundamental importance of principles of confidentiality in our adversarial system of justice:

> [The privilege] is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from consequences or the apprehension of disclosure.[60]

In its April 2, 1982 Report of the Legal Ethics Committee, the College criticized similar proposed changes to Rule 1.6, stating that "the draft Rules' approach to client confidences is a failure. It sets forth a rule of confidentiality so riddled with ill-defined and poorly thought through exceptions that it affords no assurance to any client as to when, if ever, he may rely on his attorney to protect his secrets." This point must be emphasized. The proposed changes to Rule 1.6 do not instantaneously abolish the Rule on confidences, but they eviscerate confidentiality. Superficially, particularly by purportedly limiting their application to where the client "has used or is using the lawyer's services to further the crime or fraud," the appearance of confidentiality remains, but the premise of the attorney-client relationship is eroded. The proposed expansion of an option to breach confidences includes ambiguous and poorly defined provisions for: (1) informing on former clients, (2) preventing crime or fraud that results solely in substantial financial or property injury, and (3) rectifying or mitigating substantial injury to financial or property interests. What remains can be characterized as an amorphous, highly subjective mandate to "supervise" and "parent"

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[58] *Blackburn v. Crawford's Lessee,* 70 U.S. 175, 18 L.Ed 186, 193 (1866) (quoting *Greenough v. Gaskell,* 1 Myl & K, 98; see also Fisher v. United States, 425 U.S. 391, 403 (1976) ("...As a practical matter, if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice.")

[59] 449 U.S. 383 (1981).

[60] *Id.* at 389.

the client. This has never been the intent or spirit of Rule 1.6, nor is it consonant with the letter of the Rule and the essential conditions underlying the American legal system.

2. Client Fraud.

The issue of client fraud presents a complex and difficult problem involving the core values that require confidentiality. It challenges the function, or perhaps more aptly the role, of the lawyer in the attorney client relationship. American jurisprudence and the College have held the principle of confidentiality nearly inviolate, and see the function of the attorney to be first and foremost a protector of client confidences and a zealous advocate for the client's interests. Others, particularly those who support the proposed changes to Rule 1.6, believe that although an attorney has a duty to keep a client's confidences and to advocate on behalf of the client, this duty should be tempered by countervailing duties to protect the monetary interests of non-clients. In fact, some states have made disclosures of client confidences mandatory, rather than discretionary, in these circumstances.

By including property or pecuniary damage as triggers for disclosure, the proposed Rule changes the role of the attorney from a representative and a zealous advocate to a "whistleblower" and "policeman." In many respects, the attorney's role under the proposed Rule would resemble a combination of prosecutor, judge, and jury; he would gather information about possible fraud, render a decision, and then exact a punishment - disclosure - as he saw fit in a context in which the client no longer has a legal representative or advocate. Under the proposed changes to the Rule, the attorney's whistleblowing function would interfere with the attorney's traditional role and would override the principles of loyalty and confidentiality upon which that role is based.

This is a significant and dramatic paradigm shift. Amending Rule 1.6 would shift the attorney's function away from advocacy and loyalty to the client toward a construct that permits the attorney to represent the financial interests of others. This has never been and should not be the role of lawyers in our system of jurisprudence. The assurance of fairness at trial is predicated on advocacy of adverse interests to an impartial judge and jury. The lawyer has personal ethical duties to self, ethical duties to the client, and ethical duties to the court, but has never been obligated to represent the interests of third parties to the extent described in the proposed changes to Rule 1.6. There is no need and no justification to recruit the attorney from officer of the court to officer for the court.

The Importance of the Reasons Supporting the Attorney-Client Privilege as it is Recognized in the Law of Evidence.

The same systemic values and policy considerations that underlie the duty of confidentiality in present Rule 1.6 are also reflected in the attorney-client evidentiary privilege. Courts have recognized for centuries that testimony about the content of communications between attorneys and clients should be barred from evidence in most circumstances because of the chilling effect admissibility would have on the necessary flow of information between clients and their legal representatives. Moreover, the judicial system recognizes, through evidentiary protection of privilege, the bar's need for its indispensable independence. Confidentiality and attorney-client privilege are the pillars of that indispensable independence. But for limited circumstances, that independence has ably served our legal system. Proposed Rule 1.6 (b)(2) and (b)(3) remove that independence by interjecting the monetary interests of third parties and dividing the lawyer's loyalty in the eyes of the client.

Even the crime-fraud exception to the privilege does not allow an attorney to act as a sole arbiter of whether to become a whistle-blower with respect to client wrongdoing; it comes into operation only with proper safeguards: (a) independent evidence of the wrongdoing, (b) obtained from non-confidential sources, (c) a proceeding before a court, (d) a prima facie showing of fraud, and (e) a judicial ruling, subject to rights to appeal, requiring the disclosure.[61]

By contrast, proposed Rule 1.6 (b)(2) and (b)(3) would permit an attorney to decide for himself or herself to disclose client confidences to any third parties who could be financially harmed by the client's wrongdoing. The crime-fraud exception does not require the attorney to independently seek out third parties and report suspected client wrongdoing that was otherwise unknown.

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[61] *See, e.g., United States v. Zolin,* 491 U.S. 554, 570-72 (1989); *Titmas v. Superior Court,* 104 Cal. Rptr. 2d 803 (Ct. App. 2001) ("[W]e hold that when there is a prima facie claim of attorney-client privilege, the trial judge must accord a full hearing, *with* oral argument, before ordering the revelation of client confidences...") (Emphasis in original).

Accordingly, it does not create a division of the loyalty that the attorney owes to the client and does not place the attorney in the position of whistleblower or informer. By taking that additional step, proposed Rule 1.6 abandons the basic premise that the attorney will represent the interests of the client and destroys the trust, loyalty, and confidentiality that our legal system requires and assumes. Proposed Rule 1.6 would authorize attorneys to divide their loyalties between their clients and any third parties who may be harmed financially by the clients' conduct.

The "Rectify" Provision

The proposed provision for disclosure in order to "rectify" a wrong in Rule 1.6, paragraph (b)(3) is particularly inappropriate. Even after successfully satisfying all of the procedural and evidentiary requirements needed to invoke the crime/fraud exception to the attorney-client privilege, information regarding past or completed events remains protected by the privilege. The crime/fraud exception to the privilege is commonly held only to extend to ongoing or future planned wrongdoing, but not to past conduct[62]. If past alleged conduct may be disclosed, the most basic protections of the attorney-client privilege have been stripped away.

Conclusion

The understandable theoretical desire to create broad public protection cannot always be perfectly reconciled with the very real duties of confidentiality and loyalty. These duties are at the very heart of the attorney-client relationship.

> The law is molded on the premise that a greater good inheres in encouraging all clients, most of whom incline toward complying with the law, to consult freely with their lawyers under the protection of confidentiality in order to gain the benefit of frank communication.[63]

Enacting rules which are counter-intuitive and are often likely to be disregarded is more likely to spawn cynicism or disregard for the

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[62] *E.g., United States v. Hodge and Zweig,* 548 F.2d 1347, 1354 (9th Cir. 1977).

[63] RESTATEMENT ch. 5 intro, note at 453-54.

ethics rules than to change societal behavior. The attorney's fiduciary duty of undivided loyalty is compromised by the proposals. Appeals to attorney self-interest made at the expense of damage to the well practiced and well understood principles of loyalty and confidentiality exacerbate the problem, and would inevitably, if genuinely embraced in actual practice, create an environment of uncertainty and mistrust.

The American College of Trial Lawyers opposes the ABA Ethics 2000 Commission proposals for change of Rule 1.6(b)(2) and 1.6(b)(3).