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CONFIDENTIAL INFORMATION UNDER THE CODE OF PROFESSIONAL RESPONSIBILITY—CANON 4

I. INTRODUCTION

Grave shadows of suspicion were cast upon the time honored privilege of confidentiality recently when two New York attorneys admitted concealing their knowledge that their client, whom they were defending for one murder, had committed several other unreported murders.[1] Adverse public reaction stimulated a criminal investigation against the attorneys.[2] The problems that surround the use of confidential information are not confined to the criminal lawyer; they affect all lawyers—the corporate lawyer,[3] the securities lawyer,[4] and all lawyers involved in any civil litigation.[5]

Canon 4 of the Code of Professional Responsibility,[6] which governs an attorney's duty regarding information received because of

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1. N.Y. Times, June 20, 1974, at 1, col. 2. The enormity of the burden borne by the attorneys was increased when Earl Petz, father of one of the victims, Susan Petz, contacted attorney Frank Armani. Petz was searching for his missing daughter who had disappeared at the same time and in the same vicinity as the murder, which Armani's client was accused of committing, had occurred. Petz asked Armani if he knew anything about his daughter. Armani denied knowing anything, even though he knew that Susan Petz had been stabbed to death by his client. *Id.*

2. The District Attorney's Office in Onondaga County, New York, the scene of the murders, presented evidence to a grand jury for a decision on whether charges should be lodged against the attorneys. One report said that the grand jury would be asked whether the evidence warranted charging the attorneys with violating three public health laws requiring that everyone be given a decent burial or cremation, that every death be registered within 72 hours, and that any person with knowledge of a death report it to the coroner. NEWSDAY, July 5, 1974, at 6. On February 7, 1975, two sealed indictments were handed down, and one of the attorneys was cleared of any criminal wrongdoing. N.Y. Times, February 8, 1975, at 42, col. 5.

3. *See, e.g.*, Emle Indus., Inc. v. Patentex, Inc., 478 F.2d 562 (2d Cir. 1973); Richardson v. Hamilton Int'l Corp., 333 F. Supp. 1049 (E.D. Pa. 1971).

4. *See, e.g.*, Meyerhoff v. Empire Fire & Marine Ins. Co., 497 F.2d 1190 (2d Cir.), *petition for cert. filed*, 43 U.S.L.W. 3148 (U.S. Sept. 18, 1974) (No. 292).

5. *See, e.g., In re* Callan, 122 N.J. Super. 479, 300 A.2d 868, *aff'd*, 126 N.J. Super. 103, 312 A.2d 881 (1973); Dike v. Dike, 75 Wash. 2d 1, 448 P.2d 490 (1968).

6. ABA CODE OF PROFESSIONAL RESPONSIBILITY [hereinafter cited as ABA CODE]. The Code was adopted by the House of Delegates of the American Bar Association on August 12, 1969. It supplanted the ABA Canons of Professional Ethics, which formerly governed attorney conduct. The Code is organized into Canons, which are statements of "axiomatic norms" expressing "the standards of professional conduct expected of law-

his relationship with his clients, provides: *"A lawyer should preserve the confidences and secrets of a client."* This duty is enforced by Disciplinary Rules[7] which require that a lawyer not knowingly reveal a confidence or secret of his client except in certain situations.[8]

The purpose of this Comment is twofold. First, to ascertain the scope of a lawyer's ethical duty it will examine the meaning of the terms "confidence" and "secret." Second, it will examine the area of confidential communications to demonstrate how vigorously courts enforce this duty and to delineate the circumstances where a lawyer *may* properly disclose the information and those where he *must* disclose it. The intention is to discuss the attorney's privileges and duties regarding his use of confidential information as outlined by the Code. The discussion is not limited to Pennsylvania, except when reference to the law of a particular state is necessary.

II. Information Protected By Canon 4

Canon 4 of the Code and its conjunctive ethical considerations and disciplinary rules make no substantive change in the settled principles of ethics involving the preservation of confidential information.[9] The primary guide to the lawyer under the Canons of Professional Responsibility, which formerly governed attorney conduct, was Canon 37.[10] Both old Canon 37 and new Canon 4 im-

yers," Ethical Considerations, which are aspirations that every lawyer should strive for, and Disciplinary Rules that "state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." *Id.* Preliminary Statement.

7. *Id.* Disciplinary Rule 4-101 [hereinafter cited as DR].

8. *Id.* DR 4-101(C) (lists excepted circumstances); *see* notes 63-66 and accompanying text *infra.*

9. R. Wise, Legal Ethics 65 (2d ed. 1970).

10. ABA Canons of Professional Ethics No. 37 provided:

> It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, and extends as well to his employees; and neither of them should accept employment which involves or may involve the disclosure or use of these confidences, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even though there are other available sources of such information. A lawyer should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client.
>
> If a lawyer is accused by his client, he is not precluded from disclosing the truth in respect to the accusation. The announced intention of a client to commit a crime is not included within the confidences he is bound to respect. He may properly make such disclosures as may be necessary to prevent the act or protect those against whom it is threatened.

pose a duty upon the lawyer to preserve the confidences of his client. New Canon 4 speaks not only to the confidences of the client but also to his "secrets," which the Code defines as information that the client has requested be held inviolate or the disclosure of which would be embarrassing or detrimental to the client.[11] This addition of the word "secrets" was probably not meant to expand the latitude of the lawyer's duty, but merely to clarify that the lawyer must protect more than just the information which is protected by the attorney-client privilege.[12] This could be implied from the use of the word "confidences" in old Canon 37,[13] but the addition of the word "secrets" eliminates any ambiguity.

For an attorney to know what information he must preserve, some understanding of the meaning of the terms "confidence" and "secrets" is required. Both terms are defined in the Code;[14] the purpose of this section is to explain and interpret the definitions given in the Code with the hope of furthering an understanding of what information is embraced by the lawyer's duty.

A. Confidences—The Attorney-Client Privilege

DR 4-101(A) defines "confidence" as "information protected by the attorney-client privilege under applicable law." Consequently, the lawyer has an ethical duty to preserve any information which falls within the protection of the attorney-client privilege.

Today, the attorney-client privilege has been embodied in statutes in most jurisdictions.[15] In Pennsylvania, the law is the same

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11. ABA CODE, DR 4-101(A).

12. R. WISE, *supra* note 9.

13. Several factors indicate that "confidences" under old Canon 37 included more than just information protected by the attorney-client privilege. Canon 37 states that the information should be preserved "even though there are other available sources of such information." If there are other available sources of the information, this might tend to indicate that the information was not of a confidential nature and hence the attorney-client privilege might not be applicable; still, the lawyer was obligated to protect it. And Canon 37 specifically declared that the "announced intention of a client to commit a crime is not included within the confidences [the attorney] is bound to respect." If confidences under Canon 37 only referred to information protected by the attorney-client privilege, as it does in the Code, this sentence would have been unnecessary since the client's announced intention to commit a crime is not protected by the attorney-client privilege, and so would not be a confidence at all. *E.g.*, Clark v. United States, 289 U.S. 1 (1932). The logical conclusion is that "confidence" under Canon 37 included more than information protected by the attorney-client privilege. *See also* H. DRINKER, LEGAL ETHICS 135 (1953).

14. ABA CODE, DR 4-101(A).

15. For a complete list of statutes covering the attorney-client privilege see 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2292, at 555 n.2 (McNaughton rev. 1961) [hereinafter cited as 8 WIGMORE].

The privilege was recognized as early as 1577. Berd v. Lovelace, 21 Eng. Rep. 33 (Ch. 1577). Today, its existence is justified on the basis of social policy:

> In a society as complicated in structure as ours and governed by laws as complex and detailed as those imposed upon us, expert le-

for both civil[16] and criminal[17] proceedings:

> Nor shall counsel be competent or permitted to testify to confidential communications made to him by his client, or the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client.[18]

In most jurisdictions, including Pennsylvania, the incorporation of the common law rule of the privilege into statute has not changed the essentials of the privilege.[19] Before the privilege can be asserted by the attorney several conditions must be met.

First, the party must be seeking legal advice of some type,[20] although it need not be sought for the purpose of litigation.[21] Generally, any matter discussed with a professional legal adviser is prima facie for the sake of legal advice, unless it clearly appears to concern a matter which does not require legal advice.[22] Of course, the privilege will not protect the client who consults a lawyer for advice on how to commit a crime or engage in some other wrongful conduct.[23]

> gal advice is essential. To the furnishing of such advice fullest freedom and honesty of communication of pertinent facts is a prerequisite. To induce clients to make such communication, the privilege to prevent their later disclosure is said by courts and commentators to be a necessity. The social good derived from the proper performance of the functions of lawyers acting for their clients is believed to outweigh the harm that may come from the suppression of the evidence in specific cases.

MODEL CODE OF EVIDENCE rule 210, comment (1942). For a thorough evaluation of the privilege see Gardner, *A Re-Evaluation of the Attorney-Client Privilege*, 8 VILL. L. REV. 279 (part I), 469 (part II) (1963).

16. PA. STAT. ANN. tit. 28, § 321 (1958).

17. PA. STAT. ANN. tit. 19, § 686 (1964).

18. Notes 16 and 17 *supra*.

19. 8 WIGMORE § 2292, at 556.

20. *Id.* § 2294.

21. The rationale for this was aptly stated in *Greenough v. Gaskell*, 39 Eng. Rep. 618, 620 (Ch. 1833): "[A] person oftentimes requires the aid of professional advice upon the subject of his rights and his liabilities, with no reference to any particular litigation, and without any other reference to litigation generally . . . [because] all human affairs may . . . become the subject of judicial inquiry." In fact, by encouraging people to seek legal advice at the nonlitigious stage, the necessity of litigation is often avoided.

22. 8 WIGMORE § 2296. For examples of specific circumstances see *id.* at 567 n.2.

23. *E.g.*, Clark v. United States, 289 U.S. 1 (1932); Alexander v. United States, 138 U.S. 353 (1891); United States v. Friedman, 445 F.2d 1076 (9th Cir. 1971); 8 WIGMORE § 2298, at 573 n.1. This is commonly referred to as the crime-tort exception to the privilege. The privilege does not apply in these situations because it would not forward the policy of the privilege: the administration of justice is not served by protecting a client who seeks advice to carry out an illegal or fraudulent scheme. C. MCCORMICK, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE 194 (2d ed. 1972) [hereinaf-

The advice must be sought from a professional legal adviser[24] in his capacity as such.[25] A mere discussion with an attorney upon the law without any purpose of treating his opinion as a service professionally rendered is not privileged; the person must be seeking the benefit of that relation.[26]

The communication must be relevant to the purpose of the consultation for the privilege to exist.[27] If a client knowingly departs from his purpose, he is, in that respect, not seeking legal advice, and the communication is not protected.[28] The test is "whether the statement is made *as a part of the purpose* of the client to obtain advice on that subject."[29]

Another condition that must be met before the privilege attaches is that the communication must be made in confidence[30] and come from the client.[31] There is no presumption of confidentiality simply because the attorney-client relation exists.[32] Whether the communication was of a sort intended to be confidential will be implied from the circumstances.[33] If the client intended to divulge the information to others, or related it to the attorney so he could relay it to others, then it is normally held not to be privileged.[34] Likewise, communications to an attorney in the presence of a third

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ter cited as McCORMICK]. Courts are hesitant to grant the exception and require more than just an accusation of criminal or fraudulent purpose; there must be prima facie evidence that the accusation has some foundation in fact. Clark v. United States, 289 U.S. 1, 15 (1932).

24. For purposes of the privilege "lawyer" is defined as any person authorized or reasonably believed by the client to be authorized to practice law in any state or nation whose law recognizes the privilege. UNIFORM RULES OF EVIDENCE 26(3)(c).

25. 8 WIGMORE § 2300.

26. *Id.* § 2304, at 586. It is not necessary that the attorney be charging a fee. Robinson v. United States, 144 F.2d 392 (6th Cir. 1944). Any preliminary communications while negotiating for a retainer are within the privilege regardless of whether the attorney accepts the retainer. United States v. Funk, 84 F. Supp. 967, 968 (E.D. Ky. 1949), *aff'd sub nom.*, Prichard v. United States, 181 F.2d 326 (6th Cir. 1950).

27. 8 WIGMORE §§ 2306-10.

28. *E.g.*, Modern Woodmen of Am. v. Watkins, 132 F.2d 352, 354 (5th Cir. 1942).

29. 8 WIGMORE § 2310, at 599 (emphasis added).

30. *Id.* §§ 2311-16.

31. *Id.* §§ 2317-2320.

32. *E.g.*, Collette v. Sarrasin, 184 Cal. 283, 193 P. 571 (1920); Mackel v. Burtlett, 33 Mont. 123, 82 P. 795 (1905); Vance v. State, 190 Tenn. 521, 230 S.W.2d 987 (1950). "A past attorney-client relationship does not, of itself, preclude an attorney from ever testifying against a former client on new and separate issues." Glass v. Heyd, 457 F.2d 562, 565 (5th Cir. 1972).

33. Hiltpold v. Stern, 82 A.2d 123 (D.C. Mun. App. 1951).

34. *E.g.*, United States v. McDonald, 313 F.2d 832 (2d Cir. 1963); Colton v. United States, 306 F.2d 633 (2d Cir. 1962) (information transmitted by client to attorney for inclusion in tax return held not privileged); United States v. Tellier, 255 F.2d 441 (2d Cir. 1958) (attorney was to set forth the conversation in a letter to client with copies to go to others; not privileged); Heaton v. Findlay, 12 Pa. 304 (1849) (communication of facts to be embodied in a letter sent to the sheriff not privileged); 8 WIGMORE § 2311, at 600 n.5.

party who is not an agent of either the client or the attorney tend to indicate that the communication is not confidential.[35] Any communication through any agency of the client will be deemed to have come from the client.[36] But readily observable information which is not made observable for the purpose of a communication is not privileged.[37]

The privilege protects both the attorney and the client from compelled disclosure,[38] but the right to assert it belongs to the client.[39] Once claimed,[40] the trial judge determines whether the facts justify granting it,[41] and absent a flagrant disregard of the law by the judge, the attorney must submit to his decision.[42] The privilege will not prohibit or protect third parties who obtain knowledge of the communication either by overhearing it[43] or by surreptitiously reading or obtaining possession of a document.[44]

Protection of the privilege may be waived by the client either expressly or impliedly.[45] By failing to claim the privilege by objecting to a disclosure,[46] or testifying[47] or calling the attorney to

35. *E.g.*, Gordon v. Robinson, 109 F. Supp. 106 (W.D. Pa. 1952); Loutzenhiser v. Dodds, 436 Pa. 512, 260 A.2d 745 (1970); Tracy v. Tracy, 377 Pa. 420, 105 A.2d 123 (1954).

36. *See* Annot., 139 A.L.R. 1250 (1942).

37. *E.g.*, Clark v. Skinner, 334 Mo. 1190, 70 S.W.2d 1094 (1934) (attorney's knowledge of client's mental capacity not privileged); State v. Fitzgerald, 68 Vt. 125, 34 A. 429 (1896) (attorney's testimony to client's intoxication, observable by all, not privileged); 8 WIGMORE § 2306.

38. *E.g.*, *In re* Turner, 51 F. Supp. 740 (W.D. Ky. 1943); 8 WIGMORE §§ 2324-26.

39. *E.g.*, Boyd v. Kilmer, 285 Pa. 533, 132 A. 709 (1926); Dowie's Estate, 135 Pa. 210, 19 A. 936 (1890); 8 WIGMORE §§ 2321-23.

40. If the client is not a party to the cause of action where the attorney is called to testify, courts generally refuse to allow someone who is a party to assert the privilege on behalf of the client. *E.g.*, State v. Madden, 161 Minn. 132, 201 N.W. 297 (1924); Dowie's Estate, 135 Pa. 210, 19 A. 936 (1890). Some courts permit anyone present to call it to the court's attention. *E.g.*, Republic Gear Co. v. Borg Warner Corp., 381 F.2d 551 (2d Cir. 1967) (client's attorney); O'Brien v. New England Mut. Life Ins. Co., 109 Kan. 138, 197 P. 1100 (1921) (client's attorney or party).

41. 8 WIGMORE § 2322, at 630.

42. *Id.* § 2321, at 630; MCCORMICK § 92, at 193-94.

43. *E.g.*, Cotton v. State, 87 Ala. 75, 6 So. 396 (1889) (conversation bebetween attorney and client in jailer's presence; held jailer's testimony not privileged); People v. Castiel, 153 Cal. App. 2d 653, 315 P.2d 79 (1957) (court reporter); Clark v. State, 159 Tex. Crim. 187, 261 S.W.2d 339, *cert. denied*, 346 U.S. 855 (1953) (telephone operator).

44. 8 WIGMORE § 2326, at 634.

45. *Id.* §§ 2327-29; MCCORMICK § 93.

46. MCCORMICK § 93, at 194. *But see* People v. Kor, 129 Cal. App. 2d 436, 277 P.2d 94 (1955).

47. *E.g.*, General Accident, Fire & Life Assurance Corp. v. Savage, 35

testify to[48] a privileged communication, the client implicitly waives the privilege.

All the components just discussed are necessary elements which must be present for the attorney-client privilege to apply to a specific situation. As Wigmore summarizes them:

> (1) Where legal advice of any kind is sought, (2) from a professional adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are at his instance permanently protected, (7) from disclosure by himself or by his legal adviser, (8) except the protection be waived.[49]

If one of these prerequisites is not satisfied, then the attorney-client privilege will not protect a client from disclosure of information by his attorney on the witness stand. An attorney who fails to reveal the information when he is ordered to do so by the court may be subject to a contempt citation.[50]

Even though the information cannot be protected from compelled disclosure, the attorney is not free to disclose the information sua sponte. He has an ethical obligation to preserve, not only that information which is protected by the attorney-client privilege, but also information which does not fall within the protection of the attorney-client privilege—his client's secrets.[51]

B. Secrets

DR 4-101(A) defines secrets as "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." Since the Code is relatively new, and since the Canons of Professional Ethics did not contain a similar distinction between "confidences" and "secrets", cases interpreting the word "secret" are scarce.

The recent case of *City of Wichita v. Chapman*[52] confronted this problem. In that case, an attorney was representing a client whose property the city was attempting to condemn. The attorney's firm had represented the city in a previous condemnation proceeding, and during the course of that representation the firm had

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F.2d 587 (8th Cir. 1929); People v. Gerald, 265 Ill. 448, 107 N.E. 165 (1914); People v. Shapiro, 308 N.Y. 453, 126 N.E. 559 (1955).

48. *E.g.*, Brooks v. Holden, 175 Mass. 137, 55 N.E. 802 (1900); 8 WIGMORE § 2327.

49. 8 WIGMORE § 2292, at 554. See United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358 (D. Mass. 1950) for a similar formulation.

50. *See* Appeal of the United States Securities & Exchange Comm'n, 226 F.2d 501 (6th Cir. 1955); Dike v. Dike, 75 Wash. 2d 1, 448 P.2d 490 (1968).

51. ABA CODE, EC 4-4 provides in part: "The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences of his client."

52. 214 Kan. 575, 521 P.2d 589 (1974).

received from the city a report of a real estate expert valuing certain comparable property. In the current condemnation proceeding by the city against the attorney's client, the city employed the same real estate expert and he valued the same property, which he had valued in the previous proceeding, at a substantially lower rate. The attorney used the report that his firm had gained in the prior proceeding to discredit the expert's lower valuation in this case. The city contended the report was a "secret," and by using it the attorney violated Canon 4. In rejecting the city's argument the court discussed the prerequisites necessary for the attorney-client privilege to apply and concluded that these should also apply to determine what is a "secret." Applying this rule, the court held that the "public exposure" in making the report available to various agencies and individuals negated its "secret" or "confidential" character.[53]

Language in the Code seems to dictate a different result than the *City of Wichita* court reached. The Code explicitly states that "the attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client,"[54] and the ethical obligation "exists without regard to the nature or source of information or the fact that others share the knowledge."[55] Clearly, this precludes application of the attorney-client privilege standard to "secrets." The fact that the report was made available to others is relevant in ascertaining whether the attorney-client privilege exists[56] but not to whether the matter was "secret."[57] Utilizing the definition of "secret" from the Code,[58] the report was "information gained in the professional relationship," its disclosure was "detrimental to the client;" consequently, it was a "secret" that the lawyer had a duty to preserve,[59] and having failed to, he should have been disciplined.[60]

III. Disclosures

Generally, any information protected by Canon 4, whether it is a "confidence" or a "secret," may not be revealed by an attor-

53. *Id.* at 582, 521 P.2d at 596.
54. ABA Code, EC 4-4.
55. *Id.*
56. *See* note 34 and accompanying text *supra.*
57. *See* note 55 and accompanying text *supra.*
58. ABA Code, DR 4-101(A).
59. *Id.* DR 4-101(B)(1), (2), (3).
60. Violation of a disciplinary rule subjects a lawyer to discipline. *Id.* Preliminary Statement; Pa. R. Disciplinary Enforcement 17-3.

ney.[61] Revealing it will subject the lawyer to discipline.[62] However, there are certain situations where a lawyer may, and in some cases must, reveal his client's confidences or secrets. These include: (1) when he has the consent of his client after making full disclosure to him;[63] (2) when permitted under the disciplinary rules or required by law or court order;[64] (3) when his client intends to commit a crime;[65] and (4) when it is necessary to establish or collect his fee, or to defend himself against an accusation of wrongful conduct.[66] The purpose of this section is to discuss how courts protect clients from the damaging use of information by an attorney, and also to delineate and explain those situations where an attorney may, and those situations where he must. disclose information received from his client.

A. Protection for the Client—The Lawyer's Duty and Its Enforcement

Subject to the exceptions enumerated in DR 4-101(C),[67] a lawyer may not reveal any "confidence" or "secret" of his client.[68] Courts vigorously enforce this duty in both criminal[69] and civil[70] cases.

The lawyer's competing interests[71] as advocate for his client and "officer of the court" most acutely manifest themselves in rep-

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61. ABA CODE, DR 4-101(B).

62. PA. R. DISCIPLINARY ENFORCEMENT 17-3. The discipline may be any of the following: (1) disbarment; (2) suspension for a maximum of five years; (3) public censure; (4) private reprimand; (5) private informal admonition. *Id.* 17-4.

63. ABA CODE, DR 4-101(C)(1).

64. *Id.* DR 4-101(C)(2).

65. *Id.* DR 4-101(C)(3).

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

67. *See* note 63-66 and accompanying text *supra.*

68. *Id.* DR 4-101(B).

69. *See* notes 71-86 and accompanying text *infra.*

70. *See* notes 120-129 and accompanying text *infra.*

71. The Canons of Professional Ethics and case law imposed a dual role upon a lawyer. Canon 15 provided that the lawyer owed "entire devotion to the interest of his client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability to the end that nothing be taken or withheld from him, save by the rules of law, legally applied." ABA CANONS OF PROFESSIONAL ETHICS No. 15. Cases spoke in similar language. *E.g.*, People *ex rel.* Attorney Gen. v. Beattie, 137 Ill. 553, 27 N.E. 1096 (1891). But it was also recognized that the lawyer was an "officer of the court." *E.g., Ex parte* Garland, 71 U.S. (4 Wall.) 333, 378 (1866); *In re* Cohen, 370 F. Supp. 1166, 1174 (S.D.N.Y. 1973); *In re* Kelly, 243 F. 696, 705 (D.C. Mont. 1917); People *ex rel.* Karlin v. Culkin, 248 N.Y. 465, 473, 162 N.E. 487, 490 (1928); Sterling v. City of Philadelphia, 378 Pa. 538, 544, 106 A.2d 793, 796 (1954); ABA CANONS OF PROFESSIONAL ETHICS No. 22.

The Code of Professional Responsibility has attempted to eliminate any inconsistency in a lawyer's duty by declaring that his duty to his client and the court is the same: "to represent his client zealously within the bounds of the law. . . ." ABA CODE, EC 7-1, EC 7-19. While the problem thus be-

resenting a criminal defendant. The criminal defense attorney has a heavy burden to protect his client's confidences. Even if the client admits to his attorney that he is guilty of the crime charged, the attorney may not disclose that admission voluntarily and is barred from testifying to that effect.[72] Besides fulfilling the policy behind the privilege,[73] this promotes the constitutional guarantees of effective assistance of counsel[74] and the privilege against self-incrimination.[75] Both these rights would be ineffectual if it were held that a client, who admits his guilt to counsel in order to insure counsel's effective assistance, thereby waives his privilege against self-incrimination.[76] Guilty persons are entitled to counsel to guarantee they receive a fair trial.[77] It is the duty of the legal profession to provide such counsel;[78] an attorney's belief that a defendant, whom he represents as appointed counsel, is guilty is not a "compelling reason" for excusing him from that representation.[79] Once a lawyer undertakes the representation of an accused, he is bound to use all available defenses,[80] "[l]ike a soldier he must use the weapons and the practices that are available to him,"[81] and he must not use any information "to the disadvantage of his client."[82]

Courts will not permit an attorney in a criminal case to testify to any communication which deserves the protection of the attorney-client privilege. For example, in *Cummings v. Commonwealth*,[83] the prosecution introduced the testimony of a former attorney for the defendant which established a motive for the murder the defendant allegedly committed: he was having illicit relations with the victim's wife. The court held it was error to admit the testimony over the defendant's objection; the judgment was reversed and the case remanded.[84] In another case, *State v. Sulli-*

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comes determining whether a particular course of conduct is "within the bound of the law," it is doubtful that the competing considerations have been eliminated.

72. People v. Singh, 123 Cal. App. 365, 11 P.2d 73 (1932).
73. *See* note 15 *supra*.
74. U.S. CONST. amend. VI; Powell v. Alabama, 287 U.S. 45 (1932).
75. U.S. CONST. amend. V; Miranda v. Arizona, 384 U.S. 436 (1966).
76. *See* United States v. Judson, 322 F.2d 460 (9th Cir. 1963).
77. *See* Powell v. Alabama, 287 U.S. 45, 66-68 (1932).
78. ABA CODE, CANON 2.
79. *Id.* EC 2-29.
80. *Id.* EC 7-4.
81. Stayton, *Cum Honore Officium*, 19 TEX. B.J. 765, 766 (1956).
82. ABA CODE, DR 4-101(B)(2). Of course, this is subject to the exceptions of DR 4-101(C).
83. 221 Ky. 301, 209 S.W. 943 (1927).
84. *Id.* at 311-12, 298 S.W. at 947-48.

van,[85] the court afforded a defendant protection against the introduction of an incriminating conversation that was the fruit of a privileged communication. The defendant had contacted her attorney and informed him that she had murdered her husband. The attorney notified the sheriff of the location of the body. At trial, the prosecution called the attorney to the witness stand and questioned him about his conversation with the sheriff, delicately avoiding any reference to any conversation with the defendant which would have permitted the attorney to invoke the attorney-client privilege. Even though the conversation itself was not privileged, the court held that its admission was prejudicial since it was likely the jury inferred that the attorney gained his information from the defendant, and this violated the protection afforded by the attorney-client privilege.[86] This court extended the protection of the privilege to what, in reality, was a non-privileged communication demonstrating the respect courts afford to communications protected by the attorney-client privilege.

Notwithstanding judicial insistence that the attorney preserve information revealed to him by his client, the criminal defense attorney must conduct himself within the bounds of the law.[87] He may not use the attorney-client relationship as a shield or justification for actively participating in the concealment or destruction of evidence. For example, in the case of *In re Ryder*,[88] attorney Ryder voluntarily took possession of stolen money and a sawed-off shotgun which had been secreted in a safe-deposit box by his client who was about to be charged with bank robbery. Ryder rented a safe-deposit box in his own name and transferred the evidence to it from the adjacent safe-deposit box of his client. He defended his conduct as a perfectly legitimate attempt to act in his client's best interests, since by concealing the evidence he would avoid the presumption of guilt which would arise if the weapon and money were found in his client's possession. Neither the trial[89] nor the appellate court[90] recommended what course Ryder should have pursued,[91] but he was suspended from practice for eighteen months because his acts bore "no reasonable relation to the attorney-client privilege and the duty to refuse to divulge a client's confidential communication."[92]

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85. 60 Wash. 2d 214, 373 P.2d 474 (1962).
86. *Id.* at 218, 373 P.2d at 476.
87. ABA CODE, CANON 7.
88. 263 F. Supp. 360 (E.D. Va.), *aff'd*, 381 F.2d 713 (4th Cir. 1967), *noted in* 25 WASH. & LEE L. REV. 133 (1968).
89. 263 F. Supp. 360 (E.D. Va. 1967).
90. 381 F.2d 713 (4th Cir. 1967).
91. For an intensive examination of Ryder's alternatives see Comment, *Professional Responsibility and In re Ryder: Can An Attorney Serve Two Masters?*, 54 VA. L. REV. 145, 190 (1968).
92. 381 F.2d at 714.

However, in another case, *State ex rel. Sowers v. Olwell*,[93] an attorney's possession of the instrumentalities of a crime was granted limited protection. The attorney had refused to comply with a subpoena duces tecum which ordered him to appear at a coroner's inquest and bring with him any knives he had in his possession as a result of his relationship with certain named persons, one of whom he was defending against a charge of murdering the person whose death was the subject of the inquest. The state supreme court upheld the attorney's refusal to comply with the order saying compliance would have required the attorney to testify to matters arising out of the attorney-client relationship.[94] But it qualified its holding and instructed the attorney on what it expected him to do with the evidence:

> We do not . . . mean to imply that evidence can be permanently withheld by the attorney. . . . The attorney should not be a depository for criminal evidence. . . . [A]fter a reasonable period [the attorney] should, as an officer of the court, on his own motion turn the same over to the prosecution."[95]

In order to guarantee that the client's privilege of communication with his attorney was protected, the court ordered the prosecution to make certain that the source of the evidence was not disclosed in the presence of the jury.[96]

Some basic guidelines emerge from the *Ryder*[97] and *Olwell*[98] cases. First, an attorney's continued possession of the fruits or instrumentalities of a crime will not be protected by the attorney-client privilege.[99] Second, an attorney in possession of the articles of his client's crime may be disciplined if he attempts to conceal them.[100] Finally, some courts impose an affirmative duty upon him to deliver the evidence to the prosecution.[101] This latter rule promotes the public interest in the administration of justice, while the court's refusal to permit the prosecution to divulge the source of the evidence[102] provides some protection for the client. It may

93. 64 Wash. 2d 828, 394 P.2d 681 (1964).
94. *Id.* at 833, 394 P.2d at 684.
95. *Id.* at 833-34, 394 P.2d at 684-85.
96. *Id.*
97. *See* notes 88-92 and accompanying text *supra*.
98. *See* notes 93-96 and accompanying text *supra*.
99. *In re* Ryder, 381 F.2d 713, 714 (1967); State *ex rel.* Sowers v. Olwell, 64 Wash. 2d 828, 833-34, 394 P.2d 681, 684-85 (1964).
100. *In re* Ryder, 381 F.2d 713 (1967).
101. State *ex rel.* Sowers v. Olwell, 64 Wash. 2d 828, 833-34, 394 P.2d 681, 684-85 (1964).
102. *Id.*

have the practical effect of discouraging a client from revealing evidence of his crime to his attorney, but it will also prevent the attorney from becoming the "depository of criminal evidence." Surely, logic compels the conclusion that a client should not be able to protect or conceal evidence of his crime by placing it in the hands of his attorney.[103]

In addition to subjecting the attorney to professional discipline, some decisions suggest that the attorney may be convicted as an accessory after the fact for actively participating in the destruction or concealment of evidence.[104] In Pennsylvania, a person may be convicted of the offense of hindering apprehension or prosecution if he conceals or destroys evidence of a crime.[105] The law provides no exemption for an attorney, and it is easy to envision an attorney who takes possession of evidence of his client's crime being convicted under this statute.[106] Since the Code of Professional Responsibility requires an attorney to represent his client within the bounds of the law,[107] the concealment or destruction of evidence which violates this statute would also be a violation of the Code.

Just as a lawyer may not conceal or destroy evidence himself, neither can he advise his client to do so. In a Minnesota case,[108] an attorney advised her client to destroy a list made by a decedent providing for the distribution of her estate. The attorney was disbarred for her "willful participation" in the destruction of this evidence which she knew would be required in proceedings for the distribution of the estate. In a similar situation a Texas court[109] said it was not "in the legitimate course of professional employment"[110] for an attorney to advise his client, who had just murdered his wife, to dispose of the murder weapon.

Neither the courts nor the Code have squarely addressed the

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103. *See* Falsone v. United States, 205 F.2d 734, 739 (5th Cir. 1953); McCORMICK § 89, at 185; 8 WIGMORE § 2307.

104. *In re* Ryder, 381 F.2d 713, 714 (4th Cir. 1967); Clark v. State, 159 Tex. Crim. R. 187, 193-94, 261 S.W.2d 339, 344 (1953), *cert. denied*, 346 U.S. 855 (1953). *See also* ABA COMM. ON PROFESSIONAL ETHICS OPINIONS, No. 155 (1936). Indeed, Jeremy Bentham maintained that any lawyer who knows from the confession of his client that his client has committed a felony and enables him to avoid "suffering the punishment to which he is condemned," is an accessory after the fact. 7 THE WORKS OF JEREMY BENTHAM 474 (Bowring ed. 1842).

105. PA. STAT. ANN. tit. 18, § 5105(a)(3) (1973). *See also* 18 U.S.C. § 3 (1970); 18 U.S.C. § 1505 (1970).

106. To be convicted, it is necessary that the party *intend* to hinder the apprehension, prosecution, conviction or punishment of another for crime. PA. STAT. ANN. tit. 18, § 5105(a) (1973). Mere knowledge that the other person has committed the crime is not sufficient. Commonwealth v. Giacobbe, 341 Pa. 187, 19 A.2d 71 (1941).

107. ABA CODE, CANON 7.

108. *In re* Williams, 221 Minn. 554, 23 N.W.2d 4 (1946).

109. Clark v. State, 159 Tex. Crim. R. 187, 261 S.W.2d 339, *cert. denied*, 346 U.S. 855 (1953).

110. *Id.* at 200, 261 S.W.2d at 347.

problem of what a lawyer *should* do when his client confronts him with incriminating evidence.[111] The decisions, thus far, speak mostly in negative terms: a lawyer may not take evidence into his possession and conceal it;[112] a lawyer may not advise the disposal[113] or destruction[114] of evidence. The Code gives a positive command to the lawyer to represent his client zealously within the bounds of the law,[115] and then proceeds to list a number of acts on the part of the lawyer which are clearly not within the bounds of the law.[116] Some commentators suggest that the lawyer's obligation is simply to advise his client of the incriminatory implications of the evidence, and let the client decide what course to take.[117] Practically speaking, it is unreasonable to expect counselors not to advise their clients of the potentially damaging legal implications of a specific piece of evidence or information, but lawyers should be aware that they may be disciplined for giving explicit advice directing a client to a particular course of action,[118] or actually participating in the destruction or concealment of evidence.[119]

The judicial balancing done to protect clients from damaging disclosures by their lawyers in criminal cases is also extended to civil litigants. The problem of a lawyer's taking advantage of information received during an attorney-client relationship often arises when the lawyer is employed in a civil suit against his former

111. *See* Comment, *supra* note 91.
112. *In re* Ryder, 381 F.2d 713, 714 (4th Cir. 1967).
113. Clark v. State, 159 Tex. Crim. R. 187, 261 S.W.2d 339 (1953).
114. *In re* Williams, 221 Minn. 554, 23 N.W.2d 4 (1946).
115. ABA CODE, CANON 7.
116. *Id.* DR 7-102:
(A) In his representation of a client; a lawyer shall not:
(1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.
(2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.
(3) Conceal or knowingly fail to disclose that which he is required by law to reveal.
(4) Knowingly use perjured testimony or false evidence.
(5) Knowingly make a false statement of law or fact.
(6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.
(7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.
(8) Knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule.
117. *See* Comment, *supra* note 91, at 191.
118. *See* notes 108-110 and accompanying text *supra*.
119. *See* notes 88-107 and accompanying text *supra*.

client.[120] The case of *Emle Industries, Inc. v. Patentex, Inc.*[121] exemplifies the typical factual situation. The plaintiff was seeking declaratory judgments that patents held by the defendant, Patentex, were invalid and unenforceable because another defendant, Burlington, by its alleged control of Patentex, has misused the patents. Plaintiff's counsel had previously represented Burlington in another patent infringement case[122] which also called into question the nature and scope of Burlington's control over Patentex. The court, attempting to preserve the balance between an individual's right to his own freely chosen counsel and the need to preserve the highest ethical standards of professional responsibility, disqualified the plaintiff's counsel from the representation.[123]

In these situations courts apply a "strict prophylactic rule"[124] disqualifying the attorney where "it can reasonably be said that in the course of the former representation the attorney *might* have acquired information *related* to the subject matter of his subsequent representation."[125] No proof is required that he did, in fact, receive such information.[126] The rule is aimed at protecting both the attorney's former and present client: the attorney may unconsciously use or manipulate a confidence acquired in the earlier representation and transform it into a telling advantage, or he may refrain from seizing a legitimate opportunity for fear that such a tactic might give rise to an appearance of impropriety.[127]

A case of this type[128] has already been heard by the Disci-

120. *See, e.g.*, Emle Indus., Inc. v. Patentex, Inc., 478 F.2d 562 (2d Cir. 1973); *In re* Anonymous, No. 14, 1974 Term (Pa. Sup. Ct. Disciplinary Bd., July 26, 1974), as reported in The Disciplinary Board of the Supreme Court of Pennsylvania, Summaries of Discipline Imposed on Pennsylvania Attorneys During The Period July 1, 1974 through November 30, 1974 at 47, July 26, 1974. Typically, these cases arise when one party objects to his opponent's counsel, but it has been suggested that it is the court's duty to act sua sponte in such a situation. Universal Athletic Sales Co. v. American Gym, Recreational & Athletic Equip. Corp., Inc., 357 F. Supp. 905, 908 (W.D. Pa. 1973).

121. 478 F.2d 562 (2d Cir. 1972).

122. Triumph Hosiery Mills, Inc. c. Alamance Indus., Inc., 191 F. Supp. 652 (M.D.N.C. 1961), *aff'd*, 299 F.2d 793 (4th Cir.), *cert. denied*, 370 U.S. 924 (1962).

123. 478 F.2d at 565.

124. *Id.* at 571.

125. T.C. Theatre Corp. v. Warner Bros. Pictures, 113 F. Supp. 265, 269 (S.D.N.Y. 1953) (emphasis added).

126. There can be no inquiry into whether the attorney did receive confidential information during the previous employment because the only way to determine if he did would be to describe in detail the information previously disclosed, and this would require the former client to forfeit the protection to which he is entitled. Emle Indus., Inc. v. Patentex, Inc., 478 F.2d 562, 571 (2d Cir. 1973).

127. *Id.* "A lawyer should avoid even the appearance of professional impropriety." ABA CODE, CANON 9.

128. *In re* Anonymous, No. 14, 1974 Term (Pa. Sup. Ct. Disciplinary Bd., July 26, 1974), as reported in The Disciplinary Board of the Supreme Court of Pennsylvania, Summaries of Discipline Imposed on Pennsylvania Attor-

plinary Board in Pennsylvania.[129] In that case, the attorney, as an Assistant County Solicitor, had participated in the promulgation of county air pollution regulations after many conferences with state technical, administrative and legal officials. Later, as a private counselor, he was representing defendants who were charged by the State with violations of the state air pollution regulations. The Disciplinary Board dismissed the complaint against the attorney on the ground that the attorney never had substantial responsibility with respect to the state regulations, and never having been employed by the State possessed no attorney-client confidences to reveal. The significance of the case is to demonstrate that disciplinary action may be taken against an attorney for representing someone against a former employer.

The client is also protected from the attorney's violating his confidence by such action as withdrawing from the case or disassociating himself from the client. In any matter pending before any tribunal, it is permissible for an attorney to request permission to withdraw if his client insists on pursuing an illegal course of conduct,[130] or insists that the lawyer pursue an illegal course, or a course prohibited by the disciplinary rules.[131] But even if the request is granted, the lawyer may not withdraw from the employment "until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client."[132] In fact, where the possibility of prejudice is great, it may preclude withdrawal. For example, in one case presented to the ABA Committee on Professional Ethics,[133] an attorney had agreed to defend a young man accused of a sexual offense after the young man's father had assured the attorney of his son's innocence. The attorney accepted the case at the request of the boy's father with the understanding that he would be at liberty to withdraw from the case at any time if he became convinced of the young man's guilt. The defendant made admissions to the attorney which were inconsistent with his innocence, and the attorney wanted to withdraw from the case. The Committee's opinion concluded that it was the attorney's duty not to withdraw since his withdrawal would amount to disclosure to the defendant's family of the confidential information which he had re-

neys During The Period July 1, 1974 through November 30, 1974 at 47, July 26, 1974.

129. The Disciplinary Board was established by the Supreme Court of Pennsylvania. PA. R. DISCIPLINARY ENFORCEMENT 17-5.

130. ABA CODE, DR 2-110(C) (1) (b).

131. *Id.* DR 2-101 (C) (1) (c).

132. *Id.* DR 2-110(A) (2).

133. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 90 (1932).

ceived from his client. Similarly in another problem presented to the ABA Committee on Professional Ethics,[134] the Committee concluded that if a lawyer, who is representing a client before the Internal Revenue Service, believes that the service is relying on him as corroborating statements of his client, and the lawyer knows his client's statements are false, then the lawyer has a duty to disassociate himself from any such reliance, unless it is obvious that the very act of disassociation would have the effect of violating his duty to preserve his client's confidences and secrets.[135]

The above analysis sufficiently demonstrates that all attorneys, criminal and civil, must be scrupulous in protecting their clients confidences, and courts will vigorously defend clients from their attorney's derelictions.

B. Information the Lawyer May Disclose Sua Sponte

The Code enumerates the circumstances where it is permissible for a lawyer to voluntarily divulge confidential information.[136] With one exception to be discussed later,[137] no affirmative ethical duty is imposed upon the lawyer to reveal information in any of the enumerated situations.[138] Consequently, no disciplinary action will result from a failure to reveal the information. Actually, the enumerated situations are exceptions to the lawyer's duty to preserve the confidences and secrets of his client,[139] and in a sense, are the lawyer's defenses to an accusation that he has violated this ethical duty.

A lawyer may reveal the "confidences" or "secrets" of his client when the client has consented to it after full disclosure by the attorney.[140] Full disclosure entails a complete, detailed[141] revelation of what information is going to be divulged, and probably includes informing the client of the purpose in divulging it, since consent is defined as a voluntary acceptance of what is done or proposed to be done by another,[142] and a person cannot consent to what the lawyer intends to do, unless he is so informed. The client's consent to the revelation of information for one purpose should not be taken

134. *Id.* No. 314 (1965).

135. Even in this situation though, if a direct question is put to the lawyer, he must advise the service that he is not in a position to answer. *Id.* It seems likely that this opinion would be different in light of DR 7-102 (B) (1) of the Code which requires a lawyer to reveal any fraud perpetrated by his client if the client refuses to do so.

136. ABA CODE, DR 4-101 (C).

137. *See* notes 170-190 and accompanying text *infra.*

138. DR 4-101 (C) simply states that a lawyer *may* reveal the information, it does not say he must reveal it. ABA CODE, DR 4-101 (C).

139. *Id.* DR 4-101 (B).

140. *Id.* DR 4-101 (C) (1).

141. *See* City of Orlando v. Evans, 132 Fla. 609, 618, 182 So. 264, 268 (1938).

142. *See* Lusby v. State, 217 Md. 191, 200, 141 A.2d 893, 898 (1958).

as a blanket consent to divulge it for any purpose.[143] In order to protect himself, the lawyer should not rely on an implied consent, since it may be difficult to prove against a client who insists he gave no such consent. Rather, the consent should be express, and, as an additional precaution, the lawyer might do well to get his client's authorization in writing.

Disclosure is also permitted when it is necessary to enforce or protect the lawyer's rights. The Code expressly authorizes disclosures that are necessary for a lawyer to establish or collect his fee.[144] To collect his fee, he may use his knowledge of property owned by the client even if this knowledge was obtained solely through his professional relationship with his client; and, if grounds for attachment exist, he may attach the property to compel his client to pay his just fee.[145]

Information gained solely because of the attorney-client relationship may also be used by the attorney to defend himself or his employees against an accusation of wrongful conduct.[146] This provision of the Code was recently applied in the case of *Meyerhoof v. Empire Fire & Marine Insurance Co.*[147] In this case, an attorney resigned from a law firm because of the firm's unwillingness to disclose a $200,000 fee they were receiving on a registration statement they had filed in connection with a public offering made by one of their clients. Upon resigning, he immediately appeared before the SEC and reported the omission. His testimony was embodied in an affidavit, and when shareholders named him, among others, as a defendant in a suit charging the statement was false and misleading, the attorney furnished counsel for the shareholders with a copy of the affidavit. The court concluded the attorney's action was a proper response to the accusation of wrongful conduct, but enjoined him from disclosing any more material information except on discovery or at trial.[148] This restriction demonstrates the courts' insistence that even when it is permissible for an attorney to make a particular disclosure, the extent of the disclosure is limited by the purpose for which it is made. In this case, he could only ethically disclose that information which was necessary for his defense against the accusation.

143. *See* Eisenson Elec. Serv. Co. v. Wien, 30 Misc. 2d 926, 930, 219 N.Y.S.2d 736, 741 (1961).
144. ABA CODE, DR 4-101(C)(4).
145. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 250 (1943).
146. ABA CODE, DR 4-101(C)(4).
147. 497 F.2d 1190 (2d Cir.), *petition for cert. filed*, 43 U.S.L.W. 3148 (U.S. Sept. 18, 1974) (No. 292).
148. *Id.* at 1195-96.

The lawyer may also reveal the confidences or secrets of his client when they indicate that the client intends to commit a future crime.[149] "Crime" is not defined in the Code, but it generally refers to "those wrongs which the government notices as injurious to the public, and punishes in what is called a 'criminal proceeding.' "[150] In Pennsylvania, such a revelation is within the lawyer's discretion,[151] but the ABA Project on Standards for Criminal Justice[152] advises the lawyer "he must do so if the contemplated crime is one which would seriously endanger the life or safety of any person or corrupt the processes of the courts and the lawyer believes such action on his part is necessary to prevent it."[153] This standard is recommended by the ABA as a guide "to honorable practice," but failure to conform to it will not subject an attorney to disciplinary action.[154]

Notwithstanding the non-obligatory nature of this provision, some courts impose criminal penalties on an attorney for failing to reveal his client's intention to commit a crime. *In re Callan*,[155] a recent New Jersey case, is an example. The attorneys' client, a tenant association, had withheld rent and placed it in a rent strike fund. The court ordered the association not to disburse the money until it was determined at an upcoming hearing who had the legitimate right to the fund. Prior to the hearing the attorneys learned that their clients intended to distribute the fund, but did not inform the court of this until the day of the hearing, after its distribution. The court concluded the attorneys had an absolute duty to inform the court of their client's intention to violate the court order and rejected the attorney-client privilege defense saying, "[n]o one rationally expects the law to protect from disclosure a deliberate plan to defy the law and deprive another of his rights. . . ."[156] The attorneys were found in contempt of court. If this case is any indication of judicial temperament, attorneys should beware that courts

149. ABA CODE, DR 4-101(C)(3). How certain must a lawyer be that his client intends to commit a crime? The ABA Committee on Professional Ethics has stated that the facts must indicate beyond a reasonable doubt that a crime will be committed. ABA COMMITTEE ON PROFESSIONAL ETHICS, OPINIONS, No. 314 (1965).

150. BLACK'S LAW DICTIONARY 445 (4th ed. 1968).

151. *See* Comparative Analysis of American Bar Association Standards for Criminal Justice with Pennsylvania Law, Rules and Legal Practice, March 1, 1974, The Defense Function at 21. This study was undertaken by the Joint Council on Criminal Justice Standards which was created in 1972 by the Pennsylvania Bar Association and the Conference of State Trial Judges.

152. ABA, THE PROSECUTION AND THE DEFENSE FUNCTION (Approved Draft, 1971).

153. *Id. The Defense Function* § 3.7(d).

154. *Id.* at 10.

155. 122 N.J. Super. 479, 300 A.2d 868, *aff'd*, 126 N.J. Super. 103, 312 A.2d 881 (1973).

156. 122 N.J. Super. at 496, 300 A.2d at 877.

may impose a duty more stringent than embodied in the Code, at least where violation of court orders are concerned.

One area where confusion abounds concerns an attorney's responsibility when he knows his client intends to perjure himself.[157] Perjury is a crime[158] and, seemingly, a lawyer has the *discretion* to reveal his client's intention to commit it.[159] But is such disclosure discretionary or mandatory? For criminal defense attorneys, the ABA has explicitly outlined how to approach the problem.[160] If the defendant insists on perjuring himself, the attorney must withdraw from the case if possible.[161] If withdrawal is not possible,[162] then he must allow the defendant to take the stand,[163] and must confine his examination to identifying the witness as the defendant, then permit him to make his statement.[164] No direct examination of the witness in the conventional sense is permissible, nor may an attorney argue the false facts to the jury or recite or rely on them in his closing argument.[165] To do so would be "unprofessional conduct"[166] and may subject him to discipline.[167]

For an attorney involved in civil litigation the course, while not explicitly charted, seems clear. The Code requires an attorney to withdraw from employment if "[h]e knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule."[168] DR 7-102(A) provides that a lawyer shall not:

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157. Reichstein, *The Criminal Law Practitioner's Dilemma: What Should The Lawyer Do When His Client Intends To Testify Falsely?*, 60 J. CRIM. L.C. & P.S. 1 (1970). Reichstein divided attorneys into two groups: the first contained a cross-section sampling of one hundred and one Chicago attorneys; the second consisted of twenty-four attorneys on the Committee of Professional Ethics of the Chicago Bar Association. Both groups were asked whether they approved of permitting a client, whom the attorney knows is guilty, to take the stand to deny his guilt. In the random sample, 58% of the lawyers disapproved, 35% approved and 8% were undecided. In the ethics group, 46% disapproved, 41% approved, and 13% were undecided.

158. PA. STAT. ANN. tit. 18, § 4902 (1973).

159. ABA CODE, DR 4-101(C)(3).

160. ABA, THE PROSECUTION AND THE DEFENSE FUNCTION, *The Defense Function* § 7.7.

161. *Id.* § 7.7(b).

162. Withdrawal may not be possible if trial has begun or is soon to begin or, in some states, because the court refuses to allow counsel to withdraw. *See, e.g.*, PA. R. CRIM. P. 303(b).

163. To protect himself the lawyer should have the defendant subscribe to a file notation, witnessed, if possible, by another lawyer, stating that he is taking the stand against his attorney's advice. ABA, THE PROSECUTION AND THE DEFENSE FUNCTION, *The Defense Function* § 7.7, Comment at 277.

164. *Id.* § 7.7(c).

165. *Id.*

166. *Id.*

167. *Id.* at 10.

168. ABA CODE, DR 2-110(B)(2).

(4) Knowingly use perjured testimony or false evidence.

. . . .

(6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.

(7) Counsel or assist his client in conduct that the lawyer knows to be illegal. . . .

Facilitating the use of perjured testimony by putting a client on the stand knowing he intends to perjure himself appears to violate all three of the above provisions, which leads to the logical conclusion that the attorney should withdraw. It is difficult to reconcile the two different approaches to this problem, one for the criminal attorney and one for the civil attorney, especially in light of the comment of the ABA Project on Standards For Criminal Justice, which states, "This [provision] takes into account DR 7-102(A)(4) and (7) of the Code of Professional Responsibility."[169] The most plausible justification for the different treatment is that the voluntary nature of a civil trial for a plaintiff and the absence of criminal penalties for a defendant might preclude a finding that withdrawal would be too prejudicial to the client in a civil case, and so prevent the necessity of letting the client take the stand. In any case, it is unlikely that the Disciplinary Board would approve of such conduct, and if the situation should arise the attorney should withdraw to protect himself.

C. Information a Lawyer Must Disclose

The Code permits a lawyer to reveal the "[c]onfidences or secrets [of his client] when permitted under Disciplinary Rules or required by law or court order."[170] There is one situation under the Disciplinary Rules where an attorney has the affirmative duty to do so: DR 7-102(B)(1) provides:

> 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.[171]

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169. ABA, THE PROSECUTION AND THE DEFENSE FUNCTION, *The Defense Function*, at 18 (Supp.).

170. ABA CODE, DR 4-101(C)(2).

171. Not all states have adopted DR 7-102(B)(1) in the form originally proposed. Montana has modified it to require disclosure only to the court. Washington permits disclosure to the affected party but does not require it. The District of Columbia only requires an attorney to call upon the client to rectify the fraud, but does not require the attorney to reveal it if the client refuses. Lipman, *The SEC's Reluctant Police Force: A New Role For Lawyers*, 49 N.Y.U.L. REV. 437, 455 (1974). Pennsylvania has adopted it as originally proposed. PA. R. CIV. PROC. 205.

A recent amendment to the Code, effective March 1, 1974, but not yet adopted in Pennsylvania, exempts information gained through privileged communications from the duty to reveal.[172]

The parameters of DR 7-102(B)(1) are as yet undefined and uncertain. Generally, fraud entails any *"intentional* perversion of truth."[173] But "actionable fraud" may also result from *recklessly* asserting something without any knowledge of its truth.[174] And fraud under the securities laws is sometimes measured by a negligence standard.[175] While it is likely the fraud which is the subject of DR 7-102(B)(1) is intentional fraud,[176] this is not explicit in the Code. Nor is the meaning of "clearly establishing" explicit, but it seems likely that this refers to conclusive proof.[177] It is submitted that given the nature of the enterprise of disciplining our legal colleagues there will be reluctance to hold a fellow lawyer accountable absent the most flagrant violation of this rule, that is, absent his failure to dislclose his client's *intentional* fraud when the information *conclusively* established its commission.

This duty to disclose affects both general and specialized practices of law. In general practice, there has been heated discussion[178] over whether the attorney who knows his client *has* committed perjury must inform the court. There is no doubt that actively advising or employing perjured testimony will result in severe discipline.[179] Likewise, courts have imposed professional disci-

172. ABA 1974 MIDYEAR MEETING, SUMMARY AND REPORTS 3 (1974). The text of the amendment appears in *id.*, document 127, at 8. For discussion of information protected as privileged communications *see* notes 20-49 and accompanying text *supra.*

173. BLACK'S LAW DICTIONARY 788 (4th ed. 1968) (emphasis added).

174. *Id.* at 51.

175. *E.g.*, SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082 (2d Cir. 1972).

176. *See* Lipman, *supra* note 171 at 461.

177. "Clearly" has been interpreted as meaning "unmistakably." Johnson v. Grady County, 50 Okla. 188, 205, 150 P. 497, 502 (1965). "Establish" is usually interpreted as "to settle or fix firmly." Thompson v. United States, 283 F. 895, 899 (3d Cir. 1922). Combining the two interpretations, the meaning to settle firmly and unmistakably is arrived at, which connotes conclusive proof.

178. *See Standards of Conduct for Prosecution and Defense Personnel: A Symposium,* 5 AM. CRIM. L.Q. 8 (1966); *Symposium on Professional Ethics,* 64 MICH. L. REV. 1469 (1966).

179. See, e.g., In re Palmieri, 176 App. Div. 58, 162 N.Y.S. 799, *rev'd,* 221 N.Y. 611, 117 N.E. 1078 (1917) (attorney disbarred for using a witness' statement which he knew to be false in his argument to the jury; reversed for insufficient evidence of intentional misconduct); *In re* Hardenbrook, 135 App. Div. 634, 121 N.Y.S. 250 (1909), *aff'd,* 199 N.Y. 539, 92 N.E. 1086 (1910) (attorney disbarred for calling his client to testify knowing he had given false testimony the previous day).

pline upon attorneys for tacitly permitting their client to testify falsely.[180] DR 7-102(b)(1), as it currently reads in Pennsylvania, reinforces these decisions. But the recent amendment exempting privileged communications,[181] which is not yet effective in Pennsylvania, clouds the resolution of this issue because often what clearly establishes the client's perjury is that the testimony he gives is inconsistent with what he has told the attorney. If what he has told the attorney is a privileged communication, it is possible the attorney will be precluded from revealing the fraud.

A specialized practice of law that has most acutely felt the sting of DR 7-102(B)(1) is the securities bar.[182] One commentator[183] asserts that the SEC relied heavily on this provision in the much publicized complaint against the *National Student Marketing Corporation*,[184] where it sought to impose upon attorneys the duty to protect the investing public at the expense of their clients.

The Code also permits an attorney to make any disclosure that he is "required by law or court order" to make.[185] What situations are encompassed by the phrase "required by law" is uncertain,[186] but there is no problem understanding what situations are embraced by the phrase "required by court order." When ordered by a court to reveal information an attorney has no ethical obligation to refuse,[187] and failure to comply will probably result in a contempt citation. Although there is no ethical requirement to refuse, one judge[188] urges any attorney who believes information which

180. *E.g., In re* Carroll, 244 S.W.2d 474 (Ky. 1951) (attorney suspended for ninety days for permitting his client in a divorce proceeding to falsely state he owned no property except an old automobile); *In re* Stein, 1 N.J. 228, 62 A.2d 801 (1949) (attorney disbarred for failing to inform the court that a former client was being coached by another attorney to testify falsely to prove desertion to obtain a divorce); *In re* King, 7 Utah 2d 258, 322 P.2d 1095 (1958) (attorney suspended for six months for permitting his client to testify falsely to dates and places where an alleged waiver of notice of a director's meeting had occurred).

181. *See* note 172 *supra.*

182. *See* Goldberg, *Policing Responsibilities of the Securities Bar: The Attorney-Client Relationship and the Code of Professional Responsibility—Considerations for Expertizing Securities Attorneys*, 19 N.Y.L.F. 221 (1973); Lipman, *supra* note 171.

183. Goldberg, *supra* note 182, at 236.

184. SEC v. Nat'l Student Marking Corp., Civil No. 225-72 (D.D.C., filed Feb. 3, 1972 [1971-1972 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 93,360 *noted in* 23 CATH. U.L. REV. 122 (1973).

185. ABA CODE, DR 4-101(C)(2).

186. "Required by law" is generally construed to refer to statutory law. *E.g., In re* Sorenson's Estate, 195 Misc. 742, 745, 91 N.Y.S.2d 220, 224 (1949). In Pennsylvania, the Code of Professional Responsibility has been adopted as a rule of civil procedure. PA. R. CIV. P. 205. Rules of civil procedure have the effect of statute in Pennsylvania. Iron City Sand & Gravel Co. v. Zoning Bd. of Adjustment, 418 Pa. 145, 208 A.2d 836 (1965); Lojeski v. Quink, 202 Pa. Super. 471, 198 A.2d 410 (1964). So arguably, any disclosure required under the Code is a disclosure required by law.

187. *See* ABA CODE, DR 4-101(C)(2).

188. People v. Kor, 129 Cal. App. 2d 436, 447, 277 P.2d 94, 101 (1954) (concurring opinion by Presiding Judge Shinn).

a court has ordered him to reveal to be privileged to take the contempt citation and appeal to a higher court. This course should not be too threatening to an attorney. If the appellate court agrees the desired information was privileged, he is vindicated. And even if it does not agree, it is unlikely that any court will impose a very severe penalty on a lawyer who honestly believes the information to be privileged[189] unless the attorney-client privilege is clearly not applicable to the facts of the case.[190]

IV. Conclusion

While only information protected by the attorney-client privilege is free from compelled disclosure, an attorney's ethical duty to preserve information obtained because of his relation with a client extends also to information not entitled to the protection of the privilege—his client's secrets. The attorney must preserve this information unless certain circumstances, enumerated in the Code, exist. Failure to do so will result in discipline. Courts in both criminal and civil litigation strictly enforce this duty to protect the client and often disqualify attorneys where a violation of it is possible.

If one of the exceptional circumstances listed in DR 4-101(C) exists, the attorney *may* reveal the information but only to the extent necessary to accomplish the purpose for which the revelation is permitted. No disciplinary action will be taken against an attorney who makes no disclosure when so permitted, and the most likely function served by these exceptions is as a defense for attorneys accused of violating their duty to their client.

There is only one situation listed in the Code where an attorney has an affirmative duty to make a disclosure: when he learns that his client has committed a fraud in the course of the representation.[191] And this too was circumscribed by a recent amendment to the Code, not yet effective in Pennsylvania, which exempts the attorney from this duty if the information is gained as a privileged communication. The nature of this duty remains nebulous.

Practically speaking, many of the problems surrounding the duty to preserve information obtained from a client will be resolved

189. "An attorney is entitled to consideration of a claimed privilege not to disclose information which he honestly regards as confidential and should not stand in danger of imprisonment for asserting respectfully what he considers to be lawful rights." Appeal of United States Securities & Exchange Comm'n, 226 F.2d 501, 520 (6th Cir. 1955).

190. Dike v. Dike, 75 Wash. 2d 1, 448 P.2d 490 (1968).

191. ABA Code, DR 7-102(b)(1).

privately. But all lawyers should be aware that their duty to their client is not absolute. And in this era of declining public confidence in the bar, all lawyers should strive to insure that the duty of confidentiality to a client does not eclipse the rational purposes of that obligation. Hopefully, this Comment adequately apprises the lawyer of the limits of his obligation.

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