2002

Client Confidences and Public Confidence in the Legal Profession: Observations on the ABA House of Delegates Deliberations on the Duty of Confidentiality

Irma S. Russell
University of Montana School of Law, irma-russell@utulsa.edu

FEATURES

Client Confidences and Public Confidence in the Legal Profession: Observations on the ABA House of Delegates Deliberations on the Duty of Confidentiality

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In August 2001 and February 2002, the American Bar Association House of Delegates debated the merits of proposed amendments to the ABA Model Rules of Professional Conduct,[1] completing their work to update the Model Rules of Professional Conduct, with the exception of the rules relating to multijurisdictional practice and the unauthorized practice of law.[2] The ABA Commission on Evaluation of the Rules of Professional Conduct ("Ethics 2000 Commission") proposed revisions to the Model Rules[3] after four years of study. During that time, the Commission surveyed lawyers and scholars, reviewed formal opinions by the ABA Standing Committee on Ethics and Professional Responsibility and opinions from state disciplinary boards, conducted hearings regarding the Model Rules, and drafted its proposed revisions to the Model Rules.

Proportionality is a hallmark principle of the rule of law.

The amendments debated included proposed exceptions to the prohibition against revealing client information set forth in Model Rule 1.6.[4] The House accepted significant remedial changes, authorizing permissive disclosure when necessary to prevent "reasonably certain death or substantial bodily harm,"[5] to "secure legal advice" about compliance with the Model Rules, and to comply with "other law or a court order." The House also retained the provision of the rule that allows lawyers to disclose client information "to establish a claim or defense on behalf of the lawyer." While the significance of these changes should not be underestimated, the House also rejected some important and beneficial changes proposed by the Commission.

As one of several individuals that the Ethics 2000 Commission asked to testify in support of its proposal to change Model Rule 1.6, I traveled to Chicago and waited to speak. I did not speak to the House because delegates "called the question," obtaining a vote on an amendment to delete subsection (b)(2) from the proposed revision to Model Rule 1.6.[6] I write now to commend both the ABA House of Delegates and the Ethics 2000 Commission on the important accomplishment they have achieved in the process of revising the rules and, additionally, to encourage the House to reconsider the proposed (b)(2) and (b)(3) and to reject any proposals to revert back to the former rule. In support of these goals, I set forth the points I would have presented at Chicago, urging the delegates to: (1) beware of absolutes and consider proportionality, (2) recognize lawyers as trustworthy decision makers, and (3) acknowledge the profession's responsibility to the public.

* Irma S. Russell is a professor at the University of Memphis School of Law, and a Visiting Professor at the University of Missouri-Kansas City School of Law.

(1) BEWARE OF ABSOLUTES AND CONSIDER PROPORTIONALITY

On this first point, it is important to note that the duty of confidentiality is one of the bedrock principles of the legal profession. It articulates the foundational duty of lawyers to protect client information. While it is undoubtedly one of the most important duties that lawyers owe to their clients, it has not traditionally been regarded as an absolute.[7] Those who argue that the duty of confidentiality should be revered as an absolute value of our profession fail to take into account two important qualifiers.

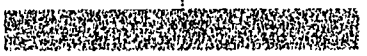
First, the general principle of proportionality often requires the use of meaningful exceptions to balance the interests at issue in any given doctrine. Proportionality is a hallmark principle of the rule of law. After all, even the First Amendment to the Constitution is not absolute. It allows for exceptions, limiting speech to respond to situations of peril.[8]

By amending Rule 1.6 to allow lawyers to disclose client information to prevent reasonably certain death or substantial bodily harm, the House cured the most severe proportionality problem raised by the confidentiality rule. Nevertheless, the House's rejection of limited exceptions to protect third parties and the public in regard to financial and property interests raises serious questions of proportionality and the lawyer's role in society, particularly because the proposed exceptions limit disclosures to situations in which a client used the lawyer's services to commit a crime or fraud.

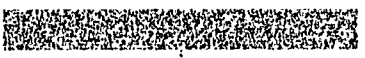
Specifically, the deletion of the Commission's proposed subsection (b)(2) at the August meeting presents a partial triumph of an absolutist view of confidentiality. This provision would have permitted the disclosure of client information by lawyers "to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interest or property of another" when the client used the lawyer's services to further the crime or fraud. After the defeat of subsection (b)(2), the

Commission withdrew proposed subsection (b)(3), which would have permitted lawyers to disclose client information to "mitigate, or rectify substantial injury" in the same circumstances of use of lawyer services to further the crime or fraud. The defeat and withdrawal of these proposed exceptions sustains a system that leaves third parties and the public at risk of significant harm from represented individuals who intend harm or act recklessly.[9]

By contrast, the current exceptions allow lawyers to speak to protect their own interests, to "establish a claim or defense," without regard to the strength of the interest or the nature of the threat. The claim or defense asserted need not be of any particular value: a $5.00 fee meets the test as well as a $5 million fee. This liberal exception for lawyer self-interest is in sharp contrast to the House's rejection of the limited protection for third parties and the public,[10] even where the interests at stake are substantial. For example, neither the loss of the family farm nor significant property damage caused by an intentional release of hazardous substances is sufficient to trigger protection for third parties. Moreover, Enron employees, who lost millions of dollars in pensions, lack protection under this rule, though protection of the lawyer's fee, no matter how small, is sufficient to allow disclosure.



[T]he House of Delegates took significant steps toward rejecting an absolutist version of confidentiality.



The rejection and withdrawal of subsections (2) and (3) leaves third parties and the public at risk to significant harm from a lawyer's client. It leaves lawyers without discretion to reveal information to prevent substantial harm that would flow from a crime or fraud in which the client used the lawyer's services. The comparison of these results offends any serious conception of proportionality of law.

Second, the law of attorney-client privilege, including the crime-fraud exception to the privilege, may present a legitimate limitation on the duty of confidentiality in some cases. Even an absolute rule of confidentiality would not protect against disclosure of criminal or fraudulent conduct, though it might delay disclosure. For example, if communications between a lawyer and client are made in furtherance of a conspiracy to commit a crime, the communication is not protected by the privilege.[11] In cases in which criminal or fraudulent conduct by the client creates a danger of future harm to the public or a third party, the attorney-client privilege will not protect client information from ultimate disclosure in court. Thus, clients who engage in on-going criminal or fraudulent conduct have no reasonable expectation that the information at issue will be protected.

Legal ethics experts debate the issue whether the attorney-client privilege has bearing on the question of the appropriate scope of the duty of confidentiality. As Professor Hazard has noted, "the two concepts [of confidentiality and the attorney-client privilege] are linked in policy and in practical consequences."[12] In their article, *Professional Secrecy and its Exceptions: Spaulding v. Zimmerman Revisited*,[13] Roger C. Cramton and Lori P. Knowles outline the history of the profession's abandonment of the traditional link between confidentiality and the crime-fraud exception to the attorney-client privilege and urge recognition of a permissive disclosure applicable to the crime-fraud situation in order to "reinforce[] the lawyer's duty to provide only lawful assistance and advice to clients."[14] They make explicit the policy relationship between confidentiality and the exception to the privilege.

> "The very policies and purposes that justify the professional duty of confidentiality in the first place argue strongly for a permissive exception to that duty corresponding to the client-fraud exception of the attorney-client privilege. If a lawyer is required to testify to a client communication, otherwise privileged, when the client has sought the lawyer's advice and services to perpetrate or continue a fraud, a concomitant discretion to disclose without testimonial compulsion should be recognized under the professional duty of confidentiality. Neither the legal profession nor society as a whole should tolerate a regime in which lawyers may be used by clients as a means of carrying out a crime or fraud."[15]

The Model Rules provide that the question of the existence of an attorney-client relationship is to be determined by reference to substantive law. "[F]or purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists."[16] The applicable law regarding the attorney-client relationship includes components of agency, fiduciary obligation, and contract law with contract law predominating with regard to the relationship and the expectations of the parties relating to the rights and responsibilities that inhere in the relationship. While the duty of confidentiality is a core principle of professional responsibility, it should not override substantive law or destroy the application of public policy and law to the attorney-client relationship. A truism of contract law is that parties are deemed to contract against the backdrop of existing law and public policy. Moreover, a foundational concept of contract law is that agreements that are contrary to public policy are unenforceable. Considerations of attorney-client privilege in general and the crime-fraud exception in particular are not irrelevant to the question of the reasonable expectations of a client regarding the duty of confidentiality because no contract should be construed to undermine public policy. This line of contract analysis suggests that client expectations that an on-going crime or fraud is protected by the duty of confidentiality may not be well-founded.

By its approval of the amendments noted above, the House of Delegates took significant steps toward rejecting an absolutist version of confidentiality. The former Model Rule 1.6 (which was modified by the House of Delegate's recent action) established a vision of confidentiality as a near absolute when comparing clients' interests with those of third parties and the public. The strength of the former

Rule 1.6, which is still the rule in some jurisdictions, is clear. Its prohibition against disclosure of client information is broad and its exception to protect third parties is narrow. It allows disclosure only when a multi-factor test is met: the lawyer has knowledge that the client (not some other party) is going to commit a crime that is likely to result in imminent death or substantial bodily harm.[17] The problem is that the test pairs two imponderables: whether the most disastrous effect (imminent death or substantial bodily harm) will ensue and whether the most reprehensible conduct (a crime) will be utilized and gives the lawyer no discretion to disclose client information unless these two imponderables coalesce. These questions have no answers until a trial establishes the necessary elements.

The current Rule 1.6 retains elements of this absolutist approach. It neither requires nor encourages disclosure, no matter how pernicious the client intent and provides no protection for financial or property interests, no matter how significant. Thus, in an important sense, the continued message of the rule is that silence is golden.

(2) TRUST LAWYERS AS DECISION MAKERS

By its inclusion of the recently passed exceptions, the ABA moved toward recognizing lawyers as trustworthy decision-makers. However, the ABA did not go far enough in establishing this trust. The still too absolute nature of Model Rule 1.6 prohibits the lawyer from exercising discretion in a significant number of situations. It leaves the lawyer without the right to speak, even when a client crime or fraud creates significant risks to others and the lawyer could face liability from third parties for failing to warn them of dangers.[18] Thus, the current rule ties the lawyer's hands and belittles the lawyer's role, making the lawyer essentially a functionary without the power to draw distinctions based on significant risks known to him when the risks threaten significant property or financial loss.

[T]he current rule ties the lawyer's hands and belittles the lawyer's role. . . .

The same analysis that led the House of Delegates to empower lawyers in the situations of peril to life and bodily harm also argues for empowering lawyers in situations where the interests of third parties clearly outweigh the interests of a client who misuses the lawyer's services to commit a crime or fraud resulting in substantial injury to others.

A possible justification for a categorical rule is that the person applying the rule lacks the ability to make a reasoned distinction of the principles that control. A nuanced rule is harder to apply than a categorical one. Thus, when a decision-maker lacks the ability to distinguish between categories, a categorical rule may be necessary. In the case of the lawyer's duty of confidentiality, *lawyers* apply the rule. However, applying rules is the lawyer's role in life. One of the definitive skills of lawyers is the application of rules, whether simple or complex. Moreover, deference to the lawyer's decision seems particularly appropriate in fact-specific determinations like those lawyers face in situations of peril or the risk of significant harm.[19] Lawyers have significant training and skill in applying factual tests. The ABA should trust them to apply a balanced rule with permissive exceptions. It should invest lawyers with discretion to judge the factual situations that justify disclosure of client information and it should allow lawyers to assess all the interests in the balance when harm is likely to flow from client wrongdoing.

(3) RECOGNIZE THE PROFESSION'S RESPONSIBILITY TO THE PUBLIC

If the legal profession is to retain the privilege of self-regulation, it must recognize its ultimate responsibility to the public good. The drafters of the ABA Model Rules noted the duty of lawyers and the legal profession to serve the public interest, cautioning against allowing self-interest to influence the drafting of ethics rules.

> "The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar."[20]

Implicit in the ABA's assessment of its responsibility is the fact that legislatures (both state and federal) possess the power to regulate the conduct of persons within their jurisdiction, including lawyers, so long as the legislation stops short of violating the separation of powers doctrine. Likewise, lawyers cannot escape the reach of the common law by virtue of rules of ethics. "The operation of law external to the law of lawyering,--other law—will sometimes 'force' further exceptions, regardless of what a disciplinary code might say."[21]

The House of Delegates embraced its role of serving the public good by recrafting the balance relating to confidentiality and disclosure in the exceptions it approved to Rule 1.6. The reformulation of Model Rule 1.6 adopted by the ABA House of Delegates in February 2002 strikes an appropriate balance of client interests with the interests of others when life or bodily integrity weigh in the balance.

Problems remain, however, with regard to the interests the House of Delegates rejected as insufficient to merit protection. Issues relating to client crimes or frauds that result in significant financial or property loss arise in many areas of law, perhaps most notably in environmental violations and corporate law and finance. The Enron case may provide examples of the difficult choices lawyers face when clients engage in fraud or wrongful nondisclosure. In such circumstances, clients who know well the constraints of confidentiality, may coerce lawyers to cover up wrongdoing or to facilitate a fraud on the public.

CONCLUSION

The possibility of renewed efforts by members of the House to revert to the former rule on death and bodily harm is radically out of step with the tradition of confidentiality in the American legal profession and with the rules of profes-

sional conduct adopted by most states. Such a reversion would subject lawyers to the risk of liability to non-clients harmed by client conduct that was known to the lawyer. The changes adopted by the House of Delegates offer important corrections to Rule 1.6 and represent significant progress toward addressing the interests of third parties. However, the rejection of proposed subsection (b)(2) raises questions of proportionality and fairness. It also raises questions relating to the ABA's imprimatur of the regulation of lawyers and the ABA's regard for the lawyers it represents.

ENDNOTES

* The author thanks all friends and colleagues who have discussed the ideas presented here, especially Lucian Pera an Professors Thomas D. Morgan, Rodney K. Smith, and Ellen Y. Suni.

1. Honorable E. Norman Veasey, the chair of the Ethics 2000 Commission moved the House to consider adoption of the amendments to the rules as House Report 401.
2. The ABA is awaiting a final report by the ABA Commission on Multijurisdictional Practice, which is expected in May of 2002 before completing work on Model Rules 5.5 and 8.5 on unauthorized practice of law and disciplinary authority, choice of law.
3. The Commission proposed some change to virtually every rule or comment to the rule.
4. The proposed revision to Model Rule 1.6 (in legislative format) provided as follows:

   RULE 1.6: CONFIDENTIALITY OF INFORMATION

   (a) A lawyer shall not reveal information relating to the representation of a client unless the client ~~consents after consultation, except for disclosures that are~~ gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, ~~and except as stated in~~ or the disclosure is permitted by paragraph (b).

   (b) A lawyer may reveal ~~such~~ information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

   (1) to prevent ~~the client from committing a criminal act that the lawyer believes is likely to result in imminent~~ reasonably certain death or substantial bodily harm; ~~or~~

   (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

   (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

   (4) to secure legal advice about the lawyer's compliance with these Rules;

   ~~(2)~~ (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

   (6) to comply with other law or a court order.
5. Proposed Model Rule 1.6 (b)(1). For full text, see footnote 4, *supra*.
6. Because the motion to delete subsection (b)(2) passed by a substantial majority, the Commission withdrew from consideration subsection (b)(3), a proposed exception that would have permitted disclosures to protect the interests of third parties. See footnote 4, *supra* for the full text of subsections (b)(2) and (3).
7. *See* Nix v. Whiteside, 475 U.S. 157, 158 (1986) (holding that the duty of confidentiality does not require an attorney to assist a client's fraud or to allow it to go unpunished).
8. *See, e.g.*, Cox v. Louisiana, 379 U.S. 536, 554 (1965) (stating that free speech and assembly, "while fundamental" to democracy do not mean that people may "address a group at any public place and at any time"); American Communications Ass'n v. Douds, 339 U.S. 382, 412 (1950) (noting "clear and present danger" exception to First Amendment guarantee of free speech); Schenck v. United States, 249 U.S. 47, 52 (1919).
9. Some members of the House of Delegates proposed retaining Model Rule 1.6 in essentially its current form despite the fact the long-standing tradition of the legal system in a confidentiality rule-balancing client interests against those of third parties and the public.
10. Proposed subsection (b)(5) carries forward verbatim (b)(2) from the former rule, empowering lawyers to protect their own interests. Although this exception is sometimes called the "Attorney Self-Defense Exception," it allows lawyers to use client information to establish a claim as well as a defense. *See, e.g.*, Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1 (1998) (noting that the legal profession qualified the "near-absolute duty of confidentiality" by creating the "broad 'self-defense' exception" as a way of protecting lawyers).
11. *See, e.g.*, United States v. Horvath, 731 F.2d 557 (1984).
12. Geoffrey C. Hazard, Jr., *Under Shelter of Confidentiality*, 50 CASE W. RES. L. REV. 1. 3 (1999).
13. Roger C. Cramton and Lori P. Knowles, *Professional Secrecy and its Exceptions: Spaulding v. Zimmerman Revisited*, 83 MINN. L. REV. 63 (1998).
14. *Id.* at 107.
15. *Id.* at 106-07.
16. MODEL RULES OF PROFESSIONAL CONDUCT, Scope, para. 17 (2002).
17. The exception to protect lawyers, by contrast, presents a liberal rule, allowing disclosure when a lawyer reasonably believes it is necessary to establish a claim or defense on his behalf. *See* discussion above.
18. Geoffrey Hazard made the point at the August meeting of the House of Delegates that lawyers are sued by third parties who believe that they acted in concert with clients who commit a crime or fraud, noting that such clients are "rats." On the issue of risks to lawyers for failing to disclose client information, see generally Nathan Crystal, *The Lawyer's Duty to Disclose Material Facts in Contract or Settlement Negotiations*, 87 KENTUCKY L.J. 1055 (1998-99)
19. Moreover, the Model Rules acknowledge lawyer discretion in the handling of negotiations, case development and other areas that depend on lawyers to impose professional decision-making. Model Rule 1.2 notes that the client has ultimate authority in deciding "objectives of representation," but that the lawyer has authority in determining the scope of the representation and the means for achieving the client's objectives. *See* Model Rule 1.2.
20. MODEL RULES OF PROFESSIONAL CONDUCT, Preamble, para. 12 (2002).
21. *See* 1 GEOFFREY C. HAZARD, JR., & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT 1.6:109, at 168.1-.2