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REEVALUATING THE DUTY OF CONFIDENTIALITY

CHRISTINE HARRINGTON

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I. INTRODUCTION

In 2001 and 2002, the financial world was racked by a series of corporate scandals. One after another, Enron, Worldcom, and other publicly traded companies, were revealed to have engaged in widespread fraudulent conduct, costing investors and others in the billions and billions of dollars.[1] As information of the improprieties came to light, it raised the possibility that some lawyers representing these companies were engaged directly in the wrongdoing.[2] Many other lawyers apparently stood silently by even though they presumably had extensive knowledge of corporate wrongdoing and could have prevented these staggering losses. Under the American Bar Association (ABA) rules governing legal ethics, not only did these lawyers not have a duty to disclose this wrongdoing, they were affirmatively prohibited from doing so.[3]

Just a short while earlier, the ABA had had the opportunity but chose not to expand the exception to the duty of confidentiality to permit disclosures to prevent financial harm. In mid-1997, the ABA created the Commission on Evaluation of the Rules of Professional Conduct (Ethics 2000 Commission) to reconsider the *Model Rules Of Professional Conduct.*[4] One of the major topics the ABA charged the Commission with addressing was the lawyer's duty of confidentiality.[5] The Commission proposed changes to the rule governing confidentiality that would expand the number of permissible disclo-

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1. Floyd Norris, *Enron's Collapse: News Analysis; For Andersen and Enron, the Questions Just Keep Coming,* N.Y. TIMES, Jan. 16, 2002, at C1; Rebecca Blumenstein, *Worldcom Group's Profit Slides 85%. MCI Swings into Loss,* WALL ST. J., July 27, 2001, at B2.

2. Amended Complaint, Newby v. Enron Corp., No. H-01-3624 (S.D. Tex. filed Apr. 8, 2002).

3. MODEL RULES OF PROF'L CONDUCT R. 1.6 (b) (1998) (amended 2002).

4. ETHICS 2000 COMMISSION, ABA, *Creation of the Commission: Executive Summary, at* http://www.abanet.org/cpr/e2k-exec_summ.html (last visited Oct. 24, 2003) (on file with the New York Law School Law Review).

5. *Id.*

sures.[6] The proposed Rule would have allowed for disclosure to prevent "substantial bodily harm or death" to third parties, regardless of the action's criminality.[7] It also permitted attorneys to disclose client information when there was a risk of "substantial financial harm" to third parties.[8]

The ABA House of Delegates voted to accept the proposal that would allow disclosure to prevent bodily harm in August 2001 and formally ratified the proposal in February 2002.[9] The House of Delegates overwhelmingly rejected the proposal to allow disclosure to prevent economic harm.[10]

This Note argues that disclosure of client information to prevent economic harm resulting from illegal or fraudulent conduct should be permitted in the corporate client context.[11] In particular, it argues that the traditional values that underlie the duty of confidentiality have less weight in the corporate context. Part II of this Note examines the traditional justifications for the duty. It also discusses the historical development of the duty of confidentiality. Part III explores the Ethics 2000 Commission and the reasons for its creation. It further analyzes the changes that have been suggested and were approved to the ABA rule governing confidentiality. Part IV argues that the traditional justifications are not as compelling when dealing with a corporate client, as opposed to an individual client. Therefore, a different standard of confidentiality should be applied in the context of the attorney/corporate-client relationship. In July 2002, the ABA Task Force on Corporate Responsibility recommended that the ABA recognize an exception to the duty of confidentiality to prevent substantial economic harm to third parties

6. ETHICS 2000 COMMISSION, ABA, *Model Rule 1.6:Reporter's Explanation of Changes, at* http://abanet.org/cpr/e2k-rule16rem.html (last visited Oct. 24 2003).

7. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2002).

8. ETHICS 2000 COMMISSION, ABA, *Model Rule 1.6:Reporter's Explanation of Changes, at* http://abanet.org/cpr/e2k-rule16rem.html (last visited Oct. 24, 2003).

9. Mark Hansen, *Hot Off the Press: Revised Model Ethics Rules Are Nearly Ready for State Scrutiny*, 88 A.B.A.J. 38 (June 2002).

10. Al Swanson, *ABA Ethics Debate Stalls*, UNITED PRESS INT'L, August 7, 2001.

11. When addressing corporate clients this note presupposes that the corporate client is a publicly traded company. Although the arguments for the distinction between corporate and individual clients can be made for private companies as well, for purposes of analysis this note will focus on public companies where the arguments are clearest.

from a client's illegal or fraudulent activity.[12] Thus, the ABA should seize this opportunity to permit such disclosures in the context of corporate representation.[13]

II. History and Justifications of the Duty of Confidentiality

The duty of confidentiality has been a basic dimension of the attorney-client relationship since its inception in England.[14] It has long been considered a cornerstone of the attorney-client relationship.[15] The *Model Rules of Professional Conduct*, approved by the ABA in 1983, state a general prohibition against disclosing client information: "A lawyer shall not reveal information relating to the representation of a client."[16] The *Model Rules* cite two related bodies of law as the source for this duty: the attorney-client privilege, which applies in the evidentiary setting, and the ethical rules, which apply generally.[17] This ethical obligation requires the "lawyer to hold inviolate confidential information of the client."[18] This section will explore the traditional justifications for the duty. It will also trace how the duty evolved in the history of the bar's regulation of lawyers.

A. Traditional Justifications

Throughout the history of the attorney-client relationship, different rationales have been advanced to justify the duty of confidentiality. The primary justifications that have been advanced in legal scholarship and sources are: the duty of confidentiality as instrumental to the workings of the adversarial system, the duty as an out-

12. James H. Cheek, ABA, *Preliminary Report of the American Bar Association Task Force on Corporate Responsibility*, July 16, 2002, 58 Bus. Law. 189 (2002).

13. The Task Force suggested that the ABA make disclosure mandatory, rather than permissive, in response to fraudulent or illegal activity by a client. The Task Force suggested making the disclosure mandatory because the reasons for allowing disclosure are so strong that it concluded disclosure should be mandatory. Of course, this is not suggesting that lawyers impose moral judgments on the legitimate business actions of their clients, such as hostile takeovers which may produce substantial economic harm to someone or disclosing that a client plans on writing down its profits in its quarterly reports.

14. Charles W. Wolfram, Modern Legal Ethics, §6.1.1, at 242 (1986).

15. *Id.*

16. Model Rules of Prof'l Conduct R. 1.6 (a) (1998) (amended 2002).

17. Model Rules of Prof'l Conduct R. 1.6 cmt. 5 (1998) (amended 2002).

18. Model Rules of Prof'l Conduct R. 1.6 cmt. 2 (1998) (amended 2002).

growth of the lawyer's duty of loyalty, and confidentiality as necessary to preserve constitutional rights in the criminal arena.[19]

The duty has been justified as playing an instrumental role in the adversarial system.[20] Under this rationale, clients need to "communicate fully and frankly with the lawyer."[21] The free flow of information allows an attorney to consider the issues of a particular client's case in an informed, intelligent manner. Complete knowledge of the facts enables a lawyer to provide the appropriate legal assistance.[22]

Not only does full disclosure by a client in anticipation of confidentiality assist a lawyer in acting as an advocate, it also allows a lawyer to act as an advisor.[23] Therefore, knowledge of particular facts provide the lawyer with a more informed basis to advise the client on how to comply with the law.

A second justification for the duty of confidentiality is that it is required by a lawyer's duty of loyalty to the client.[24] As an agent of a client, a lawyer has a fiduciary duty to the client that requires him to keep sensitive information secret.[25] Lawyers, even more so than the typical agent, are privileged to "embarrassing or legally damaging subject matter,"[26] which a client would not normally be willing to disclose: "Clients trust their lawyers, and lawyers want to deserve that trust."[27] The lawyer's role has been defined as that of a "special purpose friend" to the client.[28] This role has become increas-

19. *See generally* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 192-197 (1988); MONROE FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 1-5 (1975).

20. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 2 (1998) (amended 2002).

21. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 4 (1998) (amended 2002).

22. *See* FREEDMAN, *supra* note 19, 1-8. Freedman uses the illustration of a woman who kills her husband in what would constitute self-defense. Without complete disclosure to the lawyer she may never know she has this defense. *Id.* at 4-5.

23. *Id.* at 4-8.

24. *See* LUBAN, *supra* note 19, at 185-189. Luban argues that "in ordinary circumstances, a lawyer must keep the client's confidences as a matter of elemental decency, just as we must keep the confidences of a friend." *Id.* at 186.

25. WOLFRAM, *supra* note 14, §6.1.1.

26. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 4. (1998) (amended 2002).

27. LUBAN, *supra* note 19, at 186.

28. Charles Fried, *Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L. J. 1060 (1976). Fried uses the friend metaphor to reject a utilitarian theory that a lawyer should promote general societal benefit. Just as an individual promotes the benefit of those close to him, a lawyer does the same for his client who has become close to him as his "special purpose friend."

ingly important during the last century, as a complex system of laws have developed, which require legal expertise to navigate them.[29] The legal system recognizes the legal rights of the individual, and consequently the system "must also create and support the specific role of the legal friend."[30]

The dignitary justification has increased force in the criminal realm, where the attorney-client relationship is afforded special protections. These protections provide the third rationale for the duty of confidentiality in the criminal context. A lawyer's role as a "special purpose friend" enables clients to exercise their rights under the Constitution and preserves the associated human dignities.[31] Confidentiality is essential to a lawyer's fulfillment of this role and a client's vindication of these rights.[32] In particular, confidentiality serves to safeguard the Fifth Amendment right against self-incrimination and the Sixth Amendment right to effective assistance of counsel.[33]

The Fifth Amendment prevents the government from "compel[ing the defendant] in any criminal case to be a witness against himself."[34] The privilege against self-incrimination serves to balance the power between the accused and the state, and it limits the chances of testimony being coerced.[35] It also lessens the possibility of innocent defendants' being convicted for poor performance on the stand.[36]

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29. *See* Mary C. Daly, *Symposium: Executing The Wrong Person: The Professionals' Ethical Dilemmas: To Betray Once? To Betray Twice? Reflections on Confidentiality, a Guilty Client, an Innocent Condemned Man, and an Ethics-Minded Defense Counsel,* 29 LOY. L.A. L. REV. 1611, 1623-24 (1996).

30. Fried, *supra* note 28, at 1073.

31. *See* Lee Pizzimenti, *The Lawyer's Duty To Warn Clients About Limits On Confidentiality,* 39 CATH. U.L. REV. 441, 451-463 (1990).

32. FREEDMAN, *supra* note 19, at 1-8.

33. *Id.*

34. U.S. CONST. amend. V.

35. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE, § 26.03 (Fifth Ed. 2002). The privilege against self-incrimination predates the United States and has its origins in English common law. It was originally believed to be a response to the deplorable inquisitorial approach of religious persecution in England during the 16th and 17th centuries. A more recent theory portrays the privilege as being part of the switch to an adversarial system of justice in the end of the 18th century. *See* John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law,* 92 MICH. L REV. 1047 (1994).

36. DRESSLER, *supra* note 35, § 26.

The Sixth Amendment further guarantees the assistance of counsel in presenting a defense in all criminal prosecutions.[37] The Sixth Amendment right to counsel begins when the defendant is formally charged.[38] In *U.S. v. Marion*, the Supreme Court asserted that its interpretation of the amendment as being "far from mere formalism. It is the starting point of our whole system of adversary criminal justice."[39]

Basic moral principles of privacy, personal autonomy and human dignity underlie both of these constitutional protections afforded to defendants in criminal proceedings.[40] Our criminal justice system is built on respect for the rights of the individual.[41] One of the results of this respect for the individual, as discussed above, is that lawyers are required to take on this role with the necessary loyalty.[42] The right to counsel preserves human dignity by providing that "no person is required to stand alone against the awesome power"[43] of the state. It allows defendants to tell their story, even though they do not personally have the skills to tell it in the appropriate legal context: "it gives voice to the legally mute."[44] The right against self-incrimination prevents a person from being used "as the means of his own destruction."[45] These two rights applied simultaneously can be considered a "legal right to compel [an] attorney's silence."[46] Allowing an attorney to disclose confidential information

37. U.S. CONST. amend. VI.

38. Kirby v. Illinois, 406 U.S. 682 (1972). There is a Fifth Amendment right to counsel, otherwise known as a *Miranda* right to counsel, which attaches earlier if the suspect has been taken into custody for interrogation, but counsel's role there is only to ensure that the suspect has the opportunity to assert his right against self-incrimination. For further discussion of this distinction *see* Dressler, *supra* note 35, § 25.04, at 440.

39. U.S. v. Marion, 404 U.S. 307 (1971).

40. DRESSLER, *supra* note 35, at 467.

41. FREEDMAN, *supra* note 19, at 2-6. Freedman asserts that the rights of the individual are afforded more respect than the search for the truth. He argues that a number of individual rights are afforded protection even though they do not further the search for truth, i.e. prohibitions against unlawful searches, the right against self-incrimination, etc.

42. *See* Fried , *supra* note 28, and accompanying text.

43. FREEDMAN, *supra* note 19, at 4.

44. LUBAN, *supra* note 19, at 193.

45. Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 892 (1995).

46. LUBAN, *supra* note 19, at 196. Luban uses Alan Donagan's discussion of moral and legal rights, recognizing that the defendant may not have a moral right to compel

would force the client to trade one right for the other; this essentially denies a client one of the rights.[47]

All three of the justifications have been invoked as a basis for the duty of confidentiality. Each justification for the duty—as an instrumental part of the adversarial system, as an outgrowth of the lawyer's duty of loyalty, and as necessary to preserve constitutional rights in the criminal arena—has been developed and clarified over time. The evolution of these justifications has resulted in the expansion of the duty since the early 20th century.[48]

B. Development of the Duty

As the traditional justifications have been clarified and have become widely accepted, the duty of confidentiality has received growing recognition as an important professional norm. Along with this recognition, there has also been the articulation of competing concerns that suggest, and may even require, limitations on the duty. These competing concerns include potential harm to third parties.[49] In an attempt to articulate a duty that serves the traditional justifications, while still heeding competing concerns, the ABA's official pronouncements regarding the duty have been inconsistent and confusing. The history of the duty of confidentiality has been marred by self-contradiction.

The Canons

In 1908, the ABA adopted its first code of ethics, the *Canons of Professional Ethics*.[50] Canon 6 protected a client's "secrets or confidences."[51] In 1928, the *Canons* were amended to include Canon 37, which explicitly stated that a lawyer was to "preserve the client's

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the attorney's silence, but the attorney must remain silent to avoid the legal right from being diminished.

47. *Id.*

48. *See generally*, MONROE FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 87-108 (MATTHEW BENDER 1990).

49. Another competing concern, which is not addressed in this note, is the lawyer's role as an officer of the court. For an interesting discussion of the conflicts that arise between the lawyer's role as officer of the court and duty of confidentiality see Jocelyn N. Sands & Roy Conn, III, Note, *Confidentiality and the Lawyer's Conflicting Duty*, 27 How. L.J. 329 (1984).

50. FREEDMAN, *supra* note 48, at 87-108.

51. CANONS OF PROF'L ETHICS Canon 6 (1908).

confidences."[52] Contradictions throughout the *Canons* soon became apparent.[53] Although the *Canons* called for confidences to be preserved, there were various Canons that required disclosure of confidential information; Canon 37 had a "future crime" exception; Canon 15 prohibited "any manner of fraud or chicane"; Canon 22 required candor to the tribunal; Canon 29 required perjury to be disclosed to prosecuting authorities; and Canon 41 required the lawyer to disclose fraud to the other party.[54] The differences among these exceptions were ultimately resolved through a series of ABA opinions, which sought to strike a balance between the duty and competing concerns. Through these opinions, the ABA clarified that confidentiality was required in many situations where the language of the *Canons* arguably suggested otherwise.[55]

The Code

In 1969, the ABA replaced the *Canons* with the *Model Code of Professional Responsibility.* The ambiguities surrounding confidentiality resurfaced again under the *Code.*[56] Canon 4 of the *Code* stated that a lawyer should "preserve the confidences and secrets of his client."[57] Ethical Consideration 4-1 further recognized that "proper functioning of the legal system require[d] the preservation by the lawyer of confidences."[58] However, the duty of confidentiality under the *Code* was not absolute, and it required disclosure in certain situations. Disciplinary Rule 7-102(b)(1) originally called for the lawyer to reveal client fraud on third parties and the tribunal.[59] It was later amended in 1974 to require disclosure "except when the

52. CANONS OF PROF'L ETHICS Canon 37 (1928).

53. FREEDMAN, *supra* note 48, at 91-92.

54. *Id.* CANONS OF PROF'L ETHICS Canon 37, Canon 15, Canon 22, Canon 29, Canon 41 (1928).

55. *See, e.g.,* ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 778 (1964). The Committee called on a lawyer to urge the client to disclose in situations of client fraud on third parties, but not to reveal.

56. FREEDMAN, *supra* note 48, at 93.

57. MODEL CODE OF PROF'L RESPONSIBILITY Canon 4 (1969). The Code contained three types of assertions; Canons that set out general principles from which the Ethical Consideration, objectives and aspirations of the profession, and Disciplinary Rules, the minimum standard, were derived.

58. MODEL CODE OF PROF'L RESPONSIBILITY EC 4-1 (1981).

59. MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102(b)1 (1981).

information is protected as a privileged communication."[60] ABA Opinion 341 interpreted the new amendment as forbidding "the lawyer to reveal the client's fraud on a tribunal or third party if to do so would be 'embarrassing' to the client."[61] With this interpretation the ABA reverted back to the same broad conception of confidentiality that had applied under the *Canons*.[62]

The Model Rules

When the ABA adopted the *Model Rules of Professional Conduct* to replace the *Code* in 1983, the duty of confidentiality was a hotly debated topic.[63] The ABA Commission that proposed the *Model Rules* suggested a broader range of permitted exceptions to the duty of confidentiality than had existed under the *Code*.[64] Nevertheless, the ABA eventually adopted a rule that only allowed disclosure in limited circumstances to prevent harm to third parties: specifically to prevent a crime that will "result in imminent death or substantial bodily harm."[65]

The Commission, known as the "Kutak Commission," after its chairman Robert Kutak, was convened in 1977 to respond to various concerns within the legal profession.[66] The first concern involved shoring up the public image of the legal profession.[67] The profession had been criticized for being exclusively client-centered and motivated by an overly partisan ethos.[68] The public image of the profession had also suffered a severe blow because of the number of lawyers implicated in the Watergate scandal.[69]

60. MODEL CODE OF PROF'L RESPONSIBILITY (1981).

61. FREEDMAN, *supra* note 48, at 95.

62. *Id.* at 87-108.

63. LUBAN, *supra* note 19, at 180-81.

64. FREEDMAN, *supra* note 48, at 100.

65. MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (1998) (amended 2002). The Rule also allows for disclosure when the lawyer is defending or bringing possible legal or ethical claims. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2),(3) (1998) (amended 2002). This note does not discuss the other limited situations in which the ABA allows disclosure of client information.

66. Theodore Schneyer, *Professionalism as Politics, in* LAWYERS' IDEALS/ LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 95, 104 (Robert L. Nelson, David M. Trubek, & Rayman L. Solomon, eds., 1992).

67. *Id.*

68. FREEDMAN, *supra* note 48, at 96.

69. Schneyer, *supra* note 66, at 104.

The second goal was to solidify the role of the ABA as the primary promulgator of ethical standards for the profession.[70] The primacy of the ABA was threatened because of Supreme Court decisions rejecting some of the ABA rules.[71] While many states had readily adopted the *Code*, state courts were not as responsive when it came to adopting the ABA's amendments or the opinions construing the *Code*.[72] One controversial issue that the ABA wanted to address was the whistle-blowing requirement that the SEC read into the ABA rule that governed a lawyer's conduct when a client engaged in fraud.[73]

The whistle-blowing requirement was directly relevant to the duty of confidentiality. The *Code*'s DR 7-102(B)(1) called on a lawyer to "reveal the fraud to the affected person or tribunal" when the lawyer's services had been used to perpetrate the fraud.[74] In 1972, the Securities Exchange Commission used this disciplinary rule to strengthen the case against two prominent law firms that had learned of fraud during a merger deal and failed to notify the shareholders.[75] The ABA responded by amending the *Code* to make it clear that the disclosure requirement was subordinate to the lawyer's duty of confidentiality and later construed the amendment to remove any disclosure duty.[76] Unfortunately, many states never adopted the amendment.[77]

The twin goals of the Kutak Commission are symptomatic of the confidentiality debate as a whole. The profession was trying, on the one hand, to refute criticisms that lawyers were overly partisan, while on the other, still preserving the lawyer's and client's interests

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70. *Id.*

71. Bates v. State Bar of Ariz., 433 U.S. 350 (1977) (narrowing the scope of permissible limitations on lawyer advertising on First Amendment grounds); Goldfarb v. Va. State Bar, 421 U.S. 773 (1975) (banning the enforcement of local minimum fee schedules on antitrust grounds).

72. Schneyer, *supra* note 66, at 104.

73. *Id.* at 105.

74. MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102(B)(1) (1969) (amended 1974).

75. SEC v. Nat'l Student Mktg. Corp., 457 F. Supp. 682, (D.D.C. 1978); *see also* Schneyer, *supra* note 66, at 105.

76. Schneyer, *supra* note 66, at 105.

77. *Id.*

in not requiring whistle-blowing.[78] Ultimately, the Kutak Commission turned out to be a more reform-minded commission than was originally expected.[79] Its original proposal included changes that would allow attorneys to disclose client information to prevent "substantial injury to the financial interest or property of another" and that would require attorneys to disclose perjury to the tribunal.[80] The House of Delegates accepted the proposed change that would require attorneys to inform the court if their clients committed fraud on the court.[81] However, the House rejected the provision that would allow disclosure to prevent economic harm in favor of a narrower rule that allowed for disclosure only to prevent physical harm resulting from a crime.[82]

In its final form, Rule 1.6 provided minimal opportunities for lawyers to disclose client misconduct. The relevant part of Rule 1.6 reads as follows: "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."[83]

Rule 1.6, for example, would not allow a lawyer concerned about the effects of toxic dumping to disclose dumping by his corporate client. For one, toxic dumping might not be a crime, one of the conditions necessary to make disclosure permissible. Even assuming that the dumping was criminal, the lawyer would also need to prove that the harm was "imminent." Therefore, a lawyer would most likely be forced to remain silent in this situation.

The Rule also required silence when dealing with an individual client capable of committing a crime that was not going to cause "imminent bodily harm, or death"[84] or if the crime had already been committed. An example of this would be a client who has put poison in the water supply of a city. Because the crime has already been committed the lawyer is compelled to remain silent.

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78. *Id.* The ABA was particularly responsive to the concerns of the elite corporate bar.

79. Schneyer, *supra* note 66, at 107-113.

80. MODEL RULES OF PROF'L CONDUCT (Discussion Draft Jan. 30, 1980).

81. MODEL RULES OF PROF'L CONDUCT R. 3.3(a)4 (2002).

82. FREEDMAN, *supra* note 48, at 99.

83. MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (1998) (amended 2002).

84. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 15 (1998) (amended 2002).

Although the ABA rejected the proposed suggestion, the problem of preventing economic injury was addressed again a year later when the ABA adopted the Comments to the *Model Rules.*[85] The Comments to Rule 1.6 require a lawyer to withdraw from representing a client if "the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct."[86] The Comments further allow an attorney to give "notice of the fact of withdrawal" and "withdraw or disaffirm any opinion, document, affirmation, or the like."[87] Such a noisy withdrawal can serve to warn third parties of harm, without direct disclosure by the attorney.[88] These Comments allowed attorneys to "wave a red flag"[89] about issues they were previously prohibited from disclosing.[90]

The noisy withdrawal option provided for in the Comments was an unsatisfactory attempt to reach a balance between the duty of confidentiality and the competing concerns. The Comment clearly contradicts the text of the Rule. Also by being placed in the Comments, which merely serves as a guide to interpretation, the noisy withdrawal provision has little credence. As a consequence, lawyers are likely to be apprehensive about using the noisy withdrawal provision.

Although the *Model Rules* generally reflected a growing recognition of the traditional justifications for confidentiality, the underlying problems remained. The balance between the competing concern of harm to third parties and the duty of confidentiality was not satisfactorily achieved under the *Model Rules.*

III. ETHICS 2000

The creation of the Ethics 2000 Commission was prompted by continuous attacks on the current Rule 1.6.[91] As the Commission noted, the current rule was "out of step with public policy and the

85. FREEDMAN *supra* note 48, at 100.

86. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 15 (1998) (amended 2002).

87. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 16 (1998) (amended 2002).

88. *See* FREEDMAN, *supra* note 48, at 100-01.

89. Ronald D. Rotunda, *The Notice of Withdrawal and the New Rules of Professional Conduct: Blowing the Whistle and Waving the Red Flag,* 63 ORE. L. REV. 455 (1984).

90. *See* FREEDMAN, *supra* note 48, at 100-01.

91. ETHICS 2000 COMMISSION, ABA, *Creation of the Commission: Executive Summary, at* http://www.abanet.org/cpr/e2k-exec_summ.html (last visited Oct. 24, 2003) (on file with the New York Law School Law Review).

values of the legal profession as reflected in the rules currently in force in most jurisdictions."[92] The version of Rule 1.6 in the *Model Rules* was not followed in the majority of jurisdictions.[93] Most jurisdictions permitted disclosure in much broader circumstances involving client crime.[94] Some jurisdictions even mandated disclosure.[95] The state rules also varied as to when a lawyer could disclose a client's intent to commit future economic crimes.[96] The Commission sought to reconcile the differences by bringing the *Model Rules* closer to the rules that are instituted in numerous jurisdictions.[97]

The controversy over the extent of the duty of confidentiality was ignited again in August 2001 when the ABA approved some, but not all, of the proposed changes to Rule 1.6.[98] The Ethics 2000 Commission sought to resolve some of the underlying problems with the duty of confidentiality. This included more expansive exceptions to the duty of confidentiality.[99] The Commission's proposal was an attempt to make disclosure permissible under circumstances where it believed society's interests outweighed the benefit of confidentiality: "While strongly reaffirming the legal profession's commitment to the core value of confidentiality, the Commission also recognizes the overriding importance of human life and the integrity of the lawyer's own role within the legal system."[100]

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92. *Id.*

93. Attorneys' Liability Assurance Society, Inc., *Chart of Ethics Rules on Client Confidences, reprinted in* 2001 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY, at 136-144 (Foundation Press, 2001). *See also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §67 (1998).

94. Attorneys' Liability Assurance Society, Inc., *Chart of Ethics Rules on Client Confidences, reprinted in* 2001 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY, at 136-146 (Foundation Press, 2001).

95. *Id.*

96. *Id.*

97. ETHICS 2000 COMMISSION, ABA, *Model Rule 1.6:Reporter's Explanation of Changes, at* http://abanet.org/cpr/e2k-rule16rem.html (last visited)ct. 24, 2003).

98. Al Swanson, *ABA Ethics Debate Stalls,* UNITED PRESS INT'L, August 7, 2001.

99. *Id.*

100. ETHICS 2000 COMMISSION, ABA, *Model Rule 1.6: Reporter's Explanation of Changes, at* http://abanet.org/cpr/e2k-rule16rem.html (last visited Oct. 24, 2003).

A. *The Proposals*

The Commission's proposals were as expansive as the changes that were previously proposed by the Kutak Commission. The proposed changes permitted disclosure of client information to prevent both physical and economic harms.[101]

The proposed exception for prevention of physical harm permitted a lawyer much broader freedom to disclose. The proposal changed the wording to allow disclosure to "prevent reasonably certain death or substantial bodily harm."[102] This change removed the requirement that a client's actions had to be criminal. It also allowed the lawyer to disclose past client actions provided that the resulting death or substantial bodily harm occurred in the future.[103] The rule also eliminated the requirement that the death or bodily harm be "imminent," now requiring that it be "reasonably certain" death or bodily harm.[104] The new rule allowed attorneys to disclose information about a client's conduct, future or past, and irrespective of whether it was criminal to the extent the lawyer believed death or substantially injury were "reasonably certain."[105] This represented a substantial departure from the extremely narrow exception within the old Rule 1.6.[106]

Ethics 2000 also proposed exceptions to the duty that would permit disclosure in circumstances in which there was a serious risk of potential financial harm to third parties. This represented a drastic change from the text of the then-current rule that did not allow an exception for financial harms.[107] The proposal allowed for disclosure to prevent a client from committing a crime or fraud when a lawyer's services were being used or had been used in that crime or fraud.[108] They also proposed allowing a lawyer to disclose "to prevent, mitigate or rectify substantial injury to the financial inter-

101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (1998) (amended 2002).
107. *Id.* This is not addressing the noisy withdrawal permitted in the Comments of the old Rule 1.6, discussed *infra* Section 2.B.
108. ETHICS 2000 COMMISSION, ABA, *Model Rule 1.6:Reporter's Explanation of Changes, at* http://abanet.org/cpr/e2k-rule16rem.html (last visited Oct. 24, 2003).

ests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud" which the client used the lawyer's services for.[109]

B. *The New Rule*

When the ABA voted on the Ethics 2000 Commission's recommendations, it split on the different proposals.[110] The physical harm exception was approved without much opposition in the House of Delegates.[111] The economic harm provision, however, was overwhelmingly rejected by a 255 to 151 vote.[112]

As mentioned above, the physical harm exception represented a marked change from the old rule. In the situation of a lawyer representing a company dumping toxic waste, a lawyer has more discretion under the newly adopted rule. The lawyer can disclose regardless of whether the dumping was criminal or accidental.[113] It is also no longer necessary that the lawyer show that harm will be "imminent,"[114] just "reasonably certain,"[115] which is a lesser standard. Therefore, a lawyer would be able to disclose in such a situation, and it is clearly a situation that the Ethics 2000 Commission had in mind.

The Rule would also allow disclosure when dealing with an individual client who has committed a crime. For example, in the situation of a client who has put poison in the water supply of a city, a lawyer would be allowed to disclose to prevent the future harm to the users of the water supply. The lawyer would no longer be hindered by the fact that the client has already committed the crime and, therefore, prevention of the crime is not possible. The emphasis of the Rule has switched from client centered, preventing the client from committing the crime, to trying to prevent physical harm to third parties.

Overall, the ABA's recognition of a broad duty with a narrow exception to disclose client information to prevent physical harm

109. *Id.*
110. Al Swanson, *ABA Ethics Debate Stalls*, UNITED PRESS INT'L, August 7, 2001.
111. *Id.*
112. *Id.*
113. This situation is taken from Comment 6 to the new Rule 1.6.
114. MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (1998) (amended 2002).
115. MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (2002).

represents its commitment to preserving the duty and serving the traditional justifications for confidentiality. By having a narrowly tailored exception to the duty of confidentiality, the ABA acknowledged the importance of competing concerns. However, when it comes to economic harm from corporate conduct the ABA should adopt a much broader exception to the duty, because the traditional justifications have less weight in the corporate context.

IV. THE CORPORATE/INDIVIDUAL CLIENT DISTINCTION

A. The Inapplicability of the Traditional Justifications in the Corporate Context

The ABA can better serve the traditional justifications for the duty of confidentiality by adopting a rule that would distinguish between corporate and individual clients. This section will demonstrate that the traditional justifications do not establish a need for a strong duty of confidentiality in the corporate setting. Accordingly, the competing concern for economic harm to third parties resulting from illegal or fraudulent conduct, which is not given weight in the individual context, should be given weight in the corporate context.

In the individual client context, the justifications for confidentiality are very strong and the duty should be vigorously preserved.[116] However, avoiding death or serious physical harm is society's most basic public interest. Therefore, Ethics 2000's decision to allow disclosure to prevent death or serious physical harm was warranted, despite confidentiality concerns.

In contrast, the traditional justifications are not as forceful in the context of corporate representation. Corporations are entities that allow investors to do business with limited liability; in exchange for this status, corporations are forced to comply with strict legal requirements.[117] These requirements begin with the compliance

116. There seems to be a rationale to distinguish between individual clients in a criminal context and in the civil context. The traditional justifications are stronger in the criminal context. This note does not address this option, because there are practical limitations on making this distinction. In any given circumstance, a lawyer would not know if a client was going to face criminal charges.

117. HARRY G. HENN & JOHN R. ALEXANDER, LAWS OF CORPORATIONS, 145-46, (1982); *see also* Note, *Constitutional Rights of the Corporate Person,* 91 YALE L. J. 1641 (1982).

with state incorporation statutes that lay out the detailed rules for the creation of a corporation.[118] Incorporation statutes have guidelines for the simplest of matters, such as corporate names, to the most complex and determinative matters, such as defining the rights that will go along with stock.[119] As entities within the American market system, corporations are supposed to aim for transparency and accountability to ensure knowledgeable decision-making by the investing public.[120] This aim is pursued by having statutes that call for disclosure of information regarding numerous aspects of corporations' inner workings. For example, when a corporation sells its stock, the Securities Act of 1933 requires that the securities be registered with the SEC, and that substantial disclosures are made during this process.[121] The 1933 Act further requires that a prospectus be furnished to every person or entity that buys the stock.[122] Additionally, corporations must file various annual reports, which are reviewed by the SEC and made available to the public.[123] Based on these requirements and the unique status of corporations, the traditional justifications for the duty of confidentiality are not as forceful.[124]

The argument for confidentiality, as an instrumental part of the adversarial system, is not persuasive in the corporate setting.[125] Due to corporations' special status, confidentiality is not necessary to facilitate a free flow of information from the client to the lawyer.[126] Many governing agencies impose disclosure requirements on corporations, thereby forcing the corporation to keep up an ongoing dialogue with its lawyers.[127] Unlike an individual client,

118. HENN & ALEXANDER, *supra* note 117, at 12, n. 3.

119. DEL. GEN. CORP. LAW § 102 (1995); N.Y. BUS. CORP. LAW § 402 (McKinney Supp. 1997).

120. HENN & ALEXANDER, *supra* note 117, at 34.

121. 15 U.S.C. §77(e) (1982).

122. 17 C.F.R. 230.174 (2001).

123. 15 U.S.C. § 78 (l), (m) (1982).

124. LUBAN, *supra* note 19, at 206-233.

125. *Id.*

126. *Id.*

127. Banking and SEC requirements require a corporation to make various public disclosures. *See* 12 C.F.R. 563.17-C (1988); *see also,* James R. Doty, *The Attorney-Client Relationship in a Regulated Society: SEC Enforcement Actions Against Lawyers: The Next Phase,* 35 S. TEX. L. REV. 585 (1994).

corporations are often forced to talk to their attorneys, at least to provide information for regulatory filings.

Loyalty within this field is also limited by the disclosure requirements from other areas of law.[128] There are regulations that force lawyers to compel their clients' compliance with regulations.[129] Lawyers also face professional risks for failure to disclose corporate clients' misdeeds, such as suspension from practice in front of the SEC.[130] Failure to comply can also result in criminal liability for the lawyer in certain circumstances.[131]

Related to the lawyer's duty of loyalty is the argument for preserving confidentiality to protect the human dignities of the client. It could be argued that the human dignities that belong to the individuals who make up a corporation justify the duty of confidentiality to the corporation.[132] However, it remains that if the corporation is the client, the individuals' rights and dignities are not protected by the duty.[133]

The protection of constitutional rights is also not a concern when dealing with the corporate client. Corporations do not have a Fifth Amendment right against self-incrimination.[134] This right is a "purely personal right" and may not be asserted to avoid incriminating a third party.[135] Therefore, an agent may not assert the right to protect the principle.[136] Since the corporation lacks a Fifth Amendment right, allowing disclosure by lawyers would not, as in

128. *See generally* 17 C.F.R. 201.102 (2002) (SEC, RULES OF PRACTICE).

129. THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION, §7.15 (4th ed. 2002).

130. *See* 17 C.F.R. 201.102(e). *See also* HAZEN, *supra* note 129, at 393 ("the SEC can discipline attorneys under SEC Rule of Practice 2(e) which provides that the Commission may suspend, limit or bar 'any person' from practicing before it 'in any way'.").

131. In re Carter & Johnson, Sec. Exch. Act Rel. No. 34-17597 (Feb. 28, 1981) (holding that in order to establish aider and abettor liability, it must be shown that the attorney was a substantial participant and acted with the requisite scienter).

132. *See id.*

133. MODEL RULES OF PROF'L CONDUCT R. 1.13(d) (2002) (requiring a lawyer to explain who the client is when dealing with employees of a corporation when the employees' interests are adverse to the corporation.)

134. Hale v. Henkel, 201 U.S. 43 (1906); *see also* Note, *Constitutional Rights of the Corporate Person*, supra note 117.

135. Hale v. Henkel, 201 U.S. 43, 49-50 (1906)

136. *Henkel*, 201 U.S. 43, 50. This decision became part of the "collective entity" doctrine which denies the right against self-incrimination to corporations, labor unions and partnerships. *See also* DRESSLER, *supra* note 35,

the context of individual clients, nullify the constitutionally co-mingled rights of effective assistance of counsel and right against self-incrimination.[137] Therefore, constitutional protections do not justify a duty of confidentiality.

Once it is established that the traditional justifications do not require a strict duty of confidentiality for corporate clients, the next issue is which competing concerns are to be recognized in these circumstances. As noted above, the traditional justifications for the duty are very strong in the individual client context. The concerns of possible economic harm are not strong enough to justify weakening a basic principle of the attorney client relationship.

In the corporate client context, the ABA should take a different approach. The ABA should pursue an approach that allows attorneys to disclose illegal or fraudulent actions of their corporate clients that will likely cause substantial economic harm.[138]

The Enron debacle is an example of where allowing an attorney to disclose could have prevented economic harm to thousands.[139] Assuming an attorney was aware of the off-balance-sheet entities Enron was involved in, under Rule 1.13, Organization as Client, it would have been appropriate for the lawyer to bring concerns up the corporate ladder, even to the point of bringing the issue to the board of directors.[140] After having exhausted the corporate procedure, if the board did not take appropriate remedial

137. LUBAN, *supra* note 19, at 217-20.

138. Corporations are precluded from having illegal interests because acting on those interests, as ultra vires, would not be a legitimate action of the corporation. Some Commentators have argued that "confidentiality interests of a corporate client are not infringed by lawyer disclosure under the circumstances required by the paragraph, as the paragraph addresses a situation where the lawyer reasonably believes that agents of an issuer are engaged in serious illegality that the issuer has failed to remedy; in that situation, an instruction by an officer or even the board of the issuer to remain silent cannot be regarded as authorized." Final Rule: Implementation of Standards of Professional Conduct for Attorneys, [Release Nos. 33-8185; 34-47276; IC-25919; File No. S7-45-02] RIN 3235-AI72

"Implementation of Standards of Professional Conduct for Attorneys" (citing the comments of William H. Simon, at 3). The regulations implemented to Sarbanes-Oxley are discussed further *infra* Section IV.B.

139. *See* Richard A. Oppel, *Employees' Retirement Plan Is a Victim as Enron Tumbles*, N.Y. TIMES, Nov. 22, 2001, at A1.

140. MODEL RULES OF PROF'L CONDUCT R. 1.13(b)(3) (2002).

measures, the lawyer should be allowed to go outside the corporation.

B. The Current Opportunity to Modify the Duty of Confidentiality to be Consistent with National Standards

The ABA's role in promulgating ethical standards would be undercut by not appropriately responding to the current concerns involving lawyers' roles in corporate scandals. By adopting an exception to permit disclosure for economic harm in the corporate context, the ABA will be able to reassert its authority as the promulgator of ethical rules. Three policy-influencing bodies— the ABA Task Force on Corporate Responsibility, Congress, and the Chief Justices Conference— have all responded to current concerns by supporting proposals similar to that of Ethics 2000. A distinction between corporate clients and individual clients would be consistent with the proposals these bodies have supported and would help achieve the related goals of protecting the investing public, while maintaining the basic tenets of the legal profession where they are at their strongest.

The ABA began its response to recent corporate scandals by convening the Task Force on Corporate Responsibility in March of 2002.[141] The task force not only recommended accepting the proposed exception to prevent economic harm that was presented by Ethics 2000, but also recommended that the ABA make the disclosure mandatory, rather than permissive.[142]

Congress responded to the apparent role of lawyers in the corporate scandals by passing the Sarbanes-Oxley Act, which empowers the SEC to promulgate regulations to set "forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way."[143] Section 307 also requires lawyers to bring concerns of material violations of securities law to

141. James H. Cheek, ABA, *Preliminary Report of the American Bar Association Task Force on Corporate Responsibility*, July 16, 2002, 58 BUS. LAW. 189 (2002).

142. *Id.* at 205.

143. Sarbanes-Oxley Act of 2002 §307, 15 U.S.C. §7201 (2002). Section 307 also explicitly required that the SEC furnish a regulation, which will mandate an up-the-ladder reporting requirement when a lawyer reasonably believes a material violation of securities laws has occurred. This up-the-ladder reporting requirement includes allowing the attorney to go to the board of directors.

upper level members of the corporation and to the board of directors, if necessary. Section 307 gives the SEC a clear statutory mandate to put rules into effect to govern the practice of lawyers before it: "remov[ing] the legal cloud that has long surrounded Rule 102(e), promulgated by the SEC to discipline securities lawyers and accountants."[144] Section 307 is also limited to governing lawyers' representing issuers, and it "does not call for the SEC to adopt any rules for lawyers representing individuals."[145]

The SEC regulations, issued pursuant to the Sarbanes-Oxley Act, have added more force to the argument that disclosure should be allowed to prevent substantial economic harm resulting from illegal or fraudulent conduct of a corporate client. Provision (d)(2) of Regulation 205.3 states that:

> (2) An attorney appearing and practicing before the Commission in the representation of an issuer may reveal to the Commission, without the issuer's consent, confidential information related to the representation to the extent the attorney reasonably believes necessary:
>
> (i) To prevent the issuer from committing a material violation that is likely to cause substantial injury to the financial interest or property of the issuer or investors;
>
> ***
>
> (iii) To rectify the consequences of a material violation by the issuer that caused, or may cause, substantial injury to the financial interest or property of the issuer or investors in the furtherance of which the attorney's services were used.

This provision makes disclosure permissible in the context of securities filings with the SEC that Ethics 2000 had proposed in the general context. As past events have demonstrated, this is certainly an area where the level and immense risk of substantial financial losses warrants having such an exception. Additionally, the SEC states

144. Roger C. Cramton, *Enron and the Corporate Lawyer: A Primer on Legal and Ethical Issues*, 58 BUS. LAW. 143, 183 (2002).

145. Larry P. Scriggins, *Legal Ethics, Confidentiality, and the Organizational Client*, 58 BUS LAW. 123, 134 (2002).

that these rules are permissive, and are meant to supplement state ethics rules, not preempt them.[146]

Since the authority to issue and enforce binding ethics rules lies with the state bar authorities, a short evaluation of how jurisdictions have responded to current concerns and events is relevant to this discussion. It is clear that the majority of jurisdictions have departed from the ABA standard of requiring strict confidentiality: "[A] significant majority of the state ethics codes have, in the past twenty years, adopted standards containing some version of permissive or mandatory disclosure of criminal or fraudulent activity having material economic consequences for another person."[147] In addition, the Conference of Chief Justices has adopted a resolution endorsing the Ethics 2000 recommendations involving the exceptions for prevention of economic harm.[148] The resolution acknowledges that its intent is to address concerns "in light of the unexpected and traumatic failures [in] recent months of several large corporations."[149] Therefore, if the ABA drew a distinction between corporate and individual clients the new rule would be consistent with the Conference of Chief Justices' aims, who are already likely to make Ethics 2000's recommendations binding in most states.

Before the ABA follows through with the Task Force's recommendations, it would be more efficient to distinguish between corporate and individual clients. This distinction would allow the ABA to address the current concerns while still preserving the duty in the individual context, where it is most forcefully justified.

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146. Sarbanes-Oxley Act of 2002 §205.1 ("These standards supplement applicable standards of any jurisdiction where an attorney is admitted or practices and are not intended to limit the ability of any jurisdiction to impose additional obligations on an attorney not inconsistent with the application of this part.").

147. Scriggins, *supra* note 145, at 128. Forty-one jurisdictions either require or permit disclosure to prevent a client from perpetrating a fraud that constitutes a crime; thirty-seven permit disclosure and four require it. Eighteen jurisdictions permit or require disclosure to rectify substantial financial loss resulting from a client's prior commission of a crime or fraud in which the client used the lawyer's services. Of these eighteen jurisdictions, sixteen permit and two require disclosure. *Id.* at 128.

148. Conference of Chief Justices, Policy Statements & Resolutions Res. 35 (Aug. 1, 2002), *at* http://ccj.ncsc.dni.us/resol35RuleOneptSixEthics2000.html (lasted visited Feb. 24, 2002).

149. *Id.*

V. CONCLUSION

This note has examined the changes to the duty of confidentiality made by the Ethics 2000 Commission. The analysis involved evaluating the traditional justifications for the duty of confidentiality in the individual and corporate client context. The traditional justifications for the duty do not warrant a stringent standard of confidentiality for corporate-clients. In reconsidering the issue of confidentiality, the ABA should make a distinction between corporate and individual clients and permit disclosure of client information to prevent substantial economic harm from a corporate client's illegal or fraudulent conduct.