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The Client-Fraud Dilemma: a Need for Consensus

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THE CLIENT-FRAUD DILEMMA: A NEED FOR CONSENSUS

I. INTRODUCTION

If attorneys could create a perfect society, no client would ever use an attorney's services for fraudulent or illegal purposes. But experience has shown that clients occasionally do use an attorney's services to aid in fraudulent or illegal activity.

The attorney who becomes aware of a client's misconduct faces a serious dilemma. Disclosure of the client's wrongful behavior appears to violate "the pivotal element of the modern American lawyer's professional functions,"[1] *i.e.*, the attorney-client privilege of confidentiality.[2] On the other hand, the attorney who takes no action may create the impression of acquiescence in the client's activities.[3] Alternatives exist between these two extremes. Unfortunately, laypersons, legislators, scholars, and organizations—most notably the American Bar Association (ABA)—have failed to reach a clear consensus on the proper scope of the privilege of confidentiality in this context. This lack of agreement, itself indicative of the dilemma's complexities, continues to leave attorneys without a clear solution to the client-fraud dilemma.

The ABA recently affirmed its position that the attorney-client privilege should greatly restrict an attorney's ability to disclose client misconduct.[4] In February 1983 the ABA House of Delegates met to discuss the then-proposed *Model Rules of Professional Conduct* (*Model Rules*).[5] Proposed Model Rule 1.6 contained two provisions that many cast as a radical assault on the traditional scope of the attorney-client privilege.[6] The first provision would have allowed an

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1. Hazard, *An Historical Perspective on the Attorney-Client Privilege*, 66 CALIF. L. REV. 1061, 1061 (1978).

2. *E.g.*, Note, *Client Fraud and the Lawyer—An Ethical Analysis*, 62 MINN. L. REV. 89, 90 (1977). *See also* Taylor, *Of Lawyers, Ethics and Business*, N.Y. Times, Feb. 6, 1983, § 3, at 4, col. 3, ("[I]n practice, it is almost unheard of for an attorney to blow the whistle on a client.").

3. *Cf.* Burke, *The Duty of Confidentiality and Disclosing Corporate Misconduct*, 36 BUS. LAW. 239, 245 (1981) (arguing that the attorney's role as an officer of the court includes a duty to work for the fair administration of justice).

4. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983).

5. Taylor, *Lawyers Vote Against Disclosure of Fraudulent Activity by Clients*, N.Y. Times, Feb. 8, 1983, § 1, at 1, col. 2.

6. *See, e.g.*, Elliot, *The Proposed Model Rules of Professional Conduct: Invention Not Mothered by Necessity?*, 54 CONN. B.J. 265 (1980) (asserting that proposed rules unnecessa-

attorney to reveal client confidences in order to prevent "substantial injury to the financial interests or property of another."[7] The second provision sanctioned disclosure "to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services have been used."[8] The House of Delegates rejected both proposals after a heated debate.[9] Nevertheless, debate on these provisions continues as various state bar associations decide whether to adopt the *Model Rules*.[10] This debate provides a ready forum in which to fully analyze client misconduct and the attorney-client privilege of confidentiality.

This comment examines client misconduct in a nonlitigation setting and concludes that the ABA should re-evaluate its current position on attorney-client confidentiality. The opening discussion of O.P.M. Leasing Services, Inc., an actual example of the ethical dilemma faced by a law firm when a major client engages in large-scale fraud, provides a concrete foundation for the arguments for and against disclosure of client wrongdoing. This comment examines the various solutions to the client-fraud dilemma proposed by the common law and the legal profession. It also analyzes the forces opposing the ABA's position on confidentiality and the effects those forces have on the legal profession. Although this comment does not purport to provide a solution to the dilemma, it concludes with several suggestions for future consideration.

II. THE STORY OF O.P.M.

The story of O.P.M. Leasing Services, Inc. (OPM)[11] illustrates

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rily dilute attorney's effectiveness as champion for the client); Koskoff, *Proposed New Code of Professional Responsibility: 1984 Is Now!*, 54 CONN. B.J. 260 (1980) (asserting that proposed draft code would place impossible judgmental burdens on attorneys and would impair clients' willingness to disclose information).

7. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (Revised Final Draft 1982).

8. *Id.* at Rule 1.6(b)(2).

9. Taylor, *supra* note 5.

10. *See* 2 Law. Man. on Prof. Conduct (ABA/BNA) at 248 (July 23, 1986), 385 (Oct. 29, 1986), 494 (Jan. 7, 1987); Daily Record (Baltimore, Md.), Dec. 2, 1985, at 1, col. 3. On April 15, 1986, the Maryland Court of Appeals adopted the Maryland Rules of Professional Conduct, effective January 1, 1987. *See* MD. R. OF PROF. CONDUCT (Supp. Aug. 1986). Maryland has in fact rejected Model Rule 1.6. It has adopted instead a rule substantially identical to the draft rejected by the ABA in 1983. Maryland Rule 1.6 contains both of the controversial draft provisions quoted in the text above.

11. This story is told in REPORT OF THE TRUSTEE CONCERNING FRAUD AND OTHER MISCONDUCT IN THE MANAGEMENT AND AFFAIRS OF THE DEBTOR (*In re* OPM Leasing Servs., Inc., Bankr. Ct. S.D.N.Y. 1983), *reprinted with modifications in* M. STEINBERG, SECURITIES REGULATION 943-57 (1986) [hereinafter TRUSTEE'S REPORT, with parallel citation in

many of the issues that arise when a client uses the services of an attorney to achieve fraudulent or illegal goals.[12] Mordecai Weissman founded O.P.M. Leasing Services, Inc. in 1970; his boyhood friend, Myron S. Goodman, soon joined him as a partner. The corporation began as a leasing service for all types of equipment but soon specialized in the leasing of computers.[13] OPM borrowed money to purchase computers, leased the computers to customers, then used the leases as security for further loans.[14] This formula appeared to work well. By 1977, large corporations such as AT&T, General Motors, and Rockwell International leased multi-million dollar computers from OPM.[15] The 1978 financial statements of OPM showed healthy profits and created the image of OPM as a "modern American success story."[16]

OPM's outward appearance of success and legitimacy did not, however, correspond to reality. The corporation never actually made money but rather relied on fraud and bribery to remain in business.[17] OPM used the same computers as security for several different loans and paid large "commissions" to those willing to steer business its way.[18] As the corporation's financial outlook dete-

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M. STEINBERG]. The meaning of the OPM initials is not entirely clear. Customers of OPM were told that the initials stood for "other people's machines." Goodman and Weissman ran the business almost exclusively on funds advanced by others, which prompted the explanation of "other people's money" to the corporation's name. The trustee who investigated the fraud noted a third interpretation of the initials: "other people's mistakes." *Id.* at 16, M. STEINBERG at 943.

12. Similar examples of client fraud exist and would have served the purposes of this comment adequately. *See, e.g., A Question of Integrity at Blue-Chip Law Firms*, BUS. WK., Apr. 7, 1986, at 76 (listing several examples of prestigious law firms facing charges connected with a client's misconduct). OPM was selected because of the availability of information concerning the fraud and the publicity the case has received. *See generally* R. GANDOSSY, BAD BUSINESS: THE OPM SCANDAL AND THE SEDUCTION OF THE ESTABLISHMENT (1985) (discussing the OPM fraud); Taylor, *Ethics and the Law: A Case History*, N.Y. Times, Jan. 9, 1983, § 6 (Magazine), at 32 (same).

13. TRUSTEE'S REPORT, *supra* note 11, at 16-17, M. STEINBERG at 944.

14. OPM actually engaged in transactions beyond the mere leasing of computers. For example, the corporation sold "equity participations" in the equipment to investors looking for tax shelters. For a general discussion of OPM's other business dealings, see *id.*

15. *Id.*

16. The corporation's 1978 financial statements showed assets of over $412 million. *Id.* at 17-18, M. STEINBERG at 945.

17. Taylor, *supra* note 12, at 32.

18. In addition to the fraud and bribery, OPM offered extremely favorable terms to its customers. Although these favorable terms did not violate the law, they caused OPM to lose money, thus creating the need for continued fraud. *Id.* Part of the continued fraud involved a check kiting scheme engaged in between December 1978 and February 1979. In March 1980 OPM pleaded guilty to charges connected with this scheme. TRUSTEE'S REPORT, *supra* note 11, at 23, M. STEINBERG at 946.

riorated in 1979, OPM resorted to massive fraud to remain in business.[19] Through forged signatures and falsified documents OPM inflated the value of computers and leases[20] to obtain otherwise unavailable loans from lending institutions. OPM's collapse in early 1981 revealed its fraudulent conduct, but not before the corporation had obtained over $196 million in loans based on fraudulent leases.[21] The conduct of accountants, bankers, and management consultants aided the OPM fraud,[22] but this comment focuses only on the conduct of OPM's attorneys.

The New York law firm of Singer, Hutner, Levine & Seeman (Singer Hutner) represented OPM from 1971 until the firm voted to withdraw as counsel in September 1980.[23] The relationship between counsel and client initially benefited both parties. The firm handled almost all aspects of OPM's legal affairs as well as the personal affairs of both Weissman and Goodman; OPM accounted for over sixty percent of Singer Hutner's revenues.[24] One of the firm's attorneys served as OPM's third director.[25] This close relationship with and financial dependence on OPM magnified Singer Hutner's dilemma once it discovered the fraud.[26]

Singer Hutner had knowledge in early 1979 that should have alerted it to OPM's conduct.[27] The firm made no apparent response

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19. The financial deterioration in 1979 could be attributed to substantial developments in the computer field and the favorable terms of the leases. Taylor, *supra* note 12, at 32.

20. *Id.* at 33. This massive fraud centered on leases that Rockwell International had executed but did not intend to make effective. Goodman chose Rockwell for many reasons, including the fact that Rockwell's internal procedures made discovery of the fraud unlikely. TRUSTEE'S REPORT, *supra* note 11, at 23, M. STEINBERG at 946.

21. Taylor, *supra* note 12, at 33.

22. TRUSTEE'S REPORT, *supra* note 11, at 27, M. STEINBERG at 949-50.

23. OPM selected Singer Hutner as counsel in 1971, in part because Goodman had grown up with the brother of Andrew B. Reinhard, then a Singer Hutner associate. The Trustee was unable to conclusively determine Reinhard's role in the fraud. The Trustee did believe that Reinhard was, at the least, a reluctant but knowing participant in the fraud. *Id.* at 31-32, M. STEINBERG at 952.

24. *Id.* at 31, M. STEINBERG at 951. During the course of Singer Hutner's representation of OPM, the firm doubled its size to include 27 attorneys by 1980. *Id.*

25. Taylor, *supra* note 12, at 33. Reinhard was the attorney who served as OPM's third director. *Id.*

26. TRUSTEE'S REPORT, *supra* note 11, at 31, M. STEINBERG at 951. Goodman referred to the close relationship between client and counsel as a "bondage of the bookends." *Id.*

27. According to the Trustee's Report,

> By early 1979 Singer Hutner had received indications that Goodman and Weissman were capable of serious illegality. Some lawyers were aware that Weissman and Goodman had engaged in lease fraud and commercial bribery, and the firm knew that Goodman had recently perpetrated a $5 million check

to this information until June 12, 1980, when Goodman first disclosed the possibility of past "wrongful transactions" *he* had committed on behalf of OPM.[28] The disclosure came during a meeting at Singer Hutner's offices on the same day the firm received a letter from OPM's chief in-house accountant revealing the lease fraud.[29] No one at Singer Hutner read the accountant's letter because Goodman somehow managed to "intercept" it.[30] Goodman refused either to return the letter or to fully disclose the fraud unless Singer Hutner could promise complete confidentiality.[31] Citing its responsibilities to both OPM and Weissman, the law firm refused to make such a promise.[32] Singer Hutner did honor Goodman's request that the firm meet with OPM's accountant and his counsel. At this meeting the accountant informed Singer Hutner that OPM had committed a multi-million dollar fraud, that the firm had unknowingly assisted by drafting opinion letters based on false documents, and that OPM probably needed to continue its fraudulent behavior to remain in business.[33] Singer Hutner sought the advice of expert outside counsel.

The firm retained the services of Joseph McLaughlin and Henry Putzel III to advise it on its legal and ethical duties in light of Goodman's disclosure.[34] McLaughlin and Putzel advised Singer Hutner that it could continue to represent OPM if Goodman assured the firm that all wrongdoing had ceased.[35] They also informed the firm that it had neither the obligation nor the right to disclose the fraudulent leases since these leases were a past and completed fraud. The experts advised the firm to seek a full disclosure from Good-

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kiting scheme. Singer Hutner also had knowledge of facts showing that OPM was suffering severe cash shortages that provided a motive for further fraud. *Id.* at 32, M. STEINBERG at 952.

28. *Id.* at 33, M. STEINBERG at 953. Weissman had also engaged in fraud on behalf of OPM; however, Goodman appeared to be the mastermind of the large-scale fraud involving the Rockwell leases. *See id.* at 16-27, M. STEINBERG at 943-49.

29. Taylor, *supra* note 12, at 33.

30. What actually happened is unclear. Taylor's account states, "The lawyers [Singer Hutner] say that Goodman snatched the letter unopened from Reinhard's hand or seized it from the top of his desk. Goodman says that this was a 'cover story' agreed upon between him and Reinhard . . . ." *Id.*

31. *Id.*

32. Because the firm represented Weissman and OPM as well, a promise of complete confidentiality to Goodman could have compromised the firm's representation of either Weissman or OPM. *Id.*

33. *Id.*

34. *Id.* McLaughlin was a dean at Fordham Law School and Putzel had taught legal ethics at Fordham.

35. *Id.* at 46.

man but cautioned against pressing the OPM executive too hard.[36] Finally, McLaughlin and Putzel recommended several steps, such as requiring OPM to certify in writing the legitimacy of each new transaction, in order to avoid further fraud.[37] Based on the experts' advice, Singer Hutner continued to represent OPM throughout the summer of 1980.[38]

The safeguards employed by Singer Hutner did not prevent OPM from using the firm's services to continue the fraud.[39] After June 1980, OPM succeeded in securing an additional seventy million dollars worth of loans with fraudulent leases.[40] Goodman's relationship with Singer Hutner deteriorated rapidly. The firm wanted Goodman to make a full disclosure of his crimes to Weissman, but Goodman delayed such a confession.[41] Despite Goodman's disclosure of some details of the fraud in September of 1980 and his assurance that all fraud had ceased, Singer Hutner voted to withdraw from representation of OPM.[42]

Once again following the advice of outside counsel, the firm engaged in a structured withdrawal designed to avoid any prejudice to

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36. *Id.* "One reason [not to push Goodman too hard], as Putzel explained in a deposition, was his concern that the law firm's obligations to OPM might be inconsistent with giving Goodman's secrets the fullest protection." *Id.*

37. *Id.*

38. The Trustee characterized the advice received from Putzel and McLaughlin as follows: "Although McLaughlin and Putzel in good faith considered their advice appropriate in the circumstances, the Trustee believes it was in fact the worst possible advice from the point of view of OPM, the third parties with whom it dealt, Singer Hutner's successor counsel, and Singer Hutner itself." TRUSTEE'S REPORT, *supra* note 11, at 34, M. STEINBERG at 954.

39. Taylor, *supra* note 12, at 48. The Trustee found Singer Hutner's conduct on the whole "nothing short of shocking." TRUSTEE'S REPORT, *supra* note 11, at 35, M. STEINBERG at 954. Specifically, the Trustee stated:

> Singer Hutner was wrong in relying on Goodman's representations that the fraud had stopped and ignoring substantial evidence that it had not. Just after Goodman's confession, Clifton's [OPM's accountant] lawyer had informed Hutner and another Singer Hutner partner of Clifton's belief that OPM could not survive without continued wrongdoing. In addition, on two occasions in June and July, Singer Hutner lawyers noticed peculiarities in title documents used in fraudulent Rockwell lease financings that should have led them to seek to confirm their authenticity with third parties.

Id. at 33-34, M. STEINBERG at 953.

40. *Id.* at 34, M. STEINBERG at 953.

41. Goodman displayed a dramatic flair in his attempts to delay a full confession of his wrongdoing. After Singer Hutner had given Goodman a deadline for confessing to Weissman, Goodman threatened to hurl himself through the window of his office. Taylor, *supra* note 12, at 48.

42. In fact, Goodman did not make a full disclosure: he did admit to a multi-million dollar fraud but denied it had continued beyond June 1980. TRUSTEE'S REPORT, *supra* note 11, at 34, M. STEINBERG at 953.

OPM.[43] If anyone inquired as to the reason for the withdrawal, Singer Hutner stated simply that both parties had agreed to part ways.[44] This misleading explanation of withdrawal allowed OPM to hire a different law firm and to obtain more than fifteen million dollars in additional loans based on fraudulent leases.[45] The end came for OPM in March 1981 when the company filed a voluntary petition for reorganization.[46] An investigation resulted in Goodman and Weissman pleading guilty to charges related to the fraud.[47] Singer Hutner did not escape OPM's collapse and was named as a codefendant in a series of multi-million dollar lawsuits.[48]

The OPM situation demonstrates the conflicts that may arise among the various duties of a law firm when faced with client fraud. As OPM's counsel, the firm owed OPM a duty of zealous representation.[49] Singer Hutner also represented the individual interests of both Goodman and Weissman.[50] The firm could only conceal the wrongdoing of its client Goodman at the expense of keeping Weissman ignorant of information directly affecting his interests. The duties of a law firm do not end with the duty to clients but also include duties owed to others.[51] Many banks and lending institutions relied on Singer Hutner's opinion letters to lend OPM huge sums of cash. The firm owed these lending institutions a duty of assuring the accuracy of its opinion letters.[52] Beyond these duties, Singer Hutner had conflicting concerns about its own self-interest. The firm wanted to respond to OPM's fraud in a legal and ethical manner but did not wish to lose a client essential to its financial survival. The outcome of the OPM case indicates the difficulty a law firm and its attorneys confront in serving all of these conflicting interests. Based on the information Singer Hutner received from its outside counsel, the firm placed primary emphasis on its duties to its clients. As a

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43. Taylor, *supra* note 12, at 48-49.

44. *Id.* at 49. At one point Putzel advised a Singer Hutner partner that the partner should not warn even a close personal friend about OPM's true status. *Id.*

45. *Id.*

46. *See* TRUSTEE'S REPORT, *supra* note 11, at 26, M. STEINBERG at 948.

47. *Id.*

48. Taylor, *supra* note 12, at 52.

49. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1980).

50. Representation of those conflicting interests was prohibited by MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-19 (1980).

51. *See id.* at EC 7-19 to -39 (discussing an attorney's obligations toward the adversary system).

52. *See id.* at DR 1-102 (4) (lawyer should not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation).

result, banks and lending institutions suffered, the firm itself suffered, and OPM never rectified the consequences of the fraud.

In addition to the duties mentioned above, Singer Hutner had a general duty to maintain the legal profession's integrity and competence.[53] On the surface it would appear that Singer Hutner breached this duty. The firm's conduct assisted OPM in concealing its fraud far beyond the point when Singer Hutner could have ended it.[54] Due in part to the firm's neutral notice of withdrawal, a second law firm unwittingly became an instrument for securing additional fraudulent loans. However, one might ask: did Singer Hutner fail in its duty to the legal profession or did the legal profession fail in its duty to Singer Hutner? The firm received "expert" legal advice on its legal and ethical duties. According to Putzel, "the advice we gave was correct based on what we knew at the time."[55] Given the final results of the OPM case, the need to rethink those principles contained in McLaughlin and Putzel's advice is obvious.

III. ARGUMENTS FOR AND AGAINST DISCLOSURE OF CLIENT FRAUD

In the OPM case, Singer Hutner believed that the risk of financial harm to others did not justify a revocation of its client's privilege of confidentiality. Singer Hutner's belief demonstrates that one of the basic disagreements over the proper scope of the attorney-client privilege concerns where one draws the line between the privilege and those interests significant enough to overcome it.[56] Virtually no one disputes the attorney's right to disclose a client confidence when necessary to prevent an imminent threat to human life.[57] Substantial debate, however, surrounds the attorney's ability to disclose a confidence when necessary to protect a third party's property interest. Commentators on attorney-client confidentiality generally fall into one of two categories. The first category supports a broad application of the privilege and emphasizes the duty an attorney justifiably owes to the client. Commentators in the second category stress the attorney's role in society and the occasional need to place society's interests before the client's right to confidentiality.

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53. *Id.* at Canon 1.

54. *See* TRUSTEE'S REPORT, *supra* note 11, at 33, M. STEINBERG at 953.

55. Taylor, *supra* note 12, at 52.

56. *See* Hazard, *supra* note 1, at 1091.

57. *See, e.g.*, Freedman, . . . *Wrong? Silence is Right*, N.Y. Times, Feb. 14, 1983, § 1, at 17, col. 1.

A. Arguments Against Disclosure

Two arguments, one legal and one factual, support the views of commentators who maintain that the attorney's duty to the client restricts the attorney's authority to disclose client confidences. Invoking the principles embodied in the Bill of Rights, the "legal argument" against greater disclosure of client confidences starts from the premise that the sixth amendment right to counsel requires a strong attorney-client privilege. Under the sixth amendment, a criminally accused individual has the right to have an attorney defend the accused's life, liberty, and property. In today's complex and legalistic society, the government can easily threaten an individual's legally protected interests without the formality of a criminal prosecution.[58] Consider the hypothetical case of a merchant who operates a small and marginally profitable grocery store in an impoverished area. The government unwisely enacts new and potentially unenforceable food stamp regulations that the merchant must violate to remain solvent. Like the criminally accused, the merchant needs the services of an attorney to protect the merchant's liberty and livelihood from the effects of the new regulations.[59] A rule requiring disclosure of present or future client misconduct, however, could severely restrict the merchant's ability to obtain the effective assistance of counsel. If the merchant chose to remain in business, the rule would require the attorney to inform the government of the client's violation of the regulations. The attorney's disclosure could adversely affect the merchant's ability to obtain a fair hearing.[60] If, on the other hand, the merchant decided to go out of business rather than violate the regulations, the merchant would have neither a practical reason nor the financial ability to hire an attorney. In this manner, the government might deprive an individual of property and threaten that person's liberty without the individual's being able to receive the assistance of counsel.[61] This result would violate the

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58. *See* Freeman, *Recent Governmental Attacks on the Private Lawyer as an Infringement of the Constitutional Right to the Assistance of Counsel*, 36 BUS. LAW. 1791, 1795 (1981).

59. *Cf.* Burke, *supra* note 3, at 257 (asserting that current regulatory environment often requires a corporation to seek legal advice).

60. *See* Pickholz, *The Proposed Model Rules of Professional Conduct and Other Assaults Upon the Attorney-Client Relationship: Does "Serving the Public Interest" Disserve the Public Interest?* 36 BUS. LAW. 1841, 1850 (1981).

61. Even if the food stamp regulations did not impose criminal sanctions, the merchant would have just cause for concern. *See generally* Nessen, *Rethinking The Lawyer's Duties to Disclose Information: A Critique of Some of Judge Frankel's Proposals*, 24 N.Y.L. SCH. L. REV. 677, 709 (1979) (observing that people become very concerned over threatened loss of property and acknowledging the threat government bureaucracy can pose against property).

basic concept of the sixth amendment, which should apply "against all government process of major impact."[62]

The legal argument also relies on fundamental principles of individual liberty embodied in the Bill of Rights. A restriction of the attorney-client privilege could result in the individual's forfeiting certain liberties to advance governmental interests. For example, suppose a client consults an attorney about a proposed course of conduct of questionable legality. The attorney believes that the conduct would violate the law, but the client disagrees with the attorney's analysis. A mandatory disclosure law would force the client either to abide by the attorney's analysis and refrain from the questionable conduct, or else to risk potential prosecution when the attorney exposes the conduct to the government. Even if the client were confident of success in any prosecution, the potential costs might dissuade the client from taking the risk. When the client yields to the advice, the client's autonomy has been partially surrendered to an attorney closely allied with the governmental interest.[63] One might argue that the grant of this decisionmaking authority over the client fosters efficient law enforcement and thereby benefits society as a whole. The legal argument quickly responds that the Bill of Rights protects individual liberties against government action and does not guarantee efficient law enforcement.[64] For this reason, any attempt to restrict the attorney-client privilege would frustrate the Bill of Rights' attempt to place certain individual rights above the interests of the government.[65]

The "factual argument" against greater disclosure of client confidences shifts to the practical realities of the attorney-client relationship. First, mandatory or permissive disclosure would hinder competent legal representation. Competent legal representation re-

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62. Freeman, *supra* note 58; *cf.* Freedman, *Are the Model Rules Unconstitutional?* 35 U. MIAMI L. REV. 685, 687 (1981) (arguing that professional rules of conduct should enable an attorney to advance the client's rights).

63. *See* Pickholz, *supra* note 60 (stating that when lawyer and client differ, a rule requiring disclosure of client misconduct would mean the lawyer should prevail); Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CALIF. L. REV. 669, 684 (1978) (arguing that to require lawyers to deny assistance when a client proposes conduct the attorney views as "unconscionable" would impose standards of an elite upon segments of society not fairly represented at the bar).

64. *See* Freeman, *supra* note 58, at 1793; *see also* Koskoff, *supra* note 6, at 262 (describing as totalitarian or collective a society that values the interests of the state over the rights of individuals).

65. *See* Pickholz, *supra* note 60, at 1844, 1849 (comparing greater disclosure requirements to the legal system of William the Conqueror who demanded that attorneys owe primary loyalty to the King).

quires that the client reveal all relevant information to the attorney.[66] A rule that would require or allow the attorney to disclose the client's intended misconduct might cause the client to withhold potentially incriminating information.[67] The client may not possess, however, the requisite skills and knowledge to determine what is incriminating and may erroneously withhold favorable information.[68] Failure to reveal all relevant information could cause the attorney to render incomplete, inadequate, or even incorrect legal advice.[69] It therefore follows that the attorney-client privilege must remain broad to assure "that future clients will have enough faith in the system to confide in their lawyers in the first place."[70] A client's faith in the system creates benefits that go beyond the mere confines of the attorney-client relationship.

The free flow of information theory asserts that the attorney-client privilege allows the attorney to perform a beneficial and overlooked role in society. When a client reveals an intention to engage in illegal activity, the attorney may counsel against such activity and persuade the client to remain within the law.[71] The client would probably not reveal an illegal intention to the attorney in the absence of a strong attorney-client privilege.[72] The OPM case illustrates this point by Goodman's refusal to discuss his illegal activity with Singer Hutner after the firm denied his request for complete confidentiality.[73] Without a full disclosure by Goodman, Singer Hutner could not effectively counsel against future fraudulent conduct. In this manner, greater disclosure of client confidences would harm the interests of society by depriving many attorneys of the ability to counsel their clients against wrongful behavior.

According to the next aspect of the factual argument, greater disclosure of client misconduct would restrict the vital role attorneys play in the continuing development of the law. Attorneys assist in effecting legal change by convincing courts to discard outdated, unrealistic, and unconstitutional laws and regulations. For example,

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66. Burke, *supra* note 3, at 253-54; *cf.* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-1 (1980) ("A client must feel free to discuss whatever he wishes with his lawyer . . . .").

67. *See* Burke, *supra* note 3, at 253-54.

68. Freedman, *supra* note 57, at col. 2.

69. Burke, *supra* note 3, at 253-54.

70. Hodes, *The Code of Professional Responsibility, The Kutak Rules, and the Trial Lawyer's Code: Surprisingly Three Peas in a Pod*, 35 U. MIAMI L. REV. 739, 776 (1981).

71. *Id.* at 794; *see also* G. HAZARD, ETHICS IN THE PRACTICE OF LAW 28 (1978).

72. *See* Freedman, *supra* note 57.

73. Singer Hutner refused complete confidentiality not because of a duty to the government but because of duties owed to Weissman and OPM.

clients occasionally request their attorney's advice about an activity that the law expressly neither prohibits nor allows.[74] The attorneys should respond by carefully analyzing the various values at stake and by giving an opinion that reflects how the law ought to develop based upon what society would determine to be fair and proper.[75] If clients accept their attorney's analysis and the government challenges the conduct, the attorney may then have the opportunity to persuade a court to alter the existing law. Greater disclosure of client misconduct would decrease this function of the attorney because many clients would not reveal any intention to challenge the present boundaries of the law. Instead, a client might choose to remain safely within the law and to leave unchallenged an unjust law. A client might also engage in the questionable conduct without seeking the advice of an attorney. The client's lack of legal sophistication, however, could result in conduct so clearly illegal as to preclude a successful challenge to the suspect law.[76] Given the changing nature and legal complexities of today's world, society needs the attorney to challenge and question those aspects of the law that do not reflect present reality. In short, greater disclosure of client confidences would harm society by decreasing the attorney's role in legal development.[77]

The third and final aspect of the factual argument against greater disclosure of client confidences raises the question of practicability. Greater disclosure would not work in practice because neither attorneys nor clients desire a restriction of the attorney-client privilege. The OPM case clearly demonstrates how client friendship and financial considerations combined to discourage a law firm from disclosing a client's misconduct. A firm might view any disclosure of client confidences as a "betrayal of trust,"[78] affecting not only the firm's conscience but also its relationship with other

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74. Burke, *supra* note 3, at 255; Lorne, *The Corporate and Securities Adviser, The Public Interest, and Professional Ethics*, 76 MICH. L. REV. 425, 467 (1978).

75. Lorne, *supra* note 74, at 473.

76. Consider, for example, a merchant who owns a gift shop specializing in European products. To take advantage of the Christmas season, the merchant wishes to remain open on Sunday in violation of local Blue Laws. Many other merchants question the validity of the Blue Laws and have remained open on Sunday without receiving government sanctions. The merchant remains open on Sunday but inadvertantly sells an expensive bottle of French wine in violation of local liquor laws. If the government chooses to prosecute the merchant, it can prevent a challenge to its Blue Laws by charging the merchant with the liquor law violation.

77. *See* Lorne, *supra* note 74, at 473-74.

78. Burke, *supra* note 3, at 264; Landesman, *Confidentiality and the Lawyer-Client Relationship*, 1980 UTAH L. REV. 765, 782.

clients.[79] Financial considerations might also discourage disclosure when, as in the case of Singer Hutner, disclosure of a client's misconduct could lead to financial ruin for the law firm. For these reasons, a firm might avoid disclosure by finding or forging a loophole in the disclosure law or by relying on the client's promise to cease the wrongful activity and to rectify any consequences. The firm could also avoid a disclosure requirement by purposely remaining ignorant of the client's wrongful acts. Clients would undoubtedly assist their attorneys in eluding the disclosure law by keeping their misconduct concealed. Under this analysis, a greater disclosure law would fail to achieve its desired result and should therefore never be enacted.[80]

The various arguments against greater disclosure of client confidences characterize the attorney-client privilege as a misunderstood right. When society criticizes the confidentiality between an attorney and a client, it fails to understand the beneficial role that the privilege plays in the legal system and the protection of individual rights.[81] Commentators who favor greater disclosure of client confidences do not deny that the attorney-client privilege achieves certain benefits. Instead, they argue that greater disclosure of client misconduct in a nonadversarial setting would not necessarily sacrifice the legitimate interests that the privilege currently serves. Commentators who favor greater disclosure pose several arguments to support their views. Each of these arguments expands on the belief that the legal profession can formulate a disclosure standard that would separate those who use confidentiality for legitimate purposes from the few who abuse the privilege to conceal illegal activity.

B. Arguments For Disclosure

In representing a client, an attorney may act as either an advocate in an adversarial proceeding or as an advisor in a nonadversarial setting. Those who favor greater disclosure of client misconduct distinguish these two roles and conclude that societal needs justify disclosure in nonadversarial situations. The argument

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79. *See* G. HAZARD, *supra* note 71, at 31 (suggesting that law firms might view a firm that discloses client confidences as untrustworthy); *cf.* Lorne, *supra* note 74, at 481 (suggesting that if a firm has the reputation of concealing clients' misconduct, all clients of that firm will suffer a tarnished reputation).

80. *See* authorities cited *supra* note 2.

81. *See* Koskoff, *supra* note 6 (asserting that attorneys best serve public interest by serving individuals).

begins with the premise that the very nature of the adversary system establishes the boundaries for attorney behavior. The system assigns neither moral nor legal responsibility for the results the attorney achieves.[82] For example, the system will not condemn an attorney who successfully defends an unpopular and obviously guilty civil defendant by pleading the statute of limitations. Those attorneys who assume the role of advocate usually attempt to defend or enforce their client's interests based on past and completed events. The adversary system allows the attorney to pursue these interests in a forum in which the "essential elements are an impartial tribunal of defined jurisdiction, formal rules of procedure and governing substantive law, and assignment to the parties of the task of presenting their own best cases and of challenging the presentations of their opponents."[83] In addition, certain rules exist to govern the permissible scope of the advocates' behavior. An advocate cannot, for example, present false evidence or allow a client to commit perjury.[84] Many presume that if the advocate obeys the rules of the adversary system, " 'truth' will emerge from a clash of opposing views."[85] The system, rather than the advocate, assumes the responsibility for all matters decided in accordance with the rules provided.

The advisory role of the attorney differs greatly from that of the advocate. The adversary system cannot relieve the advisor of moral and legal responsibility for the advisor's actions. Instead of pursuing the client's interests in court, the legal advisor provides the "client with an informed understanding of the client's legal rights and obligations and explains their practical implications."[86] This advice often takes place between the attorney and the client without the presence of an impartial tribunal, other parties, and rules specifically designed to limit the scope of the advisor's role.[87] Unlike the advocate, the advisor looks to the future by assisting the client in charting a prospective course of conduct.[88] One can easily argue that the advisor who influences a client's future conduct must bear some of the responsibility if that client engages in illegal activity. Because the advisor cannot rely on the adversary system for relief

82. Schwartz, *supra* note 63, at 671.

83. *Id.* at 672.

84. *See, e.g.*, MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(4) (1981); Nix v. Whiteside, 106 S. Ct. 988 (1986).

85. Flynn, *Professional Ethics and the Lawyer's Duty to Self*, 1976 WASH. U.L.Q. 429, 431.

86. MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1983).

87. *See* Schwartz, *supra* note 63, at 677-78.

88. *See id.* at 693.

from this responsibility, the advisor must "find a social need for the technical assistance of nonadvocates that would take priority over moral considerations."[89] Unfortunately for the advisor implicated in a client's wrongdoing, society does not appear willing to justify this need.

The first argument in favor of greater disclosure of client misconduct concludes that the reliance society must place on the advice a nonadvocate renders to a client justifies disclosure of client misconduct in many nonadversarial settings.[90] For example, when the advisor assists a client in the preparation of a registration statement for an upcoming public offering of stock, both the Securities and Exchange Commission (SEC) and the investing public rely on the trustworthiness of that statement. Similarly, inadequate staffing of the Internal Revenue Service (IRS) requires the Treasury Department to rely on the attorney who aids a client in completing a technical and complex tax return. If attorneys knowingly concealed clients' intentions to commit securities fraud or to cheat on their taxes, then the integrity and efficiency of these institutions would suffer. Society has enacted laws to prohibit individuals from abusing these and other institutions and no justification exists to allow confidentiality to "become a sword by which a client accomplishes through a lawyer what the law would forbid the client himself."[91] The legal profession should restrict the attorney-client privilege of confidentiality in nonlitigation settings in which society must rely on the advisor's good faith.[92]

Certain problems do exist in any attempt to separate an attorney's role as an advocate from the role of advisor. Frequently, the attorney serves a client in both roles.[93] The example of the attorney who assists a client in the preparation of a registration statement illustrates one possible dilemma of this dual role.[94] Suppose the attorney uncovers a fact that the law requires the statement to disclose, but disclosure of this fact would adversely affect the client's

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89. *Id.*

90. *See* Patterson, *The Limits of the Lawyer's Discretion and the Law of Legal Ethics: National Student Marketing Revisited*, 1979 DUKE L.J. 1251, 1270. *Cf.* Schwartz, *supra* note 63, at 678 (comparing the attorney's role as advisor to two teams playing a pick-up nonrefereed basketball game).

91. Taylor, *supra* note 2 (quoting Robert Kutak).

92. *See generally* Patterson, *supra* note 90, at 1270 (suggesting that the proper scope for attorney conduct should depend on the attorney's significance in the process involved).

93. Some even suggest that society has chosen attorneys to advise businesses because of the adversarial talents attorneys possess. *See* Lorne, *supra* note 74, at 434.

94. *Id.* at 465.

position in an ongoing litigation.[95] Should the attorney view his or her primary responsibility as preventing the client from issuing an incomplete registration statement or as preserving the client's interest in the litigation? While some commentators insist that this type of dilemma does not occur often, it does occur.[96] Therefore, any attempt to separate the attorney as advocate from the attorney as advisor must address this situation.

A second major argument in favor of greater disclosure of client misconduct raises a more philosophical consideration of the attorney's moral integrity. When a client uses an attorney to achieve an illegal or unjust objective, the client not only harms the interests of society but also may cause the attorney to experience a sense of moral guilt.[97] If the attorney could have prevented the unjust result, the sense of guilt may intensify.[98] At least one Singer Hutner partner experienced a deep sense of moral guilt when Putzel advised the firm that it could not warn other attorneys away from representing OPM.[99] One might argue that attorneys could rightfully escape this guilt by viewing themselves as the amoral agents of the client. Amorality may imply either that the attorney has chosen not to judge the client's behavior or that the attorney does not possess a proper standard to judge the client.[100] In either case, the amorality argument fails because it refuses to grant the attorney status as a moral individual. A decision not to judge a client's conduct represents a decision that the client's interests outweigh competing interests of society.[101] Furthermore, the attorney's training and profession provide a ready standard to judge the legality of a client's behavior.[102] In this sense, amoral conduct quickly becomes apathetic or immoral conduct and signifies the need for a rule allowing attorneys to disclose a client's misdeed.

Even those who argue persuasively for greater disclosure of client misconduct recognize the apparent conflict between the attor-

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95. *Id.*

96. Patterson, *supra* note 90, at 1269-70.

97. Gillers, *Lawyers' Silence: Wrong . . .*, N.Y. Times, Feb. 14, 1983, § 1, at 17, col. 2; *see also* Burke, *supra* note 3, at 243 (quoting Bentham's condemnation of the attorney-client privilege as a protection of the guilty).

98. Gillers, *supra* note 97.

99. *See* Taylor, *supra* note 12, at 49.

100. Flynn, *supra* note 85, at 429-30.

101. *Cf.* Chemerinsky, *Protecting Lawyers From Their Profession: Redefining the Lawyer's Role*, 5 J. LEGAL PROF. 31, 32-34 (1980) (suggesting that attorneys become so identified with the clients' interests that they adopt the clients' beliefs as their own).

102. *See* Hazard, *How Far May a Lawyer Go in Assisting a Client in Legally Wrongful Conduct?*, 35 U. MIAMI L. REV. 669, 672 (1981).

ney's ability to disclose and the duty of loyalty to the client. Professor L. Ray Patterson, consultant to the ABA commission that drafted the *Model Rules*, has developed a theory that reconciles the two concepts.[103] Although the limits of this comment do not permit a full discussion of the theory, the basic premise is worthy of note.

Professor Patterson views the attorney-client relationship as one of reciprocal rather than simple agency.[104] Both attorney and client derive their rights and duties in the relationship from the positive law and from the other's rights and duties.[105] Decisionmaking authority in the relationship depends on the interrelationship of the rights and duties of the attorney with those of the client.[106] In view of this relationship, the attorney acting as the client's representative may disclose a confidential communication when the client fails to perform a duty owed to others.

Thus, when the client attempts to accomplish an illegal objective, the attorney may implement the client's duty to remain within the law.[107] Implementation of the client's duty may require the attorney to disclose a confidential communication if the client has a corresponding duty to disclose the information.[108] One could argue that this conclusion violates the duty of loyalty between the attorney and the client, but Patterson believes "the lawyer's implementation of the client's duty for the client cannot be correctly characterized as an act of disloyalty."[109] In this manner, attorneys may disclose a client's fraudulent intent without sacrificing the duty of loyalty that attorneys owe to their clients.

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103. Patterson, *The Function of a Code of Legal Ethics*, 35 U. MIAMI L. REV. 695 (1981) [hereinafter Patterson, *Function*]. *See also* Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, 29 EMORY L. J. 909, 960-69 (1980) (characterizing confidentiality as a "corresponding right" of the lawyer, one that is dependent on the client's own legal rights and duties; when client expresses an intention to act illegally, lawyer has authority and responsibility to disclose).

104. Patterson, *Function*, *supra* note 103, at 704-08.

105. *Id.* at 708-14.

106. *Id.* at 708.

107. *Id.* at 721. Although Patterson used the duty of candor to the tribunal as an instance in which the attorney assumes the duty of the client, he admitted that the client's duty of fairness to others follows a similar analysis. *Id.* at 722.

108. *Id.* at 720. In this manner, Patterson has placed confidentiality as a right that the client derives directly from the positive law. Since confidentiality involves the attorney's acting on the client's behalf in the presence of other parties, the attorney must derive the duty of confidentiality directly from the client. This analysis conflicts with a view of confidentiality as a right and duty existing solely between the attorney and the client. Patterson believes that the presence of other parties does not allow confidentiality to be analyzed as simply existing between the attorney and the client. *Id.*

109. *Id.* at 721.

IV. COMMON-LAW AND ETHICAL CODE RESPONSES TO THE CLIENT-FRAUD DILEMMA

Although the arguments both for and against greater disclosure may contain persuasive reasons to either prohibit or allow disclosure of confidential communications, the thoughts of legal scholars do not necessarily control the actual practice of law. When attorneys confront situations of client misconduct, they may find their options governed by either common law principles or a professional ethical code. The common law and most ethical codes have provisions relating to the attorney-client privilege, but none has developed an effective solution to the client-fraud dilemma.

Common law principles cannot fully resolve the client-fraud dilemma because, in a strict sense, the common law views the attorney-client privilege in a litigation context.[110] Confidentiality exists under commom law as an evidentiary privilege that forbids a tribunal from compelling an attorney to reveal confidential communications. The common law does attempt, however, to define the limits of the privilege, and this definition offers some insight for the purposes of this comment. Most courts do not consider the evidentiary privilege as absolute[111] and have refused to apply it in certain situations. One court explained:

> Because the attorney-client privilege is not to be used as a cloak for illegal or fraudulent behavior, it is well established that the privilege does not apply where legal representation was secured in furtherance of intended, or present, continuing illegality. The crime or fraud exception applies even where the attorney is completely unaware that his advice is sought in furtherance of such an improper purpose.[112]

In this manner, the common law refuses to grant the evidentiary privilege to a client who has used the attorney to accomplish an illegal act. By characterizing confidentiality as an evidentiary privilege, the commom law places no duty upon an attorney to disclose client misconduct unless disclosure is requested by a court or other tribu-

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110. *See* G. HAZARD, *supra* note 71, at 22 ("The attorney-client privilege strictly speaking has application only in a forensic setting, that is, in a trial or something like it such as a legislative investigation.").

111. *See* 8 J. WIGMORE, ON EVIDENCE § 2298, at 572 (J. McNaughton rev. 1961); Burke, *supra* note 3, at 244.

112. United States v. Hodge & Zweig, 548 F.2d 1347, 1354 (9th Cir. 1977) (citations omitted).

nal.[113] Because many situations of client-fraud do not involve a court or tribunal, an attorney must look beyond the common law for guidance.

The ABA has attempted to resolve the client-fraud dilemma in its codes of ethical and professional conduct.[114] These standards go beyond the common law and contain provisions that address the attorney-client privilege of confidentiality outside the judicial context. Unfortunately, the ABA's insistence on placing the duty of loyalty to the client before the duty of fairness to others has prevented the ethical codes from providing an effective solution to the client-fraud dilemma.

In 1908, the ABA first adopted the *Canons of Legal Ethics (Canons)* as a "general guide" to the practice of law.[115] The Canons contained two provisions relevant to the client-fraud dilemma, but an apparent contradiction between these provisions precluded a coherent policy on the disclosure of client misconduct.[116] Canon 41 required that:

> When a lawyer discovers that some fraud or deception has been practiced, which has unjustly imposed upon the court or a party, he should endeavor to rectify it; at first by advising his client, and if his client refuses to forego the advantage thus unjustly gained, he should promptly inform the injured person or his counsel, so that they may take appropriate steps.[117]

While Canon 41 appeared to place a duty upon an attorney to disclose client misconduct in certain situations, Canon 37 stated quite clearly: "It is the duty of the lawyer to protect client confidences."[118] Formal Opinion 287 resolved this conflict in 1953 by

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113. G. HAZARD, *supra* note 71, at 25.

114. The ABA's codes do not, in and of themselves, have any binding legal effect. However, the court systems of many states adopt the current ABA code as the law of that jurisdiction.

115. CANONS OF LEGAL ETHICS Preamble (1957). The Canons were based largely upon the ALABAMA CODE OF ETHICS (1887). Kutak, *Model Rules of Professional Conduct: Why Do We Need Them?*, 36 OKLA L. REV. 311, 312 (1983). The Alabama Code of Ethics was based largely upon the works of two earlier codes. *See generally* Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, 29 EMORY L.J. 909, 912-13 (1980) (discussing the earlier codes of ethics and how they perceived the attorney's duty of loyalty.).

116. *See* ABA Comm. on Professional Ethics and Grievances, Formal Op. 287 (1953) (attorney learns that his client committed perjury to secure a divorce and the ex-wife threatens to reveal the perjury if the client does not pay support) [hereinafter Opinion 287]; Burke, *supra* note 3, at 247 & n.30.

117. CANONS OF LEGAL ETHICS Canon 41 (1908), *quoted in* Opinion 287, *supra* note 116.

118. CANONS OF LEGAL ETHICS Canon 37 (1908), *quoted in* Burke, *supra* note 3, at 247.

concluding that Canon 37 overrode Canon 41 and protected all communications that fell within the common law evidentiary privilege.[119] In addition, the drafters of Opinion 287 stated their belief that Canon 41 applied only when a client used fraud or deception to gain an unfair advantage over another party in a civil litigation.[120] By resolving the conflict between Canon 41 and Canon 37 in favor of the duty to preserve client confidences, Opinion 287 established a precedent that all subsequently-adopted ABA codes have followed.

The *Model Code of Professional Responsibility* (*Model Code*) replaced the *Canons* in 1969 but failed to establish a conclusive policy regarding the client-fraud dilemma. As originally enacted, the *Model Code's* Disciplinary Rule (DR) 7-102(B) required the attorney to disclose a client's fraudulent behavior if the client refused the attorney's advice to rectify the consequences of the fraud.[121] Although DR 7-102(B) closely resembled Canon 41, the new rule did not appear limited to fraud in civil litigations.[122] In a 1974 amendment to DR 7-102(B), however, the ABA exempted from disclosure any information that qualified as a privileged communication.[123] Formal Opinion 341 subsequently defined privileged communications as those confidences and secrets protected by DR 4-101.[124] Unfortunately, a careful reading of the relevant *Model Code* provisions in light of

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119. Opinion 287, *supra* note 116. The Committee noted that Canon 37 was consistent with the attorney-client privilege as it existed at common law. Lawyers could not reveal client disclosures, except when necessary to prevent a future crime. The client here had already committed the perjury, a past crime. Therefore, the fraud fell within the evidentiary privilege and was protected by Canon 37. The Committee further explained that the attorney had a duty to advise the client to rectify the fraud; if the client failed to do so, the attorney had to withdraw from representation.

120. Applied to the OPM situation, Canon 41 would not have required Singer Hutner to disclose its client's misconduct despite the fact that OPM was using fraud to take an unfair advantage over other parties. The fraud did not occur in the context of a civil lawsuit. This interpretation of Canon 41 was affirmed in ABA Comm. on Professional Ethics, Informal Op. 778 (1968).

121. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B)(1) (1969) stated:

> (B) 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.

122. Disciplinary Rule 7-102(B)(1) substituted the word "person" where Canon 41 had used the term "party." This change was especially significant because it was enacted after Opinion 287.

123. The 1974 Amendment simply added the words "except when the information is protected as a privileged communication" to the end of DR 7-102(B)(1).

124. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 341 (1975).

Opinion 341 resulted in a circular analysis. While DR 7-102(B) required the disclosure of information not protected by DR 4-101, DR 4-101 allowed the disclosure of privileged communications when required by another Disciplinary Rule (such as DR 7-102(B)). Most commentators interpreted Opinion 341 as favoring confidentiality over disclosure and permitting disclosure only in extremely rare and perhaps nonexistent situations.[125] The *Model Code* thus served to advance the duty of preserving a client's confidences at the expense of those injured by the client's fraud.

The ABA expressly rejected greater disclosure of client misconduct when it voted in 1983 to adopt the *Model Rules*.[126] Since the 1982 revised final draft of the *Model Rules* contained several provisions designed to permit greater disclosure of client confidences, debate of the *Model Rules* forced the ABA to consider the client-fraud dilemma. Model Rule 1.6 (b) of the discussion draft provided:

> (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
>
> (1) to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm, or in substantial injury to the financial interests or property of another;
>
> (2) to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services had been used;
>
> (3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, or to establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer based upon conduct in which the client was involved; or
>
> (4) to comply with other law.[127]

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125. *E.g.*, Note, *supra* note 2, at 98-99.

126. Prompted in part by the negative publicity that the legal profession received following Watergate and other scandals, the ABA in 1977 appointed the Commission on Evaluations of Professional Standards (Commission) headed by Robert Kutak. The Commission soon concluded that problems within the legal profession required more than merely amending the *Model Code*. In January of 1980, the Commission released a discussion draft of the *Model Rules* and designated a period for receiving comments and opinions. Following this period, the Commission released several proposed and revised final drafts of the *Model Rules* in 1981 and 1982. The ABA House of Delegates debated and amended the rules in February 1983, and in August 1983 the ABA officially adopted the *Model Rules*. *See* Elliot, *supra* note 6, at 269; Kutak, *supra* note 115, at 314-15; AMERICAN BAR ASSOCIATION ANNUAL REPORT 1982-83, at 13, *reprinted in* 70 A.B.A. J., Jan. 1984, at 67-90.

127. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (Revised Final Draft 1982).

Although this rule would not have required the disclosure of client-fraud, it would have permitted attorneys to disclose clients' misconduct under several circumstances. For example, under such a rule Singer Hutner could have disclosed OPM's fraudulent behavior to banks, lending institutions, government enforcement agencies, and any law firm that requested information as to why Singer Hutner withdrew as OPM's counsel.[128]

Nevertheless, the ABA adopted a rule that rejected several of the disclosure provisions contained in the revised final draft.[129] The adopted rule reversed the principal impact of the proposed rule by severely restricting the attorney's ability to disclose confidential communications. Under the adopted rule an attorney may disclose a client's confidences only when disclosure is necessary to protect human life or to protect the attorney from criminal and civil charges relating to representation of the client.[130] Dean Redlich of the New York University Law School assessed the ABA's vote on the *Model Rules* by stating: " 'The practice of law, if done by sensitive people, creates financial risks and moral dilemmas. . . . These votes reflect a strong desire to eliminate those moral dilemmas by self-imposed rules that narrow or eliminate the choices a lawyer has.' "[131] The vote also reflects the ABA's persistent view that loyalty to the client remains a primary duty of the attorney.

The adopted version of Model Rule 1.6 contains what many see as a possible alternative to the actual disclosure of client fraud.[132]

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128. Singer Hutner could disclose OPM's conduct to the banks and lending institutions for two reasons. First, under Model Rule 1.6(b)(1), OPM's continuing conduct was likely to result in severe financial damage to those parties who lent OPM money based on fraudulent leases. Second, Model Rule 1.6(b)(2) allowed disclosure since Singer Hutner's services had been used throughout the fraud. Singer Hutner could disclose OPM's conduct to government agencies and other law firms in an attempt to prevent OPM from continuing the fraud.

129. The adopted Model Rule 1.6 (b) provides:

> (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
>
> (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
>
> (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

130. *See* G. HAZARD, *supra* note 71, at 32 (questioning the logic that allows the attorney to protect only the attorney's own interests).

131. Taylor, *Lawyer Confidentiality v. Disclosing Crimes-to-Be*, N.Y. Times, Feb. 14, 1983, § 1, at 9, col. 1.

132. *See* Rotunda, *The Notice of Withdrawal and the New Model Rules of Professional Conduct:*

Under the *Model Rules*, an attorney may terminate representation of a client if the client engages in criminal or fraudulent behavior.[133] The Official Comment to Model Rule 1.6 implies that the attorney who withdraws may give "notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like."[134] Although the attorney may not state the reasons for the withdrawal, mere notice to the affected parties should communicate a satisfactory warning of potential problems.[135]

The ambiguous nature of this notice precludes withdrawal from serving as an effective alternative to actual disclosure of client misconduct. Consider, for example, a large law firm that ignores a potential conflict of interest and represents both a corporation and the state-created agency that regulates the business of that corporation.[136] The law firm's discovery that the corporation has engaged in a multi-million dollar fraud prompts the firm to withdraw with notice to the affected parties. Many informed observers would view the withdrawal merely as a recognition of a conflict of interest. Consequently, the corporation would easily secure substitute counsel.[137]

If withdrawal must serve as the primary method of controlling client fraud, it also poses a potential danger to clients' legitimate interests.[138] Client-fraud and withdrawal may become so closely linked that withdrawal presumes client misconduct. Suppose a law firm decides to withdraw from the representation of a client based on interpersonal conflicts that preclude the creation of a professional relationship. The client may have difficulty in obtaining new counsel if other law firms interpret the withdrawal as a condemnation of the client's activities.[139] For these reasons, an ambiguous notice of withdrawal does not provide an effective alternative to ac-

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Blowing the Whistle and Waving the Red Flag, 63 OR. L. REV. 455, 471-81 (1984) (asserting that final draft reflects a compromise between the Kutak Commission, which sought disclosure of client fraud, and amendments passed at the February 1983 meeting prohibiting disclosure).

133. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16 (1983).

134. *Id.* at Rule 1.6 comment 16. Comment 16 would have allowed Singer Hutner to disaffirm many of the loan documents it executed on behalf of OPM. The ambiguous nature of the notice of withdrawal, however, could create more problems than it solves.

135. *See* Rotunda, *supra* note 132, at 480-81.

136. *See, e.g.*, Marcus, *S & L Crisis Hurts Image of Prominent Maryland Law Firm*, Wash. Post, Jan. 21, 1986, § 1, at 8, col. 1.

137. *See* Gillers, *supra* note 97. "Lawyers are forbidden to warn their successors. In this way, each lawyer stays pure while the profession as a whole may become the unintentional silent partner in the crimes and frauds of others." *Id.*

138. Rotunda, *supra* note 132, at 481-83.

139. *See id.* at 480-81. If a law firm's withdrawal from the representation of a client serves to cast suspicion upon the client, the firm may find itself unable to withdraw.

tual disclosure of client misconduct. Therefore, Model Rule 1.6 fails to resolve the client-fraud dilemma.

V. OTHER INFLUENCES

While the *Model Rules* represent the ABA's opinion of an attorney's ethical reponsibilities, they do not serve as the sole standard for judging an attorney's conduct. Each state remains free to draft a different code of professional ethics or to adopt its own version of the *Model Rules*. In addition, lawmaking bodies and government agencies may attempt to regulate certain aspects of the attorney's conduct in response to a perceived governmental or societal need. Disagreement among these forces and the ABA over treatment of the client-fraud dilemma can produce adverse effects for the legal profession.

Disagreement within the legal profession over Model Rule 1.6 has the potential to diminish the ABA's influence in general. According to Robert Kutak, the Chairman of the Commission that drafted the *Model Rules*, "[t]he test for evaluating a national model must be whether, given inevitable local adaptation, the document taken as a whole reflects what should and will be acceptable as the prevailing view in the vast majority of jurisdictions."[140] Currently, seventeen states, including Maryland, have adopted some version of the *Model Rules*;[141] three states have rejected the *Model Rules in toto*.[142] Of those states adopting the Rules, only three have adopted Model Rule 1.6 without significant amendment.[143] If this pattern

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Model Rule 1.16 restricts a law firm's option to withdraw to situations in which withdrawal can be accomplished without harming the interests of the client.

140. Kutak, *supra* note 115, at 314-15.

141. 2 Law. Man. on Prof. Conduct (ABA/BNA) at 142 (Apr. 30, 1986), 245 (July 9, 1986), 261 (July 23, 1986), 401 (Oct. 29, 1986), 494 (Jan. 7, 1987).

142. *Id.* at 855 (July 10, 1985), 1047 (Nov. 13, 1985). The states are New York, Oregon, and Vermont. Oregon subsequently amended its existing code. The amendment allows a lawyer to disclose if the lawyer knows that the client intends to commit a crime. *Id.* at 245 (July 9, 1986).

143. Delaware, Missouri, and Montana have adopted Model Rule 1.6 without change. *See* DEL. R. OF PROF. CONDUCT Rule 1.6 (1985); MO. R. OF PROF. CONDUCT Rule 1.6 (1986); MONT. R. OF PROF. CONDUCT Rule 1.6 (1986). Several states have retained a rule substantially equivalent to *Model Code* DR 4-101(C)(3), *i.e.*, permissible disclosure to prevent a client from committing a crime. *See* ARK. MODEL R. OF PROF. CONDUCT Rule 1.6 (1986); IDAHO R. OF PROF. CONDUCT Rule 1.6 (1986); IND. R. OF PROF. CONDUCT Rule 1.6 (1986); MINN. R. OF PROF. CONDUCT Rule 1.6 (Supp. 1987); N.C. R. OF PROF. CONDUCT Rule 1.6 (1985 & Supp. 1986); WASH. R. OF PROF. CONDUCT Rule 1.6 (1986). Five states have adopted some degree of mandatory disclosure. *See* ARIZ. REV. STAT. ANN. Sup. Ct. Rules, Rule 42, ER 1.6 (1986); CONN. R. OF PROF. CONDUCT Rule 1.6 (1986); FLA. R. OF PROF. CONDUCT Rule 1.6 (1986); NEV. SUP. CT. RULES, R. OF PROF. CONDUCT Rule 156

continues as other states consider adoption of the *Model Rules*, the Rules will clearly fail to achieve a national consensus on the proper scope of the attorney-client privilege. Given the vital role that the privilege performs in the practice of law, this failure to achieve a national consensus would affect the legal profession in two significant and related ways. First, a disagreement between the ABA and local bar associations over Model Rule 1.6 would detract from the credibility of the ABA's claim to speak as "the voice of the legal profession."[144] Second, the loss of the ABA's unified voice might encourage courts, legislative bodies, and government agencies to experiment with alternative treatments of the client-fraud dilemma.[145]

In the mid-1970s the SEC did attempt to establish an alternative approach to the client-fraud dilemma. In *SEC v. National Student Marketing Corp.*[146] the SEC brought suit against a law firm for aiding and abetting a client in securities law violations in connection with a merger. Significantly, the SEC condemned the law firm not for actually participating in the wrongdoing, but rather for failing to take action necessary to prevent a client's misconduct.[147] The SEC's po-

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(1986); N.J. R. OF PROF. CONDUCT Rule 1.6 (1987). Three states have adopted rules allowing disclosure in a broader range of circumstances than those indicated in Model Rule 1.6. *See* MD. R. OF PROF. CONDUCT Rule 1.6 (Supp. Aug. 1986); N.H. R. OF PROF. CONDUCT Rule 1.6 (1986); N.M. R. OF PROF. CONDUCT Rule 1.6 (1986).

144. AMERICAN BAR ASSOCIATION ANNUAL REPORT 1980-81, at 2, *reprinted in* 67 A.B.A. J. 1479-1502 (1981).

145. Taylor, *supra* note 2, at col. 4. A disagreement between the ABA and local bar associations could

> make the ethical rules less useful as the practice of law turns increasingly to complex multistate transactions, and would leave a vacuum likely to be filled by courts, prosecutors and government agencies. They would increasingly be tempted to make up for the deficiencies of professional self-regulation by imposing civil and criminal liability on lawyers under laws such as those regulating securities.

Id.

146. 457 F. Supp. 682 (D.D.C. 1978). Counsel for the National Student Marketing Corporation discovered shortly before the closing of a merger that the corporation had distributed misleading financial statements to its shareholders. Despite the discovery, counsel did nothing to stop the transaction. *Id.* at 691-97.

147. The SEC's complaint alleged that the corporation's attorneys "failed to insist that . . . shareholders be resolicited, and failing that, to . . . notify the plaintiff Commission concerning the misleading nature of the nine month financial statements." Lorne, *supra* note 74, at 455 (quoting ¶ 48(1) of the SEC complaint). The court agreed that the attorneys had a duty to delay the closing pending resolicitation of the shareholders. 457 F. Supp. at 714. Finding the further question of a duty to disclose outside the scope of the case before it, the court did not reach a decision on the SEC's claim that such a duty existed. *Id.* at 714-15. Professor Patterson saw the effects of the SEC's complaint and the court's opinion in *National Student Marketing* as threefold. First, the duty of loyalty to the client no longer existed as the primary criterion for an attorney's ethical decision-

sition represented an attempt to alter the attorney's duty of loyalty to the client by creating a co-equal or superior duty of candor to others.[148] The SEC viewed attorneys and their special skills as "access points" to the securities market.[149] If attorneys possessed an affirmative duty to investigate their clients for possible violations of the law, the attorneys would in effect deny those engaged in wrongdoing access to the securities market.[150] Under this analysis, attorneys would become enforcement agents of the SEC[151] with an affirmative duty of candor to the SEC and others. Such a duty would clearly conflict with the *Model Code's* duty of loyalty to the client. The legal profession resisted the SEC's attempt to alter the attorney-client relationship. In addition, commentators condemned the SEC for not fully comprehending the effects of its actions on the legitimate rights of clients.[152]

Although the SEC has since retreated from its aggressive position put forward in *National Student Marketing*, the case temporarily had an adverse impact on the securities bar. Any action brought by the SEC against a law firm automatically created negative publicity for the firm[153] and occasionally served as a catalyst for charges of civil and criminal contempt.[154] These consequences, combined with the prospect of a lengthy and expensive court battle, forced many

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making. Second, the lawyer's standard of conduct now resided in the positive law as opposed to abstract theory. Finally, the attorney had to henceforth analyze the attorney's own legal problems in the same manner in which the attorney analyzed the client's legal problems (*i.e.*, by reference to the positive law). Patterson, *supra* note 90, at 1273-74.

148. 457 F. Supp. at 1254; *see generally* Block, *An Overview: Responsibilities of Attorneys Under the Federal Securities Laws*, 36 BUS. LAW. 1781, 1784-85 (1981) (noting SEC's position that counsel aware of potential fraudulent transactions should inform the board of directors when management requires counsel's advice concerning disclosure and, failing any remedial action of the board, resign and/or inform shareholders and the SEC of the nondisclosure).

149. Pickholz, *supra* note 60, at 1848.

150. *Cf. id.* (presenting theory that securities lawyers would be pressured to advise their clients in accordance with the government's viewpoint); Freeman, *supra* note 58, at 1792 (observing that the attorney's obligation to disclose to some outside group, if not to the government, would effectively result in the SEC's receiving notice of the disclosure).

151. Pickholz, *supra* note 60, at 1848.

152. *See, e.g.*, Freeman, *supra* note 58, at 1793; Lorne, *supra* note 74, at 455; Pickholz, *supra*, note 60, at 1842.

153. *See* Block, *supra* note 148, at 1782. The negative publicity generated by an SEC prosecution was generally aggravated by the SEC's tendency to overstate its claim. Lorne, *supra* note 74, at 457.

154. Lorne, *supra* note 74, at 457. The SEC's complaint could also encourage private damage suits. *Id.*

defendant law firms to seek a negotiated settlement with the SEC.[155] These settlements often produced results that "evidence[d] little consideration of the lawyer's general role and social obligations."[156] Law firms anxious to avoid an SEC prosecution began to err by placing too much emphasis on their duty of candor to the government.[157] The SEC's position intimidated attorneys, curtailed zealous representation of clients, and interfered with the continuing development of the securities laws.[158] These results indicate how a government agency's attempts to solve the client-fraud dilemma can challenge the ability of the legal profession to regulate certain aspects of the practice of law.

Model Rule 1.6 and its treatment of the client-fraud dilemma could encourage actions similar to *National Student Marketing* which threaten the legal profession's autonomy. In addition to serving as a standard for judging an attorney's conduct, the ABA's ethical codes attempt to safeguard the legal profession's ability to regulate the practice of law. The Preamble to the *Model Rules* states:

> The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship betwen the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.
>
> To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more easily challenged by a profession whose members are not dependent on government for the

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155. *Id.* at 454. The negotiated settlement occasionally required the law firm to implement internal procedures, designed by the SEC, to prevent future wrongdoing. For a discussion of some of these internal procedures, see *id.* at 458-64.

156. *Id.* at 457.

157. In Meyerhofer v. Empire Tire & Marine Ins. Co., 497 F.2d 1190 (2d Cir. 1974), an attorney disclosed confidential communications that a court eventually held the attorney-client privilege protected. Professor Lorne suggests that the attorney's erroneous disclosure in *Meyerhofer* was prompted by the ambiguous *Model Code*, the *National Student Marketing* complaint, and the attorney's concern over his own potential liability. Lorne, *supra* note 74, at 456-57.

158. *See* M. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 21-25 (1975).

right to practice.[159]

Society grants this autonomy to the legal profession, perhaps upon a belief that the profession will hold its members to a higher standard of conduct than the government would impose.[160] If courts, legislatures, and government agencies do not consider Model Rule 1.6 a high standard of conduct, they may challenge the profession's ability to regulate the attorney-client privilege.[161] For example, Senator Arlen Specter reacted to the passage of the *Model Rules* by introducing a bill that would have made an attorney criminally liable for a failure to disclose a client's fraudulent or illegal conduct.[162] The bill did not become law, but it did indicate Specter's view that the government should act to limit the ABA's influence over the attorney-client privilege. Actions to limit the legal profession's autonomy underscore the need for the ABA to remain sensitive to opposing views on the client-fraud dilemma.

The ABA should re-examine its current position on the client-fraud dilemma to preserve the legal profession's ability to regulate the attorney-client privilege of confidentiality. The aftermath of *National Student Marketing* demonstrates the adverse consequences on the practice of law resulting from a government agency's attempt to solve the client-fraud dilemma. Similarly, Senator Specter's bill threatened to impose criminal sanctions on attorneys who do not disclose clients' misconduct. The ABA has an interest in avoiding these consequences but cannot prohibit legislatures and government agencies from regulating the attorney-client privilege.[163] Instead, the ABA must discourage outside regulation by thoroughly analyzing the issues raised by client misconduct and by adopting rules that balance the duty of loyalty to the client with a duty of fairness to others. If enough states would then enact these rules, legislatures and government agencies might find it unnecessary to experiment with alternative solutions to the client-fraud dilemma.

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159. MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1983).

160. *See* Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689, 690 (1981) (noting that "[f]rom a societal perspective, however, professional codes are desirable only insofar as they serve common goals to a greater extent than other forms of control, namely market forces or government regulation").

161. *Cf.* Nix v. Whiteside, 106 S. Ct. 988, 1006 (1986) (Blackmun, J., concurring) ("the American Bar Association's implicit suggestion . . . that the Court find that the Association's Model Rules of Professional Conduct should govern an attorney's responsibilities is addressed to the wrong audience. It is for the States to decide how attorneys should conduct themselves in state criminal proceedings . . . .").

162. N.Y. Times, Feb. 18, 1983, § 4, at 16, col. 4.

163. The ABA may raise legal challenges to the government's regulations, but it lacks any authority to preclude such regulation.

In this manner, the ABA could retain its ability to safeguard the legitimate rights of both attorneys and clients by influencing the proper scope of the attorney-client privilege.

VI. PROPOSALS

Having reached the conclusion that the ABA should replace Model Rule 1.6, this comment offers in this final section general suggestions concerning the issues the ABA should consider. This section does not purport to provide a comprehensive discussion of all of the issues relevant to the client-fraud dilemma; rather, it seeks to provide proposals for future debate.

The ABA should begin further analysis of the client-fraud dilemma with specific consideration of the attorney's role as advisor. The Preamble to the *Model Rules* acknowledges that an attorney may serve the client as advisor, advocate, negotiator, intermediary, or evaluator,[164] but Model Rule 1.6 does not distinguish among these capacities. By distinguishing the advisory role from the advocacy role, the ABA could focus on the differences and enact rules designed to best serve the needs of all concerned.[165] For example, rules applicable to the legal advisor might recognize that the absence of an impartial tribunal forces society to place great reliance on the legal advisor's good faith. A separate set of ethical rules for the legal advisor may not fully resolve the client-fraud dilemma, but would allow the ABA to develop rules applicable outside of the special concerns of the adversary system.[166]

Since the attorney's advisory and adversarial roles are not mutually exclusive, the ABA would admittedly confront obstacles if it attempted to provide separate rules. One example mentioned earlier in this comment concerned the attorney's preparation of a client's registration statement for an upcoming public stock offering and also representing the same client in ongoing litigation.[167] If the attorney discovers an adverse fact that the statement must include

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164. MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1983).

165. To a certain extent, the ABA has exercised this option. *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1983) (defining the attorney's duty of candor toward the tribunal).

166. A separate set of rules might help alleviate the schism within the legal profession over the client-fraud dilemma. It is significant that the American College of Trial Lawyers strongly opposed the draft's position on the disclosure of client misconduct. *See* Taylor, *supra* note 131; *see also* Koskoff, *supra* note 6, at 261 (describing the discussion draft's proposals as threatening "to destroy the adversary system and the lawyer-client relationship").

167. *See supra* notes 94-96 and accompanying text.

but that would compromise the client's litigation position, a conflict arises between the attorney's duties as advocate and advisor. The ABA could resolve this conflict by instructing the attorney to protect only the client's legal interests. In the above situation, the attorney could not issue a registration statement that omitted the adverse fact if the law required the fact's disclosure. Hence, the client must decide whether to postpone the public offering or else risk its position in the current litigation. Society, acting through its securities laws, forces this decision upon the client. The legal profession's ethical rules should not permit the client to frustrate society's intent. This understanding could assist the ABA in drafting separate ethical rules for the legal advisor.

If the ABA decided to enact ethical rules specifically designed for the legal advisor, a mandatory duty of withdrawal and a discretionary right of disclosure could form the nucleus of a new approach to the client-fraud dilemma. This new approach should contain a provision that allows the legal profession to enforce any new rules and also to prevent the legal advisor from intentionally remaining ignorant of the client's illegal conduct. The ABA could accomplish these goals by requiring the legal advisor to conduct a reasonable investigation of a client's questionable activities. Some would immediately argue that a duty to monitor a client's conduct places a significant burden on the legal advisor and casts an unjust suspicion on the client. To avoid this result, the ABA must draft any duty to investigate in a manner that does not place an unreasonable strain on the attorney-client relationship. For example, an ethical rule could charge the legal advisor with the same duty to investigate the client's activities as is exercised by a reasonably prudent attorney practicing in the same area of law.[168] This rule would enable the legal profession to review an advisor's conduct and to consider any complexities of the advisor's practices without creating a duty that other practitioners view as unreasonable. In this manner, the ABA could establish when an attorney knows or should know of a client's illegal conduct.

The creation of an affirmative duty to monitor the legality of a client's questionable behavior would enable the ABA to apply a mandatory scheme of withdrawal to the client-fraud dilemma. Currently, the ABA's *Model Rules* recognize certain principles of with-

168. In the OPM case, for example, Singer Hutner ignored substantial evidence of OPM's fraudulent conduct. If other New York law firms would have responded to this evidence by investigating OPM's leases, the rule envisioned by this comment would allow the legal profession to discipline Singer Hutner.

drawal that could serve as a guide for rules of mandatory withdrawal. Model Rule 1.16 requires an attorney to withdraw from representation if "the representation will result in violation of the rules of professional conduct or other law."[169] In addition, Model Rule 1.16 permits discretionary withdrawal when:

> (1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
>
> (2) the client has used the lawyer's services to perpetuate a crime or fraud;
>
> (3) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent . . . .[170]

If an attorney withdraws pursuant to Model Rule 1.16, the attorney must "take steps to the extent reasonably necessary to protect the client's interests . . . ."[171] This rule contains several useful elements, but a rule designed to combat the client-fraud dilemma requires a more detailed and aggressive approach.

The ABA should consider enacting a rule that requires the attorney serving as a legal advisor to withdraw from representation if the client insists on using the attorney's services to pursue fraudulent or illegal conduct.[172] Mandatory withdrawal, combined with a reasonable duty to monitor a client's conduct, would impose an enforceable ethical duty on the legal advisor and discourage clients from involving their attorneys in misconduct. At the same time, however, a rule of mandatory withdrawal must protect the client's legitimate interests and the attorney's ability to persuade the client to remain within the law. Thus, a scheme of mandatory withdrawal should require the legal advisor to meet with the client prior to the termination of the attorney-client relationship. This meeting would allow the client to correct any erroneous judgment the advisor may have made in assessing the legality of the client's activities. The meeting would also give the advisor an opportunity to encourage the client to refrain from future misconduct and to rectify the consequences of past misconduct. If the client refuses to accept the advi-

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169. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(a)(1) (1983).

170. *Id.* at Rule 1.16(b)(1)-(3).

171. *Id.* at Rule 1.16(d).

172. Model Rule 1.16 allows discretionary withdrawal when the client engages in conduct that the attorney finds morally repugnant. The rule proposed in this comment requires withdrawal, but only if the client engages in fraudulent or illegal activity. To force an advisor to withdraw when the advisor views a client's conduct as morally objectionable unjustly allows the advisor's moral beliefs to greatly influence the client's conduct.

sor's recommendations, the rule should then require the advisor's withdrawal, with the advisor's taking only those precautions reasonably necessary to protect the client's legitimate interests.[173] In this manner, mandatory withdrawal would create a "minimum level of conduct below which no lawyer can fall without being subject to disciplinary action."[174]

Any proposed solution to the client-fraud dilemma should also grant the legal advisor the discretion to disclose a client's misconduct when withdrawal alone will not prevent death or substantial bodily harm or substantial injury to the financial interests of others.[175] Those who oppose disclosure of confidential communications generally express great concern over the effects that unrestrained disclosure could have on the legitimate rights of clients. The discretionary disclosure envisioned by this comment shares those concerns and attempts to limit disclosure in a way that balances the client's legitimate interests with several compelling needs of society. First, the disclosure rule should require the advisor to terminate the representation pursuant to the mandatory withdrawal rule prior to any disclosure of client misconduct. Compliance with the mandatory withdrawal rule limits any potential disclosure to a situation in which the client has expressly refused to refrain from fraudulent or illegal activity. Even if the advisor must withdraw from representation, however, the disclosure rule would deny the right to disclose unless the client's conduct threatens substantial injury to others. Thus, the proposed disclosure rule would restrict that right to a relatively narrow set of circumstances. This rule would not serve as a tool to discipline attorneys; rather, it would allow the legal advisor to sacrifice a client's fraudulent or criminal intent to safeguard compelling needs of society.

A mandatory duty of withdrawal and a discretionary right of disclosure should contain several principles designed to preserve essential functions of the attorney-client privilege. First, the ABA

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173. The ABA may also wish to enact a provision that requires the legal advisor who has prepared for the client any documents that contain false or misleading information to withdraw those documents. To avoid unjust prejudice to the client, this provision would give the client the option of withdrawing the documents before the advisor does so.

174. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preamble and Preliminary Statement (1980).

175. This proposal borrows the language of proposed Model Rule 1.6(b)(1) (Revised Final Draft 1982). *See supra* note 127 and accompanying text. *See generally supra* notes 136-139 and accompanying text (explaining why withdrawal alone is not an effective solution to the client-fraud dilemma).

could modify the legal advisor's duty of withdrawal with a de minimis and harmless consequences exception.[176] This exception would allow the legal advisor to continue the representation of a client if the client's misconduct remains insignificant and does not pose a threat to others. Without such an exception, mandatory withdrawal would require the legal advisor to terminate representation when a client's continued violation of some minor government regulation would not harm the interests of others. The vague meaning of "de minimis and harmless consequences," however, could encourage abuse by those attorneys determined to continue representing clients engaged in significant wrongdoing. For this reason, any draft of such an exception must avoid creating a broad loophole for the unscrupulous. If the ABA can accomplish this goal, insignificant and technical violations of the law would not terminate an attorney-client relationship.

In addition to an exception for de minimis and harmless consequences, the duty of mandatory withdrawal should also contain a good faith argument exception. Those who would oppose mandatory withdrawal might conclude that such withdrawal prevents the legal advisor from challenging unjust, poorly drafted, or outdated laws. The legal advisor should be relieved of a duty to withdraw if the advisor can make a good faith argument in support of the position taken. In an example used earlier in this comment, the government enacted new food stamp regulations that seriously jeopardized the operation of a merchant's business.[177] Under a good faith argument exception, the legal advisor could avoid withdrawal and could assist the merchant in challenging the legality and enforceability of the new regulations.

This exception could also have indirect application to the advisor's discretionary right of disclosure. For example, the advisor withdraws after attempting to fit the client's conduct within the good faith argument exception. Although the conduct represented a close case, the attorney nevertheless determines that a good faith argument does not support the conduct's legality. The closeness of this determination could encourage the advisor not to disclose the client's conduct because someone else might succeed in construct-

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176. *See* Lorne, *supra* note 74, at 490:

> When there is relatively little involvement of the advisor in an improper activity, either because the involvement is slight or the impropriety is unclear, and the social harm is not perceived or substantial, the advisor should be permitted to resign but only if to do so will not operate to the disadvantage of the client.

177. *See supra* notes 59-62 and accompanying text.

ing a good faith argument. Thus, the exception would protect the client's legitimate interests and would allow the attorney to participate in the continued development of the law.

In summary, client misconduct poses an ethical dilemma which the legal profession has failed to resolve. This failure has exposed the legal profession's vulnerability to government regulation and demonstrated a need for the ABA to conduct a comprehensive analysis of the client-fraud dilemma. This comment has presented several suggestions for a set of rules to guide the legal advisor when confronting client misconduct. These suggestions attempt to create an ethical scheme that encourages clients to refrain from fraudulent or illegal activity without restricting the client's ability to secure zealous legal representation. The ABA should consider these and similar proposals to provide an effective solution to the client-fraud dilemma.

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