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# **SYMPOSIUM: ETHICAL GUIDELINES ON ATTORNEY-CLIENT CONFIDENTIALITY**

## **SYMPATHY FOR THE DEVIL?: REFLECTIONS ON THE CRIME-FRAUD EXCEPTION TO CLIENT CONFIDENTIALITY\***

DAVID S. CAUDILL\*\*

The practice of law as we know it requires the much discussed division between legal or constructive ethics and nonlegal or actual ethics. A lawyer need not act like a good citizen if doing so would, for example, breach a client's trust. The ongoing investigations into the savings and loan industry and into the roles played by attorneys who represented now-failed institutions highlight this division between good lawyers and good people in the field of ethics. When the question is raised in these investigations as to

\* Except for slight modifications, these remarks were delivered as the 18th Annual Legal Ethics Institute lecture, November 6, 1992, at Washington & Lee University, Lexington, Virginia.

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whether banking lawyers should have recognized the point at which they had a duty to nonclients (*i.e.*, to courts, agencies, third parties, and opposing counsel), the duty of confidentiality usually functions as constructive ethics and the duty to disclose begins to look like actual ethics. While this may seem an opportune time to reintroduce or revitalize moral reflection in law, I think that the practicing bar will make every effort to keep disclosure duties well within the constructive ethics of law, primarily because the stakes nowadays are so high. Just when the public wants good citizens, lawyers see expanded liability for moral reflection outside the rules of professional responsibility.

This Article briefly considers the tension between constructive and actual ethics as it appears: in the confusion of law students; in academician and lawyer jokes; in Voltaire; in Professor Tom Shaffer's moral reflections; in the ABA Model Rules (adopted generally in about two-thirds of the states, although very few states adopt its confidentiality provisions); in the Virginia Code of Professional Responsibility ("Virginia Code"), which like most states' rules on confidentiality contrasts with the ABA Model Rules approach; in savings and loan litigation; and, of course, in Kafka. I have no solution,<sup>1</sup> but I hope to clarify, for those who criticize legal ethics on the basis of actual ethics, a barrier they must face.

When I chose the title *Sympathy for the Devil?*, I was thinking about the question of whether we ought to feel sorry for attorneys who choose, in the name of client confidentiality, *not* to disclose client fraud, especially if they suffer ethical sanctions or liability to third parties for that choice.<sup>2</sup> My concern is not with sympathy as an appropriate psychological response, but rather whether the rules of professional responsibility or the principles of legal ethics surrounding those rules or both, provide sufficient guidance to attorneys who suspect fraudulent activities on the part of their clients. In other words, if an attorney faces ethical sanctions or lia-

<sup>1</sup> See generally Kenneth J. Drexler, *Honest Attorneys, Crooked Clients and Innocent Third Parties: A Case for More Disclosure*, 6 GEO. J. LEGAL ETHICS 393 (1992) (proposes a disclosure option); Lonnie Kocontes, *Client Confidentiality and the Crooked Client: Why Silence Is Not Golden*, 6 GEO. J. LEGAL ETHICS 283 (1992) (proposing mandatory disclosure scheme).

<sup>2</sup> See generally Donald C. Langevoort, *Where Were the Lawyers? A Behavioral Inquiry Into Lawyers' Responsibility for Client Fraud*, 46 VAND. L. REV. 75 (1993) (giving a behavioral and psychological account of why attorneys might not recognize clients' wrongdoing as wrong, and discussing cognitive bias or illusions, wishful thinking, blind spots, group (attorney-team) dynamics, and other explanations for lack of awareness).

bility to third parties for failure to report client fraud, should we join the current trends of legal scholarship and of the courts in condemning him or her, or should we view that individual as caught within a confusing web of inconsistent guidelines and conflicting duties, of dangerous line-drawing and expensive moral introspection?

The tension between the rule of client confidentiality and the rule requiring disclosure of a client's intention to commit a crime or fraud is well-known—it involves a clash between two recognized duties of a lawyer.<sup>3</sup> The two “dialectical” rules are particularly challenging to law students, because client confidentiality is paramount to the attorney-client relationship. In Virginia, for example, you do not reveal past illegal conduct, but you *may* reveal client confidences if the client consents, or if the court requires you to do so, or if the client acknowledges a fraud has been committed on a third party. Further, you *must* reveal a client's stated intention to commit a crime *if* you can't talk the client out of it; and, finally, you *must* reveal a fraud on a tribunal.<sup>4</sup> These so-called crime-fraud exceptions to the duty of confidentiality can be confusing, and recent law school graduates studying for the Virginia bar exam are often afraid they will get the ethics questions wrong. Hypothetically, they are afraid they will be good citizens and end up not being good advocates, or that they will try to protect their clients' interests and end up getting arrested or sued. If such fears drive a graduate outside Virginia, he or she will discover the persistent lack of uniformity among state bars regarding disclosure options and duties. Nevertheless, while some states' rules are less complicated, the dialectical tension between client confidentiality and disclosure of client fraud is inescapable.

Of course, unresolvable tensions *abound* in the law, generally between conflicting social policies, between individual and community rights, and between formalism and *ad hoc* balancing. These tensions recur in judicial opinions in every specific field, sub-discipline, or practice-area of the law. Moreover, even though the practicing bar and legal educators have paid more and more attention to professional responsibility over the past ten to fifteen

<sup>3</sup> See generally Drexler, *supra* note 1, at 394-403 (tracing history of organized bars' attempts to balance the two rules).

<sup>4</sup> VA. CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1992); VA. CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102 (1992).

years, the field of legal ethics has always been viewed with some disdain by law professors and by law students.<sup>5</sup> Professional Responsibility is a required course for law students, that's bad; it is another Continuing Legal Education burden on practitioners,<sup>6</sup> that's bad. And in any event, it was not traditionally considered an exciting field of law.<sup>7</sup>

During the past two years, however, things changed. Two trends in the field of professional responsibility have captured the minds of attorneys and the attention of the national media: first, the trend toward viewing ethical codes as a basis of civil liability; and second, the trend toward expansive disclosure duties on attorneys. While neither trend is new, they intersected rather dramatically in the New York City offices of Kaye, Scholer, Fierman, Hays & Handler ("Kaye, Scholer"). Kaye, Scholer, one of the law firms that represented Lincoln Savings and Loan Association whose failure cost taxpayers \$2.6 billion,<sup>8</sup> was sued by the Office of Thrift Supervision for \$275 million and the firm's assets were frozen. Many lawyers in the firm believed the accusation that its lawyers had participated in false reporting to regulatory authorities was insupportable because of the rules of client confidentiality,<sup>9</sup> but nonetheless the firm settled for \$41 million after only six days—"six turbulent days that shook the legal world."<sup>10</sup> The impact on the legal community was immediate. The *ABA Journal* in July 1992 made the Kaye, Scholer controversy its cover story, devoting eleven pages to the question of whether lawyers should be

<sup>5</sup> See William H. Simon, *The Trouble with Legal Ethics*, 41 J. LEGAL EDUC. 65 (1991). "At most law schools, students find the course in legal ethics or professional responsibility boring and insubstantial, and faculty dread having to teach it." *Id.* at 65.

<sup>6</sup> See *Fax Poll*, CAL. LAWYER, Mar. 1993, at 108, 108 (in recent fax poll, 79% of 565 practitioners responding did *not* favor mandatory continuing legal education, and 89% did *not* think Continuing Legal Education programs would diminish incompetent or unethical lawyering).

<sup>7</sup> See Simon, *supra* note 5, at 65 ("From afar, it seems exciting . . . . But close up, legal ethics usually turns out to be dull and dispiriting").

<sup>8</sup> See Sharon Walsh, *D.C. Lawyer is Fined in S & L Failure: \$600,000 Penalty Set for Lincoln Opinion*, WASH. POST, May 23, 1992, at A1.

<sup>9</sup> See Rita Henley Jensen, *Kaye Scholer's Lincoln Woes*, NAT'L L.J., Mar. 16, 1992, at 1, 32. A significant feature of the Kaye, Scholer affair, beyond the scope of these remarks, is the question of whether attorneys engaged in regulatory compliance work are in an adversarial mode, for example, when responding to investigative inquiries of the regulatory authority. See generally Robert G. Day, *Administrative Watchdogs or Zealous Advocates? Implications for Legal Ethics in the Face of Expanded Attorney Liability*, 45 STAN. L. REV. 645, 659-69 (1993).

<sup>10</sup> Stephanie B. Goldberg, *Welcome to the New Uncertainty*, A.B.A. J., July 1992, at 50, 51.

responsible for client fraud when lawyers were aware of but chose not to disclose the fraud. ABA committees are now in place to study the rules and to provide guidance in this area.<sup>11</sup>

As to the trend toward using ethical codes as a basis for civil liability, *e.g.*, as a *standard* for lawyer malpractice,<sup>12</sup> the ABA Center for Professional Responsibility has been monitoring recent judicial opinions.<sup>13</sup> In 1991, the Court of Appeals for the Fourth Circuit in *Schatz v. Rosenberg*<sup>14</sup> held to the old line, which was written into the "scope" section of the ABA Model Code of Professional Responsibility, that the ethical duty of disclosure does not create a legal duty.<sup>15</sup> Thus, in *Schatz*, the possibility of an ethical violation did not affect the court's finding of no securities fraud.<sup>16</sup> But that very same year, the Seventh Circuit in *Ackerman v. Schwartz*<sup>17</sup> weakened the distinction between ethical and "legal" duties, making the attorney in a tax opinion matter responsible for losses caused by misstatements.<sup>18</sup>

Along these lines, two recent 1992 Illinois state court opinions, *Rutledge v. St. Ann's Hospital*<sup>19</sup> and *Mayol v. Summers, Watson & Kimpel*,<sup>20</sup> applied the rules of professional responsibility as standards of conduct for determining lawyer malpractice liability. In addition, a California court in *Mirabito v. Liccardo*<sup>21</sup> used the ethical code as a standard of care; and while the Washington State Supreme Court in *Hizey v. Carpenter*<sup>22</sup> explicitly refused to follow that trend, the court nonetheless suggested that use of ethical

<sup>11</sup> See Nancy Cowger Slonim, *The A.B.A. Responds*, A.B.A. J., July 1992, at 61.

<sup>12</sup> See generally Emily Courie, *The Tangled Web: When Ethical Misconduct Becomes Legal Liability*, A.B.A. J., Apr. 1993, at 64-68.

<sup>13</sup> See Joanne Pitulla, *Law Firm Liability for Client Fraud: Distinguishing Between Legal and Ethical Standards*, PROF. LAW., May 1992, at 8; Cornelia Honchar Tuite, *Ethical Rules Can Determine Standard of Care*, PROF. LAW., Aug. 1992, at 10; *Ethics Rules Don't Prove Malpractice*, PROF. LAW., Aug. 1992, at 21. *The Professional Lawyer*, the newsletter of the Special Coordinating Committee on Professionalism at the A.B.A. Center for Professional Responsibility, includes "case updates" in each issue.

<sup>14</sup> 943 F.2d 485 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1475 (1992).

<sup>15</sup> *Id.* at 493 (ethics violation does not create civil liability).

<sup>16</sup> *Id.* at 498 (no breach of securities laws).

<sup>17</sup> 947 F.2d 841, 846 (7th Cir. 1991).

<sup>18</sup> *Id.* at 846 (there exists legal duty that information relating to securities be accurate).

<sup>19</sup> 595 N.E.2d 1165, 1171 (Ill. App. Ct. 1992) (involving attorney's violation of rules of adversarial system).

<sup>20</sup> 585 N.E.2d 1176, 1186-88 (Ill. App. Ct. 1992) (rules used to instruct jury).

<sup>21</sup> 5 Cal. Rptr. 2d 571, 573 (Cal. Ct. App. 1992) (attorney's duties are governed by the rules of professional conduct).

<sup>22</sup> 830 P.2d 646, 654 (Wash. 1992) (expert witness referred to general ethical requirements but legal duty governed).

principles without reference to the code might work.<sup>23</sup> That is, the standard of care in malpractice cases may be the same as the ethical code, but the code alone does not establish that standard, so the Washington court seemed to join the trend toward liability here identified.<sup>24</sup>

The other trend or aspect of this trend, namely the growing exception to client confidentiality for client fraud, was addressed in the Spring of 1992 at Washington & Lee University in the annual securities law lecture by Richard Phillips.<sup>25</sup> He confirmed that the issue is a matter of hot debate among securities regulators and practitioners.<sup>26</sup> I agree that the dilemma is not just a matter of responding calmly and rationally—for example, by tinkering with the language of the code—to inevitable changes in the profession. Rather, this is an area where many of the proposed solutions seem to cause additional problems. Briefly, if expansive exceptions to the rule of confidentiality are created, lawyer-client relations will suffer and one of the foundations of lawyering as we know it will begin to collapse.<sup>27</sup> But I don't want to exaggerate an everyday or run-of-the-mill problem. If we say that there are good arguments for changes in legal ethics and good arguments for resisting those changes, that is a fairly accurate description of every significant legal problem or controversy among lawyers.

As you know, academicians are often accused of spending their lives on trivial matters. Long articles and books are written on the smallest details of history and politics and literature, and we joke about this obsession with the seemingly irrelevant. There is a story about the police department in a small town in Colorado, which hired a Ph.D. in ancient philosophy as a police officer. He turned out to be an outstanding member of the force. So, when another position opened up, the police department ran an ad in a philosophy journal. It read: WANTED: MEDIEVAL PHILOSOPHY PH.D. FOR POLICE OFFICER. The editors of the journal

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* (court balanced between legal duty and ethical precepts).

<sup>25</sup> See Richard M. Phillips, *Client Fraud and the Securities Lawyer's Duty of Confidentiality*, 49 WASH. & LEE L. REV. 823 (1992) (stating that attorneys have greater duty to prevent fraud in situations involving financial transactions).

<sup>26</sup> See generally Day, *supra* note 9, at 669-86 (discussing whether an attorney's duty has been altered by the Remedies Act of 1990).

<sup>27</sup> See Koontes, *supra* note 1, at 288-89 (critical discussion of arguments for and against greater disclosure duties, including a challenge to presumption that more disclosure will severely affect lawyer-client relations).

called the police chief and asked: "Why a philosopher?" The police chief told the editor of the success of the earlier hire. Then the editors asked: "Why medieval philosophy?," and the chief replied: "We already have somebody in ancient." The curricular joke, of course, is on philosophers. Who really cares about the details of ancient and medieval philosophy?

There is another story about a linguistics conference, where a speaker was explaining the analogy between language and mathematical logic. While he was arguing strongly for the proposition that two positive assertions in language, like two positive numbers, can never create a negative implication, someone in the back of the room said dismissively: "Yeah, yeah . . . ."

We joke about the self-importance of academicians. We don't feel sympathy for their problems. In fact, when we do feel sympathy for a certain class of people, we find jokes about them particularly inappropriate. The political cartoonist Callahan, who is, in common parlance, "disabled" is controversial because draws cartoons about the "disabled." One of his cartoons portrays a camel, in a wheel chair, on a television talk show. The talk show host asks the camel: "Do you feel comfortable talking about the straw?"

If the current industry in lawyer jokes tells us anything, it's that lawyers are not sympathetic figures in society. There is a story of two lawyers in Washington, D.C., who were classmates in law school, but had not seen each other in a year when they met on the street. One of them asked the other: "How's your practice going?" The other replied: "Are you kidding?," and then explained he had just finished winning a large case before the United States Supreme Court, which resulted in his being recognized as attorney of the year. When his friend said: "I'm amazed, I didn't know things had been going so well," the successful attorney continued: "My brief was published in the *Harvard Law Review*." His friend said: "That's great, I'm sorry I didn't see it." The embarrassed friend then asked: "Otherwise, you're O.K.?" The successful attorney replied: "Well, to be frank, I am a bit depressed because yesterday I gave a jury argument without realizing my pants zipper was open." His friend then said: "Yeah, I heard about that." That joke combines a jab at attorneys generally with a specific reference to the triviality of what lawyers pay attention to.

Of course, making fun of lawyers and the law is not new. When

the French philosopher Voltaire wrote his *Philosophical Dictionary*<sup>28</sup> in 1764, which was not a dictionary at all but a collection of satirical essays arranged alphabetically by topic, he included an essay on law which is worth revisiting on the issue of triviality. Voltaire recounts and reflects upon his own experience with the law courts in eighteenth-century France. On one occasion, he lost a lawsuit in Paris concerning some clothes made for him in India, and upon losing, his lawyer told him that in another court in Paris he would probably have won.<sup>29</sup> Voltaire reflects: "That's very funny [that] each court [in Paris] has its own law." His lawyer, sensing an opportunity to entertain Voltaire even more, tells Voltaire that in the nearby province of Normandy, the lawsuit would have been easily won! Voltaire goes on with tongue-in-cheek, in his essay, to praise the "wisdom" of a French law that imprisons a shepherd for nine years for giving a little foreign salt to his sheep.<sup>30</sup> After all, we need to protect local salt producers. He also praises the "just" result in a case involving his neighbor, who cut down a tree in his own woods without knowing that the action was illegal. The law was harsh, but after all we need to protect the environment, even though the neighbor's wife died in misery, and even though the neighbor's son, Voltaire observed, "drags out a life unhappier than death."<sup>31</sup> Suddenly, however, typical of Voltaire's essays, the mood changes when Voltaire talks about laws that authorize war on neighboring regions; the slaughter of 100,000 people is not something to be joked about.<sup>32</sup> The little inconsistencies of the Parisian courts and the annoyances of numerous unwise and unjust laws pale in comparison to the arbitrary and inhuman laws of war. We learn from Voltaire's critical legal study that there are everyday problems that we should recognize, but that there are serious problems on which we should spend our time.

There were echoes of Voltaire in Professor Tom Shaffer's November 1991 lecture to the Legal Ethics Institute.<sup>33</sup> Professor Shaffer began his presentation by trivializing the rules of profes-

<sup>28</sup> VOLTAIRE, *PHILOSOPHICAL DICTIONARY* (T. Besterman trans. 1971).

<sup>29</sup> *Id.* at 283-84.

<sup>30</sup> *Id.* at 286.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> See Thomas L. Shaffer, *There is More to Legal Ethics than Rules*, 18 WASH. & LEE SOC. RESP.: BUS., JOURNALISM, LAW, MED. 31 (1992).

sional responsibility. The title of his lecture was *There is More to Legal Ethics Than Rules*. In his lecture, Professor Shaffer wanted to get beyond the rules themselves and reach the morals "around and under the rules."<sup>34</sup> For his departure point, an example of mere rules, he chose the 1983 Virginia Code, which adopted the "whistle-blower" rule,<sup>35</sup> rather than the ABA model "mouthpiece" rule,<sup>36</sup> on matters of client confidentiality. The "mouthpiece" rule is exemplified in the ABA Model Rule 1.6(a): a lawyer shall not reveal information relating to representation unless the client consents, although a lawyer *may* reveal, but need not reveal, information to prevent a criminal act likely to result in imminent death or substantial bodily harm.<sup>37</sup> On the other hand, the Virginia rule states that a lawyer *shall* reveal the intention of a client to commit a crime, any crime, after urging the client to desist and advising that the planned crime will be reported unless the client abandons the plan; fraud on a third party *may* be revealed—hence the "whistle-blower" role for attorneys in Virginia.<sup>38</sup> In fact, the Virginia rule expressly permits the attorney "to disregard the duty of confidentiality if it is clearly established that the client is using the lawyer to perpetuate a fraud or other crime."<sup>39</sup>

Professor Shaffer reported that attorneys in attendance at the Richmond conference on the new code in Virginia thought that the new Virginia rule on crime disclosure was ridiculous and would probably be evaded in practice.<sup>40</sup> For example, if a client says she will submit false tax documents, the client will probably promise not to do it if the attorney threatens to turn her in, which Shaffer notes relieves the attorney from the obligation to report even if the attorney is convinced that the client will continue with the tax fraud.<sup>41</sup> Professor Shaffer pointed out that unless a client clearly acknowledges a planned crime or fraud, the attorney is not free to disclose the crime or fraud. This suggests that Virginia is playing

<sup>34</sup> *Id.* at 31.

<sup>35</sup> See VA. CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(D) (1992).

<sup>36</sup> See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (1992).

<sup>37</sup> *Id.*

<sup>38</sup> See VA. CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(D) (1992). *But see* Phillips, *supra* note 25, at 827-28 (most states do not follow the ABA "mouthpiece" rule). Nevertheless, many variations of the "whistle-blower" rule exist. See Drexler, *supra* note 1, at 298-301.

<sup>39</sup> See Phillips, *supra* note 25, at 827-28.

<sup>40</sup> See Shaffer, *supra* note 33, at 32. "One or two of those I talked to planned to respond to it as a lawyer learns to respond to dumb rules: It is to be evaded." *Id.*

<sup>41</sup> *Id.*

games by placing the focus not on fraud but on admission of fraud, as if an admitted fraud is an evil to be reported, but a fraud that a client does not recognize or wishes to hide from her attorney is a matter to be kept confidential.

Professor Shaffer used this example to illustrate that the rules of ethics are not really guides to attorney conduct, since most attorneys will not report a client's stated intention to commit a crime simply because the ethical rules require doing so. There is, in fact, another "rule" or guideline having to do with trust, which for many attorneys trumps the ethical rules except in cases of serious violations of the law. That is, trivial violations will simply not be reported. This means that murder, mayhem, and widespread securities fraud should be reported, but not plans to violate tax laws, vehicular regulations, hunting laws, and plans for petty theft from the grocery store. Child abuse, of course, goes on the list of serious violations.<sup>42</sup>

But as Professor Shaffer points out, this division between serious and trivial violations is not in the Virginia Code; rather, it is a moral distinction under and around the rules. An attorney might need to betray client trust by reporting a serious crime, and cause pain to herself and others, but that's part of being moral.<sup>43</sup> I would like to invert that principle and talk about the damage an attorney might cause to both herself and her law firm if she, for moral reasons, involving client trust, chooses not to disclose client fraud.

I would like to reconsider some recent cases involving lawyer liability for client fraud, and also to look carefully at how the Virginia Code guides attorneys faced with fraudulent clients. We might make a rough distinction in the field of legal ethics between two different discourses or types of analyses. On the one hand, we can view the rules of professional responsibility as a legal framework having little to do with actual ethics except in the sense that the rules do constitute an ethical system. That is, we can acknowledge the rules reflect a set of ethical principles, but then focus on the rules as guidelines. Often professional responsibility professors say: "I'm not going to teach ethics. I'm not going to ask you whether you think the rules are right or wrong. I just want you to learn the rules and follow them." These statements confirm

<sup>42</sup> *Id.* at 33.

<sup>43</sup> *Id.* at 34.

a division between legal rules and ethical reflections. The latter category, ethics, is trivialized or marginalized, and the rules are elevated as determinative of behavior. The opposite view was reflected in Professor Shaffer's remarks when he stated: "There is nothing the matter with rules. But there is something the matter with the notion that our moral lives are determined by rules."<sup>44</sup> For moral guidance, we must look under and around the rules, to the religious foundations of the rules, and to the narratives of lawyering in history and in our day. Without this context the rules alone, like the rule that requires reporting any crime that a client proposes to commit, produce dumb results. The truly ethical attorney might be forced by his conscience to evade or ignore the rule.

The tension between these two perspectives is highlighted by the codes adopted by state bars, which often seem to be efforts to eliminate ethical reflection on the part of attorneys. When the code is not sufficiently clear as to what an attorney should do, then an ethical opinion can be obtained to provide attorneys additional guidance and thus avoid most, if not all, ethical reflection.

If we focus on the ABA Model Rule approach to disclosure of criminal activities planned by a client, the "mouthpiece" approach, the emphasis is on keeping client secrets, and an exception is created for attorneys who believe they must disclose a client's plans.<sup>45</sup> The exception is *optional*—the attorney may but need not reveal a planned crime—and it is limited to serious crimes. This is one solution to the attorney's dilemma. There is a clear rule of keeping confidences, and a narrow optional exception for terrible crimes, and whether or not the attorney exercises his or her option, for ethical reasons, there has not been a breach of any rule.

There are other approaches that may become less popular because they do not provide the kind of guidance that attorneys want in practice. On the question of whether an attorney in Virginia must disclose that a witness was bribed, a recent Virginia ethics opinion<sup>46</sup> seems to set up a materiality standard by which attorneys are to weigh the significance of the bribed testimony. If the witness is testifying as to a central issue in the case then the

<sup>44</sup> *Id.*

<sup>45</sup> See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1992).

<sup>46</sup> See Va. State Bar Standing Comm. on Legal Ethics, Legal Ethics Op. 1361 (1990).

bribe should be revealed, but if the witness's paid lies are not central to the outcome, the bribe need not be revealed. This situation does not involve confidentiality, since a witness is not a client, but I mention it as an example of a solution to the question of disclosure duties that places a responsibility on attorneys to make an assessment of what makes sense in a particular situation, and to do what is right for the law.

In the context of the duty of confidentiality, we could adopt a rule that a client's plan to commit a crime *must* be revealed if the crime is serious, perhaps if it will result in physical harm or *substantial* financial loss, but small tax and traffic and hunting law violations need not be revealed. The attorney could then decide whether his or her client's act was serious or trivial.

A different solution, one that also places responsibility on an attorney, was suggested in a Virginia legal ethics opinion that a client's stated plan to commit a crime must be revealed, even if the plan is contingent upon a series of events "which may or may not occur," if a reasonably prudent and competent lawyer would conclude that the client *really* intended to commit the crime "should the conditions precedent take place."<sup>47</sup> Simply by introducing such distinctions, when the rule in Virginia is that a stated crime must always be revealed, the ethics committee created an exception that could be expanded to permit an assessment of the sincerity of clients who claim to have abandoned a planned crime. For example, the rule could require that a plan to commit a crime must be revealed, even if the client agrees to abandon the plan, if a reasonably prudent and competent lawyer would conclude that the client had not *really* abandoned the plan. This solution responds to Professor Shaffer's concern that we are playing games if we say that a client can undo his plan for a moment and relieve his or her attorney from the duty to disclose, even if the attorney does not believe the client.<sup>48</sup>

Both of these solutions place responsibilities on an attorney to decide whether a crime is serious or to decide whether the client is being truthful, so they both carry the risk that an attorney may be wrong. That is, in an ethics violation hearing or a civil trial for

<sup>47</sup> See Va. State Bar Standing Comm. on Legal Ethics, Legal Ethics Op. 1355 (1990).

<sup>48</sup> See ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT 901:4604, Mass. Op. 90-2 (1990).

lawyer liability to third parties, the lawyer who made a bad assessment may be punished or found liable for that assessment.

In Tucson in the Spring of 1992, a class of 17,000 investors sued for treble damages totalling \$1.2 billion when a Linclon Savings and Loan institution failed. The bank's directors were joined as defendants with the accountants and the law firm of Jones, Day, Reavis & Pogue ("Jones, Day"). Although most of the other defendants settled, Jones, Day went to trial, presumably to protect its assets and its image. But after three days of testimony, including testimony from a former associate who mentioned backdating of corporate resolutions and borrowing authorizations, Jones, Day settled for \$24 million. Richard Pogue, a named partner of the firm, said he did not want a jury of nonlawyers to decide his partners' fates.<sup>49</sup> As laypersons they might not understand the tension between the fiduciary relationship, wherein a client must be able to disclose everything and a lawyer must be trustworthy and capable of preserving secrets, and the duty to stay within the bounds of the law. This is reminiscent of Carl Llewelyn's dream that the Uniform Sales Act would always be litigated before a merchant jury who understood business customs.<sup>50</sup> Should we feel sorry for attorneys whose ethical decisions, made while walking the tight-rope between confidentiality and disclosure duties, result in an accusation of participation in client misconduct?

Let us look again at the Virginia Code and the rule that all plans to commit a crime, any crime, must be disclosed if the client does not agree to abandon those plans.<sup>51</sup> This rule eliminates the need for an attorney to make a determination of the materiality or seriousness of the crime. It also eliminates the need for the attorney to determine if the client is telling the truth. If the client *states* an intention and refuses to abandon that intention, the duty to disclose arises. This becomes the rule in fraud cases as well, since DR 4-101(C)(3) allows disclosure of client fraud on a third party only when it is clearly established, and DR 4-101 (D)(2) requires disclosure of fraud on a tribunal only when it is clearly es-

<sup>49</sup> See Gail Diane Cox, *Just Why Did Jones, Day Settle?*, NAT'L L.J., Apr. 13, 1992, at 3, 50.

<sup>50</sup> See Dennis M. Patterson, *Good Faith, Lender Liability, and Discretionary Acceleration: Of Llewellyn, Wittgenstein, and the Uniform Commercial Code*, 68 TEX. L. REV. 169, 203 (1989).

<sup>51</sup> VA. CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(D) (1992).

tablished. You might think that the term "clearly established" requires some assessment on the part of the attorney, but according to recent legal ethics opinions, a fraud is clearly established only if the client *acknowledges* the fraud to the attorney.<sup>52</sup> Without such an acknowledgement, there is no fraud to report, even if the attorney is suspicious. Recall Professor Shaffer's formulation that when rules generally do not guide us, the morals around and under the rules might. Here, the state bar ethics committee, upon realization that a rule containing the words "clearly established" does not provide sufficient guidance, gave us an interpretation that creates another rule, namely that we can refer to the client's own words to establish a fraud on third parties or the courts.

My point is that in Virginia, we have a *clear* rule and clarity is its virtue. It may be ethically impoverished, and likely to be avoided, but it is *objective*. In Ross Perot's terminology, it is a "slam-dunk."

From the point of view of those who want to be morally responsible attorneys, the Virginia rule does not make sense. Why should I breach my client's trust and make her angry by reporting her admission of persistent fishing without a license, while failing to report her clear intention to kill the game warden simply because it was not clearly stated or because she promised, without any sincerity in her voice, not to do it? If that example sounds too farfetched, why should I breach my client's trust and make him angry by reporting his acknowledged failure to renew a septic tank permit, while failing to report his misrepresentations in negotiations over the sale of his house because he refused to acknowledge the fraud, that is, because he thinks he is just being a good salesperson?

But from the point of view of an attorney who senses that society is ready to sacrifice a little confidentiality for a little more whistle-blowing by attorneys, and who senses that courts are willing to impose liability on attorneys who hide client misconduct, the clarity of the Virginia rule is especially attractive. The price of moral responsibility is going up, and when your livelihood, your family's future, your law firm's fate, and your malpractice insurance premiums are at stake, you just might appreciate a simple,

<sup>52</sup> See Va. State Bar Standing Comm. on Legal Ethics, Legal Ethics Op. 1347 (1990); Va. State Bar Standing Comm. on Legal Ethics, Legal Ethics Op. 1367 (1990).

objective rule of ethics.

The Wisconsin rule on attorney disclosure of a client's intended crime or fraud seems to be an exemplary approach to this tension between clear rules and moral responsibility. In Wisconsin, if you have reasonable doubt about a client's intention to commit a crime or fraud, you can either report the wrongful conduct or not without violating the Ethics Code.<sup>53</sup> This framework lets the attorney decide, and then seems to promise the attorney that the code will not be used against him or her in a third-party liability suit. But the nervous, suspicious, and paranoid Wisconsin attorney will read the Wisconsin rule more carefully. What if one's doubt is not found to be reasonable by a jury that is not sympathetic toward lawyers? Who wants that kind of responsibility? Are there any job openings in the state of Virginia?

Although I have probably borrowed far too much from Professor Shaffer, I will go one step further and say, in Professor Shaffer's terminology, that the narrative under and around the Virginia rule is a story of sympathy for the plight of attorneys. The barely hidden assumption behind the Virginia rule, and the ethics opinions interpreting it, is that attorneys have enough problems, enough burdens, without requiring that they make ethical judgments. The practice of law is simply too dangerous, and the price of subjectivity too high, to make independent assessments. The moral of the story is that bright-line rules, even if arbitrary, are to be preferred over potentially costly ethical judgments about the line between confidentiality and disclosure duties.

The characters in this story are not unlike Joseph K., the central character in Kafka's *The Trial*.<sup>54</sup> The legal system in which Joseph K. is caught is full of hidden traps, surprises, and absurdities. Perhaps some attorneys view the rules of ethics and their use in malpractice cases as unpredictable—just when you're keeping client secrets, you find out that you should have been reporting your client; just when you report a client, you find out that you should have been preserving secrets. The law firm across town to which you regularly sent business is now suing you; all the tricks that you learned about how to make a witness sing are now being

<sup>53</sup> See ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT 901:9110, Wis. Op. E-89-9 (1989).

<sup>54</sup> FRANZ KAFKA, *THE TRIAL* (William & Edwin Muir trans. 1937).

used against you; and the enterprise of legal ethics around and under the rules is the least of your worries.

Sympathy for today's attorney, however, implies a certain marginalization, or trivialization, of legal ethics as the exercise of moral judgments beyond the rules of professional responsibility. If we sympathize with the attorney who is faced with a shifting line between confidentiality and disclosure duties, and who is at the same time faced with liability for his or her own line-drawing, then we might forgive the attorney for wanting a clear rule even if it is ethically bankrupt. In our sympathy however, we will join those who think that the legal ethics enterprise is old-fashioned, almost sentimental, and in any event too expensive to take seriously.

If I wanted to conclude in a manner that might be seen as crass and cynical, I would say that if you want attorneys to make ethical judgments, then make sure that attorneys don't suffer professional liability for bad judgments. But I will not so conclude, primarily because that would reduce the discipline of professional responsibility to professional formalities.

Instead, I conclude that the enterprise of legal ethics faces a new challenge. When we assert that the current rules cannot govern our moral lives, we will be met with a request for more rules. We will be asked for new rules to protect attorneys from each other, from creative claims of unethical conduct and from clever jury arguments. The State of Virginia has given us one such rule. It solves the problem of inconsistent ethical judgments but it leaves us with the problem of no room for ethical judgments. There is no room for ethics in the life of an attorney who feels bound by his malpractice insurance carrier to follow the letter of the Virginia Code. The challenge to those who work in the field of legal ethics is to provide a framework for discussion of attorney responsibility in the face of the trends toward expansive disclosure duties and third-party liability—two trends that I have identified as not encouraging to ethical discourse.