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## "Anything You Say May Be Used Against You": A Proposed Seminar on the Lawyer's Duty to Warn of Confidentiality's Limits in Today's Post-Enron World

### Cover Page Footnote

Professor of Law, Georgetown University, specializing in evidence, torts, and other subjects concerning civil, criminal, and constitutional judicial process from the U.S. Supreme Court on down. His publications include the books *Federal Testimonial Privileges* (2d ed. 2008), *Evidence: Cases, Materials & Problems* (3d ed. 2006), *Evidence in a Nutshell* (5th ed. 2007), *Federal Rules of Evidence* (3d ed. 2007), and numerous legal articles. He has taught legal ethics and authored briefs in (among others) the Supreme Court's *Upjohn* and *Daubert* cases. A former Oxford University Fulbright Scholar, Law Review Editor-in-Chief, and Washington, D.C., trial practitioner, he has been special counsel and consultant to the judiciary committees of both houses of Congress (helping draft the Federal Rules of Evidence and the Federal Crime Victims Compensation Act and to revise the full Federal Criminal Code, substantive and sentencing); the National Conference of Commissioners on Uniform State Laws (helping draft the Uniform Crime Victims Reparations Act and revise the Uniform Rules of Evidence); the National Academy of Sciences (on both voiceprint evidence and legality of new airport security technology); the Federal Judicial Center (training federal judges and contributing to the center's Scientific Evidence Manual); the National Judicial College (training state judges); the Rand Corporation, Carnegie Foundation, Brookings Institution, and American Enterprise Institute (on mass civil lawsuits, science in court, and *Daubert*); the U.S. Department of Justice (training Justice Department trial attorneys); and, principally on constitutional, judicial, or related law reform, the governments of, among others, Canada, the Philippines, and over a dozen nations emerging from the former Soviet Union (Russia, Ukraine, Lithuania, Hungary, Kazakhstan, and others). He has also advised/assisted several U.S. state governments, federal agencies (inter alia, training Federal Trade Commission trial attorneys), bar associations, and some of the nation's most prominent law firms. He chaired the Association of American Law Schools Evidence Section and an American Bar Association committee monitoring developments under the Federal and Uniform Rules of Evidence, suggesting changes to the Rules, a number of which have been made. His series of national conferences on the Federal Rules of Evidence, and his accompanying book, the first on the Rules, are credited with introducing the bench, bar, and much of academia to what they would be facing under the new Rules. He is also noted for his appearances in the print, radio, television, and electronic media.

**“ANYTHING YOU SAY MAY BE USED  
AGAINST YOU”: A PROPOSED SEMINAR ON  
THE LAWYER’S DUTY TO WARN OF  
CONFIDENTIALITY’S LIMITS IN TODAY’S  
POST-ENRON WORLD**

*Paul F. Rothstein\**

I. THE PROBLEM

Once upon a time, people speaking about legally sensitive matters with their own attorneys (or even with their corporate employers’ attorneys) could be relatively confident that their conversations would be protected by attorney-client privilege and the lawyer’s ethical obligation of silence.

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Even today, most people—including law students—are under that same impression. Indeed, broad assumptions of confidentiality underlie the leading attorney-client privilege case studied in law school, *Upjohn Co. v. United States*, which proclaimed,

[The attorney-client privilege's] purpose 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. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed . . . . [W]e recognize[] the purpose of the privilege to be "to encourage clients to make full disclosure to their attorneys."

. . . .

. . . [T]he privilege exists to protect not only the giving of professional advice . . . but also the giving of information to the lawyer to enable him to give sound and informed advice. The first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant.

. . . .

. . . [Failure to accord privilege as in] the court below thus frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation. . . .

. . . [This] not only makes it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem but also threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law.<sup>1</sup>

Thus *Upjohn* takes as a given that lawyer communications are by and large confidential, that people know this, and that people will be more willing to communicate with a lawyer because of it.

The official comment to the American Bar Association's Model Rules of Professional Conduct Rule 1.6 ("Confidentiality of Information") expresses similar thoughts, parroting rubrics from its predecessor codes drafted earlier in the twentieth century:

A fundamental principle in the client-lawyer relationship is that . . . the lawyer must not reveal information relating to the representation. . . .

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1. *Upjohn Co. v. United States*, 449 U.S. 383, 389–92 (1981) (citations omitted). That corporate counsel do, at least sometimes, caution against illegality as *Upjohn* supposes, is illustrated by a recently reported incident involving Chiquita International Brands Co. See Carol D. Leonnig, *Advice from Justice Dept. Central to Chiquita Case*, Wash. Post, Aug. 2, 2007, at A1 ("[I]nternal Chiquita records state that the company's outside legal counsel warned them in February 2003 that they 'must stop [the] [illegal] payments [to a group the State Department had declared a terrorist group].' . . . 'Bottom line: CANNOT MAKE THE PAYMENT,' the Kirkland & Ellis law firm advised Chiquita, according to court records and sources.").

This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.<sup>2</sup>

But these assumptions of confidentiality may be sadly mistaken today. Driven by a more jaundiced public perception of the role of lawyers than the rosy view expressed by *Upjohn* and the code commentary, modern law increasingly recognizes exceptions to legal privilege and the lawyer's duty of silence. More and more, lawyers are being permitted or expected to reveal information once thought to be confidential. The trend has been fueled in part by the exposure in 2000 and 2001 of the calamitous series of corporate frauds collectively and popularly known as "Enron."<sup>3</sup> Lawyers and lawyer loyalty and secrecy were blamed for facilitating or hiding wrongdoing that inflicted billions of dollars of losses on investors, retirement funds, and the general economy.<sup>4</sup>

The public outcry produced a number of reforms. The Sarbanes-Oxley Act<sup>5</sup> (SOX) was enacted in 2002, containing an array of anti-corporate-fraud measures.<sup>6</sup> Securities and Exchange Commission (SEC) regulations

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2. Model Rules of Prof'l Conduct R. 1.6 cmt. 2 (2007). The Model Rules of Professional Conduct are recommended by the American Bar Association (ABA) for state adoption, to regulate lawyers licensed by the particular state, but a number of states have not adopted them, or have modified them, or have adopted some but not others. The ABA Model Rules were promulgated in 1983 and extensively revised in 2002. The Rules were further revised concerning a few provisions in 2003. Some adopting states have also adopted the amendments, some have not, and some have adopted variants. Where the ABA Model Rules are not adopted, usually some form of earlier ABA ethics code provisions, previously adopted by the state, remain in place, such as the 1969 ABA Model Code of Professional Responsibility (ABA Model Code)—which is different, despite its somewhat similar name, than the ABA Model Rules—or, less likely, the 1908 ABA Canons of Ethics. Confusingly, both the 1908 and 1969 codes use the word "Canon" for their general prescriptions. I will generally cite herein only the ABA Model Rules on a particular matter, leaving to the students to cite the state provisions (as this essay is a proposal for a student research seminar, and should not give away the whole "ball game").

3. See Paul F. Rothstein, *The Story of Upjohn Co. v. United States: One Man's Journey to Extend Lawyer-Client Confidentiality, and the Social Forces that Affected It*, in *Evidence Stories* 151, 153, 173 (Richard Lempert ed., 2006).

4. See John C. Coffee, Jr., *The Attorney as Gatekeeper: An Agenda for the SEC*, 103 *Colum. L. Rev.* 1293 (2003); Susan P. Koniak, *Corporate Fraud: See, Lawyers*, 26 *Harv. J.L. & Pub. Pol'y* 195 (2003); Susan P. Koniak, *When the Hurlyburly's Done: The Bar's Struggle with the SEC*, 103 *Colum. L. Rev.* 1236 (2003).

5. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

6. See 15 U.S.C. § 7245 (Supp. IV 2004) (codifying a pertinent provision of Sarbanes-Oxley (SOX) for our purposes). In that provision, Congress told the Securities and Exchange Commission (SEC) to establish "minimum standards of professional conduct for

adopted pursuant to SOX<sup>7</sup> require public companies' lawyers, who practice or appear before the SEC, to report to their superiors financial or fiduciary wrongdoing of their client or its agents if the wrongdoing meets a threshold of seriousness and comes to the lawyers' attention in a sufficiently credible way. If the superiors' response is unsatisfactory, lawyers may report to the SEC.<sup>8</sup> Corresponding or even broader provisions in many state and model ethics rules and rulings<sup>9</sup>—including the American Bar Association's recommended Model Rules of Professional Conduct<sup>10</sup> and the American Law Institute's Restatement of the Law Governing Lawyers<sup>11</sup>—have heightened a lawyer's license or duty to disclose wrongdoing even beyond the SEC context.<sup>12</sup>

Adding to the trend are new pressures on individuals and companies to waive privilege and expose previous lawyer confidences. These pressures include government promises or policies of leniency for those who "cooperate" with investigations or who "self-report"—terms often interpreted to include waiving attorney-client privilege.<sup>13</sup> The current escalation of penalties for corporate wrongdoing and the modern decline in company continuity and loyalty (as corporations change hands at ever-increasing rates today) mean companies are likely to waive these and other protections that could have shielded predecessors and employees.<sup>14</sup> While it has always been the case that an employee of a company who confided potentially self-damaging matters to company counsel risked disclosure if

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attorneys appearing and practicing before [the SEC]," and to require attorneys to report up the corporate ladder, to the company's chief legal counsel or chief executive officer, evidence of material securities law violations or breaches of fiduciary duty, and if there is no "appropriate[]" response, to go further up the corporate ladder to the board of directors' audit committee, which shall be composed solely of outside directors, or to the board of directors itself. *Id.*

7. The regulations appear at 17 C.F.R. § 205 (2006). *See also* Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. 6297, 6320 (Feb. 6, 2003) (codified at 17 C.F.R. § 205). They became effective August 5, 2003, and in some respects arguably go beyond what Congress contemplated. *See infra* notes 8, 37.

8. Thus the regulations provide for two kinds of reporting of lawyer confidences: "up-the-ladder" (inside the client) and "outside-the-ladder" (outside the client). *See infra* note 37.

9. The local provisions are detailed in comparative chart format in Att'ys' Liability Assurance Soc'y, *Ethics Rules on Client Confidences*, in Thomas D. Morgan & Ronald D. Rotunda, 2003 Selected Standards on Professional Responsibility, 161, 161-72 (2003).

10. *See generally* Model Rules of Prof'l Conduct (2007).

11. Restatement (Third) of the Law Governing Lawyers (2000).

12. I am not saying that all the exceptions to confidentiality that are discussed herein are recent or are the result of Enron, or even have been augmented recently. They are germane to my central thesis regardless. Rather, the exceptions have become more prominent because of recent developments. The saga of how the ABA's recommended ethics rules lagged behind many state provisions favoring disclosure of fraud, until the ABA's hand was forced by Enron (and ensuing SEC developments) is told in Roger C. Cramton et al., *Legal and Ethical Duties of Lawyers After Sarbanes-Oxley*, 49 Vill. L. Rev. 725, 727-34, 781 (2004).

13. *See generally* Paul F. Rothstein & Susan W. Crump, Federal Testimonial Privileges § 2:31 (2d ed. 2008); Rothstein, *supra* note 3, at 158-59, 175-76.

14. *See* Rothstein, *supra* note 3, at 175-77.

the company later decided to waive its privilege, these new corporate realities greatly enhance the chances of that happening.

In addition, the courts are eroding expected confidentiality by, for example, expanding the sorts of conduct embraced by standard exceptions to privilege and ethical confidentiality such as the exceptions for crime and fraud,<sup>15</sup> for lawyers defending themselves,<sup>16</sup> and for business (nonlegal) communications.<sup>17</sup>

In light of these and other similar developments, the confidence that one's communications with a lawyer will remain sacrosanct today may be badly misplaced. This raises important questions concerning the duty of lawyers: When, to what extent, and in what detail, does an attorney communicating with someone who may expect confidentiality, have a duty to explain in advance the circumstances under which the information gained may subsequently be revealed pursuant to these or other confidentiality loopholes? Will the interviewee "clam up" in the face of such *Miranda*-like warnings? If so, what does this do to the premise of *Upjohn* and the Model Rule comment that confidentiality enables attorneys to obtain the facts

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15. A good statement of the crime-fraud exception to attorney-client privilege is contained in Uniform Rule of Evidence 502(d)(1), which was recommended by the National Conference of Commissioners on Uniform State Laws (who drafted it) and the ABA for state adoption and generally reflected the law in most states and federal courts. There are decisions expanding this traditional exception in at least three ways: (1) extending the exception beyond crime and fraud to include other wrongs and torts, (2) eroding threshold burdens of proof triggering in camera inspection and triggering the exception itself, and (3) blurring the distinction between, on the one hand, past wrongdoing (which is privileged) and, on the other hand, continuing, planned, or future wrongdoing (which is unprivileged), by articulating a theory of continuing duty to disclose past wrongdoing—making past wrongdoing that is not disclosed into present and continuing wrongdoing. See Rothstein, *supra* note 3, at 177–79; see also Rothstein & Crump, *supra* note 13, § 2:36. Ethics codes typically have confidentiality exceptions—somewhat analogous to the crime-fraud exception—that are also expanding. See, e.g., Model Rules of Prof'l Conduct R. 1.6(b)(1)–(3) (2007).

16. See, e.g., Unif. R. Evid. 502(d)(3) (unprivileging communications relevant to a breach of duty by either a client or lawyer to the other, such as in a malpractice action, fees lawsuit, claim of ineffective assistance of counsel in a criminal case, disciplinary proceeding, and other situations); Unif. R. Evid. 502(d)(4) (unprivileging communications needed to defend lawyer against charges he assisted the client in crime or fraud). Ethics codes typically have somewhat similar confidentiality exceptions. See, e.g., Model Rules of Prof'l Conduct R. 1.6(b)(4)–(5). There is some difference among jurisdictions, both as to privilege and as to ethics provisions, regarding the extent to which the client must be involved in a matter or proceeding in which the lawyer is defending herself. The importance of this exception for our purposes is magnified by the fact that there seems to be an increasing tendency to prosecute lawyers in connection with their client's crimes, as noted in many statements and publications of members of the criminal and white-collar bar. See, e.g., Sheri Qualters, *As Liability Grows, GCs Get Nervous; An SEC Fine of \$40K Against a GC Illustrates Growing Scrutiny*, Nat'l L.J., Sept. 26, 2006, at 8 (quoting Robert Ullman, a white-collar defense lawyer of the Boston firm Nutter McClennen & Fish, as saying that "[t]he government often overreaches when it brings criminal charges against lawyers and accountants who are trying to fix problems in their companies").

17. See Rothstein & Crump, *supra* note 13, § 2:8 (citing many cases and describing how under privilege, the purpose of the consultation must be for professional legal services). Ethics codes frequently have somewhat similar provisions.

necessary to advise properly against illegality? These are significant questions and are the central focus of this essay. But rather than directly answering, I propose a law school student seminar to explore them. In the course thereof, I venture directions toward some tentative conclusions.

## II. THE SEMINAR IN GENERAL

Such a seminar is needed because these issues, which intimately affect what many of the students do in practice after graduation, usually are not covered elsewhere in the curriculum. The seminar would also correct common student misimpressions about the ironclad nature of legal and ethical confidentiality.

Seminar participants would prepare research papers and reports on the various current inroads on lawyer confidentiality, and would recommend and draft new ethical warnings found necessary and desirable. Along the way, students would engage in simulated interviews in which the problem of potentially false expectations of confidentiality might arise, illustrating the problem and testing their tentative conclusions about the need for warnings.

The seminar would meet in one two-hour session per week for fourteen weeks (the length of a typical semester). Because a considerable amount of outside research and writing would be required of students in preparation for the sessions, the seminar should bear four hours of credit, even though it meets only two hours per week. The class could accommodate between fifteen and twenty-five students.

I will suggest below a general thrust, structure, and content for the seminar, but will leave considerable flexibility regarding details to those who might wish to adopt the proposal.<sup>18</sup> My purpose is merely to provide a framework to be fleshed out by potential adopters. I would appreciate any suggestions for further refinement readers may have.

## III. SEMINAR GOALS

### A. *The End Product*

A series of preliminary research reports would be written and presented to the seminar by the students during the first eight weeks. These reports will be described more fully later in this essay. They would lay the groundwork for the end product of the seminar, which would consist of:

- (1) *A Written Class Consensus on Whether and When Warnings Are Needed.* The consensus (or as close thereto as possible) would be reached in a summary discussion session several

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18. For one mechanical example, I have not said much about how the reports and related tasks I describe are to be allocated among the students. Whether and to what extent students would be assigned more than one will depend on, among other things, how many students are enrolled in the seminar.



sessions before the end of the seminar. The consensus would be based on the series of research papers presented earlier in the seminar. The consensus would be reduced to writing prior to the next session of the seminar, by a student assigned as a reporter. Dissenting students could write their own dissents. The consensus should cover:

- (a) What confidentiality loopholes (if any) might require warnings to clients and others in advance of communications with lawyers?
  - (b) What fact situations (if any) should trigger warnings?
  - (c) What should the warnings say?
  - (d) Are existing rules concerning warnings adequate? If not, in what respects are they deficient?
- (2) *Draft Warning Provisions.* A proposed model *Miranda*-style warnings rule (or rules) of legal ethics (with explanatory commentary) should be drafted by the entire group, subsequent to and embodying the consensus, if the consensus is that a rule(s) is needed and existing rules are deficient. The new rule(s) would deal with the issues labeled (a) through (d) above, to the extent deemed desirable and feasible. A tentative outline of a commentary for the new rule or rules would also be agreed upon at the same time. A student would be assigned to write up the draft model rule(s) and commentary for the next session, in which session there would be a final rule-and-commentary markup. The final session of the seminar would be devoted to examining the final draft rule(s) and commentary. If the consensus was that no new ethical prescription is needed, these last sessions should be devoted to preparing fall-back provisions in case a jurisdiction differed with that conclusion.

In making assignments with respect to these end products, the teacher should take care to ensure that work is distributed equitably among the students, especially since there will have been earlier extensive student reports to the class on various background legal and ethical issues, as described elsewhere in this essay.

### B. *Educational Objectives*

The seminar would attempt to inculcate and afford practice in certain lawyering skills, as well as to enlighten regarding substantive principles of law and ethics. More specifically, the teaching objectives would be to

- (1) disabuse students of the notion that ethics and privilege guarantee lawyer confidentiality;

- (2) sensitize them to ethical obligations and the conflicting pulls that most ethical judgments involve;
- (3) give them practice in researching ethics materials;
- (4) introduce them to the skill of client and witness interviewing;
- (5) expose them to the kind of collaborative work effort that characterizes the best law firms;
- (6) impart some notion of what it is to draft a statutory or rule provision, and what kinds of things might be left to commentary or legislative history; and
- (7) perhaps produce contribution(s) to defining ethical conduct and to the literature in the field.

The following sections of this essay contain some further thoughts about how the seminar might proceed, and matters that might be germane along the way.

#### IV. SEMINAR PHASE ONE: BACKGROUND REPORTS

The first phase of the seminar would embrace approximately the first four weeks of the semester. It would be devoted to compiling reports on the legal and ethical prescriptions, principles, and exceptions that might be pertinent to the end products down the road. During this phase, students would be assigned to prepare and present, orally and in writing to the group, papers on topics discussed in each of the following four lettered sections.<sup>19</sup> Some of the class session time in this phase could be given back to the students to work privately on their papers, with the teacher on call during released classroom time—and at other times as well—for individual consultations with those preparing the papers.

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19. One or several students should be assigned to each of the topics, depending on the number of students in the seminar and how the teacher chooses to divide the work. The teacher could decide whether research on all four of the topics should start simultaneously or whether each should wait until the previous one is completed and presented to the group. There is enough information in this essay to get research on all the topics started simultaneously without waiting for the others. In any event, presentation to the seminar of the four topics should be *seriatim*. The third and fourth topics could be delivered to the seminar out of order, and even before the other topics are in. These variations in order are all possible because I am assuming the teacher will have given a relatively thorough introduction on the opening days of the seminar and that, at the weekly meetings of the full seminar, the teacher will go around the table and get oral reports of the progress and preliminary findings of each of the student researchers.

Even if I were relatively “omniscient” about the subject, I would not try to provide exhaustively in the present essay everything the students will be expected to uncover in their research, since they will undoubtedly discover this essay and that would defeat the research skills we are striving to inculcate. My guideline in this essay has been to provide only enough substantive legal and ethical information to indicate the general sorts of things that can be done and found and the direction the research should take—that is, enough to get the ball rolling.

A. *First Seminar Background Report(s):  
Possible Sources of Confidentiality*

Students assigned to this topic would prepare and present, orally and in writing, background briefing material that would describe the legal and ethical sources of confidentiality, citing authorities. This briefing should include discussion of attorney-client privilege,<sup>20</sup> tort decisions providing liability for breach of confidentiality,<sup>21</sup> ethical code provisions inveighing confidentiality,<sup>22</sup> ethical opinions and disciplinary rulings reinforcing confidentiality,<sup>23</sup> and relevant criminal cases<sup>24</sup>—in other words, anything giving rise to or significantly contributing to a duty of confidentiality.<sup>25</sup> The differences in general scope among these various sources would also be presented and illustrated, such as the difference between the coverage of the ethical requirement of confidentiality and that of privilege.<sup>26</sup>

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20. See, e.g., Unif. R. Evid. 502; Restatement (Third) of the Law Governing Lawyers §§ 68–86 (2000).

21. See, e.g., Richard A. Zitrin et al., *Legal Ethics in the Practice of Law* 125 (3d ed. 2007) (setting forth a sample tort complaint).

22. See, for example, the Model Rules of Professional Conduct Rules 1.6(a), 1.8(b), 1.9(c), 1.18(b) (2007) and the corresponding provisions of the 1983 Model Rules, the Model Code of Professional Responsibility DR 4-101(A) (1983), and the Restatement (Third) of the Law Governing Lawyers § 60 (2000). See also Restatement (Third) of the Law Governing Lawyers § 15.

23. See, e.g., *Lawyer Disciplinary Bd. v. McGraw*, 461 S.E.2d 850 (W. Va. 1995); *In re Mandelman*, 514 N.W.2d 11 (Wis. 1994); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-370 (1993); State Bar of Ariz. Comm. on Rules of Prof'l Conduct, Op. 2000-11 (2000); see also Kan. Bar Ass'n Comm. on Ethics/Advisory Servs., Op. 01-01 (2001); N.D. State Bar Ass'n Ethics Comm., Op. 95-11 (1995).

24. See, e.g., *People v. Belge*, 372 N.Y.S.2d 798 (1975), *aff'd*, 376 N.Y.S.2d 771 (1975).

25. See, e.g., *Swidler & Berlin v. United States*, 524 U.S. 399 (1998) (noting that confidentiality is so important that it persists after the death of a client); *Ag Gro Serv. Co. v. Sophia Land Co.*, 8 F. Supp. 2d 495, 498 (D. Md. 1997) (noting that confidentiality is not just a “fine point” of ethics, but central to the relationship of lawyer and client). Prescriptions commanding confidentiality to lawyers’ employees would be relevant here, as well. See Ctr. for Prof'l Responsibility, Am. Bar Ass'n, Annotated Model Rules of Prof'l Conduct 94 (5th ed. 2003) [hereinafter Annotated Model Rules].

26. See *Ex parte Taylor Coal Co.*, 401 So. 2d 1, 7–8 (Ala. 1981). *Taylor Coal* noted that a finding that client information is not within the privilege does not mean that a lawyer is permitted to reveal it. *Id.* Unlike privilege, the ethical duty of confidentiality applies notwithstanding the facts that there has already been disclosure, that the source of information about the representation is not the client, that the information was not communicated in confidence, that the information is not sought or given in a formal proceeding, that the information about the representation was not derived from a client confidence, that the communication related to the client’s will, or that information is of the generalized kind mentioned later in this essay, which would not be privileged. See *In re Goebel*, 703 N.E.2d 1045 (Ind. 1998); Model Rules of Prof'l Conduct R. 1.6 cmts. 3, 4 (2007); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 411 (1998); ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1287 (1974) (DR 4-101(A)); see also *Taylor Coal*, 401 So. 2d 1; *In re Anonymous*, 654 N.E.2d 1128 (Ind. 1995); *Lawyer Disciplinary Bd. v. McGraw*, 461 S.E.2d 850 (W. Va. 1995); *In re Harman*, 628 N.W.2d 351 (Wis. 2001); State Bar of Ariz. Comm. on Rules of Prof'l Conduct, Op. 2000-11 (2000); Miss. State Bar Ass'n Ethics Comm., Op. 101 (1985); N.D. State Bar Ass'n Ethics Comm., Op. 95-11 (1995); Bd. of Prof'l Responsibility of the Sup. Ct. of Tenn., Op. 82-5F-25 (1982). *But see Profit Mgmt. Dev. v. Jacobson, Brandvik, and Anderson, Ltd.*, 721 N.E.2d

B. *Second Seminar Background Report(s): Limitations on Confidentiality Under the Various Sources*

This background paper (or series of papers) would compile and present a list with descriptions (supported by authorities) of all principles limiting confidentiality under each of the above sources.<sup>27</sup> The descriptions would be of the fact situations in which each confidentiality limit applies, using hypothetical or real case illustrations. Thus, this paper or series of papers would concern exceptions to the privilege and to tort, criminal, and ethical duties of confidentiality, and the like.

There are quite a few situations in which duties of confidentiality may not apply under these sources, and the situations may be somewhat different under each source. All such situations should be put out on the table in this paper or series of papers. A selection will be made later by the assembled group, regarding which situations are most significant for purposes of potentially requiring a warning to the interviewee. The seminar would pursue these further, as detailed later herein. Optionally, the teacher, at the outset of the seminar, could eliminate some situations he or she regards as less important or less manageable.

The effort at this point in the seminar is to spread before the students for discussion a relatively complete list of things that might conceivably, in some situation or another, require a warning to the interviewee that confidentiality may subsequently be breached.

The list might include, *inter alia*, the following subjects of permissible breach of confidentiality. Each should be treated under (a) ethical or disciplinary law, (b) regulatory law, (c) privilege law, (d) tort law, and/or (e) criminal law. How each subject plays out under each of these five sources, and whether they are different under each, should also be treated.<sup>28</sup> The list is as follows:

*Situations of Possibly Justifiable Breaches of Confidentiality:*

- (1) Waiver by corporation of privilege covering employee communications.<sup>29</sup>

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826 (Ill. App. Ct. 1999); *In re Sellers*, 669 So. 2d 1204 (La. 1996); *In re Detention of Williams*, 22 P.3d 283 (Wash. Ct. App. 2001). Violation of an ethical rule of confidentiality does not itself necessarily mean malpractice has been committed. *See* Model Rules of Prof'l Conduct pmb1., para. 20.

27. For example, ethical rules covered would include rules like ABA Model Rules 1.6(b) and 1.13 (2003) and perhaps Rules 1.2(d), 3.3, 4.1(b), 8.1, and 8.3, as well as others. Also covered should be the more limited exceptions to confidentiality in the analogous provisions of the ABA's 2000 Model Rules, 1983 Model Rules, 1969 Model Code, and 1908 Canons of Ethics. Some states still have something similar to these older versions. The students should cover representative state rules and rulings as well.

28. I am including a list because I think both the teacher and the students may need some guidance. It still leaves room for the student's paper to develop more fully and support the items on this list and add to the list. To facilitate this, I have limited my citations to only those needed to suggest my direction.

29. *See* Rothstein, *supra* note 3, at 173-77. As an adjunct to this, the student should include some discussion concerning the ethics of representing both the corporation and the employee, and the danger that the interviewee may make assumptions in this regard. *See*

- (a) Express waiver to help law enforcement or for public appearances.
  - (i) In general.
  - (ii) Government leniency policies and promises.<sup>30</sup>
- (b) Internal investigations considered “arm of law.”<sup>31</sup>
- (c) Waiver requirements imposed by independent auditors, audit committees, and stock exchanges.<sup>32</sup>
- (d) Waiver as to underlying materials by submitting reports to auditors or government agencies.<sup>33</sup>
- (e) Bankruptcy.<sup>34</sup>
- (2) “Watchdog” counsel.<sup>35</sup>
- (3) Fiduciary-beneficiary exception: *Garner v. Wolfenbarger* doctrine.<sup>36</sup>
- (4) Preventing harm to others.

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Model Rules of Prof'l Conduct R. 1.13(g); Annotated Model Rules, *supra* note 25, at 219–23, 228–30; Rothstein & Crump, *supra* note 13, § 2:20.

30. See *supra* notes 13–15 and accompanying text. In addition to provisions for credit for such cooperation in the Federal Sentencing Guidelines, several government agencies, including the SEC and the Department of Justice have cooperation policies in place. See Thomas G. Bost, *Corporate Lawyers After the Big Quake: The Conceptual Fault Line in the Professional Duty of Confidentiality*, 19 Geo. J. Legal Ethics 1089 (2006); C. Evan Stewart, *This Is a Fine Mess You've Gotten Me Into: The Revolution in the Legal Profession*, N.Y. Bus. L.J., Summer 2006, at 15. The Department of Justice purports to have recently softened its stance on pushing for waiver of attorney-client and work-product protections, in what is known as the “McNulty Memorandum.” See Press Release, U.S. Dep't of Justice, U.S. Deputy Attorney General Paul J. McNulty Revises Charging Guidelines for Prosecuting Corporate Fraud (Dec. 12, 2006), [http://www.usdoj.gov/opa/pr/2006/December/06\\_odag\\_828.html](http://www.usdoj.gov/opa/pr/2006/December/06_odag_828.html). Many believe the change is only cosmetic. See, e.g., Lawrence D. Finder & Ryan D. McConnell, Commentary: McNulty Memo Will Have Marginal Effect on Deferred and Nonprosecution Agreements, Corp. Couns., Mar. 27, 2007, <http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1174912597365>.

31. See Rothstein, *supra* note 3, at 176 n.16.

32. See *id.* at 176 n.15.

33. See *id.*

34. A trustee in bankruptcy of a corporation, like other successors, has the power to waive privilege for the corporation, and frequently does. See generally *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343 (1985); Paul F. Rothstein, *Federal Rules of Evidence* 251 (3d ed. 2007). Certain other persons in the nature of receivers have that power as well. See Rothstein & Crump, *supra* note 13, § 2:22. The trustee of a bankrupt individual may not have similar power.

35. See Rothstein, *supra* note 34, at 246–48. The student should examine whether this applies in the ethical context as well.

36. See Rothstein & Crump, *supra* note 13, § 2:38. The student should examine whether similar principles apply in the ethical context as well.

(a) Sarbanes-Oxley regulations.<sup>37</sup>

37. 17 C.F.R. § 205 (2007); *see supra* notes 6–8 and accompanying text. The regulations provide for two kinds of reporting of lawyer confidences:

- (1) *Mandatory "Up-the-Ladder" (Inside the Client) Reporting.* Covered lawyers who become aware of credible evidence of certain "material" wrongdoing by their client company (or agent thereof) *must* report it to the chief legal officer of the client and (discretionarily) to the client's chief executive officer. The chief legal officer must, upon being so notified, institute an inquiry into whether or not the violation has, is, or will take place. He or she must then advise the lawyer who reported, of what has been found and any action taken. If the lawyer/reporter reasonably believes that the report has not been promptly and appropriately responded to, the lawyer is required to report the matter to the audit committee of the board of directors or another committee composed solely of outside directors who are not "interested persons," or the board itself if there is no committee. If the client has a "legal compliance committee" to which the lawyer reported, the lawyer need not go any further and gauge the response. 17 C.F.R. § 205.3(b).
- (2) *Permissive Outside-the-Ladder (Outside the Client) Reporting to the SEC.* A covered lawyer *may* disclose confidential client information to the SEC, if the lawyer reasonably believes it necessary to:
  - (a) prevent "a material violation that is likely to cause substantial injury to the financial interest or property of the issuer or investors," *id.* § 205.3(d)(2)(i);
  - (b) prevent the client from committing perjury or subornation or an act likely to defraud the SEC, *id.* § 205.3(d)(2)(ii); or
  - (c) "rectify the consequences of a material violation by the issuer that caused, or may cause, substantial injury to the financial interest or property of the issuer or investors in the furtherance of which the attorney's services were used," *id.* § 205.3(d)(2)(iii).

Ordinarily, a lawyer probably could only believe the outside-the-ladder reporting is "necessary" if the up-the-ladder reporting had not obtained satisfactory results. The permission to report outside the client arguably goes beyond what Congress contemplated. *See supra* note 6. It would also seem to violate traditional notions of lawyer confidentiality and privilege as still found in the legal and ethical prescriptions of a number of states, at least as to past wrongdoing. These states have not adopted provisions like the 2002/2003 amendments to the ABA Model Rules of Professional Conduct 1.6 and 1.13 (which are consistent with the SEC regulations). Do Congress and the SEC have constitutional power to override state prescriptions when it is the states that license lawyers? For example, California's privilege and ethics rules, like those in many other states, seem to forbid outside-the-ladder reporting except in certain narrow instances (e.g., to prevent death or serious bodily injury). *See* Cal. Bus. & Prof. Code § 6068(e) (2007); Cal. Rules of Prof'l Conduct R. 3-100, 3-600 (2004); Cal. R. Ct. 3.1362(c) (West 2007); Cal. Rules of Prof'l Conduct R. 3-210 (Discussion Draft 2006). The SEC regulations expressly purport to override state provisions to the contrary. *See* 17 C.F.R. §§ 205.1, 205.6(a)–(c), 205.7. But there is an open question as to their constitutionality in this regard. For a variety of views on this question, see generally N.C. State Bar Ass'n Ethics Comm., Op. 9 (2006); Corps. Comm. of the Bus. Law Section of the Calif. State Bar, *Conflicting Currents: The Obligation to Maintain Inviolable Client Confidences and the New SEC Attorney Conduct Rules*, 32 Pepp. L. Rev. 89 (2004); and Cramton et al., *supra* note 12. *See also* Corps. Comm. of the Bus. Law Section & Comm. on Prof'l Responsibility and Conduct, Ethics Alert: The New SEC Attorney Conduct Rules v. California's Duty of Confidentiality (2004), available at <http://www.calbar.ca.gov/calbar/pdfs/SEC-ethics-alert.pdf>.

The SEC has under consideration some even more extensive inroads on confidentiality. *See* Shawn Harpen, Eric Landau & Kathryn Lohmeyer, *The SEC's Proposed Noisy Withdrawal Rule: Intended and Unintended Consequences*, Orange County Law., June 2007, at 42 (2007). These authors suggest that if these go into effect, some sort of corporate

- (b) Other provisions allowing disclosure to prevent serious property or financial loss.<sup>38</sup>
  - (c) Provisions allowing disclosure to prevent death or serious bodily harm.<sup>39</sup>
  - (d) *Tarasoff*-type and related tort liability for not disclosing potential harm.<sup>40</sup>
- (5) Lawyer charged with obstruction of justice or other offense for keeping communications confidential.<sup>41</sup>
  - (6) Inadvertent waiver during massive document discovery.<sup>42</sup>
  - (7) “Quick-peek” discovery agreements.<sup>43</sup>

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“*Miranda* warning” may become necessary. “Corporate attorneys may need to advise officers and other agents of the corporation that the attorney may decide to disclose information and documentation provided to the attorney, in addition to the legal advice conveyed by the attorney.” Harpen, Landau & Lohmeyer, *supra*, at 48–49.

38. See, e.g., Model Rules of Prof'l Conduct R. 1.6(b)(2)–(3), 1.13 (2007); Restatement (Third) of the Law Governing Lawyers § 67 (2000).

Forty-one states permit (and four of them require) a lawyer to disclose confidential information to prevent a client's criminal fraud. . . . Eighteen states permit a lawyer to disclose confidential information to rectify or mitigate a past client fraud in which the lawyer's services were used. . . . Forty-four states permit (and three require) a lawyer to disclose confidential information relating to a client's ongoing criminal or fraudulent act.

Cramton et al., *supra* note 12, at 784 (citations omitted).

39. See, e.g., Model Rules of Prof'l Conduct R. 1.6(b)(1); Restatement (Third) of the Law Governing Lawyers § 66. Students may also examine analogous state provisions and ethical opinions such as R.I. Sup. Ct. Ethics Advisory Panel, Op. 98-12 (1998). See also Cal. Evid. Code § 956.5 (West 2007) (“There is no privilege . . . if the lawyer reasonably believes that disclosure . . . is necessary to prevent [the client from committing] a criminal act that the lawyer reasonably believes is likely to result in death of, or substantial bodily harm to an individual.”); *People v. Dang*, 113 Cal. Rptr. 2d 763 (Ct. App. 2001); *Fox Searchlight Pictures, Inc. v. Paladino*, 106 Cal. Rptr. 2d 906 (Ct. App. 2001); *Purcell v. Dist. Att'y*, 676 N.E.2d 436 (Mass. 1997); *State v. Hansen*, 862 P.2d 117 (Wash. 1993). *Contra State v. Macumber*, 544 P.2d 1084 (Ariz. 1976).

40. *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 343 (Cal. 1976). The SOX regulations expressly do not provide any private right of action for their violation, 17 C.F.R. § 205.7, but there are SEC penalties and remedies, *id.* § 205.7(b).

41. The traditional cases where attorneys have been charged usually also involved some tampering or meddling with physical evidence brought to the attention of the attorney by the client. See *In re Ryder*, 263 F. Supp. 360 (E.D. Va. 1967), *aff'd per curiam*, 381 F.2d 713 (4th Cir. 1967); *People v. Meredith*, 631 P.2d 46 (Cal. 1981); *cf. People v. Belge*, 372 N.Y.S.2d 798 (Onondaga County Ct. 1975), *aff'd*, 376 N.Y.S.2d 771 (App. Div. 1975). But students should be able to find other cases as well.

42. *Hopson v. Mayor and City Council of Baltimore*, 232 F.R.D. 228 (D. Md. 2005) (setting forth the various positions on inadvertent waiver of attorney-client privilege); see also Rothstein & Crump, *supra* note 13, § 2:30; Paul F. Rothstein, Myrna S. Raeder & David Crump, *Evidence in a Nutshell* 207–08 (5th ed. 2007) [hereinafter *Evidence in a Nutshell*]; Paul F. Rothstein, Myrna S. Raeder & David Crump, *Evidence: Cases, Materials and Problems* 894–95 (3d ed. 2006 & Supp. 2007) [hereinafter *Evidence: Cases, Materials & Problems*]. The cited pages in these books also refer to some relevant new and proposed evidence and procedure rules on the matter, including newly amended Federal Rule of Civil Procedure 26(b)(5) and proposed Federal Rule of Evidence 502.

- (8) Business (nonlegal) purpose doctrine.<sup>44</sup>
- (9) No privilege for identity of client, fact of visits or consultation, ministerial matters, fees, broad subject matter of consultation, and other generalized information.<sup>45</sup>
- (10) Risk of interception of communications by fax, e-mail, or cell or cordless phones.<sup>46</sup>

43. See citations in *supra* note 42 that also deal with “quick-peek” agreements.

44. See, e.g., *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977); *Rothstein & Crump*, *supra* note 13, § 2:8 (explaining that, under privilege, the purpose of the consultation must be for professional legal services). Ethics codes frequently have somewhat similar provisions. The problem is exacerbated where an attorney wears “two hats,” i.e., has a business position with the client corporation as well as being its lawyer. See *SEC v. Gulf & Western Indus., Inc.*, 518 F. Supp. 675 (D.D.C. 1981). English lawyers have had a particular problem with the “nonlawyer” purpose doctrine. See *Three Rivers Dist. Council v. Bank of Eng.*, [2004] UKHL 48 (Eng.).

45. For a good statement of the varying positions under privilege, see *United States v. Sindel*, 53 F.3d 874 (8th Cir. 1995), which deals with the Internal Revenue Service requirement to report the receipt and source of payments over \$10,000 as applied to a lawyer’s fee from a client, but treats the general question posed here. See *Rothstein*, *supra* note 34, at 244–46; *Rothstein & Crump*, *supra* note 13, § 2:11; see also Alan Mandel, Comment, *The Attorney-Client Privilege as a Protection of Client Identity: Can Defense Attorneys Be the Prosecution’s Best Witnesses?*, 21 Am. Crim. L. Rev. 81 (1983). Regarding the relative absence of the general principle under ethics rules and rulings, see *In re Goebel*, 703 N.E.2d 1045 (Ind. 1998); Conn. Bar Ass’n Comm. on Prof’l Ethics, Op. 99-35 (1999); Ill. State Bar Ass’n Advisory Op. on Prof’l Conduct, Op. 97-1 (1997); Iowa Sup. Ct. Bd. of Prof’l Ethics & Conduct, Op. 97-4 (1997); cf. *United States v. Legal Servs.*, 249 F.3d 1077 (D.C. Cir. 2001). On client’s whereabouts, see John R. Przypyszny, *Public Assault on the Attorney-Client Privilege: Ramifications of Baltes v. Doe*, 3 Geo. J. Legal Ethics 351 (1989); Shelly K. Hillyer, Comment, *The Attorney-Client Privilege, Ethical Rules of Confidentiality, and Other Arguments Bearing on Disclosure of a Fugitive Client’s Whereabouts*, 68 Temp. L. Rev. 307 (1995).

46. See David Hricik, *Confidentiality and Privilege in High-Tech Communications*, 60 Tex. B.J. 104 (1997); David Hricik, *Lawyers Worry Too Much About Transmitting Client Confidences by Internet E-mail*, 11 Geo. J. Legal Ethics 459 (1998); Karen Mika, *Of Cell Phones and Electronic Mail: Disclosure of Confidential Information Under Disciplinary Rule 4-101 and Model Rule 1.6*, 13 Notre Dame J.L. Ethics & Pub. Pol’y 121 (1999); Jonathan Rose, Note, *E-mail Security Risks: Taking Hacks at the Attorney-Client Privilege*, 23 Rutgers Computer & Tech. L.J. 179 (1997). See also the following cases on e-mails: *In re County of Erie*, 473 F.3d 413 (2d Cir. 2007); *Curto v. Med. World Commc’n*, No. 03CV6327, 2006 WL 1318387 (E.D.N.Y. May 15, 2006) (affirming the magistrate judge’s order that plaintiff-employee did not waive attorney-client privilege with respect to e-mail communications to her lawyer using the company’s e-mail system); *Hopson*, 232 F.R.D. at 228; *In re Asousa P’ship*, No. 01-12295DWS, 2005 WL 3299823 (Bankr. E.D. Pa. Nov. 17, 2005); *In re Asia Global Crossing, Ltd.*, 322 B.R. 247, 257 (Bankr. S.D.N.Y. 2005) (noting that in determining whether an employee’s use of the company e-mail system to communicate with his personal attorney destroyed the attorney-client or work-product privilege, the court considered four factors: “(1) does the corporation maintain a policy banning personal or other objectionable use, (2) does the company monitor the use of the employee’s computer or e-mail, (3) do third parties have a right of access to the computer or e-mails, and (4) did the corporation notify the employee, or was the employee aware, of the use and monitoring policies?”). Relevant to the analysis was the fact that although the company published a policy notifying employees they should have no expectation of privacy in e-mails as the company would monitor them, this policy was rarely enforced. On cell phones, see the following ethics opinions: State Bar of Ariz. Comm. on Rules of Prof’l



- (11) One-way protection.<sup>47</sup>
- (12) Opening-the-door and shield-sword principles.<sup>48</sup>
- (13) Crime-fraud privilege exception and related ethical prescriptions.<sup>49</sup>
  - (a) Does it apply beyond crimes and frauds to wrongdoing generally?<sup>50</sup>
  - (b) When does concealment of a privileged past wrong become an unprivileged continuing cover-up?<sup>51</sup>
  - (c) Quantum of proof to trigger the exception.<sup>52</sup>
  - (d) Quantum to trigger in camera inspection of privileged material.<sup>53</sup>
  - (e) Risk that entire matter becomes tainted by illegality of part.<sup>54</sup>
- (14) Exception for disputes between client and lawyer or when client alleges malfeasance of lawyer.<sup>55</sup>

Conduct, Op. 95-11 (1995); Del. State Bar Ass'n Comm. on Prof'l Ethics, Op. 2001-2 (2001); Iowa Sup. Ct. Bd. of Prof'l Ethics & Conduct, Op. 90-44 (1991); Mass. Bar Ass'n Comm. on Prof'l Ethics, Op. 94-5 (1994); Ass'n of the Bar of the City of New York Comm. on Prof'l and Judicial Ethics, Op. 1994-11 (1994); N.C. State Bar Ass'n Ethics Comm., Op. 215 (1995); N.H. Bar Ass'n Ethics Comm., Op. 1991-92/6 (1992); Wash. State Bar Ass'n Rules of Prof'l Conduct Comm., Informal Op. 91-1 (n.d.).

47. See Rothstein, *supra* note 34, at 244; Rothstein & Crump, *supra* note 13, § 2:13.

48. Rothstein, *supra* note 34, at 252.

49. See, e.g., Unif. R. Evid. 502(d)(1); Model Rules of Prof'l Conduct R. 4.1(b), 3.3 (2007).

50. For cases extending the crime-fraud exception beyond crimes and frauds, see *Madanes v. Madanes*, 199 F.R.D. 135 (S.D.N.Y. 2001) (holding that the crime-fraud exception includes any intentional tort that may undermine the adversary system); *Irving Trust Co. v. Gomez*, 100 F.R.D. 273 (S.D.N.Y. 1983) (holding that the crime-fraud exception embraces any unlawful conduct regardless of whether it constitutes fraud or any intentional tort—including reckless tortious behavior); *Diamond v. Stratton*, 95 F.R.D. 503 (S.D.N.Y. 1982) (holding that intentional infliction of emotional distress falls within the crime-fraud exception).

51. See, e.g., *In re John Doe Corp.*, 675 F.2d 482 (2d Cir. 1982); *Sound Video Unlimited, Inc. v. Video Shack, Inc.*, 661 F. Supp. 1482 (N.D. Ill. 1987).

52. See, e.g., *United States v. Collis*, 128 F.3d 313 (6th Cir. 1997) (requiring a prima facie showing upon which a reasonable person would have a reasonable basis to suspect the perpetration of a crime or fraud). There are many other formulations. See cases cited on burden of proof in Rothstein & Crump, *supra* note 13, § 2:36.

53. See, e.g., *United States v. Zolin*, 491 U.S. 554 (1989); *In re Grand Jury Investigation*, 974 F.2d 1068 (9th Cir. 1992) (explaining that the *Zolin* standard requires the court to speculate); see also cases cited on in camera inspection in Rothstein & Crump, *supra* note 13, § 2:36.

54. A particularly graphic example of this is *Clark v. State*, 261 S.W.2d 339 (Tex. Crim. App. 1953). Cf. *Collis*, 128 F.3d 313.

55. The situations that may be embraced include allegations by the client of malpractice in tort cases, allegations by the client of ineffective assistance of counsel in criminal cases,

- (15) Exception in some jurisdictions for lawyers defending selves against criminal, civil, or ethical allegations whether or not made by client.<sup>56</sup>
  - (a) Upsurge of criminal and civil charges against lawyers.<sup>57</sup>
  - (b) Variation: Lawyer seeking advice on own ethical/legal obligations.<sup>58</sup>
- (16) Exception where needed by third-party criminal defendants for their defense.<sup>59</sup>
- (17) Wills exception.<sup>60</sup>

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charges by the client of ethical violations before disciplinary tribunals, efforts both formal and informal to collect or resist the lawyer's fees, and others. *See* Model Rules of Prof'l Conduct R. 1.6(b)(3) cmts. 10, 11 (2007). The kinds of proceedings involving lawyers in which this might arise are suggested in Restatement (Third) of the Law Governing Lawyers §§ 5 (professional discipline), 6 (judicial remedies), 7 (judicial remedies available to a client or nonclient for lawyer wrongs), and 8 (lawyer criminal offenses) (2000). For further instances, see Restatement (Third) of the Law Governing Lawyers §§ 48 (professional negligence—elements and defenses generally), 49 (breach of fiduciary duty generally), 50 (duty of care to a client), 52 (the standard of care), 53 (causation and damages), 54 (defenses; prospective liability waiver; settlement with a client), 55 (civil remedies of a client other than for malpractice), 56 (liability to a client or nonclient under general law), and 65 (using or disclosing information in a compensation dispute). Ethics opinions relating to disclosure of client confidences in fee disputes are collected in the Annotated Model Rules, *supra* note 25, at 96–97. On the corresponding exception to privilege, see Uniform Rule of Evidence 502(d)(3). On use by an attorney of confidences of his ex-client to sue the ex-client for wrongfully discharging the attorney, see Rothstein, *supra* note 34, at 253.

56. *See generally* Unif. R. Evid. 502(d)(4); Restatement (Third) of the Law Governing Lawyers §§ 30 (a lawyer's liability to a third person for conduct on behalf of a client), 51 (duty of care to certain nonclients), 56 (liability to a client or nonclient under general law), 57 (nonclient claims—certain defenses and exceptions to liability), 58 (vicarious liability). There is some dispute (regarding both ethics and privilege) as to (1) whether disclosure is permitted when a third person (not the client) is making the allegations against the lawyer (or is otherwise in dispute with the lawyer) and, if so, (2) whether the matter nevertheless must somehow involve the lawyer's representation of the client whose confidential information is being disclosed. Annotated Model Rules, *supra* note 25, at 96–98; Rothstein & Crump, *supra* note 13, § 2:37. The text of the Restatement rule seems to have neither restriction on disclosure but requires that the allegation or dispute arises out of the lawyer's representation of some client. *See* Restatement (Third) of the Law Governing Lawyers § 64 (using or disclosing information in a lawyer's self-defense). "A lawyer may use or disclose confidential client information . . . to the extent that the lawyer reasonably believes necessary to defend the lawyer or the lawyer's associate or agent against a charge or threatened charge by any person that [the lawyer, associate, or agent] acted wrongfully in the course of representing a client." *Id.* Notice it says "a client," not "the client."

57. *See, e.g.*, Qualters, *supra* note 16; *see also* Rothstein & Crump, *supra* note 13, § 2:37.

58. *See, e.g.*, Model Rules of Prof'l Conduct R. 1.6(b)(4) & cmt. 9.

59. *See* Evidence: Cases, Materials & Problems, *supra* note 42, at 876–80; *see also* Swidler & Berlin v. United States, 524 U.S. 399 (1998).

60. As to privilege, see Uniform Rule Evidence 502(d)(2); Swidler & Berlin, 524 U.S. at 404–07; Rothstein & Crump, *supra* note 13, § 2:18. There may, however, not be such an exception under ethics rules unless the court orders disclosure. *See, e.g.*, N.D. State Bar

- (18) Exception for government attorneys in criminal cases in some circuits.<sup>61</sup>
- (19) Information obtained by lawyer from third parties not privileged (even if obtained as result of confidential client communication).<sup>62</sup>
- (20) Joint or common-interest clients.<sup>63</sup>
- (21) Implied authority to disclose.<sup>64</sup>
- (22) Disclosures otherwise required by law or a court.<sup>65</sup>
- (23) Disclosure incident to or implied by withdrawal.<sup>66</sup>
- (24) Disclosure to employees, partners, secretaries, assistants, and agents of lawyer, and intrafirm disclosures generally.<sup>67</sup>
- (25) Insurance and billing information.<sup>68</sup>

The seminar may decide that there are other subjects that should be on the list as well.

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Ass'n Ethics Comm., Op. 95-11 (1995). Note that the Uniform Rule states that the exception applies in disputes over testate succession as well.

61. See Rothstein & Crump, *supra* note 13, § 2:21.

62. The client may direct the lawyer to third parties. Ethical duties would prevent disclosure if information obtained from the third party related to the representation of the client, but privilege usually would not, so if a court ordered disclosure, the ethical duty would be removed. See Model Rules of Prof'l Conduct R. 1.6(b)(6) (2007); see also Rothstein & Crump, *supra* note 13, § 2:11. On the proposition that it may be covered by the ethical duty of confidentiality, see, for example, Annotated Model Rules, *supra* note 25, at 90-91.

63. Rothstein & Crump, *supra* note 13, §§ 2:17, 2:34; cf. Model Rules of Prof'l Conduct R. 1.7 cmt. 30.

64. See, e.g., Model Rules of Prof'l Conduct R. 1.6(a) cmt. 5, 1.2(a); Restatement (Third) of the Law Governing Lawyers §§ 23(2), 26, 27, 61, 62 (2000); ABA Comm. on Ethics and Prof'l Responsibility, Formal Ops. 01-421 (2001), 98-411 (1998); ABA Comm. on Ethics and Prof'l Responsibility, Informal Ops. 89-1530 (1989), 86-1518 (1986); Ark. Bar Ass'n Prof'l Ethics & Grievances Comm., Advisory Op. 96-01 (1996); Haw. Sup. Ct. Disciplinary Bd., Formal Ethics Op. 38 (1999); Kan. Bar Ass'n Comm. on Ethics/Advisory Servs., Op. 01-01 (2001). Included under this heading would be waiver of privilege by the attorney preparing or refreshing the memory of a lay or expert witness for deposition or trial, by use of privileged material on or off the stand. See Rothstein, *supra* note 34, at 253.

65. See, e.g., Model Rules of Prof'l Conduct R. 1.6(b)(6) & cmt. 12; Restatement (Third) of the Law Governing Lawyers § 63.

66. See Model Rules of Prof'l Conduct R. 1.16.

67. See Model Rules of Prof'l Conduct R. 1.6 cmt. 5 (explaining that "a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. . . . Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers").

68. See, e.g., Annotated Model Rules, *supra* note 25, at 89-90.

C. *Third Seminar Background Report: Extent of Disclosure Under the Various Limits on Confidentiality*

The seminar may ultimately conclude that in certain situations not only should an interviewee be warned that there may be later disclosure, but also be warned of the extent of such possible disclosure<sup>69</sup>—the possibility, for example, that if the corporation waives its privilege to give information to the SEC, it may have waived as to all other agencies, prosecutors, and private parties as well, and may have waived not only as to the precise piece of information handed over, but as to everything related to the same subject matter.<sup>70</sup> Application of the crime-fraud exception may work a similar expansive loss of privilege.<sup>71</sup> Thus, the seminar should be informed of the doctrines concerning selective<sup>72</sup> and subject-matter<sup>73</sup> abrogation of confidentiality and other doctrines that may impact the extent of disclosure under the various limits on or exceptions to confidentiality. This particular seminar report should focus on these issues.

D. *Fourth Seminar Background Report: Changes in Corporate Structure and Climate that May Increase the Chances of Nonconfidentiality*

This paper should be concerned with such issues as the burgeoning use of independent directors and audit committees, and other societal and corporate culture factors that may bear on the likelihood of corporate waiver.<sup>74</sup>

At the end of this phase, the seminar as a group should reach a decision as to which are the most important limits on confidentiality that should engender advance warning, eliminating from further seminar consideration other limits. This group meeting, then, will have narrowed the limits that will be further considered by the seminar, down to a small handful, the exact number depending upon practical considerations such as how important and frequent the limit is likely to be, how many students are in the seminar, and the demands of an equitable workload. A decision should be made at this point about whether warnings should include references to the extent of loss of confidentiality treated in the third seminar background report above.<sup>75</sup>

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69. See, e.g., *Banner v. City of Flint*, 136 F. Supp. 2d 678 (E.D. Mich. 2000); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 01-421 (2001) (noting that before consenting to disclosure, client must be informed of all the effects of disclosure).

70. The exposure to criminal and regulatory liability and extensive private lawsuits could be quite a bit more significant than might be realized.

71. Rothstein & Crump, *supra* note 13, § 2:36.

72. Rothstein & Crump, *supra* note 13, § 2:31.

73. Rothstein & Crump, *supra* note 13, §§ 2:29, 2:35.

74. Some of these are suggested in Rothstein, *supra* note 3, at 173–79. See also *supra* notes 13, 14 and accompanying text.

75. See *supra* Part IV.C.

#### V. SEMINAR PHASE TWO: SPECIFIC CREATIVE PAPERS ON THE NARROWED GROUP OF CONFIDENTIALITY LIMITS, TENTATIVELY RECOMMENDING SPECIFIC WARNINGS IN SPECIFIC SITUATIONS

This phase will embrace approximately the fifth and sixth weeks of the seminar.<sup>76</sup> The papers here would each be devoted to one limit (in the narrowed group of limits) and each paper would be written, preferably, by one student. Each paper should be a creative attempt to envision a few of the most important interview situations where a warning should be triggered, and to fashion the specific warning. The paper should make liberal use of hypothetical fact patterns, recommend specifically when a lawyer should be alerted to the need for a warning, cite legal and ethical precedent explaining why, and then fashion the specific warning (including how to communicate to the interviewee what kind of situations may engender subsequent disclosure and the potential breadth thereof). I call these recommendations tentative, even though they are very specific, because later sessions of the seminar (in particular the mock interviews and the examination of existing general ethical prescriptions about informing clients) may change perceptions of what is needed.

#### VI. SEMINAR PHASE THREE: MOCK INTERVIEWS

This phase, lasting about three weeks, will involve role-playing. I want to leave considerable flexibility here for the teacher to fashion mock interviews that suit the teacher's own preferences and that respond to what may have surfaced thus far in the particular seminar sessions, particularly in the reports in the preceding (the second) seminar phase. It may be that specific role-playing problems could be fashioned based directly on some of the hypothetical situations given in the papers in that phase. If so, the students who composed those hypothetical situations could be used as interviewers or interviewees in the corresponding problem.

I would have from one to three role-playing problems. Each problem should have a student assigned as a lawyer, interviewing another student (or the teacher) playing the role of interviewee. Each mock interview should be played out before the assembled group. Time for the students to conduct advance preparation for the interviews should be provided. Perhaps the first hour of the two-hour session could be allowed for advance preparation by students assigned to each problem. The preparation would be done in secret from the rest of the group.

At least one of the problems should have some ambiguity as to whether the interviewee is proposing something wrongful or simply inquiring about whether and how a business goal can be accomplished, perhaps in a complex regulatory environment. To add a wrinkle, the wrongdoing could be something other than a crime or fraud—for example a regulatory infraction, breach of contract, or nonfraudulent tort. It would also be

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76. All the week allocations can be varied.

desirable to have a problem in which there is ambiguity about whether the wrongdoing the interviewee reveals would be classified as purely past, or whether there might be continuing effects. For example, holding confidential past corporate wrongdoing risks the possibility that investors will purchase company stock at inflated prices which could plummet when the truth gets out. This might be considered a future fraud.

At least one of the problems should be in the corporate setting. The corporation's lawyer should interview an employee who may risk some personal liability. The facts should be such that there is a possibility the corporation may be tempted later to waive confidentiality in order to cooperate with a regulatory or law enforcement agency. A side issue in this problem might involve whether the lawyer does (and whether the lawyer could) represent both the corporation and the employee and what needs to be said to whom in order to do so or to prevent unwarranted expectations of personal representation.<sup>77</sup>

As the roles are played out, the problems should give rise to a growing feeling that there is a tension here: the more the interviewees are warned so they can make an intelligent decision to talk or not, the less communicative and frank they may become. As this phase of the seminar unfolds, there should be a discussion of this trade-off, and whether it should influence the shape and strength of the ethical duty to warn.

If the papers in the previous phase of the seminar do not suggest sufficient role-playing problems to the teacher, here are a few provisional suggestions of mine for problems that could be used for the role-playing:

- (1) A problem based on the actual interviews in *Upjohn* itself, but updated to modern times. The facts and background of the interviews in that case, as well as differences in corporate climate then, are detailed in *The Story of Upjohn v. United States: One Man's Journey to Extend Lawyer-Client Confidentiality, and the Social Forces that Affected it*.<sup>78</sup>
- (2) A problem based on the *Upjohn* interviews but with factual changes in addition to updating. The facts could be changed to make it less clear that the purpose of *Upjohn*'s self-investigation was a professional legal purpose rather than a business purpose. Perhaps it was for customer relations or publicity. The lawyer in *Upjohn* wore a "business hat" as well as a lawyer's hat. This was downplayed in the *Upjohn* decision itself. But it could be highlighted and beefed up in the modified problem. This would sensitize the students to some risks they may face in a relatively common situation in law practice. Lawyers frequently are tempted to take on a business position in addition to their legal duties with their client corporations. For example they may become a member of the corporate client's board or become a business officer or

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77. See *supra* note 29.

78. See *supra* note 3.

member of management for the client. There could be a discussion here of some of the relative risks and benefits of doing so.

The facts could be further changed so that the interviewee is the president of the company who, along with the company, might also be represented by the lawyer, and who personally may have known of the wrongdoing.<sup>79</sup>

These modified *Upjohn* problems would involve a number of subjects raised in the seminar: the notion that the corporation may waive the privilege in today's corporate environment, the ethics of dual representation, the crime-fraud exception, the possibility of the lawyer being charged with a crime and having to defend himself down the road, continuing effects of wrongdoing, possible cover-ups, the Sarbanes-Oxley regulations, the business purpose doctrine, the possibility that a corporate internal investigation may be viewed as an arm of the law so that misstatements in the interviews may be considered obstruction of justice, and problems presented by the lawyer who wears two hats for his client.

- (3) A problem based on the toxic waste hypothetical in American Bar Association Model Rule 1.6, comment 6. An ambiguity could be built-in concerning whether the amount of pollutant discharged actually does exceed the legal limit. There could be some uncertainty about how the pollution is to be measured under the law.<sup>80</sup> This problem could raise, among other things, issues concerning the continuing effect of a cover-up.

## VII. SEMINAR PHASE FOUR: FINAL UNIFIED REPORT

This phase comprises the final weeks of the seminar. The ultimate product of this phase would be the "end product" described earlier. The work should proceed in the following stages:

- (1) *Are Existing Warning Requirements Sufficient?* A student should be assigned to brief the seminar orally and in writing as to existing law which might require a lawyer to warn interviewees in advance about the limits of confidentiality at least in certain situations.<sup>81</sup> After hearing this, the students

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79. This problem could raise, inter alia, the question of whether the warning for a sophisticated client could be less than for a nonsophisticated one. *See* Model Rules of Prof'l Conduct R. 1.0 cmt. 6 (2007).

80. *See, e.g.,* *Env'tl. Defense v. Duke Energy*, 127 S. Ct. 1423 (2007).

81. *See, e.g.,* Model Rules of Prof'l Conduct R. 1.0(e) & cmt. 6, 1.4(a), 1.4(b) cmts. 5, 7, 1.7 cmt 30, 1.8(b). California, like a number of states, requires lawyers, to the extent reasonable under the circumstances, to "inform the client, at an appropriate time, of the [lawyer's] ability or decision to reveal information" to prevent a criminal act likely to result in death or substantial bodily harm. Cal. Rules of Prof'l Conduct R. 3-100(C)(2) (2004). If this kind of warning is required before disclosure to prevent death or bodily harm, a fortiori

would collectively decide on the extent to which the new warnings rule(s) is needed.

- (2) *Collaborative Meeting: Consensus*. This is discussed earlier, in Part II.A. The seminar would reach a consensus, and proposals for the draft rule(s) and commentary would be agreed upon, in general outline.
- (3) *Final Draft Ethics Code Provision on Duty to Warn (with Commentary of Examples)*. This is discussed earlier, in Part II.A. A final draft of the rule(s) and commentary would be produced.
- (4) *Costs of Such Warning Provisions: Any Final Changes to the Draft in Light Thereof*. This is the final meeting, with the final draft of the rule(s) and commentary before the students. It would be a whole-group oral discussion session that does not necessarily need to be preceded by a report. Here the assembled group would discuss the trade-off between warning the interviewee and getting information from him or her. Inevitably, there is a tension between the two. The discussion should, *inter alia*, query whether the attorney-client privilege can accomplish its purpose if lawyers adopt the ethical provision(s) drafted by the students.<sup>82</sup> If the seminar has gone

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such a warning should be required before exposing a confidence to prevent fraud or property or financial injury. See Model Rules of Prof'l Conduct R. 1.2(d) cmt. 13; Utah State Bar Ethics Advisory Opinion Comm., Op. 97-06 (1997) (finding that a lawyer receiving payment of a fee by credit card from a client desiring to keep his identity confidential should warn the client that the credit card company will have that information). There is some law suggesting that clients should be warned by their lawyer that cell phone conversations may be intercepted. See *supra* note 46. This has heightened resonance today, at least in certain kinds of cases, because of increased government electronic surveillance in connection with terrorism. See *Learning to Live with Big Brother*, Economist, Sept. 29, 2007, at 62 ("These days, data about people's whereabouts, purchases, behaviour and personal lives are gathered, stored and shared on a scale that no dictator of the old school ever thought possible.").

The student should also try to find any tort decisions there may be in the legal malpractice area holding a lawyer liable for failure to warn of potential abrogation by the lawyer of client confidentiality. See *supra* note 21 and accompanying text. For purposes of reasoning by analogy, the student should bring forward medical, psychiatric, and legal malpractice decisions involving failure to warn a patient or client of risks of treatment or risks incident to following certain legal advice. Cases of failure to disclose to the patient or client conflicts of interest would also be relevant. See, e.g., *Karp v. Cooley*, 493 F.2d 408 (5th Cir. 1974); *Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir. 1972); *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479 (Cal. 1990); Model Rules of Prof'l Conduct R. 1.7(b) & cmts. 18, 19.

82. In the discussion at this point, the teacher may wish to recall the admonition repeated by the Supreme Court in *Upjohn v. United States*, 449 U.S. 383 (1981); *Swidler & Berlin v. United States*, 524 U.S. 399 (1998); and *Jaffee v. Redmond*, 518 U.S. 1 (1996) to the effect that, if the point is to encourage communications, a qualified privilege is no better than no privilege. In addition, the question could be raised with the students here, as to whether there was always an inherent flaw in the reasoning of *Upjohn*. Would employees be encouraged by the privilege to communicate forthrightly with corporate counsel about self-damaging topics, when they know that the privilege is the corporation's, not theirs, to raise or waive as the corporation sees fit? Was *Upjohn* suggesting this be hidden from the employees?



according to plan, the students will have plenty to say on this subject at this point, having been exposed to the tension and its ingredients all along.

A teacher could take up this last subject earlier. Arguably, it bears on the shape of the ethical prescriptions the seminar will have fashioned by this point, and should have been considered before the final drafting. But I prefer to take it up here. I believe the considerations of ethics that would require one to warn (considerations centering on the desirability of informed choice of the interviewee) are quite distinct from the need for information. It does not seem to me that, if fairness to the interviewee requires a warning, the need for information should prevent the warning. Nevertheless, this belief of mine is open to question, and should be discussed before the assembled group. If the students then feel the ethical provision(s) they have drafted should be changed after this discussion, then their draft should be revisited at this point and changed. I think such a course of action would be educational. It would be the final act of the seminar.

*Notes & Observations*