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# Ratting

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# “Ratting”

Paul R. Tremblay†

## I. Introduction

Lawyers have permission to reveal the intended criminal activity of clients.<sup>1</sup> They may even, on occasion, have permission to reveal the past criminal activity of clients.<sup>2</sup> This Article explores whether

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1. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(3) (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (1992).

2. Although it is well-established that the only generalized exceptions to the ethical obligation of confidentiality, see MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1992), and the evidentiary attorney-client privilege, see, e.g., UNIF. R. EVID. 502, are for intended, i.e., future crimes or frauds, in some contexts lawyers may, or even must, reveal past, completed crimes or frauds perpetrated by their clients and learned by the lawyer in the course of the representation. For example, in Model Code jurisdictions which have not adopted the “except clause” to DR 7-102(B)(1), lawyers must reveal “fraud [by a client] upon a person or tribunal.” MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B)(1) (1970); see also ABA Comm. on Ethics & Professional Responsibility, Formal Op. 92-366 (1992) (“noisy withdrawal” might be a lawyer’s duty when faced with client misconduct, trumping Model Rule 1.6); Randy Samforn, *‘Noisy Withdrawal’ Held a Duty*, NAT’L L.J. Jan. 18, 1993, at 3. The Massachusetts Bar Association’s Committee on Professional Ethics has determined that, regardless of the reading of DR 7-102(B)(1), lawyers must reveal past perjury if doing so is necessary to prevent a client from repeating that perjury. See Mass. Bar Ass’n, Comm. on Prof. Ethics, Op. 89-1, reprinted in 74 MASS. L. REV. 114 (1989).

Professor Harry Subin has also argued that in some contexts lawyers may be required by a tribunal to reveal past crimes under the attorney-client privilege’s “crime/fraud” exception. See Harry I. Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 IOWA L. REV. 1091, 1112-18 (1985).

The OPM and Kaye Scholer scandals, where lawyers have been accused of wrongdoing and have settled cases for many millions of dollars after they refused to disclose ongoing client fraud, may also serve as examples of an increasing willingness to recognize that lawyers’ obligations are not restricted to purely future activity. See generally *In re OPM Leasing Servs., Inc.* (Report of the Trustee Concerning Fraud and Other Misconduct in the Management of the Affairs of the Debtor) [hereinafter *OPM Trustee Report*], reprinted in GEOFFREY C. HAZARD, JR. & SUSAN P. KONIAK, *THE LAW AND ETHICS OF LAWYERING* 255-71 (1990) (discussing

lawyers have permission, or ought to have permission, to arrange deliberately to learn about or to document client criminal activity so as to reveal the information to authorities, while concealing that process from their clients. I argue that they should not have that permission.

This effort to establish an ethics-based prohibition on what I will refer to as, for want of a more elegant word or phrase, "ratting,"<sup>3</sup> may appear to be an easy task. It may appear to be the setting up of the frailest of straw persons, only to demonstrate the straw's frailties. I hope this is true. I fear it is not, though, because the phenomenon of ratting is gaining prevalence; it has at least one source of support in legal ethics literature<sup>4</sup> without any contrary publication as of yet;<sup>5</sup> and ratting has been consistently supported, even if begrudgingly, by the courts which have confronted it.<sup>6</sup> Ratting also has some conceptual attractiveness, in light of the principles stated in the first two sentences of this section,<sup>7</sup> as well as some potential moral attractiveness as discussed below.<sup>8</sup> The straw person therefore needs to be dismantled.

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and criticizing the attorneys' role in the OPM incident); Stephanie B. Goldberg, *Kaye Scholer: The Tremors Continue*, 78 A.B.A. J., July 1992, at 50 (discussing various legal and ethical issues raised in the Kaye Scholer incident); Symposium, *In the Matter of Kaye, Scholer, Fierman, Hays & Handler: A Symposium on Government Regulation, Lawyers' Ethics, and the Rule of Law*, 66 S. CAL. L. REV. 977 (1993).

3. I have rejected the use of the term "whistleblowing" as a less obviously loaded sobriquet for the deliberate arrangement of knowledge of criminal activity, because "whistleblowing" implies an innocence or an inadvertence on the part of the lawyer which is absent in the ratting examples. The distinction between whistleblowing and ratting, in fact, serves primarily as my argument against the latter and in support of the former.

4. See H. Richard Uviller, *Presumed Guilty: The Court of Appeals Versus Scott Turow*, 136 U. PA. L. REV. 1879 (1988); see also Christopher J. Shine, Note, *Deception and Lawyers: Away from a Dogmatic Principle and Toward a Moral Understanding of Deception*, 64 NOTRE DAME L. REV. 722 (1989) (somewhat apologetic about Turow's involvement in ratting arrangements).

5. But see Cathy B. Peterson, Comment, *Defense Attorneys As Government Informants: Strangers in a Strange Land?*, 5 GA. ST. U. L. REV. 619 (1989). This student comment critical of the United States v. Ofshe, 817 F.2d 1508 (11th Cir.), cert. denied, 484 U.S. 963 (1987), holding might serve as an example of contrary authority, but it is concerned more with the constitutional implications of *Ofshe* than with the ethical implications, and thus does not argue that ratting is unethical. *Id.*

6. See cases discussed *infra* notes 27-102.

7. See *supra* text accompanying notes 1-2.

8. See *infra* text accompanying notes 176-82.

I suspect that for most thoughtful observers the idea of ratting on clients is, at least viscerally, a disquieting one. In the several reported cases where ratting has played a part in a criminal proceeding, most courts—while usually upholding convictions and indictments—have included in their opinions language reflecting annoyance to outrage at the lawyers' betrayal of client trust. The opinions have described the ratting as "sleazy,"<sup>9</sup> "reprehensible,"<sup>10</sup> "shocking,"<sup>11</sup> "astonishing,"<sup>12</sup> and "bizarre."<sup>13</sup> Courts which have resorted to less colorful descriptions still frequently stress that they do not condone betrayal of trust as a crime-fighting strategy.<sup>14</sup> Those courts, as noted, permit the activity, but ruefully.

At the same time, the idea of whistleblowing, in contrast to ratting, is not nearly as disliked. Lawyers who fail or refuse to "blow the whistle" and report ongoing misconduct of their clients in order to spare harm to innocent third parties are frequently skewered in commentary.<sup>15</sup>

9. *United States v. Noons*, Criminal No. H-89-92, at 11 (S.D. Tex. Sept. 5, 1991).

10. *United States v. Ofshe*, 817 F.2d 1508, 1516 n.6 (11th Cir.), *cert. denied*, 484 U.S. 963 (1987).

11. *United States v. Marshank*, 777 F. Supp. 1507, 1512 (N.D. Cal. 1991).

12. *Id.* at 1520.

13. *Id.* at 1522.

14. *See, e.g.*, *United States v. Morrison*, 449 U.S. 361, 367, 101 S. Ct. 665, 669, 66 L. Ed. 2d 564, 569 (1981) ("[W]e do not condone the egregious behavior of the Government agents."); *United States v. Irwin*, 612 F.2d 1182, 1186-87 (9th Cir. 1980) (stating that interference with attorney-client relationship "not condoned" but not a constitutional violation); *United States v. Glover*, 596 F.2d 857, 864 (9th Cir. 1979) ("[W]e do not condone the behavior" of agents interfering with the attorney-client relationship.); *cf.* *United States v. Simpson*, 813 F.2d 1462, 1465 (9th Cir.), *cert. denied*, 484 U.S. 898 (1987) ("[W]e do not necessarily condone" use of prostitute who then engaged in a sustained sexual relationship with the defendant.).

Amid some controversy, the United States Department of Justice has continued to stress that United States Attorneys lawfully and ethically may use informants (although not necessarily lawyer informants) as a proper means through which to conduct criminal investigations, notwithstanding a possible infringement thereby on the rights of the accused to assistance of counsel. *See* 5 ABA/BNA MANUAL OF PROFESSIONAL CONDUCT No. 25, at 427-28 (Jan. 3, 1990) (discussing the controversy surrounding the "Thornburg memorandum"); *see also* Cris Carmody, *U.S. Judge's Opinion: Justice Department Rules Trump State Ethics*, NAT'L L.J. Mar. 1, 1993, at 7. The Department of Justice policy reflected the decision of the Second Circuit in *United States v. Hammad*, 846 F.2d 854, *modified*, 858 F.2d 834 (2d Cir. 1988) (allowing latitude in the use of informants as a legitimate investigative technique "authorized by law").

15. *See, e.g.*, *OPM Trustee Report*, *supra* note 2, at 266-70; DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 206-17 (1988) (criticizing the Ford Pinto episode and the lawyers' failure to warn officials who might have insured the auto's safety). For a discussion

I suggest that the two skewerings are not at all inconsistent, and that one may defend and promote whistleblowing while rejecting ratting. The difference, it seems, rests on the manner in which the lawyer approaches the disclosures, the level of honesty which accompanies the lawyer's efforts, and the degree of manipulation involved in the relationship.

In ratting, but usually not in whistleblowing, the lawyer *orchestrates* the revelation of information and preserves it in a way that will be helpful to a prosecutor. The second, and possibly more significant, concern is that ratting implies a *deceit* which I argue the profession ought to condemn. Although it is hard to find articulated support for such a proposal, justified whistleblowing must include discussion and dialogue with, and revelation to, one's client before or simultaneous with one's revelation. Ratting, on the other hand, inherently includes deception of the client in order to capture the incriminating information or deceptively to use *previously learned information*. It is that behavior which I criticize here. Dishonesty is always enormously suspect, morally, and requires great justification and burden of proof which, I argue, is not met. In addition, two accompanying concerns arise from the dishonesty and betrayal. The first is a deontological concern about exploiting intimacy. The second is a more utilitarian complaint that a failure to condemn ratting poses a risk to the profession in its effort to sustain trust between lawyers and clients. Using Professor Robert Burt's theories, this Article demonstrates that encouragement of dialogue within a morally activist and victim-sensitive practice will foster trust while substantially accomplishing the aims of ratting.

Part II of this Article canvasses briefly the stories of ratting as reported in judicial opinions and elsewhere in order to demonstrate both the increasing prevalence and the contexts of this attorney-client interaction.

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of statutes intended to encourage whistleblowing, see Roger C. Cramton, *The Lawyer as Whistleblower: Confidentiality and the Government Lawyer*, 5 GEO. J. LEGAL ETHICS 291 (1991); Robert G. Vaughn, *Statutory Protection of Whistleblowers in the Federal Executive Branch*, 1982 U. ILL. L. REV. 615; see also Stephen Gillers, *Protecting Lawyers Who Just Say No*, 5 GA. ST. U.L. REV. 1 (1988) (defending lawyers who may have to betray corporate clients). *But see* Schatz v. Rosenberg, 943 F.2d 485, 493 (4th Cir. 1991) (holding that "[t]he better rule . . . [is] that attorneys have no duty to 'blow the whistle' on their clients").

Part III reviews the law<sup>16</sup> applicable to ratting, most notably the constitutional principles implicated in a lawyer's assistance of a prosecution against his client. Part III shows that precedent, and to some extent logic, supports the conclusion that ratting done well does not inescapably contravene constitutional or other doctrinally established protections, even if there are important contrary arguments. My purpose being more ethical than legal, I do not try to establish the contrary arguments but note them and their record of nonsuccess in courts. Part IV then takes up the ethical questions, which are the primary purpose here. That Part first explains how one might try to justify ratting using conventional positivist professional responsibility guidelines, and how one might try to justify the conduct using moral principles which the profession ought to embrace. Both of those arguments fail, I argue. I then articulate my moral objections to the practice and the necessity for a concerted and principled rejection of it by the bar.

## II. Reported Ratting: The Cases

Before I offer a glimpse into the lives of ratting lawyers and ratted-upon clients, I think it is instructive to consider the guises in which this behavior might arise. The reported cases inevitably involve a lawyer taking information disclosed by a client, who seemingly trusts the lawyer not to exploit the confidence,<sup>17</sup> and communicating that information to a prosecutor or government agent who uses it, perhaps indirectly,

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16. Some readers of an earlier draft of this Article have appropriately questioned the legitimacy of a "law-ethics" distinction. They recognize, correctly it seems, that in professional responsibility matters there is as much "law" in the ethics standards as in the statutory, regulatory, or constitutional mandates. *See, e.g.*, STEPHEN GILLERS, *REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS* 1-6 (3d ed. 1992). As the text makes clear, this Article refers to "law" as the strain of doctrine which might be implicated in the ratted-upon defendant's trial, whether evidentiary or constitutional, and which might affect the validity of any indictment or conviction. *See infra* Part III. In contrast, I refer to "ethics" as that strain of doctrine which governs whether the lawyer, subject to governing professional standards, is permitted to act in a certain manner. *See infra* Part IV. The distinction is both awkward and crude, but I find it helpful. It is also a distinction used in effect by Richard Uviller in his discussion of this topic. *See Uviller, supra* note 4, at 1883, 1887.

17. The word "confidence" is used here in its lay meaning and not necessarily in the manner in which it is employed by the Model Code, where it refers to information protected by the attorney-client privilege. *See MODEL CODE OF PROFESSIONAL RESPONSIBILITY* DR 4-101(A) (1980).

in a prosecution of the client. In some rare instances the same lawyer then is retained to represent the client in the ensuing prosecution, the client being unaware of the lawyer's role in its origin.<sup>18</sup> In other cases the lawyer remains as counsel on unrelated matters while feeding the information to the state.<sup>19</sup> In such cases, the lawyer may need to maintain the ongoing relationship in order effectively to acquire the incriminating information promised to the prosecutor.

More frequently, ratting cases involve a lawyer using information about *former* clients. In these cases, the lawyer will either provide information he<sup>20</sup> already has<sup>21</sup> or reestablish contact with a client in order to collect incriminating statements or evidence.<sup>22</sup>

Also, in virtually every reported instance of ratting the lawyer himself is under suspicion or indictment for criminal activity, often separate from that of the client. This fact makes it easier to object to the ratting; positive law<sup>23</sup> as well as ethical principles<sup>24</sup> are apt to hold that such an exploitation for personal benefit is simply unacceptable. Although we might possibly reject ratting on that ground alone, I suggest that relying upon this reasoning is insufficient for the purpose of this Article. Although I describe cases where lawyers are in deep trouble and turn in their clients for their own benefit, I critique ratting from a perspective which assumes that the lawyer has only noble motives—say, ending the epidemic of drugs, or otherwise “fighting crime.” It is significant

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18. See *United States v. Marshank*, 777 F. Supp. 1507 (N.D. Cal. 1991).

19. See *United States v. Ofshe*, 817 F.2d 1508, (11th Cir.), *cert. denied*, 484 U.S. 963 (1987).

20. Throughout this Article, the pronouns “he,” “his,” and “him” are employed almost exclusively. This is done not so much for convenience, although that benefit is certainly achieved, but because the ratting behavior which has been reported is inevitably conducted by male lawyers. It also appears, as described below, that the moral reasoning which tends to support ratting is in many ways “male” in its approach. See *infra* Part IV.C.2.

21. See, e.g., *United States v. White*, 879 F.2d 1509, 1510 (7th Cir. 1989), *cert. denied*, 494 U.S. 1027 (1990).

22. See, e.g., *United States v. Arteaga*, 807 F.2d 424, 425 (5th Cir. 1986).

23. See, e.g., RESTATEMENT (SECOND) OF AGENCY § 395 (1957).

24. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (1992) (stating a lawyer may not represent a client where that representation is limited by the lawyer's own interests).

that "noble ratting"<sup>25</sup> is nowhere to be found in the literature, but given my attention to the similarities between whistleblowing and ratting,<sup>26</sup> it is of some importance that I establish that *all* ratting as I have defined it is offensive to the principles to which lawyers must adhere.

The most prominent of the ratting cases has to be *United States v. Ofshe*.<sup>27</sup> In *Ofshe*, celebrated author Scott Turow, while serving as a prosecutor for the United States Attorney's office in Chicago, arranged for a lawyer secretly to record the conversations of one of his clients.<sup>28</sup> *Ofshe* is unusual in the annals of ratting. The lawyer involved, Marvin Glass, remained as counsel to Ronald Ofshe in criminal proceedings related to Ofshe's drug trafficking business while at the same time he employed a "Nagra body bug" to preserve evidence about Ofshe's other drug activities.<sup>29</sup> Glass agreed to perform this prosecutorial favor as part of his negotiations with the Cook County, Illinois, "Operation Greylord" investigation, of which Turow was a part.<sup>30</sup>

Glass had a co-counsel, one Mel Black, in his defense of Ofshe in Florida, and Black was kept uninformed about Glass' dealings with Turow, as was the presiding judge in that proceeding.<sup>31</sup> When the presiding judge eventually learned of Glass' double agent role, he ordered withdrawal (still without informing Black); Glass was able to appeal that withdrawal order in a sealed proceeding about which neither Ofshe nor Black knew anything.<sup>32</sup>

After approximately twenty months, Black learned of the deal between Turow and Glass and sought to have the ongoing criminal prosecution of Ofshe dismissed because of the prosecutorial interference with Ofshe's right to unconflicted counsel. Black's motion to dismiss the indictment was denied,<sup>33</sup> and Ofshe was convicted and sentenced to four years

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25. See *infra* note 194 (giving hypothetical example of "noble" ratting).

26. See *supra* notes 14-15 and accompanying text.

27. 817 F.2d 1508 (11th Cir.), *cert. denied*, 484 U.S. 963 (1987).

28. *Ofshe*, 817 F.2d at 1511.

29. *Id.*

30. *Id.* at 1511 & n.2.

31. See *id.* at 1511-12.

32. See *id.*

33. *Ofshe*, 817 F.2d at 1508.



in prison.<sup>34</sup> On appeal, the Eleventh Circuit held that Ofshe suffered no prejudice by Glass' actions and that the actions of the government "were not so outrageous as to 'shock the universal sense of justice.'"<sup>35</sup> Therefore, the court affirmed the district court decision.<sup>36</sup> The Eleventh Circuit disagreed that any Sixth Amendment violation had been shown, because no information obtained through the body bug was communicated to the prosecuting attorney in Florida and Ofshe had been represented zealously by Black throughout.<sup>37</sup> The court further held that the government conduct had not been so shocking as to violate the Fifth Amendment's due process protections.<sup>38</sup>

The Eleventh Circuit, while holding that the Government's conduct was not necessarily "shocking to the universal sense of justice,"<sup>39</sup> made it plain that it did not condone the use of defense attorneys as informants against their clients.<sup>40</sup> In a now famous footnote, the court termed Glass' and Turow's conduct "reprehensible" and referred the matter publicly to the Attorney Registration and Disciplinary Commission.<sup>41</sup> That Commission then launched an investigation of Turow's actions,<sup>42</sup> but eventually dismissed the inquiry without establishing any wrongdoing on Turow's part.<sup>43</sup>

Turow filed with the court of appeals a motion to strike from the record the damning footnote.<sup>44</sup> In denying the motion, a three judge panel of the Eleventh Circuit, far from backing off its earlier footnote,

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34. David Berg, *Shallow Ruling Trespasses on Client Confidentiality*, FULTON COUNTY DAILY REP., Sept. 2, 1987, at 2.

35. *Ofshe*, 817 F.2d at 1516.

36. *Id.* at 1517.

37. *Id.* at 1515-16.

38. *Id.* at 1516.

39. *Id.*

40. *Ofshe*, 817 F.2d at 1516.

41. *Id.* at 1516 n.6.

42. Martha Middleton, *Troubles for Scott Turow*, NAT'L L.J., Aug. 17, 1987, at 2.

43. See Andrew L. Kaufman, *Judicial Ethics: The Less Often Asked Questions*, 64 WASH. L. REV. 851, 866 (1989) (citing letter from Deborah M. Kennedy, Senior Counsel to the Commission, to Thomas P. Sullivan, attorney for Turow (Dec. 13, 1988)).

44. Court Opinion Memorandum at 1, *United States v. Ofshe*, 817 F.2d 1508 (11th Cir. Nov. 16, 1987) (No. 82-6129).

wrote that Turow may have committed an "obstruction of justice"<sup>45</sup> and directed its order to the attention of the United States Attorney for the Southern District of Florida for investigation.<sup>46</sup> The United States Attorney's Office referred the matter to the Office of Public Integrity of the Department of Justice,<sup>47</sup> which cleared Turow.<sup>48</sup> The Attorney Registration and Disciplinary Commission voted to dismiss its investigation.<sup>49</sup> While Turow has described the Ofshe experience as the "most dismal—and disappointing—moment" of his professional career, he has defended his actions: "I believed—and continue to believe—that neither clients nor lawyers have the right to plan crimes secure from government law enforcement efforts."<sup>50</sup>

Marvin Glass did not fare as well as Scott Turow. Despite his cooperation with the United States Attorney's Office, he was convicted of drug charges related to "Operation Greylord" and was sentenced to serve eight years in prison.<sup>51</sup> In addition, he was disbarred,<sup>52</sup> although it is not at all apparent that this discipline was the result of his Ofshe betrayal rather than his conviction for the narcotics offense.

A more egregious example of rattng, probably the most questionable and extreme, can be found in the case of *United States v. Marshank*,<sup>53</sup> involving Los Angeles attorney Ronald Minkin. Minkin cooperated extensively with prosecutors and Drug Enforcement Agency officials to ensure the conviction, or at least the cooperation, of several suspected

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45. Court Opinion at 5, *Ofshe* (No. 82-6129).

46. *Id.* at 13.

47. See George Volsky, *Lawyer-Novelist is Assailed for Handling of Drug Case*, N.Y. TIMES, Dec. 1, 1987, at A16.

48. *Justice Department Clears Ex-Prosecutor, a Novelist*, N.Y. TIMES, May 1, 1988, at 38. In a letter to Turow's attorney, the Justice Department wrote that "there is no evidence that any of the actions taken by Mr. Turow or his superiors violated any Federal criminal statute." *Id.*

49. Kaufman, *supra* note 43, at 866.

50. Scott Turow, *Law School v. Reality*, N.Y. TIMES, Sept. 18, 1988, (Magazine) at 52, 74.

51. William B. Crawford, Jr., *Attorney Panel Probes Lawyer, Author Turow*, CHI. TRIB., Aug. 5, 1987, Chicagoland Section, at 3.

52. Middleton, *supra* note 42, at 2.

53. 777 F. Supp. 1507 (N.D. Cal. 1991).

drug dealers, most of whom were present or former Minkin clients.<sup>54</sup> Minkin began by giving to the investigating officials a list of names of those who were involved in the drug trade, several of whom were his clients.<sup>55</sup> Subsequently, Minkin worked actively to bring in Seth Booky, who agreed to cooperate, and the so-called "big fish," Stephen Marshank, who did not cooperate<sup>56</sup> and whose indictment was the subject of this reported decision.<sup>57</sup> While Minkin, unlike all of the other lawyers in the ratting sagas, was not under any suspicion for criminal wrongdoing himself, he did enter into an arrangement with the government agents which allowed him to earn millions of dollars in bounties as his share of confiscated or forfeited property.<sup>58</sup>

Not only did Minkin provide information to officials about Booky and Marshank, but he actually represented each in their negotiations with the prosecutors without disclosing his role in the investigation to his clients.<sup>59</sup> Because of the extraordinary steps which Minkin took to betray his clients, this case stands as the only reported instance where the lawyer's informing caused the indictment to be dismissed. In a rather blistering opinion, district court Judge Marilyn Hall Patel found that the government's conduct created a conflict of interest between Minkin and Marshank that rendered Minkin's representation of Marshank ineffectual.<sup>60</sup> The court found that conflict clearly prejudicial and declared that the Government's conduct in this case was "fundamentally unfair" and "shocking to the 'universal sense of justice.'"<sup>61</sup> The court also agreed with Marshank that the Government had failed to fulfill its "affirmative obligation not to subvert the Sixth Amendment right to counsel,"<sup>62</sup> and it relied upon its supervisory power to dismiss the indictment.<sup>63</sup> Since Judge Patel's opinion, efforts to challenge Minkin's

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54. *See Marshank*, 777 F. Supp. at 1511-18.

55. *Id.* at 1512.

56. *Id.* at 1512-17.

57. *Id.* at 1507.

58. *Id.* at 1514.

59. *See Marshank*, 777 F. Supp. at 1513-14, 1516.

60. *Id.* at 1519-20.

61. *Id.* at 1524.

62. *Id.* at 1525.

63. *Id.* at 1530 & n.17.

conduct in the professional arena have commenced, but as of this writing, the matter remains unresolved.<sup>64</sup>

The next story of elaborate lawyer rattling, *United States v. White*,<sup>65</sup> concerns not drug activity but bankruptcy fraud instead. It revolves around a prosecution of a husband and wife, the Whites, who had filed for personal bankruptcy using the services of attorney Mark Center.<sup>66</sup> The Whites and Center apparently misrepresented certain asset holdings in the bankruptcy papers.<sup>67</sup> Later, after that representation was completed, Center was convicted for bankruptcy fraud in an unrelated matter.<sup>68</sup> While awaiting sentencing on that charge, Center offered to provide information about the Whites' bankruptcy to prosecutors.<sup>69</sup> He then

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64. Marshank's successor attorney referred the case to the Justice Department for investigation, while the California State Bar reportedly has begun an investigation as well. Howard Mintz, *Counsel's Deal with Feds Gets Drug Case Tossed*, THE RECORDER, Nov. 6, 1991, at 1. The Justice Department investigation is proceeding. See Howard Mintz, *Patel Asked to Reconsider Dismissal of Drug Case*, THE RECORDER, Dec. 17, 1991, at 2. In September, 1991, Marshank filed suit against Minkin for malpractice. *Marshank v. Minkin*, Cal. Sup. Ct. Civil No. BC 037605 (Sept. 16, 1991); see also Howard Mintz, *Accused Hashish Smuggler Sues Former Counsel*, THE RECORDER, Sept. 17, 1991, at 8.

The press has also reported efforts on the part of the prosecutors in the Marshank case to pursue the prosecution notwithstanding the dismissal ruling. The federal prosecutors have requested permission from the District Court judge to cross-examine Marshank about his attorney-client relationship with Minkin, claiming that they were not allowed to question Marshank about his relationship with Minkin at the hearings held prior to the dismissal of the indictment. See Howard Mintz, *Patel Asked to Reconsider Dismissal of Drug Case*, THE RECORDER, Dec. 17, 1991, at 2. The prosecution is also seeking reconsideration of the dismissal of the indictment, arguing that the court should have imposed a lesser remedy such as suppressing tainted evidence. See *id.*

Minkin, meanwhile, has abandoned his legal practice, because of, in his words, the "obscene" lack of 'morality' in the Bar." See Howard Mintz, *Conflicts Imperil Drug Case*, THE RECORDER, Feb. 11, 1991 at 1, 6. Minkin has boasted that bringing his former clients down brought him a great deal of satisfaction, and that he believes he was "morally right." See Dan Morain, *A Defector to the War on Drugs*, L.A. TIMES, Sept. 7, 1991, at A1. The story of this case has attracted the interest of Hollywood producers and agents. See Dan Morain, *Lawyer Ensnared His Client, Judge Says*, L.A. TIMES, Nov. 6, 1991, at B1, B10.

65. 879 F.2d 1509 (7th Cir. 1989), *cert. denied*, 494 U.S. 1027 (1990). Except where otherwise noted, the description of the parties has been elicited from the first cited opinion listed here.

66. *White*, 879 F.2d at 1510.

67. *Id.* at 1510-11.

68. *Id.* at 1510.

69. *Id.* The first reported decision indicates that Center "volunteered" information about fraud in the Whites' bankruptcy. *Id.* The second opinion states that the FBI had been looking into the White affair and asked Center about it. *White*, 950 F.2d at 428.

gained access to his prior law firm, copied documents relating to the earlier transaction, and delivered the papers to the United States Attorney's Office.<sup>70</sup> Neither the trial judge nor the Whites' attorney saw any of the documents that the Government received from Center, and none was used in the Whites' trial.<sup>71</sup>

The Whites were convicted and appealed, claiming, among other things, that Center's involvement in the prosecution effort deprived them of certain rights.<sup>72</sup> Judge Posner, writing for the circuit court, did not disagree and remanded the matter to the trial court to hold hearings on the question of whether the Whites' Fifth Amendment due process rights and attorney-client privilege may have been violated by the government's use of the information that White had given Center.<sup>73</sup> The court held at the same time that the defendants' Sixth Amendment rights were unaffected because they were represented by new counsel, and not by Center, in the trial.<sup>74</sup>

On remand the trial court found that the information that the Whites had given Center in the documents was not privileged.<sup>75</sup> In rejecting the Whites' appeal of that ruling, the Seventh Circuit noted that the information which White disclosed to the prosecutors was intended to be used for a publicly filed document, the bankruptcy petition and schedule, and thus was not intended to be confidential and hence was not privileged.<sup>76</sup> The court did not address the seeming inapplicability of the attorney-client privilege and its exception to a case such as this where Center was not compelled by subpoena or otherwise to provide information to the prosecution, but did so on his own accord and clearly for self-interested reasons.<sup>77</sup>

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70. *White*, 879 F.2d at 1510.

71. *Id.* at 1511.

72. *Id.* at 1513.

73. *Id.* at 1513-14.

74. *See id.* at 1513.

75. *White*, 950 F.2d at 430.

76. *Id.*

77. It is elementary that the attorney-client privilege and its exceptions apply only as an evidentiary rule, which means that it can only arise where information is sought from the lawyer within an evidentiary proceeding. *See, e.g.*, RESTATEMENT OF THE LAW: THE LAW GOVERNING LAWYERS § 118 cmt. c (Tent. Draft No. 2, 1989). Center's choice to deliver confidential client

No evidence exists that Center was ever investigated or disciplined for the White disclosure. He was, however, sentenced to a prison term for an unrelated bankruptcy fraud conviction.<sup>78</sup>

In *United States v. Fortna*<sup>79</sup> and *United States v. Harnage*,<sup>80</sup> two companion cases, attorney James Smith, learning that he was under investigation for drug activity, agreed with prosecutors to tape record conversations with two clients, James Harnage and Linda Whitman, among others, concerning a suspected drug operation.<sup>81</sup> Whitman later turned informant herself and assisted in the investigation.<sup>82</sup> The two reported decisions address complaints by Harnage and the other indictees about the use of a lawyer as an informant.<sup>83</sup> In *Fortna*, the Fifth Circuit ordered the district court to reopen Harnage's indictment to explore further whether the use of Smith's evidence against Harnage was in violation of the attorney-client privilege.<sup>84</sup> The results of that remand are not reported, but Harnage was convicted and apparently did not seek review of that conviction.<sup>85</sup> In the next reported proceedings the district court denied the motions of the other involved defendants who complained that their rights were violated by the government's use of Smith as an informant.<sup>86</sup> In denying the motions, the court held that the defendants could claim no attorney-client relationship with Smith, and furthermore that anything learned by Smith was outside the scope of the attorney-client

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information about a past, completed crime would be suspect on ethical grounds, and a defense of that behavior based upon the evidentiary privilege would seem irrelevant.

78. See *White*, 950 F.2d at 428.

79. 796 F.2d 724 (5th Cir.), cert. denied, 479 U.S. 950 (1986).

80. 662 F. Supp. 766 (D. Colo. 1987).

81. *Fortna*, 796 F.2d at 727.

82. *Id.* at 728.

83. See *id.* at 729, 732; *Harnage*, 662 F. Supp. at 771.

84. *Fortna*, 796 F.2d at 731.

85. This inference is drawn from the indication in the second reported opinion, *Harnage*, 662 F. Supp. at 768, that Harnage was "serving a 100-year federal sentence . . . pursuant to the verdicts in the companion case . . . [and] filed no motions in [the *Harnage*] action." *Id.*

86. *Harnage*, 662 F. Supp. at 773-74. This opinion confuses the same issue encountered in the second *White* opinion, by discussing the exception to the attorney-client privilege in a context where the ratting lawyer offered information entirely on a voluntary basis, and not subject to subpoena or compulsion. See *supra* note 77 and accompanying text.

privilege.<sup>87</sup> Smith, incidently, was disbarred for his ratting; the Colorado Supreme Court held explicitly that ratting violates established ethical standards.<sup>88</sup>

In *In re United States (Noons)*,<sup>89</sup> attorney C. Marshall Rea was involved with Thomas and Phillip Noons, two brothers, in setting up various real estate transactions which were alleged to be intended to defraud the FSLIC.<sup>90</sup> When Rea found himself under suspicion, he cooperated with the Government in recording several phone calls with the Noonses and turned evidence, including the recordings, over to the prosecutors.<sup>91</sup> The defendants objected to the resulting prosecution; they claimed that use of their lawyer against them was in violation of their Fifth and Sixth Amendment rights.<sup>92</sup> The reported opinion concerns the defendants' attempt to depose Rea *ex parte*; this request was allowed by the trial court but set aside by the court of appeals.<sup>93</sup> The motion to dismiss was later disallowed, with the trial judge called Rea's conduct "sleazy" but "not illegal."<sup>94</sup>

The criminal proceedings in *United States v. Arteaga*<sup>95</sup> involved a defendant whose former lawyer had served as a government informant in arranging a drug sale.<sup>96</sup> On appeal from his conviction, Arteaga

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87. See *Harnage*, 662 F. Supp. at 774.

88. *People v. Smith*, 778 P.2d 685 (Colo. 1989). The Colorado Supreme Court stressed that Smith

was a private attorney, not a prosecuting attorney. We do not agree that the above-described policy considerations [allowing prosecutors to resort to deceit as a legitimate investigatory tactic] permit private counsel to deal dishonestly and deceitfully with clients, former clients and others. To hold otherwise would fatally undermine the foundation of trust and confidentiality that is essential to the attorney-client relationship in the context of civil as well as criminal proceedings.

*Id.* at 687.

89. 878 F.2d 153 (5th Cir.), *cert. denied*, 493 U.S. 991 (1989).

90. *In re United States (Noons)*, 878 F.2d at 155.

91. *See id.*

92. *Id.*

93. *Id.* at 155-56, 159.

94. *United States v. Noons*, Criminal No. H-89-92, at 11 (S.D. Tex. Sept. 5, 1991).

95. 807 F.2d 424 (5th Cir. 1986).

96. *Arteaga*, 807 F.2d at 425.

raised the attorney-client privilege objection as well as a due process objection that use of a lawyer constituted outrageous prosecutorial conduct.<sup>97</sup> The appeals court dismissed the due process claim, noting that the use of close relationships, and the accompanying exploitation of the trust therein, does not offend the constitution.<sup>98</sup>

One last case contains the second firm indication, other than that involving James Smith, of a lawyer being sanctioned by a disciplinary authority for his involvement in ratting. In *Committee on Professional Ethics and Conduct v. Mollman*,<sup>99</sup> a lawyer agreed to cooperate with prosecutors in gathering evidence about the drug activities of a friend and former client of the lawyer in return for immunity from prosecution for his own drug activities.<sup>100</sup> He secretly tape recorded conversations with the friend,<sup>101</sup> and that action led to an indefinite suspension of Mollman's license.<sup>102</sup>

The foregoing list shows that instances of prosecutors using willing lawyers to implicate their clients are far from rare. Defense attorneys agree—they contend, as one quote tells us, that “[it is] happen[ing] more and more.”<sup>103</sup> A Justice Department official's comments implies that the defense lawyer's observation may be accurate: “[U]sing lawyers as snitches isn't something we do a lot, but it is something we think we ought to do. . . . It is [one of] the tools we have, and it is a perfectly valid one.”<sup>104</sup> Whether it is “valid” is the issue that deserves much more careful consideration.

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97. *Id.* at 426-27.

98. *See id.* The defendant withdrew the attorney-client privilege claim at oral argument. *Id.*

99. 488 N.W.2d 168 (Iowa 1992). The concurring opinion however, leaned toward allowing lawyers the option of secretly recording conversations with clients as a means to “foster a search for truth and honest dealing.” *Mollman*, 488 N.W.2d at 174.

100. *Mollman*, 488 N.W.2d at 169.

101. *Id.* at 169-70.

102. *Id.* at 173.

103. Robert Kuntz, *When Lawyers Wear Wires, Where Can Clients Turn?*, CONN. L. TRIB., Aug. 12, 1991, at 10.

104. *Id.*



### III. The Law

#### A. Preamble

If ratting were *unlawful*, that is, if in cases where ratting contributed to the evidence against a defendant the indictment would be dismissed or the evidence would be excluded, then the ethics question would be of relatively minor import, because there would be no incentive to rat or for prosecutors to induce lawyers to rat. Unfortunately, at least for those of us who find the practice ethically troublesome, despite elaborate arguments against the use of surreptitiously obtained lawyer evidence from clients, the practice has been permitted by every court which has faced the issue, except the *Marshank* court.<sup>105</sup> The conclusion after exploring the judicial decisions is plain: ratting, at least ratting done well, leads to evidence which aids in convictions. Judges seem to *regret* that they cannot penalize the prosecution for this conduct, but notwithstanding that regret they uphold convictions.<sup>106</sup>

My purpose here is not to critique or explore in detail the Fifth and Sixth Amendment implications of ratting, because my intention is to try to address the ethics, and not necessarily the law, surrounding ratting. I believe, though, that a brief description of those elements would make the present endeavor more coherent. With that in mind, I develop in this Part the doctrinal arguments and why they have failed in the reported cases.

#### B. The Attorney-Client Privilege Question

The initial concern of a defendant in a criminal proceeding whose lawyer has served as the source of incriminating information will often be the attorney-client privilege. Clients are led to believe that conversations with lawyers are confidential<sup>107</sup> and are apt to claim attorney-client

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105. *United States v. Marshank*, 777 F. Supp. 1507 (N.D. Cal. 1991); see also *supra* notes 53-63 and accompanying text.

106. See *supra* notes 9-14 and accompanying text.

107. See, e.g., Lee A. Pizzimenti, *The Lawyer's Duty to Warn Client About Limits on Confidentiality*, 39 CATH. U. L. REV. 441 (1990) (discussing lawyers who fail to educate clients

privilege when the information entrusted to a lawyer is used in a criminal proceeding.<sup>108</sup> In rattling cases, however, the privilege will most often be inapplicable, because of the "crime/fraud" exception to the privilege.

### 1. Fifth Amendment Concerns

It is important to note, preliminarily, that the attorney-client privilege objection would be available only in those cases where the lawyer's testimony is to be used in trial, or is otherwise compelled. Unlike the ethical obligation to maintain the confidences of one's client, the attorney-client privilege is an evidentiary rule applied to judicial processes which seek to compel evidence from a lawyer about communications with the client.<sup>109</sup> A lawyer who opts to talk to prosecutors *sua sponte* does not implicate the attorney-client privilege, although the prosecutor's later use of evidence obtained through the leads provided by the lawyer may well be problematic. As the *White* court noted, the difficulty is founded on Fifth Amendment due process grounds and not on attorney-client privilege grounds.<sup>110</sup>

Rule 502(d)(1) of the Uniform Rules of Evidence describes the crime/fraud exception as follows: "There is no privilege under this rule . . . [i]f the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably

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about the exceptions to the ordinary confidentiality principles); Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 382-83 (1989) (providing survey results which show clients at times expect greater confidentiality than they are entitled to).

108. See, e.g., *United States v. White*, 879 F.2d 1509, 1513 (7th Cir. 1989), *cert. denied*, 494 U.S. 1027 (1990) (raising the attorney-client privilege in challenging a conviction); *United States v. Ofshe*, 817 F.2d 1508 (11th Cir.) (raising the privilege in challenging a conviction), *cert. denied*, 484 U.S. 963 (1987).

109. See RESTATEMENT OF THE LAW: THE LAW GOVERNING LAWYERS § 118 cmt. c (Tent. Draft No. 2, 1989); see also David J. Fried, *Too High a Price for Truth: The Exception to the Attorney-Client Privilege for Contemplated Crimes and Frauds*, 64 N.C. L. REV. 443 (1986).

110. *White*, 879 F.2d at 1513. Judge Posner addresses the Whites' complaint that their lawyer's submissions might have led to admissible evidence by reference to "serious governmental misconduct that would violate a criminal defendant's rights under the due process clause of the Fifth Amendment." *Id.*; see *United States v. Marshank*, 777 F. Supp. 1507, 1519 n.11 (N.D. Cal. 1991) (discussing the "fruit of the poisonous tree doctrine" as applied to the use of tainted lawyer information) (citing *United States v. Terzado-Madruga*, 897 F.2d 1099, 1113 (11th Cir. 1990)); see also *United States v. Wade*, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 1149 (1967).

should have known to be a crime or fraud.”<sup>111</sup> In all of the ratting cases reported thus far, the communications that the lawyer collected and used against his client concerned criminal activity that was planned or ongoing (at the time of the lawyer/client communication, but not necessarily at the time of the lawyer disclosure),<sup>112</sup> and that was separate from any criminal charges that might have been the subject of the lawyer’s representation of the client.<sup>113</sup> The courts addressing objections by clients about lawyer ratting inevitably call upon the attorney-client privilege exception as an initial justification for their refusal to dismiss indictments.<sup>114</sup> Since the exception to the privilege will inevitably be applicable, claims under the privilege offer little hope in a defendant’s challenge to a ratting-influenced prosecution.<sup>115</sup>

## 2. Sixth Amendment Concerns

The Sixth Amendment<sup>116</sup> has potential applicability to ratting cases in three ways, but the three will seldom apply to ratting done “well.” The three Sixth Amendment concerns are ineffective assistance of counsel,

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111. UNIF. R. EVID. 502(d)(1). *See, e.g.*, *United States v. Zolin*, 491 U.S. 554, 109 S. Ct. 2619, 105 L. Ed. 2d 469 (1989); *see also* Note, *The Future Crime or Tort Exception to Communications Privileges*, 77 HARV. L. REV. 730 (1964).

112. *See, e.g.*, *United States v. White*, 879 F.2d 1509, 1510 (7th Cir. 1989), *cert. denied*, 494 U.S. 1027 (1990), *and appeal after remand*, 950 F.2d 426, 430 (7th Cir. 1991) (attorney providing to prosecutors information about completed bankruptcy fraud learned prior to its completion).

113. *See, e.g.*, *United States v. Ofshe*, 817 F.2d 1508 (11th Cir.), *cert. denied*, 484 U.S. 963 (1987).

114. *See, e.g.*, *In re United States (Noons)*, 878 F.2d 153, 157 (5th Cir.), *cert. denied*, 493 U.S. 991 (1989); *United States v. Fortna*, 796 F.2d 724, 730 (5th Cir.), *cert. denied*, 479 U.S. 950 (1986); *United States v. Ofshe*, 817 F.2d 1508, 1515 (11th Cir.), *cert. denied*, 484 U.S. 963 (1987); *United States v. Harnage*, 662 F. Supp. 766, 774 (D. Colo. 1987); *see also* *United States v. White*, 879 F.2d 1509, 1513 (7th Cir. 1989) (stating that the government failed to raise the fraud exception), *cert. denied*, 494 U.S. 1027 (1990).

115. It deserves repeating, though, that the ratting cases have seldom involved actual testimony by lawyers against clients, and thus are distinguishable from the subpoena cases in which lawyers are subjected involuntarily to examination about their clients’ affairs. *See infra* text accompanying notes 137-41. To the extent that the lawyers in the ratting cases have, by their *voluntary* assistance to the prosecution, violated any ethical obligations outside of the attorney-client privilege, due process considerations might affect the validity of any conviction that follows.

116. U.S. CONST. amend. VI. “In all criminal prosecutions the accused shall . . . have the Assistance of Counsel for his defence.” *Id.*

government intrusion into the attorney-client relationship, and conflict of interest.<sup>117</sup> These arguments only come into play, however, where the government has interfered with the lawyer who is defending the accused on the charge which is the subject of the Sixth Amendment claim.<sup>118</sup> If ratting takes its usual route, where a lawyer collects evidence from a client and that evidence leads to a later prosecution, the Sixth Amendment seems to have little import. It is instructive to note that *United States v. Ofshe*<sup>119</sup> presented the most direct Sixth Amendment implications, and yet in *Ofshe* the conviction was upheld. A brief inquiry into the court's reasoning there will show the possible uses of Sixth Amendment theory in cases of lawyer ratting.

To claim ineffective assistance of counsel, a defendant must demonstrate that his lawyer has failed to "render 'adequate legal assistance'" in his defense.<sup>120</sup> Since the 1984 opinion of the United States Supreme Court in *Strickland v. Washington*,<sup>121</sup> however, a defendant must show *both* ineffective representation and actual prejudice as a result of that ineffectiveness.<sup>122</sup> The mere fact that a lawyer might be collecting evidence against his client on unrelated matters while defending that client in a criminal proceeding does not, by itself, demonstrate ineffective representation and prejudice. The *Ofshe* case, where Glass defended Ofshe while tape recording their conversations to provide to prosecutors pursuant to a different investigation, did not result in a dismissal.<sup>123</sup>

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117. See Peterson, *supra* note 5, at 621-34.

118. See, e.g., *United States v. Ofshe*, 817 F.2d 1508 (11th Cir.), *cert. denied*, 484 U.S. 963 (1987).

119. 817 F.2d 1508 (11th Cir.), *cert. denied*, 484 U.S. 963 (1987).

120. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 692 (1984) (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 344, 100 S. Ct. 1708, 1716, 64 L. Ed. 2d 333, 334 (1980)).

121. 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

122. See *Strickland*, 466 U.S. at 687. For an analysis of *Strickland* and its impact on claims of ineffective assistance of counsel, see Vivian O. Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?*, 86 COLUM. L. REV. 9 (1986) (analyzing *Strickland* and its impact on claims of ineffective assistance); Martin C. Calhoun, Note, *How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims*, 77 GEO. L.J. 413 (1988) (noting how a few claims of ineffective assistance have survived the *Strickland* standard).

123. *Ofshe*, 817 F.2d at 1508-09, 1516 (failing to discuss *Strickland*, while recognizing that Ofshe was "zealous[ly] represent[ed]" by an attorney in addition to Glass); see also Peterson,

Richard Uviller in his review of *Ofshe* argues that as long as there is no apparent softpedalling of the ongoing representation, the fact that the defense counsel may be collecting evidence should not cause any concern for the defendant.<sup>124</sup>

The second Sixth Amendment concern is that of government interference in the attorney-client relationship during a criminal proceeding. The United States Supreme Court in *United States v. Morrison*<sup>125</sup> established a standard which permits government intrusion in the attorney-client relationship to rise to the level of a constitutional issue, but only in rather stringent instances. A complaining defendant, said the Court, must demonstrate prejudice resulting in an "adverse . . . impact on the criminal proceeding."<sup>126</sup> Like the *Strickland* test, this standard is unlikely to be met merely by a showing that one's lawyer provided the information that may have added to an investigation subsequently leading to an indictment or arrest.<sup>127</sup>

The third Sixth Amendment concern is one which by its literal language offers more hope for those who challenge convictions, but which at the same time has not been well received by judicial decision makers so far. That concern is about the ratting lawyer's conflict of interest. Under ineffective assistance of counsel doctrine, it is easier to prove harm when a lawyer is operating under a conflict of interest than when he is not. In *Cuyler v. Sullivan*,<sup>128</sup> the Supreme Court held that "a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief."<sup>129</sup> The Court's later opinion in *Strickland*

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*supra* note 5, at 624-25 (discussing the curious absence of a *Strickland* discussion in the *Ofshe* opinion).

124. See Uviller, *supra* note 4, at 1892-94.

125. 449 U.S. 361, 101 S. Ct. 665, 66 L. Ed. 2d 564 (1981).

126. *Morrison*, 449 U.S. at 365.

127. See Peterson, *supra* note 5, at 625-26; see also *United States v. Ofshe*, 817 F.2d 1508, 1515 (11th Cir.), cert. denied, 484 U.S. 963 (1987). For cases finding that the interference implicated Sixth Amendment rights, see *United States v. Valencia*, 541 F.2d 618 (6th Cir. 1976) (using law firm secretary as informant); *United States v. Marshank*, 777 F. Supp. 1507 (N.D. Cal. 1991) (finding a violation of the defendant's Sixth Amendment rights where the government intruded inappropriately on the attorney-client relationship).

128. 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980).

129. *Cuyler*, 446 U.S. at 349-50.

confirmed, and made more explicit, that a less exacting test applies when a lawyer accused of ineffective assistance can be shown to have a conflict of interest; in those cases the presumption is that prejudice results.<sup>130</sup> Consequently, one might think that lawyers who rat on clients while they are representing those clients might create for defendants an opening to attack a conviction in the first prosecution using the *Cuyler* standard.<sup>131</sup> Since these scenarios are rare, one can only speculate about the success of this argument. It did not succeed in *Ofshe*,<sup>132</sup> but in that case the defense counsel team included one non-tainted lawyer. Richard Uviller argues that the Glass arrangement does not constitute a disqualifying conflict of interest, but his reasoning is not terribly persuasive.<sup>133</sup>

### 3. Fifth Amendment Objections

Unlike Sixth Amendment objections, which seem most appropriately raised in the rare instance where the rattling lawyer remains as counsel

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130. *Strickland v. Washington*, 466 U.S. 668, 692, 104 S. Ct. 2052, 2067, 80 L. Ed. 2d 674, 696 (1984).

131. *See Peterson*, *supra* note 5, at 628-34.

132. *United States v. Ofshe*, 817 F.2d 1508 (11th Cir.), *cert. denied*, 484 U.S. 963 (1987).

133. *See Uviller*, *supra* note 4, at 1889-92. Uviller addresses the conflict of interest of the concurrently informing and representing lawyer only obliquely, in arguing that such lawyer should not be disqualified from the representation. *Id.* at 1889-90. He addresses the conflict of interest of a suspected (but not yet informing) lawyer more directly, arguing that the mere temptation to sell out one's client for personal advantage is overly speculative as a source of professional sanction. *Id.* at 1891-92. His argument on the latter point is intriguing, but one wonders whether the disclosure and consent element of Model Rule 1.7(b) ought not to be triggered by the lawyer's potential to want to curry favor with a prosecutor. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (1992). For the lawyer who has actually made the deal to turn in a client for personal gain, it is hard to see why such an arrangement would not at a minimum require that the client be informed about the dual allegiance and "whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client." *Id.* cmt. para. 4; *see also* Kevin McMunigal, *Rethinking Attorney Conflict of Interest Doctrine*, 5 GEO. J. LEGAL ETHICS 823, 871-75 (1992). The *Marshank* court held that such a dual role must be disclosed to a defendant and a "knowing and intelligent waiver" obtained. *United States v. Marshank*, 777 F. Supp. 1507, 1528 (N.D. Cal. 1991). On the other hand, defendants who complain of a conflict of interest in appointed counsel who themselves are under suspicion by prosecutors for unrelated criminal activity have found that courts reject that claim. *See, e.g., United States v. Aiello*, 900 F.2d 528 (2d Cir. 1990); *Commonwealth v. McCloy*, 393 Pa. 217, 574 A.2d 86 (1990), *appeal denied*, 588 A.2d 508 (1991).

for the defense in the case for which the information was provided,<sup>134</sup> the Fifth Amendment seems to offer grounds for a defendant to object regardless of the timing of the ratting. Still, in reported cases this objection has consistently failed.

The Fifth Amendment grounds are twofold. The first is one based upon the Fifth Amendment's protection against self-incrimination.<sup>135</sup> The second is one rooted in that amendment's Due Process clause.<sup>136</sup> The self-incrimination argument has seductive initial appeal but in fact is seldom a cognizable claim. The argument would proceed as follows: The Fifth Amendment prohibits the government from forcing a defendant to incriminate himself. Information obtained from a lawyer who, at least implicitly, promises confidentiality serves as a convenient end run around the protection of the Fifth Amendment. By using the lawyer as spokesperson or alter ego for the defendant, the prosecution is obtaining by subterfuge what it could not obtain by direct questions to the defendant.

The above argument has been made repeatedly in other cases where lawyers must testify against their clients, notably where lawyers are subpoenaed to testify before grand juries.<sup>137</sup> The defense lawyers' arguments inevitably lose, especially when grounded on self-incrimination grounds. They lose because the United States Supreme Court has established that the self-incrimination protection when lawyers are involved cannot exceed the protections available under the attorney-client privilege.<sup>138</sup> In other words, if what the lawyer is asked to testify about is protected by the attorney-client privilege, then a defendant may

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134. See, e.g., *United States v. Ofshe*, 817 F.2d 1508, 1510 (11th Cir.), cert. denied, 484 U.S. 963 (1987); see also *Uviller*, supra note 4, at 1889-90.

135. U.S. CONST. amend. V. "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ." *Id.*

136. *Id.* "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." *Id.*

137. See, e.g., *In re Grand Jury Matter No. 91-01386*, 969 F.2d 995 (11th Cir. 1992); *United States v. Perry*, 857 F.2d 1346 (9th Cir. 1988); *In re Grand Jury Subpoena to Attorney (Under Seal)*, 679 F. Supp. 1403 (N.D. W. Va. 1988). For a discussion of the relationship between the privilege and lawyer subpoenas, see Max D. Stern & David A. Hoffman, *Privileged Informers: The Attorney Subpoena Problem and a Proposal for Reform*, 136 U. PA. L. REV. 1783, 1796-1801 (1988); Ellen Y. Suni, *Subpoenas to Criminal Defense Lawyers: A Proposal for Limits*, 65 OR. L. REV. 215 (1986).

138. See *Fisher v. United States*, 425 U.S. 391, 410-12, 96 S. Ct. 1569, 1581-83, 48 L. Ed. 2d 39, 56-58 (1976).

raise Fifth Amendment self-incrimination grounds to prevent the lawyer from testifying.<sup>139</sup> In rattling cases, then, the self-incrimination argument offers nothing greater than the attorney-client privilege argument discussed above,<sup>140</sup> which means that if the rattling concerns criminal activity it offers no protection whatsoever.<sup>141</sup>

The due process argument under the Fifth Amendment is a very different argument. Stated simply, it claims that "[a] court may . . . dismiss an indictment when 'the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.'"<sup>142</sup> To satisfy the "outrageous" standard, the Supreme Court in *United States v. Russell*<sup>143</sup> stated that the government conduct at issue must be fundamentally unfair and "shocking to the universal sense of justice."<sup>144</sup> Defendants whose lawyers have rattled against them inevitably rely upon this language and this standard to claim that the resulting indictment should be dismissed. With the exception of the *Marshank* case,<sup>145</sup> courts have shown a notable reluctance to hold that rattling is "shocking to the universal sense of justice."<sup>146</sup>

Courts addressing the due process argument have tended to collapse the prejudice argument needed for ineffective assistance of counsel claims with the "outrageous" standard and hold that absent discrete harm to a defendant, it is difficult to find conduct "shocking to the universal

139. See *id.* The *Fisher* doctrine was first applied to lawyer subpoenas in *United States v. Hodge & Zweig*, 548 F.2d 1347 (9th Cir. 1977). For a discussion of *Fisher* and the Fifth Amendment implications of lawyer testimony against clients, see Subin, *supra* note 2, at 1120-27; Kevin R. Reitz, *Clients, Lawyers and the Fifth Amendment: The Need for a Protected Privilege*, 41 DUKE L.J. 572, 639-48 (1991).

140. See *supra* text accompanying notes 109-15.

141. See, e.g., *United States v. White*, 879 F.2d 1509, 1513 (7th Cir. 1989), *cert. denied*, 494 U.S. 1027 (1990); *United States v. Harnage*, 662 F. Supp. 766, 774 (D. Colo. 1987).

142. *United States v. Marshank*, 777 F. Supp. 1507, 1523 (N.D. Cal. 1991) (quoting *United States v. Russell*, 411 U.S. 423, 431-32, 93 S. Ct. 1637, 1643, 36 L. Ed. 2d 366, 373 (1973)).

143. 411 U.S. 423, 431-32, 93 S. Ct. 1637, 1643, 36 L. Ed. 2d 366, 373 (1973).

144. *Russell*, 411 U.S. at 432 (quoting *Kinsella v. United States*, 361 U.S. 234, 246, 80 S. Ct. 297, 304, 4 L. Ed. 2d 268, 276 (1960)).

145. See *supra* notes 53-64 and accompanying text.

146. See, e.g., *United States v. White*, 950 F.2d 426, 431 (7th Cir. 1991); *United States v. Ofshe*, 817 F.2d 1508, 1515-16 (11th Cir.), *cert. denied*, 484 U.S. 963 (1987); *United States v. Arteaga*, 807 F.2d 424, 426 (5th Cir. 1986); *United States v. Harnage*, 662 F. Supp. 766, 773-74 (D. Colo. 1987).



sense of justice."<sup>147</sup> A good example of this can be found in the opinions resulting from the *Ofshe* prosecution. In its reported decision, the Eleventh Circuit labelled Glass' and Turow's conduct as "reprehensible"<sup>148</sup> but not a violation of due process.<sup>149</sup> The court further defended its characterization of the attorneys' behavior in the unpublished opinion issued in response to Scott Turow's motion to delete the "reprehensible" language from the first, published opinion.<sup>150</sup> Thus, it will take more than merely "reprehensible" conduct on the part of the Government to constitute a due process violation, especially if the defendant has suffered no apparent prejudice by the questionable conduct.

## IV. The Ethics

### A. Introduction to the Ethics Consideration

The purpose of the previous Part has not been to engage in a developed critique of the legal issues which have been raised against lawyer rating.

147. *See, e.g.*, *United States v. Ofshe*, 817 F.2d 1508 (11th Cir.), *cert. denied*, 484 U.S. 963 (1987); *United States v. Harnage*, 662 F. Supp. 766 (D. Colo. 1987). For a review of the caselaw on the "outrageous conduct" defense and its relative lack of success, see the opinions in *United States v. Bogart*, 783 F.2d 1428 (9th Cir. 1986); *United States v. Ahluwalia*, 807 F. Supp. 1490 (N.D. Cal. 1992). The only cases in which that defense has prevailed, aside from the *Marshank* case, were the following entrapment cases: *United States v. Batres-Santolino*, 521 F. Supp. 744 (1981); *United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978); *United States v. West*, 511 F.2d 1083 (3d Cir. 1975); *United States v. Greene*, 454 F.2d 783 (9th Cir. 1971).

148. *United States v. Ofshe*, 817 F.2d 1508, 1516 (11th Cir.), *cert. denied*, 484 U.S. 963 (1987).

149. *Ofshe*, 817 F.2d at 1508, 1516.

150. *See* Court Opinion Memorandum at 1, *United States v. Ofshe*, 817 F.2d 1508 (11th Cir. Nov. 16, 1987) (No. 82-6129). In denying Turow's motion, the Circuit Court offered two quotes evidencing their, and others', distaste for what Turow and Glass had accomplished in the *Ofshe* prosecution. The panel first quoted from the United States Magistrate who heard earlier proceedings in the case:

[T]he right hand of the Government (the Illinois branch) was very busy trying to conduct undercover business in South Florida without letting the left hand of the Government (the South Florida branch) know what it was doing. When the right hand finally had to confront the left hand, they apparently decided to wash both hands and wipe the resulting grime on a towel to be put into a sealed hamper that neither the defendant nor the prosecutor nor even the defendant's local counsel could see into.

*Id.* at 3 n.2. It then offered a quote from the Government's own lawyer at oral argument: "[W]e agree—we have no problem with the magistrate's ruling on this in which she said it was horrible and nasty and all that. I can assure you we will try not to have it happen again."  
*Id.*

Rather, my purpose has been to show that several arguments exist to challenge the use of a defendant's lawyer's testimony or evidence against him in a criminal proceeding, but that the consensus of judicial opinion thus far has been that prosecutions will proceed and convictions will stand. I am not prepared to say that this trend is correct or justifiable, but only that it is documented and not irrational given applicable Supreme Court precedent.<sup>151</sup>

The success of prosecutors who have exploited lawyer ratting means that an exploration of the *ethics* of this activity carries greater urgency and weight. Lawyers may be prohibited by ethical doctrine from engaging in activity which may be permissible, but not mandatory,<sup>152</sup> under substantive law.<sup>153</sup> What follows is an assessment of why ethicists ought to be firm in their message about the evils of such lawyer activity, and why there should be a resulting bar prohibition of the conduct.

One important introductory caveat deserves note. A review of reported cases involving lawyer ratting shows that the lawyers who engage in such conduct inevitably do so when they are seeking some leniency from a prosecutor because of their own risk of prosecution or indictment.<sup>154</sup> These lawyers are most likely at imminent risk of suspension or disbarment as a result of the conduct which has led to the prosecutor's interest in them. Lawyers in that position are hardly prime candidates

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151. See *supra* Part III.B.

152. Apparently, court orders will override seemingly contrary ethical mandates, if only because of the power of contempt through which courts enforce their rulings. See, e.g., *In re Backiel*, 906 F.2d 78, 87-88 (3d Cir.), cert. denied, 498 U.S. 980 (1990) (holding attorney in contempt for refusing to give evidence against her client); RESTATEMENT OF THE LAW: THE LAW GOVERNING LAWYERS § 115 (Tent. Draft No. 2, 1989). No example can be found of a lawyer sanctioned by her professional licensing authority for obeying a procedurally valid court order. But see ANDREW L. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 233-34 (3d ed. 1989) (implying that an obligation to commit contempt might exist) (citing *People v. Kor*, 129 Cal. App. 2d 436, 277 P.2d 94, 101 (1954)).

153. See Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389, 1412-27 (1992) (noting that substantive law "trumps" ethics at times and at other times ethics will prevail). But see Ellen S. Podgor, *Form 8300: The Demise of Law as a Profession*, 5 GEO. J. LEGAL ETHICS 485, 528 (1992) (criticizing the use of court orders to regulate attorney behavior).

154. See, e.g., *United States v. White*, 879 F.2d 1509, 1510 (7th Cir. 1989), cert. denied, 494 U.S. 1027 (1990); *In re United States (Noons)*, 878 F.2d 153 (5th Cir.), cert. denied, 493 U.S. 991 (1989); *United States v. Ofshe*, 817 F.2d 1508 (11th Cir.), cert. denied, 484 U.S. 963 (1987); *United States v. Fortna*, 796 F.2d 724 (5th Cir.), cert. denied, 479 U.S. 950 (1986); *United States v. Harnage*, 662 F. Supp. 766 (D. Colo. 1987); *Committee on Professional Ethics v. Mollman*, 488 N.W.2d 168 (Iowa 1992).

for exhortation by ethics principles; thus, a firm statement by the organized bar on this subject may not serve to deter very much lawyer betrayal. On the other hand, prosecutors would certainly be constrained in their use of information gained from or by a ratting lawyer if the bar were to make clear that such use contravenes established ethical principles.<sup>155</sup>

Notwithstanding the problem of the incorrigible betraying lawyer, a firm condemnation of ratting still seems of great significance. As developed below, it seems critical that clients understand that betrayal is never a matter of accepted professional conduct. Clients, of course, can never be assured that their lawyers will not violate sacred duties, just as clients can never be guaranteed that lawyers will not steal their money, expropriate their business opportunities, or reveal their secret strategies to the clients' opponents. The important message is that lawyers who act in such a manner have no sanction in doing so by the bar and by its stated principles. Because one may read certain judicial opinions and scholarship as less than condemning of lawyer betrayal, a coherent message of disapproval is necessary.

## B. The Defender's Arguments

Ratting does not contravene the traditional notions of professional ethics, some might argue. I want to explore that position here, using authority from positivist professional regulatory standards, as well as more sophisticated ethical discourse surrounding the moral role responsibilities of lawyers.

Within the positivist realm, it is quickly apparent that the Model Code offers greater support to the defense of ratting than the Model Rules, at least in the area of protecting confidences. The fact that information may be unprotected by the attorney-client privilege does not leave that

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155. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 (1992) (limiting prosecutorial subpoenas of lawyers); *United States v. Klubock*, 832 F.2d 649, 650 (1st Cir.), *aff'd on reh'g*, 832 F.2d 664 (1st Cir. 1987) (affirming validity of Massachusetts' Prosecutorial Function Rule 15, which makes it "unprofessional conduct" for prosecutors to subpoena attorneys to provide evidence about clients except in narrow circumstances); Peter C. Sheridan, *Grand Jury Subpoenas to Criminal Defense Attorneys: Massachusetts Restrains the Federal Prosecutor Through an "Ethical" Rule*, 2 GEO. J. LEGAL ETHICS 485 (1988).

same information unprotected within the ethical obligation of confidentiality.<sup>156</sup> The attorney-client privilege's exceptions merely require a lawyer to speak when asked to in a formal proceeding; they do not authorize spontaneous speech by a lawyer of that information which could be revealed upon questioning.<sup>157</sup> Notwithstanding that broad protection of client information, the Model Code contains a common and well-known exception covering "[t]he intention of the client to commit a crime and the information necessary to prevent the crime."<sup>158</sup> Therefore, under the literal language of the Model Code, rattling is perfectly permissible, to the extent that it is a revelation by an attorney of the client's intention to commit a crime. In addition, under some versions of the Model Code a lawyer may possess the *obligation* to reveal the client's *completed* frauds (some of which may qualify as crimes),<sup>159</sup> although that obligation has been removed under the ABA's amended version of the Code

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156. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(A) (1980) (distinguishing between "confidence," which is governed by the evidentiary attorney-client privilege, and "secret," which is a much broader term including "other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client"); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (1992) (prohibiting revelation of any "information relating to the representation of a client"), and cmt. para. 5 (pointing out the broader effect of the ethical mandate as compared to the attorney-client privilege). See also RESTATEMENT OF THE LAW: THE LAW GOVERNING LAWYERS § 112 (Tent. Draft No. 2, 1989); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 296 (Practitioner's ed. 1986).

157. See, e.g., RESTATEMENT OF THE LAW: THE LAW GOVERNING LAWYERS § 112 cmt. c (Tent. Draft No. 2, 1989); Subin, *supra* note 2, at 1144-45. For a discussion of the interaction between the attorney-client privilege and out-of-court disclosures, see Robert P. Mostellar, *Child Abuse Reporting Laws and Attorney-Client Confidences: The Reality and Specter of Lawyer as Informant*, 42 DUKE L.J. 203, 224-37 (1992).

158. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(3) (1980) (footnotes omitted).

159. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B)(1) (1970). The pre-1974 amendment text read:

A lawyer who receives information clearly establishing that:

- (1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal.

See *id.* This provision was amended in 1974 and now contains an "except" clause; however, the pre-amendment version remains in effect in some jurisdictions.

and its interpretation thereof.<sup>160</sup> There is also a strong argument in favor of the *orchestration* of that revelation, which is the essence of ratting as I view it, but that issue needs to await a short discussion of the Model Rules' applicability to the revelation itself.

The defense of ratting under the Model Rules is more difficult. The plain language of Model Rule 1.6 does not permit ratting, at least at first blush, because the "intention to commit a crime" exception of the Code has been limited substantially in the Model Rules to revelation necessary "to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm."<sup>161</sup> Since most of the orchestrated ratting which appears in the literature does not involve imminent danger, it is more difficult to use the "intended crime" exception to the Model Rules as an ethical justification for the activity.

But the Model Rules do not abandon us in the search for a justified defense of ratting. Rule 1.6 orders the lawyer to protect "information relating to [the] representation of a client."<sup>162</sup> In most of the ratting examples which have surfaced in published reports, the lawyer is not collecting information which forms the basis of the actual representation in progress; it is instead information about *other crimes* which the lawyer elicits in his endeavor to assist a prosecutor.<sup>163</sup> Those other crimes almost by definition are not "related to the representation," not only

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160. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B)(1) (1980) (post-1974 amendment, which added the clause, "except when the information is protected as a privileged communication"); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 341 (1975) (interpreting "privileged communication" to include all secrets and not merely information protected by the attorney-client privilege); Subin, *supra* note 2, at 1149. Under the Model Code there also exists discretion to reveal completed or intended criminal or fraudulent activity of a client if doing so is necessary to defend the lawyer "against an accusation of wrongful conduct." See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(4) (1980); Meyerhofer v. Empire Fire & Marine Ins. Co., 497 F.2d 1190, 1194-96 (2d Cir.), *cert. denied*, 419 U.S. 998 (1974); First Fed. Sav. & Loan Ass'n v. Oppenheim, Appel, Dixon & Co., 110 F.R.D. 557 (S.D.N.Y. 1986); Henry D. Levine, *Self-Interest or Self-Defense: Lawyer Disregard of the Attorney-Client Privilege for Profit and Protection*, 5 HOFSTRA L. REV. 783 (1977). One might seek to justify ratting as warranted under DR 4-101(c)(4) if the circumstances fit.

161. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (1992).

162. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (1992) (emphasis added).

163. See, e.g., *In re United States (Noons)*, 878 F.2d 153 (5th Cir.), *cert. denied*, 493 U.S. 991 (1989); *United States v. Ofshe*, 817 F.2d 1508, (11th Cir.), *cert. denied*, 484 U.S. 963 (1987).

because of the separate character but also because, arguably, the planning of criminal activity cannot be representation.<sup>164</sup> In this way, the argument persists, the attorney-client privilege theory and doctrine dovetail somewhat with the ethical doctrine: In each case the criminal activity removes the conversations from the ambit of protected lawyering activity, and as a result no duty exists on the part of a lawyer to protect that data.<sup>165</sup>

The defense of ratting under conventional ethical authority cannot end with a demonstration that both the Model Code and Model Rules do or may permit the revelation by the lawyer of the information learned from his client. Ratting is, by the definition I have suggested, conceptually different from whistleblowing, which also involves the kind of evaluation just described. The difference is in the orchestration of the revelation. Ratting requires explicit cooperation with a prosecutor to collect and preserve evidence while the relationship with the client persists or continues. Whistleblowing implies a simultaneous disclosure and severing of the relationship.<sup>166</sup>

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164. The critical consideration in deciding whether intended criminal activity is within the universe of information protected by Model Rule 1.6 appears to be the reason the client has approached the lawyer. If the relationship has legitimate underpinnings but includes conversation about future criminal acts, it seems indisputable that the intent of Model Rule 1.6 is to render the information confidential. To think otherwise would be to vitiate the exception for more serious crimes: If all intended criminal activity is unprotected, the exception is unnecessary and the great debate about the exception would be moot. On the other hand, there is some logic to the proposition that some criminal information should fall outside the ambit of protected communications even before one reaches the exception for serious crimes. See 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* § 1.6:300-03 (2d ed. Supp. 1991). It is apparent that only if the client seeks out the lawyer for entirely criminal purposes, and thus is not seeking "representation," could the information remain unprotected under this reasoning. *But see* Subin, *supra* note 2, at 1152 (rejecting this reasoning).

165. See *supra* text accompanying notes 107-15.

166. See *supra* text accompanying notes 15-16. The elements of disclosure and severance of the attorney-client relationship are used in defining whistleblowing because these elements inhere in the conventional notion of this action. Discussion of that phenomenon in the professional literature does not necessarily assume my distinction, and can contemplate secret whistleblowing. See, e.g., SISSELA BOK, *SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION* 210-29 (Vintage Books ed. 1989) (1983) (see Chapter XIV, entitled "Whistleblowing and Leaks"). Bok *prefers* open revelation and argues its moral superiority, but sympathizes with low level employees in organizations who might prefer anonymity in order to salvage a position within the organization about which secrets are revealed. *Id.* at 223-24. This Article proposes a different standard for lawyers, but does not pretend to assert that the reasons underlying openness within the attorney-client relationship would apply to any employee-employer interaction.

How would a defender of rattng justify the orchestrative elements of this activity? Using Uviller as an example,<sup>167</sup> the defense proceeds something like this: *Nothing* that accompanies rattng (at least rattng done well) interferes with any element of the attorney-client relationship; absent some showing that it does, rattng ought not be barred, especially given its apparent benefits to society. For rattng to be done well, though, at least three elements must be present. First, the activity about which information is collected must be *distinct* from the subject matter of the representation. This element is self-evidently necessary. A lawyer who is feeding the prosecution information about the case on which he is defending his client finds himself in a plain conflict of interests.<sup>168</sup>

If the matters are unrelated, however, no conflict exists because there is no impediment to the lawyer's zealous advocacy on behalf of his client. Nothing at all prevents the lawyer from simultaneously defending a client in one proceeding while seeking that client's conviction in another. To those who see the notion of cognitive dissonance as a problem for the lawyer, Uviller, at least, argues that such a view misunderstands the daily life of an active lawyer accustomed to making arguments not because he believes in them but because he is asked to make them.<sup>169</sup>

Second, the lawyer must be collecting unprivileged information.<sup>170</sup> This point may be both obvious and inevitable given the first assumption, but it warrants a moment's reflection, if only to point out that the inevitability of the perspective is not altogether assured. It is not out

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167. See Uviller, *supra* note 4, and accompanying text.

168. See *United States v. Marshank*, 777 F. Supp. 1507, 1519-20 (N.D. Cal. 1991).

169. See Uviller, *supra* note 4, at 1890-91. For a contrary argument about the impact of cognitive dissonance in advocacy posturing, see William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 76-78.

170. It is important to confront whether the term *privileged* ought to take on only its usual and literal meaning, which would refer to the evidentiary attorney-client privilege, or whether it should refer instead to *confidential* matters, which are far more expansive. Judges have tended to view the former as dispositive, and to the extent that the lawyer is seeking to offer evidence in any formal proceeding the real question would be whether the information fits the evidentiary exception. See *supra* text accompanying notes 107-15. But the discussion here, and Uviller's in his article, concerns *ethics*, and within ethical circles the privilege has little import while the rules of confidentiality have great significance. It thus appears that any defense of rattng must assure that the information fits within some exception to the Code's or the Rules' directives about protecting confidential communication.

of the question that a lawyer seeking to collect unrelated incriminating information from his client might find some of that information to be privileged because the fact that the information does not relate to the principle representation does not necessarily mean that it is not something about which the client seeks advice from the lawyer *qua* lawyer. So the second assumption is necessary, if perhaps in a fastidious way, because it is so rare. The discussion above showed how a defender of ratting will look to exceptions under the Code and the Rules to argue that any information produced to a prosecutor fits one of those exceptions.<sup>171</sup>

Third, for orchestrated ratting to survive scrutiny, its defenders will argue, it must be concealed from the client. This element is inherent in the endeavor, but it helps to see why it is viewed as essential to the endeavor's ethical defensibility. To review the initial premises for a moment, it is apparent that the activity's most problematic ethical concerns relate to the breach of confidentiality and the perception of a conflict of interest. Confidentiality was dealt with by reference to the disclosures of crimes exception; the conflict concern is dealt with by reference to the lawyer's lack of any true competing incentives combined with the client's "blissful[] ignorance" of any potential lack of loyalty.<sup>172</sup> The defenders of ratting will concede—and I agree that this is no great concession—that a client who understands that his lawyer is collecting evidence against him for the prosecution will perceive a conflict of loyalties, even if the argument above is a solid one, and the lawyer in fact does not believe that he is impaired in his present zealous representation. In order to avoid the client-induced conflict, the defenders rely on the inherent expectation within ratting that the lawyer will not tell the client. As Uviller puts it:

If such a [ratting] lawyer should bring the criminal overture to the government's attention, are all her professional ties to the client necessarily torn? It would seem that the client, blissfully ignorant of the betrayal, suffers no loss of confidence, nor should he, regarding those matters in which he is entitled to the lawyer's full devotion.<sup>173</sup>

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171. See *supra* text accompanying notes 156-65.

172. Uviller, *supra* note 4, at 1890.

173. *Id.*



As long as the lawyer believes himself able to put aside (as lawyers do every day) his feelings of tension between roles, there is simply no conflict of interest. As Uviller poses the question, "Where then is the ethical breach?"<sup>174</sup> Of course, if the lawyer is ratting in order to save his own skin, as was the case in all but possibly one of the reported cases,<sup>175</sup> that fact might alter the ethical landscape. But my task is to defend (or critique) "pure" ratting, where the lawyer is orchestrating the collection of incriminating evidence for reasons of altruism and social conscience. Any critique of this activity must account for that strain of the activity (putting aside whether that task does not render the endeavor wholly academic, given the lack of any evidence that such altruistic behavior ever occurs). This reminder of altruism, though, brings us to the third element in the defense of ratting—the moral justification for it.

This part of the defense turns to a more affirmative posture—the moral worthiness of assisting to prevent criminal activity. It argues that turning in criminals and preventing crimes is a morally praiseworthy act, and is better justified than what lawyers are perceived to do more often, that is, to turn a blind eye to the harm caused by client criminality (at best) or to assist in that criminality by reliance on the protections of confidentiality (at worst).

To spell out or understand this argument is not difficult; therefore I address it only briefly. Sissela Bok, the esteemed philosopher, is but one example of many who criticize the traditional narrow reading of lawyers' ethics which privilege confidentiality and loyalty to the client over concern for the foreseeable harm caused by client activity. As she writes:

Confronted with such a narrow interpretation of a lawyer's responsibility, commentators both inside and outside the legal profession might ask: what about a duty to report criminal plans in cases where the victims will not otherwise be warned in time? What about criminal conduct likely to result in deaths that are not "imminent"? What about cases of ongoing child or spouse abuse, whether or not such conduct risks

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174. *Id.*

175. *See supra* Part II. Interestingly, the one case in which the attorney was not himself subject to some criminal suspicion was the one case where the trial court dismissed the indictment because of the outrageousness of the lawyer's conduct. *See United States v. Marshank*, 777 F. Supp. 1507, 1530 (N.D. Cal. 1991).

killing victims or subjecting them to "substantial bodily harm"? What about crimes causing grievous psychological harm? What about financial fraud that can bankrupt unsuspecting investors? What, finally, about the vast drug-trading and money-laundering schemes that span the globe and ultimately cause innumerable deaths?<sup>176</sup>

The Bok quote is instructive in its capturing of the *question* that lawyers need to answer in their defense of the traditional paradigm of zealous advocacy combined with strict confidentiality, as exemplified by the Model Rules. Bok begins to outline the possibility of an alternative paradigm, though, in which lawyers view themselves wedded less to the agendas of their clients and more to the ordinary social morality which governs the life of nonprofessionals, which would mean less confidentiality and more disclosure. Many writers in recent years have advocated this alternative paradigm. Harry Subin has articulately argued in favor of this position,<sup>177</sup> as has David Luban<sup>178</sup> and Fred Zacharias,<sup>179</sup> among others.<sup>180</sup> Recent developments in lawyer liability, most notably the Kaye Scholer incident of the Summer of 1992, where a prominent law firm was induced to a generous settlement of a claim brought by government officials after the law firm failed to disclose client wrongdoing,<sup>181</sup> offer further evidence of the weakening of the traditional paradigm of confidentiality.

This Article is not the place for a full exposition of the relative merits of a traditional view versus the developing view of confidentiality. However, this is the place to note that defenders might understandably rely upon the moral critics like David Luban and Sissela Bok to argue

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176. Sissela Bok, *Can Lawyers Be Trusted?*, 138 U. PA. L. REV. 913, 915 (1990).

177. Subin, *supra* note 2.

178. *See* LUBAN, *supra* note 15.

179. Zacharias, *supra* note 107; Fred C. Zacharias, *Rethinking Confidentiality II: Is Confidentiality Constitutional?*, 75 IOWA L. REV. 601 (1990).

180. *See, e.g.*, MARVIN E. FRANKEL, *PARTISAN JUSTICE* (1980); Bruce M. Landesman, *Confidentiality and the Lawyer-Client Relationship*, in *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* 191 (D. Luban ed. 1984); W. William 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 (1981); Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589 (1985).

181. *See* Goldberg, *supra* note 2, at 50 (discussing Kaye Scholer's settlement with the office of Thrift Supervision); *see also* 1 GEOFFREY C. HAZARD & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* § 1.6:201-1 (2d ed. Supp. 1992) (discussing the Kaye Scholer incident); Symposium, *supra* note 2.

that an effective and efficient disclosure of criminal plans is not only defensible, but may even be morally required under circumstances of great harm to victims of crimes, even if in doing so one were to “betray” his client.<sup>182</sup>

### C. The Ethical Critique of Rattng

Having sketched out—perhaps unfairly, but not intentionally so—the best arguments in favor of the ethical propriety of rattng, I now intend to show that those arguments fail. The arguments fail not because the moral justification of increased disclosure of wrongdoing is wanting—that justification is indeed quite defensible—but because the manner of accomplishing that goal is fundamentally inconsistent with moral principles which ought to govern the attorney-client relationship. The primary objections rest on the dishonesty of the activity, and on the exploitation of trust and intimacy. Much is gained and little is lost if the planned disclosure occurs with an open conversation with one’s client about the disclosure.

I confront the argument that rattng is ethically defensible, both under positive law and normatively. I intend to show, in two steps, that under neither analysis is rattng a valid lawyering activity. First, I argue that the current Model Code and Model Rules as well as interpretive statements thereon disallow conduct such as rattng, despite some ambiguity.<sup>183</sup> Second, I offer the substantive normative objections to any contrary reading of the positive ethical doctrine’s ambiguity—the fundamental moral objection to individual betrayal after achieving or promising intimacy,<sup>184</sup> and the impact of sanctioned rattng on the development of systemic trust in lawyers.<sup>185</sup>

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182. A defender of rattng can find some support for the idea of “betraying” clients. See LUBAN, *supra* note 15, at 55-56. Luban employs the term “betray” in discussing his view that client fidelity may be trumped by overriding moral considerations. *Id.* Compare Stephen Ellmann, *Lawyering for Justice in a Flawed Democracy*, 90 COLUM. L. REV. 116, 148-50 (1990) (criticizing Luban’s acceptance of betrayal), with David Luban, *Partisanship, Betrayal, and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann*, 90 COLUM. L. REV. 1004 (1990) (refining, while continuing to defend, his position on betrayal).

183. See *infra* text accompanying notes 186-202.

184. See *infra* text accompanying notes 203-35.

185. See *infra* text accompanying notes 236-67.

## 1. The Model Standards' Incompatibility With Rattling

In the last section I outlined the arguments why a strict reading of the Model Code and the Model Rules might permit rattling, particularly when that activity is seen as a noble endeavor, within the "officer of the court" role, to prevent crime and avoid participation in crime. Here I wish to show that such a reading is unwarranted.

Initially, some issues deserve to be disposed of in order to reach the more difficult questions. First, I want to concede the ambiguity within the language of the standards. The ability to articulate, as I have done, arguments based upon the Model Code and Model Rules to support good faith rattling demonstrates this ambiguity. However, I attempt to show why this ambiguity cannot be resolved in a manner supportive of rattling.

The second interim item is that any attempt to justify rattling based upon tape recording<sup>186</sup> of client conversations, even those which purport to be outside of the attorney-client privilege (which all presumably would, at least arguably so), almost inevitably must fail given the ethics opinions of the American Bar Association which decry lawyers' surreptitious recording of client interactions.<sup>187</sup> The model standards unambiguously discredit all forms of untruthfulness. Within the Model Code, DR 1-102(A)(4) reads as follows: "A lawyer shall not . . . [e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation."<sup>188</sup> The parallel language in the Model Rules comes from Rule 8.4: "It is

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186. For rattling cases which involve tape recording of client conversations, see *In re United States (Noons)*, 878 F.2d 153 (5th Cir.), cert. denied, 493 U.S. 991 (1989); *United States v. Ofshe*, 817 F.2d 1508 (11th Cir.), cert. denied, 484 U.S. 963 (1987); *United States v. Fortna*, 796 F.2d 724 (5th Cir.), cert. denied, 479 U.S. 950 (1986); *United States v. Marshank*, 777 F. Supp. 1507 (N.D. Cal. 1991); *United States v. Harnage*, 662 F. Supp. 766 (D. Colo. 1987).

187. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 337 (1974) (relying on, inter alia, DR 1-102(A)(4), holding that "no lawyer should record any conversation whether by tapes or other electronic device, without the consent or prior knowledge of all parties to the conversation"); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1008 (1967) (requiring previous disclosure). See also Committee on Prof. Ethics v. Mollman, 488 N.W.2d 168 (Iowa 1992); *People v. Smith*, 778 P.2d 685 (Colo. 1989); Mich. Ethics Comm. Op. 201 (1966); N.Y. State Bar Op. 328 (1974); N.Y.C. Comm., Ops. 290, 848. See generally Ellen A. Mercer, Note, *Undisclosed Recording of Conversations by Private Attorneys*, 42 S.C. L. REV. 995 (1991) (addressing the ethical implications created by attorney's using secret recordings).

188. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(4) (1980).

professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation."<sup>189</sup> The ABA having established that surreptitious recording contravenes this language, it is plain that ratting involving recording cannot be justified on a positive law basis.<sup>190</sup> One might want to argue that such a policy is wrong,<sup>191</sup> but those arguments are the normative, and not the positivist, ones to be addressed below.

The third interim item, which is addressed briefly, is that a lawyer who is himself under investigation and rats to increase the likelihood of leniency in his own troubles has, it seems easy to conclude, engaged in a conflict of interest which is fairly clearly prohibited by the model standards. This conflict has not necessarily been recognized by courts reviewing convictions as a constitutional violation equivalent to ineffective assistance of counsel,<sup>192</sup> but the ethical transgression of that kind of ratting behavior appears beyond doubt.<sup>193</sup>

189. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4(c) (1992).

190. A close reading of the ABA opinions does, however, permit a possible argument in support of ratting. Opinion 337 includes an exception for "extraordinary circumstances in which the Attorney General of the United States or the principal prosecuting attorney of a state or local government . . . might ethically make and use secret recordings . . ." ABA Comm. on Ethics and Professional Responsibility, Formal Op. 337 (1974). The Opinion does not address what might justify such extraordinary measures. In ratting cases which have full prosecutorial approval, a defender may point to this exception to justify using secret recordings as part of the ratting arrangement. *But see* *People v. Smith*, 778 P.2d 685, 687 (Colo. 1989) (finding that what might be permissible for prosecutors is impermissible for private attorneys).

191. *See, e.g.,* Peterson, *supra* note 5, at 622 (arguing for a flexible understanding of the concept of "deception," one which would permit morally justified deception in certain circumstances). This Comment, while sympathetic to Turow's plight in *Ofshe*, does not attempt explicitly to defend a lawyer's deception toward her client, but instead argues that occasional deception of third parties or of a tribunal may be justified and necessary as a method of achieving justice. *Id.* at 636.

192. *See supra* text accompanying notes 116-24. In addition to the cases noted above, several courts have addressed the question of whether a defendant/client's having filed a disciplinary complaint against his lawyer should rise to the level of a conflict of interest which would implicate the *Cuyler* and *Strickland* policies. Courts appear to be split on this question, which in many ways replicates the concern about the "ratting while representing" lawyer. *See* *People v. Johnson*, 169 Ill. App. 3d 800, 592 N.E.2d 345 (1992) (collecting state and federal cases on this issue).

193. I rely here on the plain language of Model Rule 1.7(b), which states that "[a] lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (1992). The Rule adds an escape clause, but it involves the client's consent after full disclosure of the factor which may affect the lawyer's

Having disposed of these preliminary matters, we now turn to the more complex questions: What in the model standards governing lawyer conduct prohibits lawyer ratting, even in its cleanest and most noble version? Using the example in the margin,<sup>194</sup> for instance, why is not the lawyer's conduct completely within the realm of the permissible? The lawyer is not seeking to curry favor with any prosecutor. He does not use unlawful or surreptitious recordings, nor will he act as defense counsel in the forthcoming prosecution of Mr. H. He is revealing an intention to commit a criminal act and the information necessary to prevent that act, both perfectly permissible under the strict reading of the Model Code,<sup>195</sup> although not, in this example, of the Model Rules.<sup>196</sup>

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zeal and effectiveness. This disclosure, of course, will be impossible in ratting contexts. This situation is not unlike a lawyer suing a current client on an unrelated matter, which professional ethics standards have consistently prohibited. *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(a) (1992); *IBM v. Levin*, 579 F.2d 271 (3d Cir. 1978); *In re Bentley*, 141 Ariz. 593, 688 P.2d 601 (1984); *Jeffry v. Pounds*, 67 Cal. App. 3d 6, 136 Cal. Rptr. 373 (1977).

Uviller, of course, has argued that no conflict exists if actual representation is not impaired. *See Uviller, supra* note 4, at 1890-91; *see also supra* text accompanying notes 167-75. Uviller's underlying assumption that one can betray another person and serve him at the same time—with no difference in the quality of the service component—is quite untenable. That proposition seems to ignore the moral and emotional elements of a relationship, and reflects what Gerald Postema has criticized in traditional instrumental advocacy roles—one's "practical . . . judgment [and sense of responsibility] are effectively cut off from ordinary moral beliefs." Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 78 (1980). The lawyer, according to Postema, then "views himself not as a moral actor but as a legal technician." *Id.* at 80. For a discussion of the conflict of interest concerns which arose in *Ofshe*, *see supra* text accompanying notes 27-52.

194. Consider the following story: I am a lawyer and a clinical supervisor at a law school clinic. We have been representing Josif H. for several months in an effort to prevent his eviction from his rent controlled apartment. In the course of the relationship I learn that he is receiving federal Supplemental Security Income benefits while withholding from the Social Security Administration (SSA) the fact that he has several thousand dollars in a bank account held by his daughter, but respected by her as his funds. He also receives regular payments from his daughter to help him buy things. His intentional misrepresentation of his financial status to SSA is a crime.

I like Mr. H, but I am deeply affronted by welfare fraud. I therefore collect information about his finances, and, while videotaping a student interaction with him in our clinic (which videotaping has been done with his consent), I capture on videotape his admission to the crime. I then contact SSA, unbeknownst to Mr. H, and give them the videotape and documents showing his criminal activity. I continue to represent him in his eviction, hoping I can resolve that matter before any criminal or administrative proceedings appear within SSA or the United States Attorney's Office. If and when those proceedings arrive I will testify against him.

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

196. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (1992). Under the

What precludes acceptance of our lawyer's conduct is its underlying dishonesty. Just as with the surreptitious recording,<sup>197</sup> the provisions governing honesty, DR 1-102(A)(4) and Model Rule 8.4(c),<sup>198</sup> prohibit an interpretation of the provisions that allow for discretionary revelation, DR 4-101(C)(3) and Model Rule 1.6(b)(1), which involve withholding from a client the fact that such exercise of discretion is about to occur.<sup>199</sup> The revelation is fully permitted, and may in fact be encouraged;<sup>200</sup> its secretiveness is neither. The revelation sections cannot be interpreted without reference to the anti-deceit sections, and when the two are read together only one conclusion remains: Lawyers who opt to reveal client intended crimes must inform their clients of that intention.

It is very interesting that of all of the commentary about lawyer discretion to reveal intended criminal conduct of clients, nowhere has one written about the conversation that ought to take place between lawyer and client surrounding that revelation.<sup>201</sup> It is true that in perjury contexts the lawyer's "duty to dissuade" his client before he reveals

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Model Rules this fictional lawyer is far more limited in his ability to disclose client information, but one can conceive of the "substantial bodily harm" requirement being satisfied in a different scenario, where, for instance, the criminal activity might include child abuse or neglect.

197. See *supra* text accompanying notes 186-91.

198. See *supra* text accompanying notes 188-89.

199. Rule 1.6(b)(1) provides that "[a] lawyer may reveal such information to the extent the lawyer reasonably believes necessary . . . to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (1992). Within the Model Code, DR 4-101(C)(3) provides: "A lawyer may reveal . . . [t]he intention of his client to commit a crime and the information necessary to prevent the crime." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(3) (1980) (footnotes omitted).

200. I do not want to imply that revelation of the so-called "welfare fraud" in the above hypothetical should be "encouraged." While that activity is technically a crime, and while the lawyer certainly cannot assist a client in his misrepresentation of income, I am not about to declare that this is the kind of "continuing crime" about which lawyers ought to blow the whistle.

201. See KAUFMAN, *supra* note 152, at 143-44 (posing a hypothetical with questions about whether a lawyer would warn a client before making a call to the police). The Kaufman hypothetical is wonderfully intriguing, but he offers no reference to any authority which has discussed the solution to his questions. *But cf.* RESTATEMENT OF THE LAW: THE LAW GOVERNING LAWYERS §§ 117A, 117B (Tent. Draft No. 2, 1989) (Discussion Draft provisions permitting revelation of intended criminal or fraudulent activity in certain circumstances, but only "[f]ollowing an attempt by the lawyer, if feasible, to dissuade the client").

the perjury to a judge is stressed frequently.<sup>202</sup> The guidance we receive from the perjury discussions confirms my reading of the revelation language that an attorney may not reveal and at the same time mislead a client about that revelation.

This positive law discussion is not fully satisfactory, however, for two reasons. First, as noted earlier, the actual language of the standards is not free from ambiguity. In addition, positive law can be morally troubling; thus, we ought to have a position on ratting which is satisfactory both under the standards and under moral sensibilities. With that in mind, I choose to explore the normative considerations that rule out ratting as an acceptable lawyering behavior.

## 2. The Moral Critique of Ratting

Initially, three related moral objections to ratting by lawyers present themselves, none of which is overridden by the fact that the subject of the ratting may himself be a criminal or engaged in unlawful activity. This fact about the subject makes the question closer, to be sure, but it cannot justify the profession's approval of this behavior.

First, I want to start with the fundamental objection that ratting is deceptive, and therefore presumptively impermissible. Lying to clients, as Lisa Lerman's study demonstrated, is common.<sup>203</sup> Because it is common, it, along with a collection of other factors, serves as a measure of distrust among the public about lawyers.<sup>204</sup> The commonality of client deception by lawyers imposes an obligation to be sparing in our support of sanctioned dishonesty.

In her response to Professor Lerman's article about lawyers and lying, Carrie Menkel-Meadow proposed the "Golden Rule of Candor," which asks a lawyer to treat his client with the level of honesty which he would

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202. See, e.g., *Whiteside v. Nix*, 475 U.S. 157, 106 S. Ct. 988, 89 L. Ed. 2d 123 (1986); Carol T. Rieger, *Client Perjury: A Proposed Resolution of the Constitutional and Ethical Issues*, 70 MINN. L. REV. 121, 124 (1985); Charles Wolfram, *Client Perjury*, 50 S. CAL. L. REV. 809, 846-47 (1977).

203. See Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659 (1990).

204. *Id.* at 679-80; see Frederick Miller, *If you Can't Trust Your Lawyer. . . ?*, 138 U. PA. L. REV. 785 (1990); see also BERNARD BARBER, *THE LOGIC AND LIMITS OF TRUST* 149-54 (1983).



want himself if he were the client.<sup>205</sup> Menkel-Meadow's proposal is difficult to argue against; for two reasons, however, it cannot go far enough to support the ethical prohibition on ratting. First, her Golden Rule, by asking a lawyer to envision what he would want if he were in the shoes of his client, might prove too much. A defendant about to be informed upon would not want dishonesty from his lawyer, to be sure, but he would also not want the informing at all, with or without the disclosure. The Menkel-Meadow formula applies in her discussion to paternalist deception where lawyers withhold information from clients allegedly for their own good.<sup>206</sup> In that context the rule applies well, for it forces lawyers to consider from a client's perspective when and how much, if any, paternalism is justified. Ratting, by contrast, is not a paternalistic activity. It is not done for the benefit of the client. Ratting is done for the benefit of third parties or the state in direct opposition to the client's welfare. A Golden Rule cannot help very much to address the limits of deception in that context.

The second reason why the Golden Rule cannot resolve the ethical inquiry about the limits of deception is that the rule does not aid in a determination of when deception might be justified. For the reasons just described, looking to the client for that answer does not help.

However, other ways to address the deception issue exist. Sissela Bok has done so in her ethical treatise on deception,<sup>207</sup> and her reasoning supports, I believe, the thesis that the profession ought to discourage ratting as I have defined it. Bok argues, as one might expect, that lying is morally problematic and difficult to justify.<sup>208</sup> In her view it is akin to violence, and the equivalent to "an assault" on its victim.<sup>209</sup> Like violence and assault, deception may be justified, but that justification must be considerable.<sup>210</sup>

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205. Carrie Menkel-Meadow, *Lying to Clients for Economic Gain or Paternalistic Judgment: A Proposal for a Golden Rule of Candor*, 138 U. PA. L. REV. 761, 764 (1990).

206. *Id.* at 767.

207. SISSELA BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* (1989).

208. *See id.* at 17-31.

209. *Id.* at 18. Bok equates deceit with violence and describes both as "the two forms of deliberate assault on human beings." *Id.*

210. *Id.* at 90-106. Bok suggests a three-step approach to justification: (1) ask whether an alternative form of action will resolve the difficulty without the lie, (2) determine the reasons

Deception and lying may be warranted, for example, in self-defense or in a crisis, when lying serves to avoid harm which has no moral basis or support.<sup>211</sup> To demand honesty, which otherwise is a valued good, in cases where lying can prevent a much more serious injury and where it is improbable to prevent the harm and respect the perpetrator's right to truth at the same time is illogical.<sup>212</sup> Neither of these justifications, though, would appear to apply to ratting. The better articulated moral defense for ratting covers two different points. The first argument is that the victim of ratting has sacrificed his entitlement to honesty by his use of lawyers to plan criminal activity. A second defense says that the Government's need to address crime and to protect public safety offers a superior rationale for the infringement of the right of the victim to otherwise receive honest and truthful treatment. Can these two rationales provide the level of justification needed to defend deceit?

As you might foresee, I do not believe this is so. The first argument echoes what Bok describes as "lying to enemies."<sup>213</sup> She reports that enemies are often seen as not entitled to otherwise fair treatment because they have placed themselves outside of accepted moral practice:

[T]he adversary is often thought to be outside the "social contract" which otherwise obtains among human beings or at least within any one society. The outsiders, it is held, do not, or cannot, comply with existing rules.

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offered to excuse the lie, and (3) expose those reasons to her list of "publicity" or what reasonable persons would say about such lies. *Id.* at 105-06.

211. *Id.* at 108-09.

212. See BOK, *supra* note 207, at 32-46, 108-09; see also Christine M. Korsgaard, *The Right to Lie: Kant on Dealing with Evil*, 15 PHIL. & PUB. AFF. 325, 337-39 (1986).

213. See BOK, *supra* note 207, at 134-45. Other possible rationales alluded to in Bok's treatise might be applied to lawyer ratting. One is the idea of "Lying to Liars." *Id.* at 123-33. A defender of ratting might argue that one's client's unlawful behavior might justify deception toward him. This argument seems to falter. Not only does the analogy not apply cleanly—Bok's chapter concerns when one is lied to, or when two agree to be deceptive to one another (*e.g.*, card games), neither of which approaches ratting—but Bok also *rejects* using the deceived's status as a liar as any independent reason for lying. *Id.* at 132-33. *But see* Korsgaard, *supra* note 212, at 339 (finding deception a plausible ground for deception in kind).

A second Bok category applicable here might be "The Noble Lie," or "Lies for the Public Good." See BOK, *supra* note 207, at 165-81. What has been labelled "noble ratting" might seek justification along those lines. For reasons similar to those addressed in the text, Bok expresses especial discomfort with the noble lie. She applies her "publicity" test to such conduct and concludes that one's motive to accomplish noble aims would be seen, without more, as a weak and dangerous basis on which to justify lying. *Id.* at 172-75, 179-81.

They do not uphold their end of any social arrangements from which they benefit, and can therefore not expect the ordinary protections.<sup>214</sup>

This view of enemies is common, but it is not a persuasive view. Bok urges "exceptional caution" in relying on this ground as support for lying because it eludes the usual moral inquiry about the harm of lying versus the harm of truth-telling.<sup>215</sup> This view encourages fuzzy thinking about precisely who is the enemy and whether that person has in fact rejected conventional moral discourse,<sup>216</sup> and those who resort to this excuse "fail to take into account the effects of the lies on themselves as agents, on others why [sic] may be affected, and on general trust."<sup>217</sup> This last concern of Bok's has particular applicability to the legal profession, as described below.<sup>218</sup>

Bok's exhortation concerns treating enemies with respect and honesty unless contrary demands succeed in overcoming this moral presumption.<sup>219</sup> While this teaching, if accepted, might seem to offer scant support for ratting, Bok proceeds to announce an exception to her general principle which ratting defenders will embrace. "[E]ven apart from . . . crises," she writes, "a special case might be made for deception in lawful, *declared* hostilities, as against tax evaders or counterfeiters. . . ."<sup>220</sup> Bok's point is that in declared hostilities the victim is far less expecting of the truth,<sup>221</sup> and the risk of overbreadth in the

214. *Id.* at 138. Bok has addressed her "Lying to Enemies" Chapter directly to lawyers. See Sissela Bok, *Lying to Enemies: Lawyer's Moral Choice*, 52 N.Y. ST. B.J. 552, 554 (1980).

215. Bok, *supra* note 214, at 554 (stating, "those who contemplate action against enemies may then throw ordinary moral inquiry to the winds").

216. *See id.*

217. *Id.*

218. *See infra* text accompanying notes 236-67.

219. Bok, *supra* note 214, at 589 ("No matter how hostile or dangerous a person, dealing with him honestly will always be preferable to deceit.").

220. *Id.*

221. *Id.* This reasoning has been adopted by some writers on negotiation ethics in support of an argument that in certain negotiation contexts deception ought not be prohibited because neither side to the negotiation would expect truthfulness; therefore, there will be no "reliance" on the falsehood. *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.1 cmt. para. 2 (1992). For discussion of this reasoning and its implications, see Gerald B. Wetlaufer, *The Ethics of Lying on Negotiations*, 75 IOWA L. REV. 1219 (1990); James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 AM. B. FOUND. RES. J. 926.

definition of our enemies is narrowed considerably.<sup>222</sup> Thus, while ratting is presumptively unacceptable because of its deceitful character, its defense can rely upon the need for deceit within public crime prevention campaigns as moral support for this behavior.

That argument leads to the second moral objection to ratting which is a deontological one at base.<sup>223</sup> Conceding that public campaigns against crime must rely upon deception and possess some justification in doing so, the use of lawyers as informants violates personal trust and intimacy in ways which other informant schemes do not, and for that reason are more objectionable than other police deception activities might be.

Sanford Levinson has written about the 1970s' ABSCAM investigation and its use of informants, and in doing so he has developed insights about informants that are of great relevance here.<sup>224</sup> Levinson describes three types of informants, using the Judas-Christ relationship as his vehicle, and he compares the moral implications of the differing types. The first type he terms "informer as snitch."<sup>225</sup> In this scenario, the informer came to a relationship in good faith, and whatever trust and intimacy which may have developed occurred honestly and without guile. The person then genuinely "*changed his mind* about the duties he owed to another person and acted thereafter to 'betray' that person."<sup>226</sup>

By contrast, the second informer type Levinson calls the "informer as double-self."<sup>227</sup> This type of situation contains a *genuine relationship*, which the secret agent exploits to breach the trust of his victim.

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222. The restrained definition of one's enemy is important to Bok because she sees one of the greatest risks of the "lying to enemies" argument as the tendency to expand the class of those who qualify as "enemies," and the resulting diminution of more carefully articulated justifications for any deceit that might occur. See Bok, *supra* note 214, at 554-55.

223. The Bok arguments are a mix of deontological and utilitarian arguments. Her premise that lying is morally unjustified is deontological—it relies less on utility and more on a recognition of the need for honesty as a fundamental human quality. In crafting the exceptions to her premise she relies more on utilitarian reasoning—contrary to Kant's imperative, for instance, she justifies lying if it can save the life of an innocent victim.

224. Sanford Levinson, *Under Cover: The Hidden Costs of Infiltration*, in *ABSCAM ETHICS: MORAL ISSUES AND DECEPTION IN LAW ENFORCEMENT* 43 (Gerald M. Caplan ed., 1983).

225. *Id.* at 48.

226. *Id.* (emphasis added).

227. *Id.* at 49.

The "informer as double-self" resumes the relationship after choosing to exploit it and disguises his exploitation, falsely presenting the facade of the former genuine relationship. In the Judas example, Judas returns to the Last Supper knowing that he is about to betray Jesus and gathering evidence by which to do so, but he conceals the betrayal by his deceptive impression of the former friendship.<sup>228</sup>

Finally, Levinson describes the third version, the "informer as wholly false self."<sup>229</sup> In this case, the relationship has been unauthentic from the very beginning. The informer insinuates himself into a position of trust and intimacy by disguise and deceit; he never establishes a genuine relationship and always intends exploitation.<sup>230</sup>

The three types of informers are not equivalent in their moral attributes. With the "informer as snitch," not only can we not prohibit such genuine changes of heart, we in fact would not want to do so. We recognize one's freedom to disagree with prior commitments, to evolve in one's social and moral development, and we respect the autonomy which these informants exhibit.<sup>231</sup> This is not to say that as a victim we will not feel betrayed and hurt; it is to say, though, that the pain is not one based upon moral disenchantment.

The second and third types of informants present much more serious moral complication.<sup>232</sup> Levinson argues that the second and third types of informants are "deeply subversive of the possibility of friendship, love and trust. This use [of such informants by the state or other institutions] is morally equivalent to the decision to use violence; indeed it is a kind of torture."<sup>233</sup> The level of "violence" or "torture" involved

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228. *Id.* at 49-50.

229. Levinson, *supra* note 224, at 50.

230. *See id.* at 50.

231. Compare the philosophical literature on the meaning of "self," including the argument that one's self may not be continuous over time. *See* DEREK PARFIT, *REASONS AND PERSONS* 204-26 (1984). Parfit's analysis has special relevance to the inquiry about the binding effect to be given to prior directives, such as a living will. For an application of that theory, see generally, Alen Buchanan, *Advance Directives and the Personal Identity Problem*, 17 *PHIL. & PUB. AFF.* 277 (1988); Rebecca Dresser, *Life, Death, and Incompetent Patients: Conceptual Infirmities and Hidden Values in the Law*, 28 *ARIZ. L. REV.* 373 (1986); Nancy K. Rhoden, *Litigating Life and Death*, 102 *HARV. L. REV.* 375, 410-19 (1988).

232. *See* Levinson, *supra* note 224, at 50-52.

233. *Id.* at 50-51.

is proportional to the degree of intimacy which the exploited relationship represents. There is an ironic side-effect to Government's use of trusting relationships to ferret out evidence of crimes. That side effect is captured by Levinson:

To the extent that the public becomes more and more aware that people are not at all whom they appear to be, the trust necessary for successful infiltration will be harder to evoke (or more extreme "markers" of trustworthiness will be required, ranging from sexual intercourse to participation in illegal or otherwise socially stigmatic activity).<sup>234</sup>

Indeed, reported cases show judges relying upon this rationale to justify police use of intimate relationships as informant opportunities.<sup>235</sup>

The use of lawyers as informants raises both the moral objections Levinson describes, and questions the level of trust and intimacy which the attorney-client relationship implies. Informants, according to both the Bok and the Levinson reasoning, require special justification as a result of their deceit and their exploitation of trust. When the informants are lawyers, that justification is much greater, because much more is at stake than the "torture" of the ratted-upon client. To develop why special justification is necessary, I must explore, at least briefly, the function of trust within the attorney-client interaction.

The concerns about trust capture the last of the three moral objections to lawyer ratting. My point is that, because trust is so critical within lawyering, a professional stance which fails to condemn client betrayal, even betrayal which involves unseemly criminals and noble lawyers, is particularly invidious and destructive. For this argument to succeed, though, I must demonstrate that trust is important in the relationship. This may be self evident, but it deserves some exploration given that trust as documented is in fact rather low at the present. I also need to demonstrate why prohibiting ratting is apt to bolster trust in ways that allowing ratting would not.

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234. *Id.* at 58.

235. *See, e.g.*, *United States v. Simpson*, 813 F.2d 1462 (9th Cir.) (using prostitute, who then engaged in a sustained sexual relationship with the defendant, was not condoned but not found so shocking as to violate due process), *cert. denied*, 484 U.S. 898 (1987); *United States v. Penn*, 647 F.2d 876 (9th Cir.) (giving a five-year-old child \$5 to inform on his mother not violative of due process), *cert. denied*, 449 U.S. 903 (1980).

It is easy to assert that trust is critical to the effective functioning of the attorney-client relationship. Lawyers are fiduciaries, and their role demands loyalty in order that clients might entrust their affairs to lawyers.<sup>236</sup> Attorney fiduciary responsibilities are repeated throughout Professional Responsibility opinions and conflict of interest decisions, and to craft an argument disapproving of this notion would be difficult. Since trust and loyalty are so important, any approval of ratting and its accompanying deceit and betrayal must be objected to inasmuch as it tends to corrode feelings of trust and loyalty.

The argument of trust might rest on that kind of syllogism, but there are more complex arguments here which make the syllogism questionable—but ultimately correct. I see two concerns with a simple acceptance of the logic, one concern regarding the first premise and another regarding the second premise. How can we assert that trust is so important to the profession when trust in the profession is so lacking? This is the first concern that needs exploration. Mistrust of lawyers is increasing, according to researchers.<sup>237</sup> Lawyers left to self-regulation have frequently favored the interests of lawyers over those of clients.<sup>238</sup> Lawyers' choice of a specialized morality, where conventional notions of right and wrong have been replaced by perhaps justified but difficult to comprehend "zealous advocacy" ethics, tends to increase distrust on the part of clients.<sup>239</sup> In the place of trust, contracts and contract-type measures have appeared.<sup>240</sup> Because lawyers cannot be trusted

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236. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-1 (1980); Michael K. McChrystal, *Lawyers and Loyalty*, 33 WM. & MARY L. REV. 367 (1992) (discussing the nature of the lawyer's loyalty obligation).

237. See BARBER, *supra* note 204, at 131-35, 149-54.

238. See generally Thomas D. Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702 (1977) (discussing the misordering of priorities in the Code of Responsibility); Deborah L. Rhode, *The Rhetoric of Professional Reform*, 45 MD. L. REV. 274 (1986) (calling for more analysis of the relationship between the law profession and public needs or social change); Deborah L. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689 (1981) (questioning the self-governance of the ABA).

239. See Bok, *supra* note 176, at 913.

240. For a discussion of the replacement of trust with contract-based mechanism, see generally, Edmund D. Pellegrino, *Trust and Distrust in Professional Ethics*, in ETHICS, TRUST AND THE PROFESSIONS 69, 75-76 (Edmund D. Pellegrino et al. eds., 1991) (discussing trust and the nature of contractual relationships with professionals); Annette Baier, *Trust and Antitrust*, 96 ETHICS 231 (1986) (discussing the replacement of trust with contract-based mechanism). See also

directly, clients seek protection against breaches of fiduciary duty through mechanisms such as fee agreements, informed consent, and malpractice tort remedies.

The gradual diminishing of trust and the inevitable increase of protective devices, which do not assume trust as inevitable, might lead to a conclusion that trust in fact matters less than all of the commencement-speech platitudes about loyalty and fiduciary principles which continue to be asserted.<sup>241</sup> That conclusion would be wrong. The commencement-speech platitudes are right this time—even if for reasons different from those contained in the usual speeches.

Trust within professions, and particularly the professions of law and medicine, is absolutely essential to the success of the professional's endeavor. Robert Sokolowski describes "professions" as distinct from other skilled and trained occupations by what clients of professionals entrust to the professionals.<sup>242</sup> Sokolowski's point is that in other specialized occupations people entrust *things* to the agents, and the things entrusted (a car, a roof in need of repair, one's taxes) may well be very significant. With professionals, however, people entrust *themselves* and their futures.<sup>243</sup> In addition, in professional relationships the client's prudence is blended with, and inseparable from, that of the professional, because neither can respond to the problem without the other (unlike, again, the auto mechanic or the tax preparer).<sup>244</sup>

Professional relationships furthermore possess what Sokolowski terms the "phenomenon of nakedness."<sup>245</sup> Clients are essentially vulnerable and need to rely upon the judgment of the person with greater expertise. At the same time, the profession's trustworthiness has a certain "elegant anonymity"—we must trust professionals not the way we trust friends, who after all must earn our trust by their personal interactions with us,

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JOEL F. HANDLER, *LAW AND THE SEARCH FOR COMMUNITY* 100-01 (1990) (discussing the nature of the contractual relationship versus a trusting relationship).

241. For a description of this possibility, and its refutation, see generally, Robert A. Burt, *Conflict and Trust Between Attorney and Client*, 69 *GEO. L.J.* 1015 (1981).

242. Robert Sokolowski, *The Fiduciary Relationship and the Nature of Professions*, in *ETHICS, TRUST AND THE PROFESSIONS* 23-38 (Edmund D. Pellegrino et al. eds., 1991).

243. *Id.* at 27-28.

244. *Id.* at 28.

245. *Id.*



but without knowing the professional at all.<sup>246</sup> The stranger/doctor who treats patients in the emergency room must have as much of a patient's trust as if the doctor were someone the patient knew well. To capture and confirm that trust is enormously difficult, though, because at the time that clients/patients seek out professionals, they are commonly in crisis and in distress, and their "primary being-in-the-world is ruptured by incapacity."<sup>247</sup>

These similar professional obligations and phenomena allow us to see why trust is inevitable and necessary within lawyering, and why replacement of that trust with contractarian substitutes is inappropriate. The philosopher Annette Baier, in her exploration of the moral underpinnings of trust, argues that contracts can only substitute for trust when the contracting parties are equally powerful.<sup>248</sup> In professional relationships the parties are seldom equally powerful, and it is inherent in the definition of a profession that the professional has expertise which the non-professional cannot adequately monitor.<sup>249</sup>

Baier then stresses the *vulnerability* phenomenon within trusting relationships to debunk the contractarians. Describing trust as "a three-place predicate (A trusts B with valued thing C),"<sup>250</sup> she focuses on the phenomenology of *entrusting*, of leaving something of value with another who has *discretion* in his handling of the valued thing. The element of discretion is critical, and leads to the accompanying inevitability of vulnerability:

If part of what the truster entrusts to the trusted are discretionary powers, then the truster risks abuse of those and the successful disguise of such

246. *Id.* at 31.

247. Sally Gadow, *Body and Self: A Dialectic*, in *THE HUMANITY OF THE ILL: PHENOMENOLOGICAL PERSPECTIVES* 86, 88 (Victor Kestenbaum ed., 1982).

248. Baier, *supra* note 240, at 246.

249. Eliot Freidson, *Nourishing Professionalism*, in *ETHICS, TRUSTS AND THE PROFESSIONS* 193, 194-95 (Edmund D. Pellegrino et al. eds., 1991). This is not to argue that always within the lawyer-client relationship the lawyer is the most powerful. See generally MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRMS* 16-17 (1991) (finding that historically as law firms grew they become increasingly dependent on wealthy business clients). For purposes of this Article it does not matter if within powerful corporate settings the client with access to the funds has great influence over the lawyer. That influence does not diminish the significance of vulnerability and power imbalance generally because the profession as a whole must establish the "elegant anonymity" of trust.

250. Baier, *supra* note 240, at 236.

abuse. The special vulnerability which trust involves is vulnerability to not yet noticed harm, or to disguised ill will. . . . To understand the moral risks of trust, it is important to see the special sort of vulnerability it introduces.<sup>251</sup>

The contractarian view ignores vulnerability and assumes that relationships can be negotiated and protected by agreements. That view, according to Baier, is historically a male one and conflicts with the view of human interaction which has been described as female, and which understands the contextual interdependence of the truster and the trusted.<sup>252</sup> Recognizing vulnerability, interdependence, and power imbalances means rejecting the arguments that trust does not matter.<sup>253</sup> The "ethos of distrust," as Edmund Pellegrino describes it,<sup>254</sup> is empirically impossible and professionally irresponsible. Professions must recognize the importance of trust at the same time that they struggle against the forces which leave their clients and patients mistrustful.

Clients, then, have no choice but to repose trust in their lawyers. The profession has an obligation to nurture that trust,<sup>255</sup> and each professional has an equivalent obligation to his profession to "act to preserve the profession."<sup>256</sup>

If trust indeed is critical to the legal profession's success as a profession, the question remains whether a ban on ratting tends to support or to inhibit the achievement of that goal. As with the first premise,<sup>257</sup> the simple logic says yes, that ratting only creates increased distrust. Once again, my position is that the simple logic is in fact correct, even if it is a bit less simple.

Ratting involves disclosing crimes and wrongdoing, and there is some attraction to the theory that disclosing wrongdoing and minimizing harm

251. *Id.* at 239.

252. *Id.* at 247-49. See generally CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982).

253. See Pellegrino, *supra* note 240, at 72-76.

254. *Id.* at 78.

255. See Richard M. Zaner, *The Phenomenon of Trust and the Patient-Physician Relationship*, in *ETHICS, TRUST & THE PROFESSIONS* 45, 55-56 (Edmund D. Pellegrino et al. eds., 1991).

256. Sokolowski, *supra* note 242, at 36 ("Their purposes . . . must be congruent with the ends of their professions.").

257. See *supra* text accompanying notes 242-57.

to innocent third parties actually fosters trust. That argument has been made by Sissela Bok.<sup>258</sup> Accordingly, Bok would question lawyers' seeming inattention to the moral tensions caused by their protecting wrongdoers without an equivalent concern for the harm suffered on a larger social scale.<sup>259</sup> In her opinion, "[t]he cumulative damage to trust is daunting. The burden of proof, therefore, must rest heavily on those who hold that lawyers or members of any other profession should be free to act in ways that violate common moral constraints."<sup>260</sup> Does this imply that lawyer ratting, which *does*, arguably at least, respond to the concern about victims of wrongdoing, sustains and nurtures trust?

It does not. Ratting, even ratting that might aid innocent victims, contravenes, rather than engenders, "common morality" in the ways described by Sanford Levinson earlier.<sup>261</sup> Betraying intimacy and exploiting vulnerability and trust can hardly be said to meet the criteria developed by Bok. On the other hand, whistleblowing, which includes revelation of misconduct with disclosure and dialogue between lawyer and client, does nurture and increase trust.

Robert Burt has made this argument in a noted and powerful article from the early 1980s. In his article, *Conflict and Trust Between Attorney and Client*,<sup>262</sup> Burt argues that the need for fidelity to clients and the need to protect the public from harm are not so inconsistent. He writes that the

goals of public and client protection may not be in conflict, however, and both goals may best be served through rules that lead attorneys to disclose their client's intended illegal conduct. Close examination of the role of trust, and of confidentiality rules in attaining trust in attorney-client relations, will show how these two goals may be harmonious.<sup>263</sup>

Burt argues that attorney-client mistrust is quite high because of the inherent conflicts that exist within the relationship.<sup>264</sup> The conflict

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258. See Bok, *supra* note 176, at 919-22.

259. See *id.* at 921.

260. *Id.*

261. See *supra* text accompanying notes 224-34.

262. Burt, *supra* note 241, at 1015.

263. *Id.* at 1018.

264. See *id.* at 1019-22.

which arises is intrinsic because lawyers acquire wealth from client misfortune, because lawyer income comes from client pocketbooks, and furthermore because lawyers possess responsibility toward society and toward the courts. One should note the mistrust caused by the Blumberg-type cooptation which clients frequently perceive within the locales where lawyers work.<sup>265</sup>

To address the intrinsic conflict, Burt argues that lawyers ought to talk to clients more, and his suggestion is that conversation will increase as lawyers must disclose more often and explain that disclosure.<sup>266</sup> His proposal is ironic and paradoxical, he concedes, for one would expect that greater whistleblowing will lead to greater distrust.<sup>267</sup> He persists in his claim that the increased honesty and conversation can only render the relationship more equal, more respectful, and more rich.

We do not have to embrace fully Burt's conclusions to draw from his premises. Importantly, his recognition of increased responsibility to report client fraud and illegality includes an honesty about that reportage. Inherent in his suggestions are two principles which have force here: that trust is important for the attorney-client relationship; and that any breach of the traditional confidentiality must be accompanied by some open acknowledgement of that breach, whether accepted or not by the client.

## V. Conclusion

Rattling is immensely damaging to any effort to foster and increase trust in the lawyering profession. I have attempted to illustrate that, notwithstanding important reasons for wanting to aid in preventing harm

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265. See generally Abraham S. Blumberg, *The Practice of Law as Confidence Game: Organizational Cooptation of a Profession*, L. & SOC. REV., June 1967, at 15 (discussing whether the Supreme Court's conception of the role of an attorney in a criminal case squares with social reality).

266. Burt, *supra* note 241, at 1032-33. Burt's suggestion of conversation is echoed by many who see "dialogue" as a critical but overloaded element in professional-client interaction. See, e.g., JAY KATZ, *THE SILENT WORLD OF DOCTOR AND PATIENT* (1984); Zaner, *supra* note 255, at 56-61; Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. REV L. & SOC. CH. 535 (1987-88); see also ROBERT A. BURT, *TAKING CARE OF STRANGERS* (1979).

267. Burt, *supra* note 241, at 1033.

to victims, the legal profession must be clear that those efforts must be accompanied by a respect and appreciation for client's moral worth and autonomy. This means that whistleblowing must be accompanied by conversation. And once conversation ensues, the ratting ends.