

University of Montana

ScholarWorks at University of Montana

Faculty Journal Articles & Other Writings

Alexander Blewett III School of Law

2001

Just between Us – ABA Considers New Ethical Rules

Irma S. Russell

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

Follow this and additional works at: https://scholarworks.umt.edu/faculty_barjournals



Part of the [Legal Ethics and Professional Responsibility Commons](#)

Let us know how access to this document benefits you.

Recommended Citation

Russell, Irma S., "Just between Us – ABA Considers New Ethical Rules" (2001). *Faculty Journal Articles & Other Writings*. 43.

https://scholarworks.umt.edu/faculty_barjournals/43

This Article is brought to you for free and open access by the Alexander Blewett III School of Law at ScholarWorks at University of Montana. It has been accepted for inclusion in Faculty Journal Articles & Other Writings by an authorized administrator of ScholarWorks at University of Montana. For more information, please contact scholarworks@mso.umt.edu.



Just between us – ABA considers new ethical rules

BY IRMA S. RUSSELL

The ABA is considering new ethical rules that would change the criteria for determining when lawyers may reveal client confidences. In February 2001, the ABA Ethics 2000 Commission held hearings and received comments from parties interested in proposed revisions to the Model Rules of Professional Conduct. Following four years of work, the commission plans to present its proposals to the ABA House of Delegates this July.

The proposed rule revisions are of great significance to all lawyers and to environmental lawyers in particular. For example, Model Rule 1.6, which sets forth the lawyer's duty to maintain the confidentiality of client information, is of special interest to environmental lawyers because of rigorous environmental law reporting requirements and the potential for client conduct that can affect the health and safety of large numbers of people. A lawyer who knows that a client's operations cause significant environmental hazards or risks will urge the client to comply with reporting requirements and correct the hazards. If a client refuses to comply with the law and forbids the lawyer to reveal information about violations that create hazards, the lawyer faces a difficult ethical problem.

As with the current rule, proposed Rule 1.6 prohibits disclosure of client information. The proposal set forth by the Ethics 2000 Commission is tempered, however, by the following permissive exceptions:

- to prevent reasonably certain death or substantial bodily harm;
- 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;
- 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;
- to secure legal advice about the lawyer's compliance with these Rules;
- 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 crimi-

nal charge or civil claim against the lawyer based on conduct in which the client was involved or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

- to comply with other law or a court order.

Both the current and proposed rules specifically allow disclosure when necessary to prevent death or substantial bodily harm. Current Model Rule 1.6 restricts lawyer discretion, however, allowing disclosure only when the client's conduct constitutes an intended crime and the risk threatens "imminent death or substantial bodily harm." The proposed rule rejects these limitations. In the exception allowing disclosure to prevent death or bodily harm, the proposed rule has no additional element other than that disclosure is necessary "to prevent" the harms. The other exceptions allow disclosure to prevent less drastic harm only when the client conduct is culpable (a crime or a fraud) and the client has used the lawyer's services in furtherance of the culpable conduct.

Additionally, new exceptions under the proposal authorize lawyers to disclose information the lawyer reasonably believes necessary to prevent or rectify "substantial injury to the financial interests or property of another" when the client uses the lawyer's services in the furtherance of a crime or fraud. Other exceptions allow lawyers to reveal client information "to secure legal advice about the lawyer's compliance" with the Rules and to comply with the law.

Some lawyers might fear that the new rule will encourage lawyers to disclose client information too readily. Nevertheless, the changes proposed to Rule 1.6 would provide the benefits of greater protection for lawyers, allowing disclosures in circumstances in which the lawyer is at risk of liability for undisclosed dangers. For example, under the proposed revision, a lawyer who reasonably believes that a statute or the common law requires that he or she disclose the contaminated condition of property will not violate the rule by reporting the danger in the face of a continuing refusal by the client to comply with the law. Moreover, adoption of the proposed rule would increase uniformity. The vast majority of state rules, as well as the *Restatement of the Law Governing Lawyers* and ethical codes of other professions, allow disclosures to protect the public and third parties.

It is still possible to register your comments with the Ethics 2000 Commission. Drafts of the proposed revisions and other information are available at: www.abanet.org/cpr/ethics2k.html/.

.....
Irma Russell is a Cecil C. Humphreys Professor of Law at The University of Memphis Law School. She chairs the Section's Ethics Committee and is the Section's liaison to the ABA Coordinating Committee on Professionalism.