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Tell It Only to the Judge: Disclosure of Client Confidences under the ABA Model Rules of Professional Conduct

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TELL IT ONLY TO THE JUDGE: DISCLOSURE OF CLIENT CONFIDENCES UNDER THE ABA MODEL RULES OF PROFESSIONAL CONDUCT

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I. INTRODUCTION

In August of 1983 the American Bar Association House of Delegates[1] adopted the Model Rules of Professional Conduct (Model Rules).[2] The Model Rules replace the Model Code of

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1. The House of Delegates is the policy-making body of the American Bar Association. A.B.A. CONST. § 6.1. The House of Delegates is composed primarily of officers and former officers, delegates elected by ABA members, and representatives of state and local bar associations, sections, and divisions, and other lawyers' organizations. *See id.* § 6.2.

2. The ABA Commission on Evaluation of Professional Standards drafted the Model Rules of Professional Conduct. The late Robert J. Kutak of Omaha, Nebraska, chaired the Commission, which is often referred to as the Kutak Commission.

At the 1977 Midyear Meeting of the ABA House of Delegates, the Dallas Bar Association proposed the adoption of a resolution calling for a National Symposium on the Code of Professional Responsibility to be held during the 1979 Annual Meeting in Dallas. [1977] 102 REP. OF A.B.A. 206 (1983). The resolution stated the purpose of the Symposium as follows:

> So that lawyers, judges, professors, law school deans, philosophers, theologians and other learned disciplines may critically examine the Code in light of its ten year history, looking at the ethical relationship between the individual attorney and the world in which he lives and works, with particular emphasis on what is expected of him by his profession, his clients, opposing counsel and their clients, the courts, the public at large and others.

Id. at 207. It is not unlikely that the Dallas Bar Association also hoped that the Symposium would increase attendance at the Dallas meeting.

The resolution was referred to the ABA Board of Governors. *Id.* at 206. At the 1977 Annual Meeting, the Board reported that it had created a nine-member special committee "to study further

Professional Responsibility (Model Code),[3] which forms the basis for the North Dakota Code of Professional Responsibility,[4] as the Association's recommended ethical standards. A committee appointed jointly by the North Dakota Supreme Court and the State Bar Association of North Dakota is now considering whether to recommend adoption of the Model Rules.[5]

Client confidentiality was the most controversial issue involved in the lengthy drafting and debate of the Model Rules.[6] The Model Rules generally expand the protection provided by the Model Code against disclosure of confidential information. When the duty to preserve client confidentiality conflicts with the truth-seeking function of the courts, however, the Model Rules prefer the

enlargement and review of the Code of Professional Responsibility in preparation for the National Symposium." *Id.* at 581. In April 1978, the Board transformed the special committee into a commission by adding two non-lawyers. *See* [1978] 103 REP. OF A.B.A. 646 (1983). The Commission's 1978 report to the House of Delegates indicated that its mission had expanded beyond preparation for the National Symposium. The report described the Commission's assignment as "the evaluation of all facets of legal ethics, both in substantive content and procedural form." *Id.* at 784. In addition, the Commission reported that it would file an *interim* report at the 1979 Annual Meeting and then a final report and recommendation. *Id.* at 784-85. Thus, the Commission contemplated a life and a mission much greater than the National Symposium.

The Model Rules adopted by the American Bar Association House of Delegates contain 52 rules. The rules are accompanied by comments that "are intended as guides to interpretation." *Scope,* MODEL RULES OF PROFESSIONAL CONDUCT, at 3 (1983). The House debated and acted on amendments to Rule 1.5 (pertaining to fees) at the August 1982 Annual Meeting and debated and acted on amendments to the black letter rules at the February 1983 Midyear Meeting. The House formally adopted the rules, along with the comments and prefatory sections, at the August 1983 Annual Meeting.

3. The ABA House of Delegates adopted the Model Code of Professional Responsibility (Model Code) in 1969. [1969] 94 REP. OF A.B.A. 392 (1970). The Model Code became effective January 1, 1970, and superseded the 1908 Canons of Professional Ethics. *Preface* to MODEL CODE OF PROFESSIONAL RESPONSIBILITY at i (1980). Former ABA President (now Justice) Lewis F. Powell, Jr. recommended the committee that drafted the Model Code. *Id.*

The Model Code consists of "three separate but interrelated parts: Canons, Ethical Considerations, and Disciplinary Rules." *Id. Preliminary Statement* at 1. The Canons are "statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers." *Id.* The Canons form a framework within which the more detailed Disciplinary Rules and Ethical Considerations are arranged. The Disciplinary Rules are "mandatory in character" and "state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." *Id.* The Ethical Considerations are purportedly "aspirational in character and represent the objectives toward which every member of the profession should strive." *Id.* In fact, some of the Ethical Considerations are not objectives, but rather, are justifications for related Disciplinary Rules. *See, e.g.*, MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-25 (1980) (policy supporting legal assistance to indigents). Some Ethical Considerations are not aspirational and actually lower the standard set by a Disciplinary Rule. *See id.* EC 6-4 (permits lawyer to accept employment despite lack of competence, provided the lawyer will become competent through study).

4. Under Rule 2 of the North Dakota Rules of Disciplinary Procedure, a lawyer may be disbarred for "violations of the Code of Professional Responsibility as adopted by the State Bar Association of North Dakota and approved by the Supreme Court." N.D.R. DISCIPLINARY P. 2 (1984). The North Dakota Supreme Court promulgates the Rules of Disciplinary Procedure. The North Dakota Constitution provides that the supreme court has authority "to promulgate rules and regulations for the admission to practice, conduct, disciplining, and disbarment of attorneys at law." N.D. CONST. art. VI, § 3. Violation of a provision of the Code of Professional Responsibility could also constitute a violation of § 27-14-02 of the North Dakota Century Code. *See* N.D. CENT. CODE § 27-14-02 (1974 & Supp. 1983) (causes for suspension or revocation of certificate of admission to the bar). The North Dakota Code of Professional Responsibility is identical to the ABA Model Code with respect to all provisions relevant to this Article.

5. The committee is the Professional Conduct Subcommittee of the Attorney Standards Committee of the North Dakota Supreme Court. The Professional Conduct Subcommittee includes members nominated by the President of the State Bar Association of North Dakota.

6. *How Will New Ethics Code Affect the Practice of Law?*, NAT'L L.J., Feb. 21, 1983, at 3, col. 2.

interests of the courts to those of the client. Confidential information receives greater protection under the Model Rules than under the Model Code, but not if a party uses that protection to deceive the court.

The controversy surrounding the confidentiality rules is justified by the importance of the principle. The impact of the confidentiality provisions of the Model Rules, if adopted, will far exceed the few cases of discipline that are likely to result from their violation.[7] The lawyer's ability to practice competently and the image of a lawyer as a respected professional depend on the client's belief that a lawyer will not reveal confidential information.[8] The members of the bar should carefully consider the effect of these provisions on the practice of law in North Dakota.

This Article attempts to assist lawyers in evaluating the differences between the confidentiality provisions of the Model Code and those of the Model Rules.[9] First, this Article provides an overview of the relevant Model Code sections. The Article then describes the confidentiality provisions of the Model Rules. The changes that would result from adoption of the Model Rules are described within this discussion of the provisions of the Model Rules.

II. CLIENT CONFIDENTIALITY UNDER THE MODEL CODE

A. DUTY TO MAINTAIN CONFIDENCES AND SECRETS

A comparison between the Model Code and the Model Rules appropriately begins with a description of the present Code's provisions. Unfortunately, summarizing the Model Code's confidentiality provisions is not an easy task. In fact, the confusion created by the Model Code's confidentiality provisions is one of the principal justifications for the existence of the Model Rules.

Canon 4 of the Model Code states the basic duty of client confidentiality: "A lawyer should preserve the confidences and secrets of a client."[10] Ethical Consideration 4-1 explains that this

7. Of the 80 disciplinary complaints filed against lawyers in North Dakota in 1982, only two involved confidentiality. Both were dismissed. N.D. State B. Ass'n Inquiry Committee Annual Report (1983) (available in University of North Dakota Law School Library).

8 *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-1 (1980). See *infra* note 12 for the text of EC 4-1.

9. This Article does not address confidentiality issues implicated in other areas of the Model Code and Model Rules, including, for example, conflict of interest and imputed disqualification. *See infra* note 88.

10. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 4 (1980).

obligation is essential to "[b]oth the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system."[11] This obligation has an impact on both competence and the public's perception of the profession and related willingness to use a lawyer's services.[12]

The lawyer's obligation to preserve client confidences is set forth in Disciplinary Rule 4-101.[13] The rule also contains key definitions[14] and four exceptions that permit lawyers to disclose confidential information.[15] The provisions of DR 4-101 and other provisions in the Code leave much uncertainty about the lawyer's proper conduct in many situations.

A significant, but somewhat confusing, aspect of the Model

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11. *Id.* EC 4-1.

12. *Id.* Ethical Consideration 4-1 provides:

> Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him. A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client. A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrevelant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.

Id.

13. *Id.* DR 4-101(B). Disciplinary Rule 4-101(B) provides:

> Except when permitted under DR 4-101(C), a lawyer shall not knowingly:
> (1) Reveal a confidence or secret of his client.
> (2) Use a confidence or secret of his client to the disadvantage of the client.
> (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

Id.

14. *Id.* DR 4-101(A). provides:

> "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

Id.

15. *Id.* DR 4-101(C). Disciplinary Rule 4-101(C) provides:

> A lawyer may reveal:
> (1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.
> (2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.
> (3) The intention of his client to commit a crime and the information necessary to prevent the crime.
> (4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

Id.

Code's treatment is the use of the terms "confidence" and "secret." Since a lawyer's duty is to preserve both "confidences" and "secrets," it is important to know the meaning of these terms of art. "Confidence" means information protected by the attorney-client privilege,[16] however that privilege might be defined by substantive law.[17] "Secret" has a vaguer definition: "other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."[18]

Both of these terms present difficult conceptual problems. "Confidence" is only defined by reference to other law, which may vary from one jurisdiction to another. "Secret" requires an attorney to interpret the undefined term "professional relationship,"[19] since information gained outside that relationship

16. *See id.* DR 4-101(A). See *supra* note 14 for the full text of DR 4-101(A).

17. *See* United States v. Kelly, 569 F.2d 928, 938 (5th Cir.), *cert. denied*, 439 U.S. 829 (1978). In *Kelly* the court of appeals stated:

> In order to invoke the attorney-client privilege the claimant must establish the following elements:
>
> (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is [the] member of a bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

Id. See also 8 J. WIGMORE, EVIDENCE §§ 2290-2329 (McNaughton rev. ed. 1961).

18. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(A) (1980). See *supra* note 14 for the full text of DR 4-101(A).

19. *See* L. PATTERSON, LEGAL ETHICS: THE LAW OF PROFESSIONAL RESPONSIBILITY § 2.01, at 2-1 (1982). Professor Patterson notes the difficulty of defining the term professional relationship: "What, precisely, is the legal nature of the lawyer-client relationship? An attempt to articulate an answer to this question will reveal the complexities and difficulties inherent in the problem. Perhaps that is why the question has received so little attention." *Id. See also* Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978). *Kerr-McGee* involved the disqualification of a law firm for conflict of interest. 580 F.2d at 1312. In determining whether an attorney-client relationship existed to disqualify the firm from representing the plaintiff, the court stated that "an attorney-client relationship does not arise only. . . when the parties expressly or impliedly consent to its formation. . . . A professional relationship is not dependent upon the payment of fees nor. . . upon the execution of a formal contract." *Id.* at 1317 (citing Dresden v. Willock, 518 F.2d 281, 286 (3d Cir. 1975); Fort Myers Seafood Packers, Inc. v. Steptoe & Johnson, 381 F.2d 261, 262 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 946 (1968); Udall v. Littell, 366 F.2d 668, 676 (D.C. Cir. 1966), *cert denied*, 385 U.S. 1007 (1967); Allman v. Winkelman, 106 F.2d 663, 665 (9th Cir. 1939), *cert. denied*, 309 U.S. 668 (1940); E. F. Hutton & Co. v. Brown, 305 F.Supp. 371, 388 (S.D. Tex. 1969)). The court in *Kerr-McGee* stated, "The fiduciary relationship existing between lawyer and client extends to preliminary consultation by a prospective client with a view to retention of the lawyer, although actual employment does not result." 580 F.2d at 1319. A fiduciary obligation or an implied professional relationship is created when the lawyer is "in a position to receive privileged information." *Id.* at 1319 (citing Fund of Funds, Ltd. v. Arthur Andersen & Co., 567 F.2d 225 (2d Cir. 1977)). The court determined that the deciding factor was what the client thought when he made the disclosure, not what the attorney believed: "The professional relationship for purposes of the privilege for attorney-client communications 'hinges upon the client's belief that he is consulting a lawyer in that capacity and his manifested intention to seek professional legal advice.' " 580 F.2d at 1319 (quoting E. CLEARY, MCCORMICK'S HANDBOOK ON THE LAW OF EVIDENCE § 88, at 179 (2d ed. 1972)). The court stated, "A fiduciary relationship may result because of the nature of the work performed and the circumstances under which confidential information is divulged." 580

is not included.[20] In addition, the definition of "secret" forces the client to tell the lawyer not to disclose or the lawyer to determine that disclosure would be embarrassing or detrimental to the client.[21]

If information clears these definitional hurdles, Disciplinary Rule 4-101(B) establishes the attorney's basic duty to keep confidential information inviolate.[22] Specifically, the lawyer "shall not knowingly" reveal a client's confidence or secret or use the confidential information to the client's disadvantage.[23] Nor may the lawyer use the information for the advantage of either the lawyer or a third person, "unless the client consents after full disclosure."[24]

The exceptions to the Model Code's confidentiality rule are at least as important as the rule itself. There are four exceptions that permit the lawyer to reveal confidential information.[25] It is important to note that none of these exceptions, standing alone, requires the lawyer to reveal. If one of the exceptions applies, the lawyer may reveal a client's confidence.[26] Any requirement to reveal a confidence must be found outside the provisions of Canon 4.

B. DISCLOSURE WITH CLIENT CONSENT

The first exception to the Model Code's confidentiality rule permits the lawyer to reveal confidential information if the client has consented after full disclosure.[27] The language of the exception does not indicate whether the consent must be express or may be implied. Other language in the Disciplinary Rule and two Ethical

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F.2d at 1320.

Ethical Consideration 4-4, if it is deemed explanatory and not aspirational, suggests that the phrase "gained in the professional relationship" is not a significant limit on the duty of confidentiality: "This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-4 (1980). Ethical Consideration 4-6 also suggests an expansive reading of "professional relationship" by providing that the lawyer's obligation "continues after the termination of his employment." *Id.* EC 4-6. If Ethical Consideration 4-6 is aspirational, however, one could argue that "professional relationship" as used in Disciplinary Rule 4-101(A) must have a more restricted meaning that does not protect information obtained after the termination of employment.

20. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(A) (1980). Disciplinary Rule 4-101(A) states that a "secret" refers to "information gained in the professional relationship. . . ." *Id.* See *supra* note 14.

21. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(A) (1980). See *supra* note 14.

22. *Id.* DR 4-101(B). See *supra* note 13 for the text of DR 4-101(B).

23. *Id.* DR 4-101(B)(1), (2).

24. *Id.* DR 4-101(B)(3).

25. *Id.* DR 4-101(C). See *supra* note 15 for the text of DR 4-101(C).

26. *Id.* DR 4-101(C).

27. *Id.* DR 4-101(C)(1). See *supra* note 15 for the full text of DR 4-101(C).

Considerations, however, suggest that a client impliedly consents to a lawyer's revealing confidential information to the lawyer's partners, associates, and clerical employees,[28] and to certain business-related entities.[29]

The most difficult issue raised by the first exception, aside from its silence with regard to implied consent, involves the requirement of "full disclosure." The Model Code refers to "full disclosure" in other contexts as well,[30] but the term is not defined in the Code. The ABA Standing Committee on Ethics and Professional Responsibility has interpreted full disclosure to require the lawyer to consider the sophistication and education of the client and to assure that the client understands the request to consent and the option to refuse the request.[31]

C. DISCLOSURE WHEN PERMITTED BY OTHER RULE OR REQUIRED BY LAW OR COURT ORDER

Perhaps the most difficult conceptual problem in the Model Code is raised by the second exception.[32] This exception provides that a lawyer may reveal confidential information "when permitted under Disciplinary Rules or required by law or court order."[33] The purpose of the exception is valid: to avoid the Hobson's choice

28. *Id.* EC 4-2. Ethical Consideration 4-2 provides:

> Unless the client otherwise directs, a lawyer may disclose the affairs of his client to partners or associates of his firm. It is a matter of common knowledge that the normal operation of a law office exposes confidential professional information to non-lawyer employees of the office, particularly secretaries and those having access to the files. . . .

Id. See id. DR 4-101(D), which provides: "A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee."

29. *Id.* EC 4-3. Ethical Consideration 4-3 provides:

> Unless the client otherwise directs, it is not improper for a lawyer to give limited information from his files to an outside agency necessary for statistical, bookkeeping, accounting, data processing, banking, printing, or other legitimate purposes, provided he exercises due care in the selection of the agency and warns the agency that the information must be kept confidential.

Id.

30. *See id.* DR 5-101(A) (a lawyer must have consent of client after full disclosure before accepting employment if the lawyer's professional judgment will be affected by personal interests); 5-104(A) (a lawyer may not enter into a business transaction with a client if they have differing interests in the transaction and the client expects the lawyer to exercise professional judgment on behalf of the client unless the client consents after full disclosure).

31. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1287 (1974). Formal and informal opinions are issued by what is currently called the Standing Committee on Ethics and Professional Responsibility. The Committee has had several names during its existence.

32. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(2) (1980). See *supra* note 15 for the full text of DR 4-101(C).

33. *Id.*

between professional discipline for breach of confidentiality and incarceration or other punishment for violation of law or for contempt of court.

The actual effect, however, of this exception is confusing at best. The confusion becomes apparent when one refers to other provisions of the Model Code which might trigger the application of the exception.

While the exception speaks of revelations "permitted by" Disciplinary Rules or "required" by law or court order,[34] logically the exception would apply when a Disciplinary Rule *requires* revealing confidential information. Disciplinary Rules are both "law" and "court order."[35] The policy served by allowing revelation when permitted by a Disciplinary Rule equally justifies disclosure when required by another rule.

When the American Bar Association adopted the Model Code in 1969, one provision required a lawyer to disclose confidential information.[36] Disciplinary Rule 7-102(B)(1) required a lawyer to reveal a client's "fraud upon a person or tribunal" when the client refused to rectify the fraud.[37] If, for example, a client's testimony was inconsistent with confidential information possessed by the lawyer, the lawyer would be required to disclose the client's perjury even though that action resulted in revealing confidential information.

Disciplinary Rule 7-102(B)(1) was amended in 1974, however, to provide that the duty to disclose a client's fraud existed "except when the information is protected as a privileged communication."[38] In 1975 the ABA Standing Committee on Professional Ethics interpreted the phrase "protected as a privileged communication" to refer to both confidences and secrets, as defined by Canon 4.[39] The Committee, in effect, read

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34. *Id.*

35. See *supra* note 4.

36. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B)(1) (1969).

37. As adopted in 1969, Disciplinary Rule 7-102(B)(1) read:

> A lawyer who receives information clearly establishing that:
> (1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal.

[1969] 94 REP. OF A.B.A. 779 (1970).

38. The exception was approved as a "housekeeping" amendment at the 1974 Midyear Meeting of the ABA House of Delegates. [1974] 99 REP. OF A.B.A. 166 (1978).

39. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 341 (1975). The Committee reasoned that "[t]he balancing of the lawyer's duty to preserve confidences and to reveal frauds is best made by interpreting the phrase 'privileged communication' in the 1974 amendment to DR 7-102(B) as referring to those confidences and secrets that are required to be preserved by DR 4-101." *Id.* at 4.

Disciplinary Rule 7-102(B)(1) out of the Code to the extent that it conflicted with the duty of confidentiality.[40]

One commentary has noted that the second exception to the duty of confidentiality and the amended and interpreted duty to reveal a client's fraud, when read together, "present an unfortunate example of conflicting priorities and unresolved cross-referencing."[41] The result is a logical circle; but the end result is that client confidences must be maintained, even though the lawyer's silence permits a client to commit perjury with impunity.

One unsuccessful attempt to resolve the ethical issues created by client perjury is Proposed Standard 4-7.7 of the American Bar Association Standards for Criminal Justice.[42] This Standard provides that a lawyer should "strongly discourage the [criminal]

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40. *Id.* at 3-4. The Committee discussed the relationship between Disciplinary Rule 7-102(B) and confidentiality as follows:

> [I]t is clear that there has long been an accommodation in favor of preserving confidences either through practice or interpretation. . . . The tradition (which is backed by substantial policy considerations) that permits a lawyer to assure a client that information (whether a confidence or a secret) given to him will not be revealed to third parties is so important that it should take precedence, in all but the most serious cases, over the duty imposed by DR 7-102(B).

Id.

Disciplinary Rule 7-102(B), even before the 1974 amendment, was limited by its language requiring the lawyer to possess information "clearly establishing" the fraud and requiring that the fraud be perpetrated by the client "in the course of the representation." *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B)(1) (1980).

41. A.B. FOUND., ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY 176 (1979).

42. ABA STANDARDS FOR CRIMINAL JUSTICE Standard 4-7.7 (2d ed. 1980) (Tentative Draft approved Feb. 12, 1979, with the exception of Standard 4-7.7).

Proposed Standard 4-7.7, which was not enacted in 1979 because of its implications for the work of the Commission on Evaluation of Professional Standards, reads:

> (a) If the defendant has admitted to defense counsel facts which establish guilt and counsel's independent investigation established that the admissions are true but the defendant insists on the right to trial, counsel must strongly discourage the defendant against taking the witness stand to testify perjuriously.
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> (b) If, in advance of trial, the defendant insists that he or she will take the stand to testify perjuriously, the lawyer may withdraw from the case, if that is feasible, seeking leave of the court if necessary, but the court should not be advised of the lawyer's reason for seeking to do so.
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> (c) If withdrawal from the case is not feasible or is not permitted by the court, or if the situation arises immediately preceding trial or during the trial and the defendant insists upon testifying perjuriously in his or her own behalf, it is unprofessional conduct for the lawyer to lend aid to the perjury or use the perjured testimony. Before the defendant takes the stand in these circumstances, the lawyer should make a record of the fact that the defendant is taking the stand against the advice of counsel in some appropriate manner without revealing the fact to the court. The lawyer may identify the witness as the defendant and may ask appropriate questions of the defendant when it is believed that the defendant's answers will not be perjurious. As to matters for which it is believed the defendant will offer perjurious testimony, the lawyer should seek to avoid direct examination of the defendant in the conventional manner; instead, the lawyer should ask the defendant if he or she wishes to make any additional statement concerning the case to the trier or triers of the facts. A lawyer may not later argue the defendant's known false version of facts to the jury as worthy of belief, and may not recite or rely upon the false testimony in his or her closing argument.

Id.

defendant against taking the witness stand to testify perjuriously."[43] If the witness insists on lying, the lawyer is permitted to withdraw[44] prior to trial with leave of the court, but the lawyer may not tell the court why withdrawal is sought.[45] With respect to withdrawal, the Standard ignores the fact that any judge qualified to sit on the bench will know the reason for the withdrawal.

The Standard is particularly misguided in dealing with the situation in which withdrawal is not possible. According to the standard, "it is unprofessional conduct for the lawyer to lend aid to the [client's] perjury or use the perjured testimony."[46] Instead, the lawyer is to record that the client is testifying against the lawyer's advice and may ask questions if the answers are likely to be truthful.[47] When the lawyer believes the client will give a perjurious answer, however, the lawyer must only permit the client to give a narrative; the lawyer cannot participate in direct examination.[48] In addition, the lawyer may not argue the false testimony to the jury or rely upon it in closing argument.[49]

Standard 4-7.7 strikes a compromise that fails to achieve any of the proper objectives of the legal system. The lawyer is not permitted to reveal expressly the fraud on the court, yet the lawyer's request to withdraw or his passive role in direct

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43. *Id.*

44. *Id.* The Model Rule requires a lawyer to withdraw from representation if "he knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110 (B) (2) (1980). This provision is not applicable, however, to situations involving Disciplinary Rule 7-102(B)(1), since Disciplinary Rule 7-102(B)(1) is not violated by preserving confidential information.

Disciplinary Rule 2-110(B)(2) might be triggered, however, by either Disciplinary Rule 7-102(A)(3), which provides that "a lawyer shall not. . . conceal or knowingly fail to disclose that which he is required by law to reveal," or Disciplinary Rule 7-102(A)(4), which says that "a lawyer shall not. . . knowingly use perjured testimony or false evidence." *See id.* DR 7-102(A)(3); 7-102(A)(4). Neither of these provisions contains an exception for privileged communications. Disciplinary Rule 7-102(A)(3) is vague and should not be relied upon in a situation that is addressed more specifically by Disciplinary Rule 7-102(A)(4). Disciplinary Rule 7-102(A)(4) speaks more clearly and specifically about the problem addressed by Disciplinary Rule 7-102(B)(1); Standard 4-7.7 appears to be an effort to resolve the apparent conflict between these two Disciplinary Rules.

Disciplinary Rule 2-110(C)(1) permits the lawyer to withdraw if the client "personally seeks to pursue an illegal course of conduct" or "insists that the lawyer pursue a course of conduct that is illegal or that is prohibited under the Disciplinary Rules." *Id.* DR 2-110(C)(1). Withdrawal, whether mandatory or merely discretionary, requires permission of the tribunal. *Id.* DR 2-110(A)(1). In addition, the lawyer must not withdraw "until he has taken reasonable steps to avoid foreseeable prejudice to the rights of the client." *Id.* DR 2-110(A)(2).

45. ABA STANDARDS FOR CRIMINAL JUSTICE Standard 4-7.7(b) (2d ed. 1980).

46. *Id.* Standard 4-7.7(c).

47. *Id.*

48. *Id.*

49. *Id.* One court has held that questioning a defendant's witness in a manner consistent with Standard 4-7.7 denies the defendant effective assistance of counsel. *See* State v. Robinson, 290 N.C. 56, 224 S.E.2d 174 (1976). The *Robinson* court reasoned that "this procedure could hardly have failed to convey to the jury the impression that the defendant's counsel attached little significance or credibility to the testimony of the witness, or that the defendant and his counsel were at odds." 224 S.E.2d at 180.

examination are likely to alert the judge and jury that something is amiss. Although the lawyer appears to maintain the client's confidences, the lawyer's actions may convince the judge or jury that the lawyer possesses damaging confidential information. In order to avoid making the difficult choice of one ethical principle over another, Standard 4-7.7 adopts an amoral approach that sacrifices the interests of the defendant, the lawyer, and the court.

The North Dakota Supreme Court has recognized the confusion resulting from the conflicting duties of maintaining confidentiality and preventing fraud by the client. In *In re Malloy*[50] the Grievance Committee of the State Bar Association of North Dakota sought disciplinary action against a lawyer who chose to protect a client's confidential information rather than disclose the client's unexpected perjury at a deposition.[51] The disciplinary action charged that the lawyer had violated Disciplinary Rule 7-102(B)(1).[52] The court, noting that the lawyer "was faced with [a] dilemma caused by conflicting duties,"[53] held that discipline was not appropriate.[54]

The *Malloy* court announced a prospective rule requiring the

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The lawyer's duty to the court under the Model Code is clearer when the suggested perjurer is a witness other than the defendant, which was the case in *Robinson*. Disciplinary Rule 7-102(B)(2) requires the lawyer to reveal a fraud upon the tribunal committed by a person other than the client, and this provision does not have an exception for privileged communications. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B)(2) (1980). If the defendant was suborning perjury by the witness in *Robinson*, disclosure of the fraud would be embarrassing or detrimental to the defendant and thus would constitute a disclosure of confidential information. It should be noted that Disciplinary Rule 7-102(B)(2), by its plain language, applies only to frauds after they have been committed. *See id.* The lawyer in *Robinson* disclosed the suspected fraud before it occurred. 224 S.E.2d at 175.

The *Robinson* court commended the lawyer for disclosing the suspected perjury. It reasoned that, "clearly, the client has no right to insist that counsel assist him by presenting in evidence testimony which counsel knows, or reasonably believes, constitutes perjury." *Id.* at 179. The *Robinson* court's resolution of the dilemma was neither that the lawyer withhold the perjury nor that he participate in sham representation. Instead, the *Robinson* court would permit the lawyer to withdraw and require the defendant to proceed without counsel. *Id.* at 180.

The Court of Appeals for the Ninth Circuit has held, however, that a lawyer's motion to withdraw when surprised by perjury during examination of the client in a trial before a judge without a jury denies the defendant a fair trial. Lowery v. Cardwell, 575 F.2d 727 (9th Cir. 1978). The *Lowery* court endorsed Standard 4-7.7 as a preferable alternative, which "cannot be said to constitute denial of fair trial." *Id.* at 731.

The Appellate Court of Illinois has specifically held that a lawyer's actions consistent with Standard 4-7.7 do not deny the defendant effective assistance of counsel. People v. Lowery, 52 Ill. App. 3d 44, 366 N.E.2d 155 (1977). *See also* State v. Fosnight, No. 55, 258 (Kan. Mar. 24, 1980). The Illinois court in *People v. Lowery* observed that the defendant in *Robinson* assumed questioning of the witness when the defense counsel attempted to restrict the testimony to a narrative. 52 Ill. App. 3d at 49, 366 N.E.2d at 159. The Illinois court thought that this "shifting of the advocatory function from attorney to client in the presence of the jury" distinguished *Robinson* from its case, in which the lawyer "did undertake to question the witness, albeit in narrative form, and no one else assumed defense counsel's role as an advocate." *Id.*

50. 248 N.W.2d 43 (N.D. 1976).

51. *In re* Malloy, 248 N.W.2d 43, 44-46 (N.D. 1976).

52. *Id.* at 44. The lawyer was not charged with a violation of Disciplinary Rule 7-102(A)(6), relating to creation or preservation of false evidence, or Disciplinary Rule 2-110(1), relating to mandatory withdrawal from employment. *Id.* at 45.

53. *Id.* at 45.

54. *Id.* at 47.

lawyer to withdraw when the client refuses to disclose the perjury.[55] The prospective rule does not require the lawyer to disclose the fraud upon withdrawal.[56]

The *Malloy* case is particularly noteworthy because it involved conduct that occurred before the "privileged communication" exception to Disciplinary Rule 7-102(B)(1) was adopted.[57] The exception had been adopted between the time of Malloy's challenged conduct and the decision of the court.[58] The court observed that the "gravity of the dilemma is emphasized" by the recent amendment.[59] The court correctly perceived that the amendment was adopted to resolve an irreconcilable conflict between the duty of confidentiality and the duty to disclose fraud upon the court. Adoption of the "privileged communication" exception to Disciplinary Rule 7-102(B)(1) resolved the dilemma in favor of confidentiality.

Thus, the provision allowing disclosure of confidential information "when permitted under Disciplinary Rules" seems to be of little effect. Even when revelation might be *required* under another Disciplinary Rule, that rule has been amended and interpreted to give the highest priority to preserving confidences.

The second exception to Disciplinary Rule 4-101 provides another ground for revelation: "when. . . required by law or court order."[60] Given the possible consequence of not disclosing confidential information in these circumstances, the significance of this portion of the exception is clear.

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55. *Id.* at 46. *Accord* ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1314 (1975). The *Malloy* court relied on the decision of the Oregon Supreme Court in *In re* A, 276 Or. 225, 554 P.2d 479 (1976). The court in *Malloy* stated:

> In a case somewhat similar to the present one, the Oregon Supreme Court concluded that an attorney should urge his client to make a disclosure, and if the client refuses, the attorney should have nothing further to do with him but that he need not disclose the fraud to the court. The court then held that no reprimand would be made, since withdrawal was not specifically required, but that in the future an attorney whose client refuses to disclose perjury must withdraw from the case. . . . We agree.

248 N.W.2d at 45-46 (citation omitted). The Oregon Supreme Court noted that the lawyer "was not *required* to withdraw under DR 2-110(B)(2)." *In re A,* 554 P.2d at 486 (emphasis in original). The requirement to withdraw was based on an Oregon State Bar ethics opinion requiring withdrawal, which was issued subsequent to the conduct in question. 554 P.2d at 487. The Oregon court noted that "it is not clear whether this policy [of mandatory withdrawal] reflects the present position of the American Bar Association." *Id.*

56. *Malloy,* 248 N.W.2d at 45. *Accord* ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1314 (1975). The Oregon Supreme Court in *In re A* explained that the exception to Disciplinary Rule 7-102(B)(1), as interpreted by ABA Formal Opinion 341, meant that the lawyer was not required to reveal the confidential information. 554 P.2d at 486.

57. See Malloy, 248 N.W.2d at 45. The court noted that "DR 7-102(B)(1) has been amended since the events giving rise to this proceeding occurred." *Id.*

58. *Id.*

59. *Id.*

60. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (C) (2) (1980). See *supra* note 15 for the full text of DR 4-101(C).

If the exception permits disclosure and other law or a court order requires it, apparently the lawyer would be required to disclose confidential information. One court appears to have adopted this position, reading together this exception and the prohibition in Disciplinary Rule 7-102(A)(3) against concealing or knowingly failing to disclose that which the lawyer is required by law to reveal.[61]

A famous New York case, *People v. Belge*,[62] reached the opposite result when the duty of confidentiality conflicted with a state statute that mandated disclosure of certain information.[63] Belge's client, who was accused of murder, confessed to Belge that he had committed three other murders.[64] As a result of this information, Belge discovered the dead bodies of two of his client's other victims.[65] Although there was great family and public concern over the whereabouts of the missing persons whom Belge knew to be dead, he did not disclose the existence of the dead bodies to authorities.[66] Instead, he chose to protect the confidential information that might have implicated his client in the other murders.[67]

The grand jury indicted Belge for violating two public health statutes; one required that any body be given a decent burial and the other that the death of any person who died without medical

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61. *In re* Kerr, 86 Wash. 2d 655, 548 P.2d 297 (1976) (failure to produce subpoenaed affidavits). The court's citation of Disciplinary Rules 7-102(A) (3) and 4-101 (C) (2) are in a footnote responding to the lawyer's "excuse" that the affidavits were protected by the attorney-client privilege. 548 P.2d at 301 n.2. These provisions were not listed by the court as being the basis for the discipline. *Id.* at 298-99. Instead, the court found that the lawyer attempted to suborn perjury and thus:

> violate[d] the following provisions of the Code of Professional Responsibility:
> DR 1-102 (*Misconduct*),
> (A) A lawyer shall not:
> . . . .
> (3) Engage in illegal conduct involving moral turpitude.
> (4) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation.
> (5) Engage in conduct that is prejudicial to the administration of justice.
> (6) Engage in any other conduct that adversely reflects on his fitness to practice law.

Id.

62. 83 Misc. 2d 186, 372 N.Y.S.2d 798 (Onondaga County Ct. 1975), *aff'd*, 50 A.D.2d 1088, 376 N.Y.S.2d 771, *aff'd*, 41 N.Y.2d 60, 359 N.E.2d 377, 390 N.Y.S.2d 867 (1976).

63. People v. Belge, 83 Misc. 2d 186, 372 N.Y.S.2d 798 (Onondaga County Ct. 1975), *aff'd*, 50 A.D.2d 1088, 376 N.Y.S.2d 771, *aff'd*, 41 N.Y.2d 60, 359 N.E.2d 377, 390 N.Y.S.2d 867 (1976).

64. *People v. Belge*, 372 N.Y.S.2d at 799.

65. *Slayer's 2 Lawyers Kept Secret of 2 More Killings*, N.Y. Times, June 20, 1974, at 1, col. 2. The victims whose bodies Belge found were a 20-year-old woman and a 16-year-old high school girl. *Id.* Belge was indicted for failing to report one of the dead bodies. 372 N.Y.S.2d at 799.

66. *Slayer's 2 Lawyers Kept Secret of 2 More Killings*, N.Y. Times, June 20, 1974, at 1, col. 2.

67. The father of one of the victims whose death was unofficially linked to Belge's client visited Belge but Belge did not disclose his knowledge of the body. " 'The information was so privileged — I was bound by my lawyers' oath to keep it confidential after I found the bodies,' said Francis Belge." *Id.*

assistance be reported.[68] The trial court acquitted Belge after weighing the "importance of the general privilege of confidentiality in the performance of the defendant's duties as an attorney, against the inroads on such a privilege, on the fair administration of criminal justice as well as the heart tearing that went on in the victim's family by reason of their uncertainty. . . ."[69]

The intermediate appellate court affirmed the acquittal, commenting that "the [attorney-client] privilege effectively shielded the defendant-attorney. . . ."[70] The court observed "that the privilege is not all-encompassing and that in a given case there may be conflicting considerations."[71] The observation seems hollow, however, since confidentiality prevails over substantial conflicting considerations recognized by the court, including the obligation to "observe basic human standards of decency, having due regard to the need that the legal system accord justice to the interests of society and its individual members."[72]

At the conclusion of all the proceedings in the *Belge* case, the Committee on Professional Ethics of the New York State Bar Association ruled that Belge's decision was mandated by the Code of Professional Responsibility.[73] According to the Committee, the lawyer "was under an injunction not to disclose to the authorities his knowledge of the two prior murders, and was duty-bound not to reveal to the authorities the location of the bodies."[74]

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68. The grand jury indicted Belge for violating §§ 4200(1) and 4143 of the New York Public Health Law. *Id. See* N.Y. PUB. HEALTH LAW §§ 4200(1) (requiring decent burial); 4143 (duty to give notice of a death to county coroner or medical examiner) (McKinney 1977). 372 N.Y.S.2d at 799.

69. 372 N.Y.S.2d at 802. The trial judge noted:

> A trial is in part a search for truth, but it is only partly a search for truth. The mantle of innocence is flung over the defendant to such an extent that he is safeguarded by rules of evidence which frequently keep out absolute truth, much to the chagrin of juries.

372 N.Y.S.2d at 801. The judge also commented on the effect of confidentiality on lawyer competence:

> The effectiveness of counsel is only as great as the confidentiality of its [sic] client-attorney relationship. If the lawyer cannot get all the facts about the case, he can only give his client half of a defense. This, of necessity, involves the client telling his attorney everything remotely connected with the crime.

Id. Despite these comments justifying confidentiality, the trial judge suggested the case would have been much more difficult if the grand jury had returned an indictment based on obstruction of justice rather than "the trivia of a pseudo-criminal statute." 372 N.Y.S.2d at 803.

70. People v. Belge, 376 N.Y.S.2d 771, 771 (1975).

71. *Id.* at 772.

72. *Id.*

73. N.Y. State B. Ass'n Comm. on Professional Ethics, Op. 479 (1978).

74. *Id.* at 5. The Committee explained:

> The lawyer's knowledge with respect to the location of the bodies was obtained solely from the client in confidence and in secret. Without the client's revelation in secret and in confidence, he would not have been in a position to assist the authorities in this

Thus, the second exception to the duty of confidentiality fails to provide clear guidance in the situation it seeks to address.[75] While the exception indicates that there are circumstances in which the lawyer may reveal confidential information because other authority permits or requires disclosure, it is not clear when the exception would apply.

Perhaps the exception's purpose is accomplished by virtue of its vagueness. Just as the *Malloy* court held that a lawyer could not be disciplined for preserving confidences when faced with the conflicting duties under the Code,[76] it appears unlikely that a lawyer would be disciplined for a good faith reliance on this exception when other authority permitted or required disclosure. Perhaps this is the rare situation in which the lawyer can do no wrong. But if this is the case, is the lawyer misleading a client when the lawyer represents that the client's information will be kept confidential? Must a lawyer disclose to the client that other authority may permit or require the lawyer to disclose confidential information?

D. DISCLOSURE TO PREVENT FUTURE CRIMES

The third exception to the Model Code's confidentiality rule permits the lawyer to reveal the client's "intention. . . to commit a crime and the information necessary to prevent the crime."[77] The purpose of this exception is not to protect the lawyer since it is unlikely that a court will hold a lawyer liable to the victim if the client carries out a threatened crime.[78] The theory behind the exception is that neither the evidentiary privilege for confidential information[79] nor the lawyer's fiduciary duty to the client applies to

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regard. Thus, his personal knowledge is a link solidly welded to the chain of privileged communications and, without the client's express permission, must not be disclosed. The relationship between lawyer and client is in many respects like that between priest and penitent. Both lawyer and priest are bound by the bond of silence.

Id.

75. *See Slayer's 2 Lawyers Kept Secret 2 More Killings*, N.Y. Times, June 20, 1974, at 1, col. 2. The New York Times article included this apt comment: "According to a number of legal authorities in New York City, the issue of what a lawyer should do when apprised by his client of criminal action is a gray area." *Id.*

76. *See In re* Malloy, 248 N.W.2d 43, 45-47 (N.D. 1976).

77. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(3)(1980). See *supra* note 15 for the full text of DR 4-101(C).

78. *But see* McIntosh v. Milano, 168 N.J. Super. 466, ____, 403 A.2d 500, 513 (1979). Dictum in *McIntosh* suggests language concerning a psychiatrist finding it necessary to reveal confidential information to protect a patient or the community from imminent danger "could well apply. . . even to lawyers." 403 A.2d at 513. *Cf.* Tarasoff v. Regents of the Univ. of California, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976) (psychotherapist subject to tort liability for failing to reveal confidential information to protect third person from patient).

79. *E.g.*, United States v. Bartlett, 449 F.2d 700 (8th Cir. 1971), *cert. denied*, 405 U.S. 932 (1972). The theory is ably discussed in *State v. Phelps*, an Oregon case. The court in *Phelps* explained:

criminal conduct.[80]

The third exception is not without its difficulties. If the word "crime" includes frauds, this exception raises the same problems as the second exception when a client commits perjury or another fraud. In addition, the distinction between past and future crimes provides no guidance when the client's wrongdoing is continuous. Finally, the exception makes no distinction with respect to the gravity of the crime. The exception permits the disclosure of any future crime, though it may be more appropriate to prohibit disclosure of less serious misconduct and mandate the disclosure of very serious crimes.

The "future crime" exception is limited in two important respects. First, the language of the exception restricts disclosure to that information which is "necessary" to prevent the crime.[81] Presumably, this requires the lawyer to make the most limited disclosure that will prevent the crime.

Second, language in an ABA ethics opinion[82] and an Ethical Consideration[83] discourage the lawyer from determining that the client intends to commit a crime. An ABA opinion interpreting the lawyer's duty of truthfulness under the 1908 Canons when representing a client before the Internal Revenue Service concluded that the lawyer was not required to disclose adverse information unless "the facts in the attorney's possession indicate beyond a reasonable doubt that a crime will be committed."[84] Assuming that the lawyer is likely to resolve doubts in favor of the client,[85] the "reasonable doubt" standard will rarely be met. Because the exception merely permits and does not require

> In order that the rule [of privilege] may apply there must be both professional confidence and professional employment, but if the client has a criminal object in view in his communications with his solicitor [i.e., lawyer] one of these elements must necessarily be absent. The client must either conspire with his solicitor or deceive him. If his criminal object is avowed, the client does not consult his adviser professionally, because it cannot be the solicitor's business to further any criminal object. If the client does not avow his object, he reposes no confidence, for the state of facts, which is the foundation of the supposed confidence, does not exist. The solicitor's advice is obtained by a fraud.

State v. Phelps, 545 P.2d 901, 904 (1976) (quoting Queen v. Cox, 14 Q.B.D. 153, 168 (1884)).

80. RESTATEMENT (SECOND) OF AGENCY § 395 comment f (1958). An agent may reveal information confidentially acquired in the course of the agency to protect a superior interest of the agent or a third person. If the information is to the effect that the principal is committing or is about to commit a crime, the agent is under no duty not to reveal. An attorney employed to represent a client in a criminal proceeding has no duty, however, to reveal that the client has confessed to a past crime. *Id.*

81. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C) (3) (1980). See *supra* note 15 for the text of DR 4-101(C)(3).

82. ABA Comm. on Professional Ethics, Formal Op. 314 (1965).

83. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-6 (1980).

84. ABA Comm. on Professional Ethics, Formal Op. 314 (1965).

85. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-6 (1981). Ethical Consideration 7-6 deals specifically with the development of evidence relevant to the client's state of mind when

disclosure, the lawyer is likely to reveal a future crime only when compelled to do so by personal ethical norms.

E. DISCLOSURE TO COLLECT A FEE OR IN SELF-DEFENSE

The fourth and final exception permits a lawyer to disclose confidential information to establish or collect a fee or to defend against an accusation of wrongful conduct.[86] While the protective purpose of this provision is apparent and probably justified, it creates obvious image problems for the legal profession. Professional ethics seem to give way to financial self-interest, but the alternative is to permit a client to abuse the lawyer's loyalty.

III. CLIENT CONFIDENTIALITY UNDER THE MODEL RULES

This section will discuss the major provisions of the Model Rules that relate to client confidentiality. The treatment of confidentiality under the Model Rules differs significantly in several respects from the Model Code, and these changes and other related proposals were the most controversial issues in the ABA's deliberation on the Model Rules.[87] Within the discussion of each provision of the Model Rules, this section will compare the approach of the Rules to that of the Model Code.

Three rules are of primary importance in understanding the duty of confidentiality under the Model Rules.[88] Rule 1.6

intent, motive, or desires may affect the legal consequences attached to the client's conduct. It indicates that the lawyer should resolve reasonable doubts in this situation in favor of the client. While the Ethical Consideration does not relate specifically to the client's intent to commit a future crime, it states a general principle for resolving doubts that are logically applicable to the situation. The principle of resolving doubts in favor of the client is consistent with the existence of a trust relationship between the lawyer and the client and with zealous advocacy on behalf of the client.

86. *Id.* DR 4-101(C) (4). See *supra* note 15 for the full text of DR 4-101(C). Accusations of wrongful conduct may arise in legal malpractice or other civil actions, criminal actions aimed at the lawyer, motions for disqualification for conflict of interest, motions for new trial, appeals of criminal convictions, and habeas corpus or other proceedings seeking post conviction relief. *See generally* LAWYERS' MANUAL ON PROFESSIONAL CONDUCT (ABA/BNA) 55:703 to 55:705 (1984).

87. *See How Will New Ethics Code Affect the Practice of Law?*, NAT'L L.J., Feb. 21, 1983, at 3, col. 2. *Accord* ABA COMM'N ON EVALUATION OF PROFESSIONAL STANDARDS, REPORT TO THE HOUSE OF DELEGATES No. 400, at 11 (June 30, 1982) ("Nothing in the final draft produced more comment than the three Rules addressing client-lawyer confidentiality."). When the ABA House of Delegates formally adopted the Model Rules at the August 1983 Annual Meeting, only two state bar associations indicated that their delegations would not vote for adoption. Both states, Florida and California, specifically expressed opposition to the adopted rules relating to confidentiality, but for different and conflicting reasons.

88. Other provisions of the Model Rules relate to confidentiality but do not define the duty. Rules 2.3, 8.1, and 8.3 contain specific exceptions protecting confidential information. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rules 2.3 (permitting a lawyer to evaluate a matter for use by third persons); 8.1(b) (prohibiting knowing failure to disclose information in bar admission and disciplinary matters); 8.3 (1983) (requiring a lawyer to report misconduct by another lawyer or judge

establishes the basic duty[89] and two key exceptions.[90] Rule 3.3 deals with the duty of candor to a tribunal and the conflict between that duty and client confidentiality.[91] Rule 4.1 treats the obligation of truthfulness to others and its relationship to confidentiality.[92]

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in certain situations). The comments to Rule 1.10 and Rule 2.2 note the significance of confidentiality in the application of these rules. *See id.* Rules 1.10 comment (general rule of imputed disqualification); 2.2 comment (authorizing the lawyer to act as an intermediary).

Rule 1.13, which deals with representation of corporate and other organizational clients, contains a confidentiality exception by implication. As proposed by the Commission on Evaluation of Professional Standards, Rule 1.13 would have permitted disclosure of information otherwise protected by Rule 1.6, the basic confidentiality rule, in certain situations in which the actions of the organization's highest authority were likely to injure the organization. ABA AMENDMENTS TO PROPOSED MODEL RULES OF PROFESSIONAL CONDUCT WITH SYNOPSIS 40 (Feb. 7-9, 1983) (Proposed Rule 1.13(c)). After lengthy debate, the House of Delegates approved an amendment offered by the American College of Trial Lawyers that deleted the disclosure provision and substituted the exclusive remedy of withdrawal under Rule 1.16. *See* ABA House of Delegates, Daily Journal (Feb. 7-9, 1983); ABA AMENDMENTS TO PROPOSED MODEL RULES OF PROFESSIONAL CONDUCT WITH SYNOPSIS (S) 44-3—44-3.1 (Feb. 7-9, 1983). The House adopted the amendment by a vote of 188 to 135.

89. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6. Rule 1.6(a) provides: "A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b)." *Id.*

90. *Id.* Rule 1.6(b). Rule 1.6(b) provides:

> A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
> (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
> (2) 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 lawyer's representation of the client.

Id.

91. *Id.* Rule 3.3. Rule 3.3 provides:

> (a) A lawyer shall not knowingly:
> (1) Make a false statement of material fact or law to a tribunal;
> (2) Fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
> (3) Fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
> (4) Offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.
> (b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
> (c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.
> (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Id.

92. *Id.* Rule 4.1. Rule 4.1 provides:

> In the course of representing a client a lawyer shall not knowingly:
> (a) Make a false statement of material fact or law to a third person; or
> (b) Fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Id.

A. DUTY OF CONFIDENTIALITY — RULE 1.6

Rule 1.6 establishes the basic duty of client confidentiality.[93] The comment to the rule forcefully indicates the significance of the rule. When another provision of law conflicts with Rule 1.6, there is a presumption that Rule 1.6 takes priority.[94]

Rule 1.6, as approved by the ABA House of Delegates, differs substantially from the proposal of the Commission on Evaluation of Professional Standards.[95] Two exceptions proposed by the Commission were rejected entirely. The first would have permitted disclosure to rectify the consequences of a criminal or fraudulent act when the client had used the lawyer's services to further the act.[96] The second would have preserved the Model Code's

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93. *Id.* Rule 1.6. See *supra* notes 89-90 for the text of Rule 1.6.

94. *Id.* Rule 1.6 comment *Disclosure Otherwise Required or Authorized.* This comment to Rule 1.6 provides:

> The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. . . . In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supersession.

Id. The general counsel of the Securities and Exchange Commission has objected to this presumption favoring confidentiality. [1 Current Reports] LAWYERS' MANUAL ON PROFESSIONAL CONDUCT (ABA/BNA) at 71-72. (Feb. 22, 1984).

95. The Commission on Evaluation of Professional Standards proposed the following rule at the February 1983 Midyear Meeting:

> *Rule 1.6 Confidentiality of Information*
> Model Rule Text:
> (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
> (b) A lawyer may reveal such information to the extent the lawyer believes necessary:
> (1) To prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm, or in substantial injury to the financial interests or property of another;
> (2) To rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services had been used;
> (3) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, or to establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer based upon conduct in which the client was involved; or
> (4) To comply with other law.

ABA AMENDMENTS TO PROPOSED MODEL RULES OF PROFESSIONAL CONDUCT WITH SYNOPSIS 13 (Feb. 7-9, 1983) The final version of Rule 1.6 resulted from an amendment proposed by the American College of Trial Lawyers. *See* ABA House of Delegates, Daily Journal (Feb. 7-9, 1983); ABA AMENDMENTS TO PROPOSED MODEL RULES OF PROFESSIONAL CONDUCT WITH SYNOPSIS (S) 19-2 (Feb. 7-9, 1983). The House adopted the amendment by a vote of 207 to 129. LAWYER'S MANUAL ON PROFESSIONAL CONDUCT (ABA/BNA) 55:105 (1984). The House debated but rejected two minor amendments. *See* ABA House of Delegates, Daily Journal (Feb. 7-9, 1983).

96. The Commission's proposal would have modified the principle contained in Disciplinary Rule 7-102(B)(1) of the Model Code. *See* ABA COMM. ON EVALUATION OF PROFESSIONAL STANDARDS, MODEL RULES OF PROFESSIONAL CONDUCT 41 (Proposed Final Draft 1981). The Commission

exception that permits disclosure to comply with law or court order.[97] Other differences between the Model Rules and the Model Code are described within the following discussion of Rule 1.6 as approved by the House of Delegates.

1. Scope of Coverage

The scope of information covered by the duty of confidentiality is greater under Rule 1.6 than under the Model Code.[98] Under Rule 1.6 the duty applies to all "information relating to representation of a client."[99] The scope of protection under the Model Code is limited in a number of ways as compared to the broad language of Rule 1.6.

First, the Model Code protects information labeled "confidences" only to the extent that applicable law would apply the attorney-client privilege to the information.[100] The comment to Rule 1.6 indicates that "relating to the representation" includes but extends beyond the attorney-client privilege to "all information relating to the representation, whatever its source."[101] The language in the comment to Rule 1.6 reflects a principle expressed in an Ethical Consideration of the Model Code.[102] If the language of the Ethical Consideration is merely aspirational, the scope of the duty under the Model Code is limited to the more restricted language in the Disciplinary Rules.[103] The comment to Rule 1.6, on the other hand, appears to be a logical and enforceable interpretation of the Rule's broad language.

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asserted that this provision would make the disclosure of the fraud optional rather than mandatory. *Id.* In those states that had adopted the "privileged communication" exception to Disciplinary Rule 7-102(B) (1), the Commission's proposal would have made disclosure of confidential information permissible when it is now prohibited. The Commission noted that a majority of the states had not adopted the "privileged communication" exception. *Id.* at 42.

97. This provision "was redundant insofar as a lawyer's ethical obligations are not intended to usurp his legal duties." ABA, LEGAL BACKGROUND TO THE ABA MODEL RULES OF PROFESSIONAL CONDUCT 73 (Tentative Draft, January 1984); *see Scope*, MODEL RULES OF PROFESSIONAL CONDUCT at 4 ("The Rules presuppose a larger legal context shaping the lawyer's role.") The Model Code provision is also inconsistent with the presumption under the Model Rules that Rule 1.6 is not superseded by other law. *See id.* Rule 1.6 comment *Disclosures Otherwise Required or Authorized.* See *supra* note 94 for the text of this comment to Rule 1.6.

98. *Compare* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1980) *with* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983).

99. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (1983). See *supra* note 89 for the text of Rule 1.6(a).

100. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(A) (1980). See *supra* note 14 for the definition of "confidence" and *supra* notes 16-18 and accompanying text for a discussion of information protected by the attorney-client privilege.

101. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 comment at 24 (1983).

102. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-4 (1980). Ethical Consideration 4-4 states that the attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of the client. The ethical obligation, unlike the evidentiary privilege, exists without regard for the nature or source of the information. *Id.*

103. *See id.* DR 4-101(A). See *supra* note 14 for the text of DR 4-101(A).

Of course, the Model Code protects "secrets" as well as "confidences."[104] But the scope of the coverage for "secrets" is also limited.

A "secret" is limited temporally to information "gained in the professional relationship."[105] This limitation produces the difficult problem of determining when the professional relationship begins.[106] However a court resolves the issue of when the professional relationship begins, the language "gained in the relationship" is highly unlikely to be as inclusive as "relating to the representation." When the "representation" begins is not an issue under the Model Rules, since the Rule "imposes confidentiality on information relating to the representation even if it is acquired before or after the relationship existed."[107] The only determinations necessary to trigger the Rule's protection are that the representation exists and that the information is related to that representation.[108]

The definition of "secret" in the Model Code is also limited by the action of the client in requesting nondisclosure or the judgment of the lawyer that disclosure would be embarrassing or detrimental to the client.[109] The phrase "relating to the representation" requires no action by the client in identifying confidential information.[110] The lawyer's determination that the information relates to the representation is much less subjective than whether disclosure would be embarrassing or detrimental to the client.

The threshold question in applying the duty of confidentiality is whether the particular information is covered. The Model Rules resolve this issue in a manner that far surpasses the Model Code in preserving client confidentiality. The general language of Rule 1.6 provides not only greater breadth of coverage but also more clarity, since it avoids the confusion embodied in the definitions of "confidence" and "secret."[111]

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104. *Id.*

105. *Id.*

106. See *supra* note 19 for a discussion of the difficulty in determining when the professional relationship begins.

107. *Code Comparison*, MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983). Although the House of Delegates adopted the Model Rules, the Code Comparison was never considered for adoption. LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 01:101 (ABA/BNA) (1984).

108. *See id.* Rule 1.6(a). See *supra* note 89 for the text of Rule 1.6(a).

109. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(A) (1981). See *supra* note 14 for the definition of "secret" and *supra* note 21 and accompanying text for a discussion of the definition.

110. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (1983). See *supra* note 89 for the text of Rule 1.6(a).

111. *Compare* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(A) (1980) (requires attorney to preserve client's confidences or secrets) *with* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (1983) (requires attorney to preserve any information relating to the representation of the client).

2. Disclosure with Client Consent

Rule 1.6 of the Model Rules permits disclosure of confidential information with the client's consent, as does the Model Code.[112] The treatment in the Model Rules, however, does result in two significant changes.

First, Rule 1.6 explicitly permits implied consent to disclosure of confidential information.[113] Although certain language in the Model Code appears to assume that the client impliedly consents to disclosure to a lawyer's partners, associates, clerical employees,[114] and business-related entities,[115] the language of the Disciplinary Rules does not explicitly authorize implied consent.[116] Rule 1.6 recognizes the practical reality of implied consent;[117] the comment to Rule 1.6 notes situations in litigation and negotiation in which implied consent is necessary.[118] In addition, the comment endorses implied consent to disclose information to other lawyers in the firm.[119] The comment is silent, however, on disclosure to clerical employees and business-related entities, but presumably, implied consent to these disclosures is consistent with the language of the Rule.[120]

Second, Rule 1.6 requires "consultation" prior to express consent, while the Model Code requires "full disclosure."[121] The Commission on Evaluation of Professional Standards included this change in a late draft of the Model Rules without explanation.[122]

112. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (1983) (permits disclosure of information when the client consents after consultation). *Accord* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(1) (1981) (lawyer may reveal confidences or secrets with the consent of client after full disclosure).

113. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (1983) (attorney may disclose information that is impliedly authorized in order to carry out the representation).

114. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-2 (1980). See *supra* note 28 and accompanying text for a discussion of Ethical Consideration 4-2 and implied consent.

115. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-3. See *supra* note 29 and accompanying text for a discussion of Ethical Consideration 4-3 and implied consent.

116. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(D) (1980). See *supra* note 28 for the text of DR 4-101(D).

117. A decade ago, the Canadian Bar Association explicitly authorized implied consent: "Confidential information may be divulged with the express authority of the client or clients concerned, and, in some situations, the authority of the client to divulge may be implied." CANADIAN BAR ASS'N, CODE OF PROFESSIONAL CONDUCT, ch. IV comment 9 (1974). Pleadings and other litigation documents are mentioned as examples of implied consent, in addition to disclosure to partners, associates, and nonlegal staff. *Id.*

118. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 comment, *Authorized Disclosures* (1983) (in litigation a lawyer may disclose information by admitting a fact that cannot be disputed or in negotiation make a disclosure that facilitates a satisfactory conclusion).

119. *Id.* (lawyers in a firm may disclose to each other information relating to a client of the firm unless the client instructs the attorney that the information is to be confined to specified lawyers).

120. *See id.* Rule 1.6. Disclosure to clerical employees and business-related entities is necessary "to carry out the representation." *See id.*

121. *Compare* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(1) (1980) (lawyer may disclose if client consents after full disclosure) *with* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (1983) (lawyer may disclose if client consents after consultation).

122. *Compare* ABA COMM. ON EVALUATION OF PROFESSIONAL STANDARDS, MODEL RULES OF

The only apparent benefit is to avoid the use of the same word for the "disclosure" to another of confidential information and the "disclosure" to the client of information necessary for a valid consent. Its drawback is that existing interpretations of "full disclosure"[123] are lost in the substitution of the undefined word "consultation." If states adopt the Model Rules with the word "consultation," courts or other interpreting entities may choose to resolve the issue by treating "full disclosure" and "consultation" as synonymous, applying the existing interpretations of the former to the latter. This would be consistent with the action of the Commission, which apparently saw no difference in the terms.[124]

3. Disclosure to Prevent Future Crime

Rule 1.6 maintains the controversial exception that permits disclosure of confidential information to prevent a future crime.[125] Only certain types of crime trigger the exception, however,[126] and the exception differs in other ways from the similar provision in the Model Code.[127] As reflected in the debate in the ABA House of Delegates, opinion varies greatly on the merit of specific aspects of this exception.[128] This provision of Rule 1.6 is likely to produce extensive discussion as states consider adoption of the Model Rules.

The Commission on Evaluation of Professional Standards

PROFESSIONAL CONDUCT Rule 1.6(a) at 37 (Proposed Final Draft 1981) (requiring "disclosure") *with* ABA COMM. ON EVALUATION OF PROFESSIONAL STANDARDS, REPORT TO THE HOUSE OF DELEGATES No. 400 Rule 1.6(a), App. A at 22 (June 30, 1982) in 1 ABA MATERIALS ON MODEL RULES OF PROFESSIONAL CONDUCT (August 1982) (requiring "consultation"). "Consultation" is defined as "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." *Terminology,* MODEL RULES OF PROFESSIONAL CONDUCT at 7 (1983).

123. See *supra* notes 30-31 and accompanying text for a discussion of the interpretation of "full disclosure."

124. The definition of "disclosure" employed by the Commission was almost identical to the definition of "consultation" in the adopted Model Rules. The Commission defined "disclosure" as "communication of information reasonably sufficient to permit the person to whom the disclosure is made to appreciate the significance of the matter in question." ABA COMM. ON EVALUATION OF PROFESSIONAL STANDARDS, MODEL RULES OF PROFESSIONAL CONDUCT 5 (Proposed Final Draft 1981). See *supra* note 122 for the definition of "consultation." Even before the change from "disclosure" to "consultation," the Commission had dropped the modifier "full" used with "disclosure" in the Model Code. *Compare* ABA COMM. ON EVALUATION OF PROFESSIONAL STANDARDS, MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) at 37 (Proposed Final Draft 1981) *with* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(1)(1980).

125. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (1983). See *supra* note 90 for the text of Rule 1.6(b)(1).

126. *See id.* The attorney may only reveal information to prevent the client from committing a criminal act that is likely to result in "imminent death or substantial bodily harm. . . ." *Id.*

127. *Compare* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1)(1983) *with* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(3)(1980). See *infra* notes 140-46 and accompanying text for a discussion of the other differences between the relevant Model Rules and Model Code provisions.

128. *See generally* ABA, AMENDMENTS TO PROPOSED MODEL RULES OF PROFESSIONAL CONDUCT WITH SYNOPSIS 13 to 19-16 (Feb. 7-9, 1983).

proposed a rule that permitted disclosure "to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or in substantial injury to the financial interests or property of another."[129] The House of Delegates rejected this language in favor of a proposal by the American College of Trial Lawyers to limit the exception to criminal acts resulting in death or substantial bodily harm.[130]

The purpose of the College's amendment was simply to limit the exception and thereby strengthen the duty of confidentiality.[131] Adoption of the amendment was especially noteworthy in light of the widely publicized O.P.M. case.[132] In that case lawyers for O.P.M. Leasing Services, Inc. of New York City assisted O.P.M. in securing loans by drafting opinion letters based on documents supplied by O.P.M. that the lawyers apparently did not know to be fraudulent.[133] When O.P.M.'s fraud became apparent, the lawyers chose to remain silent while their client defrauded additional lenders.[134] O.P.M. fraudulently obtained loans totaling more than $210 million.[135] While the lawyers' conduct in maintaining confidential information appears to be consistent with the provisions of the Model Code, there is little doubt their choice is *mandated* by Rule 1.6.[136] Since the Rule's limited exception

129. *Id.* at 13. See *supra* note 95 for the full text of the Commission's Proposed Rule 1.6.

130. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983). See *supra* note 95 for a discussion of the action of the House on the amendment proposed by the American College of Trial Lawyers.

131. ABA, AMENDMENTS TO PROPOSED MODEL RULES OF PROFESSIONAL CONDUCT WITH SYNOPSIS (S) 19-1 (Feb. 7-9, 1983). The American College of Trial Lawyers stated its purpose as follows:

> The College believes that Proposed Rule 1.6 seriously undermines the attorney's duty to preserve a client's confidences. A client's confidence should only be revealed when disclosure will prevent the client from committing a criminal act that the lawyer believes will cause imminent death or serious bodily harm. The College accepts the view that such consequences are so serious as to tip the scales in favor of permitting, but not requiring, the attorney to disclose confidential information.

Id.

132. *See* Taylor, *Ethics and the Law: A Case History*, N. Y. Times, Jan. 9, 1983 (Magazine), at 31; Taylor, *Lawyer Confidentiality v. Disclosing Crimes-to-Be*, N.Y. Times, Feb. 14, 1983, section A, at 9, col. 1. Because disciplinary proceedings were never brought against the attorney in the O.P.M. case, there is no reported decision. The facts of the affair are drawn from the New York Times Magazine coverage.

Geoffrey C. Hazard, Jr., the Reporter for the Commission on Evaluation of Professional Standards, specifically mentioned the O.P.M. affair at the outset of the House of Delegates debate on Rule 1.6.

133. Taylor, *Ethics and the Law: A Case History*, N.Y. Times, Jan. 9, 1983 (Magazine), at 33. The lawyers representing O.P.M. belonged to the law firm of Singer Hutner. *Id.*

134. *Id.* at 46. Singer Hutner decided that they needed outside legal advice. *Id.* at 33. The firm contacted Joseph McLaughlin who in turn contacted a legal ethics expert, Henry Putzel, III. *Id.* Putzel advised Singer Hutner that they had no duty to withdraw the false opinion letters and documents the firm had unwittingly provided to the bank to obtain loans for O.P.M. *Id.* at 46. Putzel reasoned that "leaving the victims of a past fraud in the dark was not an ongoing fraud." *Id.*

135. *Id.* at 31.

136. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(1)(b) (1983) (lawyer may only

probably does not contemplate the bodily harm that results when a defrauded banker jumps from an office window, the lawyer has no option under the Model Rules but to maintain the confidential information.

This conclusion is reinforced by the deletion of the Commission's proposal that would have permitted a lawyer to disclose confidential information to rectify the consequences of a client's fraud or crime that was furthered by the use of the lawyer's services.[137] This language would have allowed the lawyers for O.P.M. to disclose the fraud since the fraudulently obtained opinion letters were used in O.P.M.'s massive fraud.[138] Materials released by the ABA since adoption of the Rules suggest that the College's amendments have resulted in an exception which "is substantially narrower than the agency principles from which it was derived because of the lawyer's countervailing need to maintain a candid and open relationship with his clients."[139]

Rule 1.6 also appears to modify the belief standards required of a lawyer who relies on the "future crime" exception. The lawyer's belief is relevant on two separate points, the first related to the necessity of revelation and the second to the likelihood that serious physical harm will result from the client's act.

The introductory phrase for the exceptions to Rule 1.6 provides that "the lawyer may reveal such information to the extent the lawyer reasonably believes necessary."[140] This maintains the Model Code's principle that only information which is necessary to prevent the crime is to be revealed.[141]

Before the lawyer determines what information needs to be disclosed, the lawyer must decide that the client's conduct is improper. Under the Model Code, this decision turns on whether the client intends to commit a crime; the Model Rules focus instead on the specific harmful consequences of the client's act.

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reveal confidential information to prevent death or substantial bodily harm). *But see id.* Rule 1.2(d). Rule 1.2 provides that "a lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent. . . ." *Id.* The comment to Rule 1.6 notes the existence of Rule 1.2(d). *See id.* Rule 1.6 comment, *Disclosure Adverse to Client.* The duty of confidentiality should prevail over the duty of obligation in Rule 1.2(d) since there is a presumption that Rule 1.6 is not superseded by other conflicting provisions. *See id.* Rule 1.6 comment *Disclosures Otherwise Required or Authorized.* The comment to Rule 1.6, however, also describes Rule 3.3 (a)(4), the duty not to offer false evidence, as "a special instance of the duty prescribed in Rule 1.2(d). . . ." *Id.* Rule 1.6 comment *Disclosure Adverse to Client.* Since Rule 3.3 explicitly supersedes Rule 1.6, it may be argued that Rule 1.2(d) should implicitly do so.

137. *See* ABA, AMENDMENTS TO PROPOSED MODEL RULES OF PROFESSIONAL CONDUCT WITH SYNOPSIS 13 (Feb. 7-9, 1983) (Proposed Rule 1.6(b)(2)).

138. *See* Taylor, *Ethics and the Law: A Case History,* N.Y. Times, Jan. 9, 1983 (Magazine), at 46.

139. LEGAL BACKGROUND TO THE ABA MODEL RULES OF PROFESSIONAL CONDUCT 72 (1983) (Tentative Draft, January 1984).

140. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b) (1983).

141. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(3) (1980). See *supra* note

The language of the exception in the Model Rules limits its application to "a criminal act that the lawyer believes is likely to result" in the specified severe consequences.[142] The comment to Rule 1.6 suggests the impracticality of basing the exception on the lawyer's knowledge that certain consequences will occur rather than on belief.[143] The Commission's proposed exception would have required the lawyer to "reasonably" believe that the harmful consequences of the criminal act were likely to result.[144] The word "reasonably" was deleted in the College's amendment.[145] Deletion of this objective benchmark apparently expands the lawyer's discretion to reveal when the likelihood of harm is difficult to determine. The absence of any reference in the Model Rules to the "beyond a reasonable doubt" belief standard of an ABA ethics opinion predating the Model Code[146] appears to have the same effect.

One proposed amendment to Rule 1.6 would have *required* disclosure of serious future crimes.[147] Two ABA entities that often reflect the thinking of criminal defense lawyers, the Section of Criminal Justice and the Standing Committee on Legal Aid and Indigent Defendants, offered this amendment,[148] but it was rejected by the House of Delegates.[149] The amendment would have required disclosure of "information to the extent the lawyer believes necessary to prevent death or substantial bodily harm to

15 for the text of DR 4-101(C)(3) and *supra* notes 80-85 and accompanying text for a discussion of the Model Code provision.

142. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (1983).

143. *Id.* comment *Disclosures Adverse to Client.* This comment to Rule 1.6 states, "It is very difficult for a lawyer to 'know' when such a heinous purpose will actually be carried out, for the client may have a change of mind." *Id.*

144. ABA, AMENDMENTS TO PROPOSED MODEL RULES OF PROFESSIONAL CONDUCT WITH SYNOPSIS 13 (Feb. 7-9, 1983) (Proposed Rule 1.6(b)(1)). See *supra* note 95 for the text of Proposed Rule 1.6(b)(1).

145. *Id.* at (S) 19-2. The Model Rules define the words "knows," "believes," "reasonably," and "reasonably believes."

" 'Knows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." *Terminology*, MODEL RULES OF PROFESSIONAL CONDUCT at 7 (1983). This suggests an objective standard of scienter.

" 'Believes' denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances." *Id.* This is more subjective than "knows."

" 'Reasonably,' when used in relation to conduct by a lawyer, denotes the conduct of a reasonably prudent and competent lawyer." *Id.* This adverb establishes an objective standard of measurement for whatever it modifies.

" 'Reasonably believes,' when used in reference to a lawyer, denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable." *Id.* This definition attempts to combine both subjective and objective elements.

146. *See* ABA Comm. on Professional Ethics, Formal Op. 314 (1965) (lawyer not required to disclose adverse information unless the facts in the attorney's possession "indicate beyond a reasonable doubt that a crime will be committed"). See *supra* notes 82-85 and accompanying text for a discussion of this opinion and the "beyond a reasonable doubt" belief standard.

147. *See* ABA, AMENDMENTS TO PROPOSED MODEL RULES OF PROFESSIONAL CONDUCT WITH SYNOPSIS 19-8 (Feb. 7-9, 1983).

148. *Id.*

149. ABA House of Delegates, Daily Journal (Feb. 7-9, 1983).

any person."[150] Rule 1.6, as approved, maintains the practice of the Model Code of permitting, rather than requiring, disclosure.[151] Once an exception removes the professional obligation to maintain confidential information, other law or the lawyer's personal mores may mandate disclosure.

4. Disclosure to Collect Fee or in Self-Defense

Rule 1.6 maintains the exception that permits disclosure of confidential information in certain disputes between the lawyer and client.[152] In place of the Model Code's reference to establishing or collecting a fee,[153] Rule 1.6 permits disclosure "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client."[154] The more general language of Rule 1.6 would permit the lawyer to disclose confidential information, for example, to recover property from the client as well as to collect a fee.[155]

This exception to Rule 1.6 is narrowed, as compared to the language of the Model Code, in two respects. First, the lawyer may disclose confidential information to defend a criminal charge or civil claim only if the charge or claim is "based upon conduct in which the client was involved."[156] Second, by virtue of the introductory phrase to the exceptions in Rule 1.6, the lawyer may disclose only that information which the lawyer "reasonably believes necessary" to establish the claim or defense.[157] The Model Code does not include this limitation in the language of its exception,[158] but a long-standing ABA interpretation would similarly limit the Model Code provision.[159]

150. ABA, AMENDMENTS TO PROPOSED MODEL RULES OF PROFESSIONAL CONDUCT WITH SYNOPSIS 19-8 (Feb. 7-9, 1983).

151. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C) (1980) (provides that a lawyer "may" reveal).

152. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (1983). See *supra* note 90 for the text of Rule 1.6(b)(2).

An amendment offered by the District of Columbia Bar would have added "upon appropriate notice of the client" at the beginning of the exception. ABA, AMENDMENTS TO PROPOSED MODEL RULES OF PROFESSIONAL CONDUCT WITH SYNOPSIS 19-10 (1983). The House of Delegates rejected this notice requirement. ABA House of Delegates, Daily Journal (Feb. 7-9, 1983).

153. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(4) (1980). See *supra* note 15 for the text of DR 4-101(C).

154. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2).

155. *Code Comparison, id.* Rule 1.6.

156. *Compare* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(4) (1980) (lawyer may reveal confidences or secrets necessary to defend against an accusation of wrongful conduct) *with* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (1983) (lawyer may reveal information to establish a defense to a criminal or civil charge against the lawyer based upon conduct in which the client was involved).

157. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (1983).

158. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C) (1980). See *supra* note 15 for the text of Disciplinary Rule 4-101 (C).

159. ABA Comm. on Professional Ethics and Grievances, Formal Op. 19 (1930) (revealed confidences must be "relevant and material" to the proceedings).

B. DUTY OF CANDOR TO THE TRIBUNAL — RULE 3.3

While Rule 1.6 generally strengthens the duty of confidentiality, the duty gives way under Rule 3.3 to the integrity of the judicial system.[160] In place of the confusing, circular provisions of the Model Code that have the effect of preferring confidentiality,[161] the Model Rules substitute a clear duty to reveal client confidences to avoid a fraud upon the court.

Rule 3.3 sets forth the lawyer's duty of candor to the court. The specific prohibitions in Rule 3.3(a) do not differ greatly from the provisions of the Model Code. The lawyer is prohibited from "knowingly" making a "false statement of material fact or law to a tribunal"[162] and from "offer[ing] evidence that the lawyer knows to be false."[163] Rule 3.3 also requires the lawyer "to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client."[164] This requirement is not explicit in the Model Code but arguably may be implied from it.[165]

These requirements, in themselves, do not represent major changes from the Model Code. The key difference between the Model Code and the Model Rules is that the candor requirements of the Model Rules "apply even if compliance requires disclosure of information otherwise protected by Rule 1.6."[166] Because of the privileged communications exception to the Code's requirement to rectify frauds upon the court,[167] the Code permits a lawyer to maintain confidential information even if the client commits perjury.[168] That result and the unsuccessful compromise contained

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160. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1983). See *supra* note 91 for the text of Rule 3.3.

161. See *supra* notes 32-76 and accompanying text for a discussion of the problems relating to confidentiality and candor to the court under the Model Code.

162. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (a) (1) (1983). *Accord* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(5)(1980). Disciplinary Rule 7-102(A)(5) provides that "a lawyer shall not. . . knowingly make a false statement of law or fact." *Id.*

163. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(4) (1983). *See also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(4), (6) (1980). Disciplinary Rule 7-102(A)(4) provides that a lawyer "shall not. . . knowingly use perjured testimony or false evidence." *Id.* DR 7-102(A)(4). Disciplinary Rule 7-102(A)(6) provides that a lawyer "shall not. . . participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false." *Id.* DR 7-102(A)(6).

164. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (a) (2) (1983).

165. *See Code Comparison, id.* Rule 3.3. The Code Comparison for Rule 3.3 provides that "[this provision] is implicit in DR 7-102(A)(3), which provides that 'a lawyer shall not. . . knowingly fail to disclose that which he is required by law to reveal.' " *Id.* Disciplinary Rule 7-102(A)(3), however, is so ambiguous that it may be inappropriate to imply this provision from it.

166. *Id.* Rule 3.3(b).

167. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B)(1) (1980).

168. See *supra* notes 36-59 and accompanying text for a discussion of DR 7-102(B)(1).

in Standard 4-7.7 of the ABA Standards for Criminal Justice[169] are rejected in favor of the interests of the court.[170]

If the client has committed perjury or in some other fashion the lawyer has offered "material evidence" that the lawyer later "comes to know" is false, Rule 3.3 requires the lawyer to take "reasonable remedial measures."[171] According to the comment to Rule 3.3, the lawyer should attempt to remedy the introduction of perjured testimony or false evidence by a three-step process.[172] First, the lawyer is to "remonstrate with the client confidentially."[173] Second, if remonstration fails, the lawyer should seek to withdraw "if that will remedy the situation."[174] If withdrawal is ineffectual or impossible, the lawyer is required to take the third and final step of disclosure to the court.[175] The language of the comment recognizes the limitations on the remedy of withdrawal.[176] Since the Model Code opts for confidentiality over candor to the tribunal, withdrawal appears to be the preferred method of resolving the conflict under the Code. Because of the preference in the Model Rules for candor to the court, withdrawal is unlikely to be a sufficient response following a client's perjury.

The final version of Rule 3.3 was the product of extensive debate by the ABA House of Delegates. The House considered seven amendments, rejecting six and adopting only one minor amendment.[177] Aside from this one minor change, Rule 3.3 as adopted by the House of Delegates is identical to the proposal of the Commission on Evaluation of Professional Standards.

The American College of Trial Lawyers, which had succeeded

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169. *See* ABA STANDARDS FOR CRIMINAL JUSTICE, Standard 4-7.7 (2d ed. 1980) (Tentative Draft approved Feb. 12, 1979, with the exception of Standard 4-7.7). See *supra* notes 42-49 and accompanying text for a discussion of Standard 4-7.7.

170. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 comment *Remedial Measures* (1983).

171. *Id.* Rule 3.3 (a) (4).

172. *Id.* Rule 3.3 comment *Remedial Measures.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* The comment states that "[a]n unscrupulous client might in this way attempt to produce a series of mistrials and thus escape prosecution. However, a second such encounter could be construed as a deliberate abuse of the right to counsel and as such a waiver of the right to further representation." *Id.* See *supra* note 49 for discussion of a North Carolina case suggesting the approach endorsed by this comment.

177. ABA House of Delegates, Daily Journal (Feb. 7-9, 1983). The one amendment the House of Delegates adopted related to ex parte proceedings and was offered by the ABA Section of Patent, Trademark and Copyright Law and the American Patent Law Association. *See* ABA, AMENDMENTS TO PROPOSED MODEL RULES OF PROFESSIONAL CONDUCT WITH SYNOPSIS (S) 70-17 (Feb. 7-9, 1983). The House adopted the amendment by voice vote. An amended provision is Rule 3.3(d) of the Model Rules. See *supra* note 91 for the text of Rule 3.3(d). The amendment offered by the New York State Bar Association would have deleted the provision on ex parte proceedings entirely. *Id.* at (S) 70-2. The House rejected the New York amendment by voice vote. See *infra* notes 181-83, 187 and accompanying text for additional discussion of the New York amendment.

in narrowing the exception to Rule 1.6,[178] attempted to delete the language that makes Rule 3.3 superior to Rule 1.6 in case of a conflict between the two.[179] In addition, the College's amendment would have added language to accomplish precisely the opposite result.[180] The House of Delegates also debated three other amendments to accomplish the same end.[181] The House rejected all four amendments, three by voice vote and the last by a vote of 209 to 101.[182]

Two of the four rejected amendments would have deleted the requirement to disclose information to avoid assisting a client's criminal or fraudulent act.[183] Two of these amendments would also have included language to recognize that constitutional law might

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One of the rejected amendments would have deleted Rule 3.3(a)(3), which requires a lawyer to reveal to the tribunal legal authority that is controlling but directly adverse to the client. *See id.* at (S) 70-19 (offered by Iowa State Bar Association). This obligation, which relates to candor to the court but not directly to confidentiality, is contained in Disciplinary Rule 7-106(B)(1) of the Model Code of Professional Responsibility. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-106(B)(1) (1980). See *infra* notes 181-84, 188-89 and accompanying text for additional discussion of the Iowa amendment.

178. See *supra* notes 129-39 and accompanying text for a discussion of the American College of Trial Lawyers amendment to Rule 1.6.

179. *See* ABA, AMENDMENTS TO PROPOSED MODEL RULES OF PROFESSIONAL CONDUCT WITH SYNOPSIS (S) 70-9 (Feb. 7-9, 1983). The College's amendment would have deleted the provision that the duties established by Rule 3.3 "apply even if compliance requires disclosure of information otherwise protected by Rule 1.6."

180. *Id.* The College's amendment would have added the following pertinent provisions:

> (c) If the lawyer has offered material evidence and comes to know of its falsity, the lawyer shall disclose this fact to the tribunal unless such disclosure is prohibited by Rule 1.6.
>
> (d) If the lawyer has offered material evidence and comes to know of its falsity, and disclosure of this fact is prohibited by Rule 1.6, the lawyer shall make reasonable efforts to convince the client to consent to disclose. If the client refuses to consent to disclosure, the lawyer may seek to withdraw from the representation in accordance with Rule 1.16.

Id.

181. These amendments were proposed by the New York State Bar Association, the International Association of Insurance Counsel, and the Iowa State Bar Association. *See id.* at (S) 70-2 (New York State Bar Association amendment); (S) 70-3.1 (International Association of Insurance Counsel amendment); (S) 70-19 to 70-20 (Iowa State Bar Association amendment). The three amendments differed in precise language from each other and from the amendment offered by the American College of Trial Lawyers, but all four unsuccessfully attempted to reverse the preference of Rule 3.3 over Rule 1.6.

182. ABA House of Delegates, Daily Journal (Feb. 7-9, 1983). The Iowa State Bar Association amendment was the last of the four debated and the only one on which there was a recorded vote; the other three were rejected by voice vote. The author, who personally observed the House of Delegates deliberations on the Model Rules, believes the margin of defeat in the voice vote on the earlier amendment offered by the American College of Trial Lawyers was closer than the 2-to-1 margin on the Iowa amendment. The will of the House was clear from the three voice votes rejecting the preference for Rule 1.6, so the standing vote on the Iowa amendment probably includes some bandwagon effect.

183. These were the amendments offered by the New York State Bar Association and by the Iowa State Bar Association. *See* ABA, AMENDMENTS TO PROPOSED MODEL RULES OF PROFESSIONAL CONDUCT WITH SYNOPSIS (S) 70-2 (New York State Bar Association amendment); (S) 70-19 (Iowa State Bar Association amendment) (1983). An amendment offered by the International Association of Insurance Counsel would have expanded this exception to cover "otherwise intentionally tortious" acts as well as criminal and fraudulent conduct but would have made the entire exception subordinate to Rule 1.6. *See id.* at (S) 70.3.1.

supersede the requirements of Rule 3.3 in criminal cases;[184] although the House of Delegates rejected these amendments, language to this effect is included in the comment to Rule 3.3.[185] The House also rejected an amendment that would have incorporated Standard 4-7.7 of the ABA Standards for Criminal Justice into Rule 3.3.[186]

Several of the rejected amendments dealt with the issue of false evidence. Two amendments would have deleted the provision permitting a lawyer to disclose evidence that the lawyer reasonably believes is false.[187] A third would have permitted withdrawal if the lawyer believes the evidence is false.[188] Two amendments addressed the situation in which the lawyer learns that evidence is false after it is offered; these amendments would have required the lawyer to disclose if permitted by Rule 1.6.[189] If disclosure were prohibited,

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184. The amendment offered by the American College of Trial Lawyers would have added the following language: "Caveat: Constitutional law defining the right to assistance of counsel in criminal cases may supersede the obligations stated in this rule." *Id.* at (S) 70-9.1. The amendment of the Iowa State Bar Association would have added the following: "Notwithstanding paragraphs (a) through (e), a lawyer does not violate the rules of professional conduct if that lawyer acts in accordance with the requirements of applicable law defining the right to assistance of counsel in criminal cases." *Id.* at (S) 70-20.

185. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 comment *Constitutional Requirements* (1983). The comment provides:

> The general rule — that an advocate must disclose the existence of perjury with respect to a material fact, even that of a client — applies to defense counsel in criminal cases, as well as in other instances. However, the definition of the lawyer's ethical duty in such a situation may be qualified by constitutional provisions for due process and the right to counsel in criminal cases. In some jurisdictions these provisions have been construed to require that counsel present an accused as a witness if the accused wishes to testify, even if counsel knows the testimony will be false. The obligation of the advocate under these Rules is subordinate to such a constititutional requirement.

Id.

186. ABA House of Delegates, Daily Journal (Feb. 7-9, 1983). The Section of Criminal Justice and the Standing Committee on Legal Aid and Indigent Defendants proposed the amendment that would have added the following provision:

> (e) Notwithstanding subsections (a) through (d), a lawyer for a defendant in a criminal case shall not disclose that the client has perpetrated a fraud or testified falsely. However, if the lawyer knows that the client will testify falsely, the lawyer shall:
>
> (1) Counsel the client against such testimony; and
>
> (2) Not assist the client in preparing such testimony; and
>
> (3) Not assist the client in testifying except to the extent necessary to avoid revealing to the fact finder the lawyer's knowledge that the testimony is false; and
>
> (4) Not refer to such testimony in the lawyer's argument to the fact finder unless the circumstances of the case require such a reference in order to avoid revealing to the fact finder the lawyer's knowledge that the testimony is false.

ABA, AMENDMENTS TO PROPOSED MODEL RULES OF PROFESSIONAL CONDUCT WITH SYNOPSIS 70-11 (Feb. 7-9, 1983). The House rejected the amendment by voice vote.

187. The New York State Bar Association and the State Bar of Michigan offered the amendments, which would have deleted Rule 3.3(c) of the Model Rules, as adopted. *See* ABA, AMENDMENTS TO PROPOSED MODEL RULES OF PROFESSIONAL CONDUCT WITH SYNOPSIS (S) 70-2 (New York State Bar Association amendment); 70-10 (State Bar of Michigan amendment) (Feb. 7-9, 1983). The House rejected both amendments by voice vote.

188. The Iowa State Bar Association offered this amendment. *Id.* at (S) 70-19 to 70-20.

189. The American College of Trial Lawyers and the Iowa State Bar Association offered the

the lawyer could withdraw but only after encouraging the client to consent to disclosure.[190]

In light of the influence wielded by the American College of Trial Lawyers in the consideration of Rule 1.6,[191] the result of the debate on Rule 3.3 was somewhat surprising. The end product is an enigma: a stronger duty of confidentiality that gives way totally when it conflicts with candor to the court.

The preference for candor to the court over client confidentiality is likely to have significant practical effects. When the client lies to the court, the lawyer's first duty is to the court. The client who is unaware of the lawyer's preeminent duty, who reveals confidential information to the lawyer, and who then seeks to lie suffers unexpected but arguably just consequences. If the client is aware of the Model Rules' preference, the lawyer will be the ultimate loser, since the client will not disclose information that may be crucial to effective representation.

C. DISCLOSURE OF FRAUD ON THIRD PERSON — RULE 4.1

Rule 4.1 of the Model Rules maintains the preference of the Model Code for confidentiality over disclosure of a client's fraud on a third person.[192] Unlike the Model Code, this preference is the product of clear language. Although the result is the same as under the Model Code, the Model Rules achieve the result without the circular reasoning and interpretive gap-filling that is necessary under the Code.[193]

IV. CONCLUSION

With one major exception, the Model Rules strengthen the

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amendments. *See id.* at (S) 70-9 (American College of Trial Lawyers amendment); (S) 70-19 (Iowa State Bar Association amendment).

190. *Id.*

191. See *supra* notes 129-46 and accompanying text for a discussion of the influence of the American College of Trial Lawyers on Rule 1.6.

192. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.1 (1983). See *supra* note 92 for the text of Rule 4.1.

The confidentiality exception in Rule 4.1 resulted from an amendment offered by the American College of Trial Lawyers. ABA House of Delegates, Daily Journal (Feb. 7-9, 1983); ABA, AMENDMENTS TO PROPOSED MODEL RULES OF PROFESSIONAL CONDUCT WITH SYNOPSIS (S) 89-2.1 (Feb. 7-9, 1983). After lengthy debate the House adopted the amendment by a vote of 188 to 127. The confidentiality exception applies only to Rule 4.1(b), which prohibits a lawyer from knowingly failing to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client. MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.1(b) (1983). The exception does not apply to the prohibition against knowingly making a false statement of material fact. *Id.* Rule 4.1 (a).

193. See *supra* notes 32-76 and accompanying text for a discussion of a lawyer's duties under the Model Code when the client perpetrates a fraud upon another individual.

duty of confidentiality. Broadening the scope of information covered, narrowing the future crime exception, and adding provisions that state the priority of confidentiality over other specific provisions are all significant changes in favor of greater confidentiality. Making confidentiality subordinate to candor to the court, however, substantially weakens the fundamental principle of confidentiality.

The duty of confidentiality may be further eroded as individual states consider adoption of the Model Rules. Particularly when the client uses the lawyer's services to further a crime or fraud[194] or where substantial property or financial interests may be harmed,[195] the duty of confidentiality may be forced to give way. When death or serious bodily harm may result, some states may require the lawyer to disclose confidential information.[196]

While some states may choose to weaken the duty of confidentiality, others may strengthen it. As the Model Rules emerged from the ABA House of Delegates, there was only one substantial weakness. That weakness — the preference for candor to the court over confidentiality — was the result of a hard-fought battle. That battle will continue in the various states. It is unlikely that the interests of the court will prevail in every jurisdiction.

194. The Pennsylvania Supreme Court, which issued an order stating its intention to adopt the Model Rules following a comment period, approved a modification to reinsert the provision permitting disclosure to rectify the consequences of a crime or fraud in which the lawyer's services were used. [1 Current Reports] LAWYERS' MANUAL ON PROFESSIONAL CONDUCT (ABA/BNA) 17 (Jan. 25, 1984). The Michigan State Bar has recommended adoption of the Model Rules but with this provision reinserted. *Id.* at 71 (Feb. 22, 1984).

195. The Michigan State Bar also favors permitting disclosure if substantial injury to the financial interests or property of another is likely. *Id.*

196. A New Jersey Supreme Court committee and the New Jersey State Bar Association have recommended adoption of the Model Rules with the addition of this required disclosure. *Id.* at 17 (Jan. 25, 1984).