Society Versus the Lawyers: The Strange Hierarchy of Protections of the "New" Client Confidentiality

Gilda M. Tuoni
SOCIETY VERSUS THE LAWYERS: THE STRANGE HIERARCHY OF PROTECTIONS OF THE "NEW" CLIENT CONFIDENTIALITY

GILDA M. TUONI*

In 1984, the American Bar Association (the "ABA") promulgated the Model Rules of Professional Conduct (the "Model Rules").1 Thereafter, the majority of states adopted the Model Rules in whole or in part.2 Among the Model Rules adopted in 1984 was Model Rule 1.6 concerning the subject of maintaining client confidences.3 Model Rule 1.6 protects from disclosure information related to a lawyer's representation of a client with some exceptions.4 Under Model Rule 1.6(a), a lawyer may reveal confidential client information if the client consents after consultation or if the disclosures are "impliedly authorized in order to carry out the representation."5 Under Model Rule 1.6(b), a lawyer may reveal confidential information, relating to the representation of a client, if the lawyer reasonably believes it 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;6 or 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 proceed-

* B.A., University of New Mexico; J.D., Boston College Law School; LL.M., Harvard Law School. At the time this article was written, the author was an Associate Professor of Law, Loyola Law School, Los Angeles, California. She currently is a Visiting Scholar at Harvard Law School and engaging in graduate studies in Ethics at the Harvard Divinity School. Professor Tuoni would like to thank Dean Gerald McLaughlin, Professors Dan Selmi and Jan Costello, and Ms. Denai Burbank of Loyola for their support in the completion of this article.

1 MODEL RULES OF PROFESSIONAL CONDUCT (1984) [hereinafter MODEL RULES].
2 As of this writing, most of the states, including the District of Columbia and the Virgin Islands, have adopted some form of the MODEL RULES.
3 MODEL RULES Rule 1.6.
4 MODEL RULES Rule 1.6(a).
5 Id.
6 MODEL RULES Rule 1.6(b)(1).
ing concerning the lawyer’s representation of the client.\textsuperscript{7}

Thus, under the Model Rules, a lawyer may reveal confidential client information only with client consent, or if impliedly authorized; if reasonably necessary to prevent only certain types of crime; or, if reasonably necessary for the lawyer to succeed in a controversy with a client or to defend himself or herself. These provisions have, to a large extent, restricted a lawyer’s prior discretion to reveal confidential client information when necessary to prevent the commission of many types of crime other than that of imminent bodily harm or death. As a result, the interests of society and individuals, historically given greater protection under former American Bar Association ethical codes,\textsuperscript{8} have suffered while protections for clients and lawyers have been strengthened.

Concurrently, Model Rule 3.3, regarding candor to a tribunal, a lawyer’s ability, indeed obligation, to reveal confidential client information if the lawyer learns that a client used the lawyer’s services to commit a fraud on a court is enlarged. Model Rule 3.3(a)(4) provides that “[i]f a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.”\textsuperscript{9}

Such “remedial measures” are explained in the commentary to Model Rule 3.3.\textsuperscript{10} The comment provides, in part:

If perjured testimony or false evidence has been offered, the advocate’s proper course ordinarily is to remonstrate with the client confidentially. If that fails, the advocate should seek to withdraw if that will remedy the situation. If withdrawal will not remedy the situation or is impossible, the advocate should make disclosure to the court.\textsuperscript{11}

These Model Rule provisions, requiring the disclosure of client confidential information concerning fraud on a court, depart substantially from prior rules regarding the protection of client confidences. Thus, the courts, along with clients and lawyers, have

\textsuperscript{7} Model Rules Rule 1.6(b)(2).

\textsuperscript{8} Compare Model Rules (rules should be interpreted with reference to purposes of legal representation) with Canons of Professional Ethics (1908 & 1928) (lawyer should assist in maintaining integrity and integrity of legal profession) and Model Code of Professional Responsibility (1970) (lawyers play vital role in preservation of society).

\textsuperscript{9} Model Rules Rule 3.3(a)(4).

\textsuperscript{10} Model Rules Rule 3.3 cmt.

\textsuperscript{11} Id.
benefitted from enhanced protections under the Model Rules in the area of client confidentiality. In sum, the Model Rules give greater protection to clients who announce future criminal conduct, increase the ability of lawyers to protect themselves by enlarging the number of instances in which lawyers may reveal client confidences where necessary, and require mandatory disclosure of client information which reveals the commission of fraud on a court during a lawyer’s representation when other efforts to correct the fraud have not worked.

This Article analyzes these changes in the context of a confidentiality “battleground,” which has pitted lawyers against society through the rather strange hierarchy of protections which have evolved under the Model Rules. The Article presents a series of hypotheticals which are based, in whole or in part, on recent cases. Through analysis of these hypotheticals, the history of protections afforded to clients, lawyers, courts, and the public through the American Bar Association Canons of Ethics (the “ABA Canons”), the American Bar Association’s Model Code of Professional Responsibility (the “ABA Code”), the Model Rules, as well as the ethical opinions and court decisions interpreting these professional conduct provisions will be revealed. In conclusion, this Article proposes a rethinking of client confidentiality. A remodeled design of client confidentiality is suggested which would, if adopted, afford society and individuals greater protections. The proposed protections would be consistent with those given to clients, lawyers, and the courts, and yet they would not substantially change the adversary system as we know it.

I. THE HYPOTHETICALS

Ponder the following hypothetical situations:

A. Hypothetical One

A lawyer represents a client, defendant A, who has a codefendant, defendant B. The defendants are arrested for the murder of a security guard during a bank robbery. A tells his lawyer that he

12 See Canons of Professional Ethics (1908 & 1928).
15 See ABA Opinions of the Committee on Professional Ethics (1967).
has never seen defendant B before the arraignment of the two. In fact, A tells his lawyer that he alone committed the crime with which both defendants are charged. The lawyer for defendant A never says anything to the authorities or to the lawyer for defendant B about A's statements concerning B's innocence. Several law enforcement personnel tell the police that they do not believe defendant B was involved. The police do nothing about these statements.

At trial, both defendants are convicted of first degree murder, with the possibility of the death penalty or life in prison as potential sentences. The jury comes back with a sentence of life in prison. Just before he dies, defendant A tells a prison chaplin that defendant B was not involved in the crime. Neither the chaplin nor defendant A's lawyer say, or do anything regarding defendant B. Several years later, a motion is made by a new court-appointed counsel for defendant B requesting that the court release A's lawyer from his obligation of confidentiality still owed to his deceased client. The motion is denied. It is only after defendant A's relatives are located by B's new lawyers, and the relatives agree to release A's lawyer from the confidentiality obligation, that the court permits the lawyer to testify as to defendant A's prior exculpatory statements concerning defendant B. Thereafter, the law enforcement personnel and the chaplin also testify. The result: B is finally released from prison, having been incarcerated for a decade and a half for a crime he did not commit. 16

B. Hypothetical Two

X tells the police that after attending a childbirth instruction class at a hospital with his pregnant wife, he and his wife, who were white, were accosted in their automobile by an African-American male in a predominantly African-American area of the city. X stated that the assailant robbed and shot them. The wife died shortly thereafter and the couple's infant, delivered by emergency Caesarean section, died a few weeks later.

16 See Commonwealth v. Sullivan, 239 N.E.2d 5 (Mass. 1968) (George Reissfelder convicted of first-degree murder in course of robbery), cert. denied, 393 U.S. 1056 (1969); see also Ted Gest, When the Nightmare of False Arrest Comes True, U.S. NEWS & WORLD REP., Dec. 17, 1984, at 45 (one-half of 1% of all arrests are "illegitimate"); Imprisoned in the '66 Killing, He Goes Free in Boston, N.Y. TIMES, Aug. 31, 1982, at A10 (Mr. Reissfelder spent years incarcerated at Walpole State Prison a crime he did not commit).
The violent murders set off an uproar in the city and around the country. The city, already divided by racial strife, become the center of an intensified national focus on racial tension. The police conduct aggressive and often random stops of African-American males in the city who fit the assailant’s description. X ultimately identifies the assailant in a police line-up. The police obtain incriminating statements from others who claim the identified assailant has bragged about the crimes.

A number of weeks later a lawyer is contacted by X. X apparently learned that his brother had told the police that X, not the identified assailant, actually shot his wife and himself. X discusses the matter at some length with the lawyer. The next day, X commits suicide by jumping off a bridge. The entire city is outraged by the gross fraud perpetrated by X on his family, the city as a whole, and in particular, on the African-American community. The lawyer is subpoenaed to testify at a grand jury investigation concerning the matter. The lawyer claims the attorney-client privilege bars him from testifying. The family of the deceased client refuses to release the lawyer from the privilege. The prosecution seeks an order to compel the lawyer to testify as to what his client has told him about the events before he committed suicide. The prosecution intimates that such information is required by the public interest in learning the details of a crime that has taken the lives of a mother and child, and simultaneously, has created intense racial division in the city. In addition, there is some evidence that the client may have told his lawyer about other crimes committed or to be committed by himself and others. But the highest court of the state concludes that the lawyer cannot be ordered to testify, and that the attorney-client privilege, even in these circumstances, survives the death of the client. Consequently, the true facts are never revealed.17

C. Hypothetical Three

A well-respected law firm represents a savings and loan association and its parent holding company. During the course of the representation, the law firm learns that documents submitted to

17 See generally In re John Doe, 562 N.E.2d 69, 69 (Mass. 1990) (efforts to compel testimony by lawyer of Charles Stuart of Boston regarding what he was told by his now deceased client about shooting of his pregnant wife, Carol DiMaiti Stuart).
the Federal Home Loan Bank Board on behalf of the client may have contained deliberate omissions and falsifications. Nonetheless, the firm continues to represent the thrift before the Board and to urge favorable treatment so as to reduce the risk of regulatory intervention. There is no disclosure to the Board or the thousands of investors in the savings and loan and its parent company. Subsequently, it becomes clear that the client has engaged in numerous fraudulent transactions, which artificially inflated the net worth of the thrift and discouraged regulatory intervention. The client eventually goes bankrupt, resulting in millions of dollars in losses to investors, and enormous losses to taxpayers when the bank has to bailed out by the federal government. The events form the basis of a nationwide scandal involving the savings and loan industry. ¹⁸

D. Hypothetical Four

A defendant in a murder case tells his lawyer that he will take the stand in his own defense and falsely testify. The defendant wants to tell the jury that he saw a silver object in the victim's hand before he shot him. The defendant says that if he does not testify in this manner he will be convicted. The lawyer tells the client that he cannot perjure himself, and that if he does do so, the lawyer will withdraw and tell the court of the client's perjury. In face of the threat, the client testifies truthfully, is convicted, and sentenced to many years in prison. ¹⁹

E. Hypothetical Five

A lawyer represents a corporate client in the filing of stock registration statements. The lawyer withdraws from the law firm when a decision is made by the partners not to disclose certain information on a current filing statement. The lawyer then drafts and files a statement concerning this matter with the Securities and Exchange Commission. Eventually, the law firm, as well as the lawyer, are named as defendants in a lawsuit by disgruntled


stockholders of the client. The lawyer turns over information to the plaintiffs' counsel regarding the lawyer's lack of involvement and the behavior of others in the law firm. The plaintiffs drop the lawyer from the suit, but proceeds against the other members of the law firm.20

II. QUESTIONING THE PROPRIETY OF RULES REQUIRING MAINTENANCE OF CLIENT CONFIDENCES WHEN SOCIETAL OR INDIVIDUAL INTERESTS ARE AT STAKE

The general public questions the appropriateness of rules that require the maintenance of client confidences when there are contrary societal or individual interests at stake. The strict maintenance of client confidences seems particularly hypocritical when juxtaposed against rules that expressly permit revelation of confidences when the interests of the courts or lawyers are at issue.

Was the conduct of the lawyers proper in each of the preceding hypotheticals? One might ask, what does "proper" mean? For purposes of this discussion, "proper" means conduct which is professionally acceptable under the profession's most recent articulation of "professional responsibility," the Model Rules.21 Therefore, the answer in each situation is an unqualified "yes." In each hypothetical the lawyer or law firm acted in a way considered to be professionally "responsible," and countenanced by the Model Rules. Client confidences must be maintained, notwithstanding societal or individual harm. The only exceptions are where the confidences concern future criminal conduct likely to cause imminent death or substantial bodily harm,22 the commission of fraud on the court,23 or information which the lawyer needs to succeed in a controversy with a client or to defend himself or herself.24 Discretion is permitted in circumstances involving potentially harmful future criminal conduct likely to cause physical harm.25 But under the Model Rules, there is no discretion to disclose future criminal conduct likely to result in economic harm, or physically harmful noncriminal conduct. And, of course, disclosure of

22 See MODEL RULES Rule 1.6(b)(1).
23 See MODEL RULES Rule 3.3(a)(4).
24 See MODEL RULES Rule 1.6(b)(2).
25 See MODEL RULES Rule 1.6(a).
past criminal conduct is forbidden under any circumstances.

The Model Rules have created a virtual war between societal and individual interests, and those of clients, lawyers, and the courts. The Model Rules set forth a very strange hierarchy of protections in the area of client confidentiality. The oddity of this new ordering is clear when one compares the client confidentiality protections and discretionary lawyer disclosure afforded by the former ABA Canons and ABA Code with the Model Rules.

A. The History of Client Confidentiality

A historical look at client confidentiality begins with an examination of the rules regarding confidentiality under prior ABA ethical codes. In addition, attention should be directed at the attorney-client evidentiary privilege. That privilege excludes from evidence the substance of lawyer-client communications. The evidentiary privilege is intrinsically related to the ethical rules of lawyer-client confidentiality. Indeed, under the ABA Code, as seen below, the evidentiary privilege formed the basis for ethical confidentiality protections. Yet, over the years, the evidentiary privilege and the lawyers' ethical responsibilities, have gone somewhat different routes in detail and coverage with respect to client confidentiality. Thus, the inquiry here looks primarily to protections afforded under the ethical codes.

1. The ABA Canons

The ABA Canons were adopted by the ABA in 1908. Prior to the adoption of the ABA Canons, approaches to professional ethics were developed on a state-by-state basis. In 1884, Judge George Sharswood, a lawyer, teacher, and justice of the Pennsylvania Supreme Court, put together a proposal on the norms of professional conduct, delivered through a series of lectures, entitled An Essay on Professional Ethics. This proposal was widely circulated, and served as a model for professional conduct throughout the states. Alabama, following the model, was the first state to

26 See CAL. EVID. CODE § 954 (Deering 1993); N.Y. CIV. PRAC. L. & R. § 4503 (McKinney 1993).
28 See CANONS OF PROFESSIONAL ETHICS Preamble (1908).
29 GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS (5th ed. 1884).
adopt a professional code in 1887. Soon, however, it was apparent that the problem was a national one and thus, in 1908, the ABA Canons were adopted as a uniform code for lawyers across the country. Thirty-two canons were adopted in 1908 and thirteen more in 1928.

a. Confidentiality Protections Under the ABA Canons

The first thirty-two canons did not contain a specific canon regarding client confidentiality. Canon 6 generally provided that a lawyer had an "obligation to represent the client with undivided fidelity and not to divulge his [or her] secrets or confidences." Canon 37, the specific confidentiality canon, was added in 1928 and amended in 1937. It read, in part:

It is the duty of a lawyer to preserve his [or her] client's confidences. This duty outlasts the lawyer's employment, and extends as well to [the lawyer's] employees; and neither of them should accept employment which involves or may involve the disclosure or use of these confidences, either for the private advantage of the lawyer or [the lawyer's] employees or to the disadvantage of the client, without [the lawyer's] knowledge and consent, and even though there are other available sources of such information. A lawyer should not continue employment when he [or she] discovers that this obligation prevents the performance of [the lawyer's] full duty to his [or her] former or . . . new client.

Even in the ABA Canons, however, exceptions to client confidentiality existed. Provisions included the areas of lawyer self-defense and announced intentions of clients to commit crime.

b. Exceptions to Client Confidentiality Under the ABA Canons

Canon 37 provided two exceptions to the confidentiality requirement. They were in the nature of revelations necessary to defend the lawyer and revelations necessary to prevent crimes from tak-

31 Id.
33 Id.
34 ABA CANONS Canon 6 (1908).
35 ABA CANONS Canon 37 (1928) (amended 1937).
36 Id.
ing place. Canon 37 read, in part:

If a lawyer is accused by his [or her] client, [the lawyer] is not precluded from disclosing the truth in respect to the accusa-
tion. The announced intention of a client to commit a crime is not included within the confidences which [a lawyer] is bound
to respect. [The lawyer] may properly make such disclosures as may be necessary to prevent the act or protect those against whom it is threatened.37

Thus, the lawyer had discretion to reveal confidences in defense of a client’s accusation, or to prevent future criminal acts in order to protect potential victims.

However, there were certain circumstances under the ABA Ca-
nons where lawyers appeared to be mandated to disclose client confidences. One such instance involved the disclosure of perjury or fraud on the court. Canon 29 provided: “The counsel upon the trial of a cause in which perjury has been committed owe it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities.”38 Moreover, Canon 41, added in 1928, also ordered a lawyer to inform against his or her client in certain circumstances in regard to “fraud or deception.”39 It read:

When a lawyer discovers that some fraud or deception has been practiced, which has unjustly imposed upon the court or a party, [the lawyer] should endeavor to rectify it; at first by advising [the] client, and if [the] client refuses to forego the advantage thus unjustly gained, [the lawyer] should promptly inform the injured person or his [or her] counsel, so that they may take appropriate steps.40

However, over the years, there were situations brought to the attention of the ABA Committee on Professional Ethics in which the confidentiality provisions of Canon 37 conflicted with the disclosure of fraud provisions of Canons 29 and 41. The Committee, in a series of opinions, addressed these conflicts by suggesting that, in such a case, the lawyer was to urge the client to disclose perjury, but if client failed to do so, the lawyer was only to withdraw, not disclose.41

37 ABA CANONS Canon 37 (1928).
38 ABA CANONS Canon 29 (1908).
39 ABA CANONS Canon 41 (1928).
40 Id.
41 ABA Comm. on Professional Ethics and Grievances, Formal Op. 287 (1953) (with re-
Indeed, in an earlier opinion, the Committee stated that a lawyer could not reveal the false claims of residence previously made by his client.\(^{42}\) The Committee held: "While ordinarily it is the duty of a lawyer as an officer of the court to disclose to the court any fraud that he [or she] believes is being practiced on the court, this duty does not transcend that to preserve the client confidences."\(^{43}\) Finally, in 1965, the Committee held that a lawyer could not reveal that his client, the wife in a divorce case, was pregnant by another man.\(^{44}\)

It was, however, unmistakable that under the ABA Canons that discretion to disclose confidential client information in the situations of client accusation against a lawyer and the announced intention of a client to commit a future crime was preserved. For example, in 1936, the ABA Committee on Professional Ethics stated:

> When the communication by the client to his [or her] lawyer is in respect to the future commission of an unlawful act or to a continuing wrong, the communication is not privileged. One who is actually engaged in committing a wrong can have no privileged witnesses, and public policy forbids that a lawyer should assist in the commission thereof. . . .\(^{45}\)

That same year in another opinion the ABA Committee stated that in a case of continued wrongdoing on the part of a client: "Such information, even though coming to the lawyer from the client in the course of his [or her] professional relations with respect to other matters in which [the lawyer] represents the defendant, is not privileged from disclosure."\(^{46}\)

Not only was there discretion to disclose in cases of future crime, but the language of some of these decisions implied that, in cases of serious crime or crime involving the judicial process, the lawyer was under an obligation to disclose. In 1965, the ABA Committee commented that if a lawyer knows beyond a reason-
able doubt that his or her client is going to commit a crime, disclosure should take place.\textsuperscript{47} Decisions by the ABA Committee indicated an obligation to disclose in certain other circumstances as well, for example, in the case of a client escaping from custody.\textsuperscript{48} And regarding a client’s violation of probation and “continuing” wrongdoing, the ABA Committee held that if a client “persists in violating the terms and conditions of... probation, it is the duty of the lawyer as an officer of the court to advise the proper authorities concerning [the] client’s conduct.\textsuperscript{49}

2. The ABA Code

In 1954, it was decided that a complete revision of the ABA Canons was necessary because the changing professional environment for lawyers in this country and the fact that ethical principles and precepts needed to be more applicable to concrete situations, and more consistent among each other.\textsuperscript{50} Thus in 1964, the ABA appointed a committee to do so.\textsuperscript{51}

In 1969, the ABA Code of Professional Responsibility (the “ABA Code”) was promulgated.\textsuperscript{52} The ABA Code consisted of four identifiable types of provisions: canons, disciplinary rules, definitions, and ethical considerations. As noted in the ABA Code: “Canons [were] statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession. They embod[ied] the general concepts from which the Ethical Considerations and Disciplinary Rules are


The Committee found:

In failing to disclose his [or her] client’s whereabouts as a fugitive under these circumstances the attorney would not only be aiding [the] client to escape trial on the charge for which [the client] was indicted, but would likewise be aiding [the client] in evading prosecution for the additional offense of escape. It is the opinion of the committee that under such circumstances the attorney’s knowledge of [the] client’s whereabouts is not privileged, and that [the attorney] may be disciplined for failing to disclose that information to the proper authorities.

\textit{Id.}


\textsuperscript{50} \textsc{Andrew Kaufman, Problems in Professional Responsibility} 16-17 (3d ed. 1969); see Frankel, supra note 30, at 875.

\textsuperscript{51} \textsc{Kaufman, supra} note 50, at 17.

\textsuperscript{52} Model Code of Professional Responsibility (1969) [hereinafter ABA Code]. Although the ABA Code has been revised several times it retains its general format.
While general in nature, breach of the canons could constitute misconduct.

The disciplinary rules of the ABA Code were mandatory and akin to statutory provisions in that they stated the minimum level of conduct to which one could fall without being subject to discipline. The definitions defined terms used in the disciplinary rules. The ethical considerations of the ABA Code were "aspirational in character and represent[ed] the objectives toward which every member of the profession should strive. They constitute[d] a body of principles upon which the lawyer [could] rely for guidance in many specific situations." The ethical considerations addressed specific factual situations and suggested appropriate lawyer behavior in such situations, even conflicting ones. The ethical considerations often gave the rationales behind particular stances taken in the ABA Code.

a. Confidentiality Protections Under the ABA Code

Canon 4 was the confidentiality canon of the ABA Code. Canon 4 provided: "A lawyer should preserve the confidences and secrets of a client." The disciplinary rules under Canon 4 defined "confidences" and "secrets" as follows:

"Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to 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.

The disciplinary rules under Canon 4 further provided that a lawyer could:

not knowingly: (1) Reveal a confidence or secret of [a] client; (2) use a confidence or secret of [a] client to the disadvantage of the client. (3) Use a confidence or secret of [a] client for the advantage of [the lawyer] or of a third person, unless the cli-

54 Id.
57 ABA CODE Canon 4.
58 ABA CODE DR 4-101(A).
ent consents after full disclosure.\textsuperscript{59}

As indicated, the attorney-client evidentiary privilege is incorporated in the ABA Code's definition of "confidence."

b. Attorney-Client Evidentiary Privilege

In 1888, the United States Supreme Court focused on the need for the attorney-client evidentiary privilege:

The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.\textsuperscript{60}

The privilege, however, inasmuch as it "may serve as a mechanism to frustrate the investigative or fact-finding process,"\textsuperscript{61} will apply only if:

(1) The asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his [or her] subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the lawyer was informed (a) by his [or her] client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.\textsuperscript{62}

As such, the attorney-client evidentiary privilege is to be strictly construed.\textsuperscript{63} Nonetheless, it has been held that the privilege:

is the price that society must pay for the availability of justice to every citizen, which is the value that the privilege is designed to secure. The "social good derived from the proper performance of the functions of lawyers acting for their clients

\textsuperscript{59} ABA Code DR 4-101(B).
\textsuperscript{60} Hunt v. Blackburn, 128 U.S. 464, 470 (1888).
\textsuperscript{63} Id.
... outweigh[s] the harm that may have come from the suppression of the evidence.\textsuperscript{64}

The privilege belongs only to the client and can only be waived by the client.\textsuperscript{65} The attorney-client privilege survives the client's death, which assures that "the mouth of the lawyer [will] be forever sealed."\textsuperscript{66} However, an executor or administrator of a client's estate may, in some instances, waive the privilege of the deceased client.\textsuperscript{67} This is especially true where a lawyer is called to testify after a client's death concerning the client's testamentary intentions.\textsuperscript{68}

The attorney-client evidentiary privilege, of course, is much more limited in scope than the ethical privilege. As indicated above, under Disciplinary Rule 4-101(A), the protections afforded client "secrets" in addition to "confidences" covered much more than "confidential" client information protected under the evidentiary privilege. In this regard, Ethical Consideration 4-4 of Canon 4 stated that "the lawyer-client [evidentiary] privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his [or her] client. The ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information, or the fact that others share the knowledge.\textsuperscript{69} Indeed, it has been stated that the ethical protections under the disciplinary rule looked "beyond technical consideration of secrecy in the evidentiary sense and [shielded] all information given by a client to his [or her] lawyer whether or not strictly confidential in nature. The sole requirement under Canon 4 [was] that the lawyer receive the communication in his [or her] professional capacity."\textsuperscript{70}

It is interesting to note, however, that although the ethical priv-


\textsuperscript{66} In re John Doe, 562 N.E.2d 69, 70 (1990) (quoting Foster v. Hall, 14 Mass. (1 Pick.) 89, 93 (Mass. 1831)).


\textsuperscript{68} In re John Doe, 562 N.E.2d at 71 (citing Doherty v. O'Callaghan, 31 N.E. 726 (Mass. 1892)).

\textsuperscript{69} ABA Code Canon 4; ABA Code EC 4-4.

ilege under the ABA Code protected more client information than the evidentiary privilege, it also "survived" the death of the client in the same fashion as the testimonial privilege. The ABA Committee on Professional Ethics held the same in 1974. In its opinion, the Committee noted that an exception to "ethical" confidentiality may exist when disclosure is made after a client's death for the benefit of the estate, when it is clear that if the client was alive, he or she would waive confidentiality.

c. Exceptions to Client Confidentiality Under the ABA Code

The ABA Code retained exceptions for disclosure of client confidential information from the ABA Canons and expanded the instances in which client confidences could be disclosed. A lawyer could reveal: 

- "[c]onfidences or secrets with the consent of the client or clients affected, but only after full disclosure to them;"
- "[c]onfidences or secrets when permitted under Disciplinary Rules or required by law or court order."
- "The intention of [a] client to commit a crime and the information necessary to prevent the crime"
- "Confidences or secrets necessary to establish or collect [the lawyer's] fee or to defend [the lawyer or his or her] employees or associates against an accusation of wrongful conduct"

These provisions explicitly reaffirmed disclosure mechanisms that existed for lawyers under the ABA Canons, but also broadened disclosure possibilities, particularly in the area of a lawyer's defense of himself or herself. In particular, the ABA Code did not limit lawyer disclosure in self-defense only to those instances where a client had made accusations against a lawyer, as had Canon 37 under the ABA Canons. Rather, Disciplinary Rule 4-
101(C)(4) opened the door to disclosure by a lawyer of confidential information in response to third party claims against a lawyer inasmuch as the only reference was to "accusation of wrongful conduct." 79 Moreover, under the ABA Code, the question arose whether client confidentiality would supersede the lawyer's duty to the court as it had occurred under the ABA Canons and their interpretation. Under the ABA Code, Canon 7, the corresponding provision to Canons 29 and 41, a lawyer was to represent a client zealously but only within the bounds of the law. 80 Two disciplinary rules, in particular, addressed the issue of a lawyer's responsibility with regard to client perjury. Disciplinary Rule 7-102(A)(4) provided that, in the representation of a client, a lawyer shall not knowingly "use perjured testimony or false evidence." 81 This disciplinary rule thus provided a prohibition as to a lawyer's active involvement in the future use of client perjury. In addition, Disciplinary Rule 7-102(B)(1) referenced past instances of client perjury. If provided that a lawyer who receives information clearly establishing that a client "has, in the course of the representation, perpetrated a fraud upon a person or a tribunal shall promptly call upon [the] client to rectify the same, and if [the] client refuses or is unable to do so, [the lawyer] shall reveal the fraud to the affected person or tribunal." 82 Thus, it appeared that the ABA Code had turned the tables and resolved the dilemma between client confidentiality and a lawyer's duty to the court in favor of disclosure to the court. Revelation was required. However, this apparent "resolution" was not long lived. In 1974, the ABA amended Disciplinary Rule 7-102(B)(1) providing that disclosure of the fraud should take place "except when the information is protected as a privileged communication." 83 The "except" clause of Disciplinary Rule 7-102(B)(1) appeared, once again, to shift the lawyer's responsibilities back to the protection of confidential client information, even though such information indicated past fraud on a court. In 1975, the ABA seemed to

79 Id.
80 ABA Code Canon 7.
81 ABA Code DR 7-102(A)(4).
82 ABA Code DR 7-102(B)(1) (amended 1974).
finally put the dilemma to rest. The Committee restated “the essence of Formal Opinion 287,” holding that client confidentiality prevailed over duties to disclose fraud. The Committee interpreted the phrase “privileged communication,” contained in the 1974 amendment, as referring to those confidences and secrets that were required to be preserved by Disciplinary Rule 4-101. Thus, “privileged information” was given a very broad reading by the ABA Committee. While the Committee did note that there were still remaining instances where client past fraud might be revealed, such as where the information came to the lawyer by third-party sources and not in the context of the client’s representation, it appeared that the requirement of disclosure to the court was largely interpreted out of the disciplinary rule.

d. The Hierarchy of Confidentiality Protections Under the ABA Code

Under the ABA Code, the hierarchy of confidentiality protections was structured in this manner. Pursuant to Disciplinary Rule 4-101(C)(3), lawyers could utilize their discretion to protect society and individuals from any intended future client criminal conduct. There was no explicit mandate to disclose, however; the ABA Code appeared to “bet on lawyers’ judgment and good will.” Moreover, the ABA Code did retain, in footnote citations to Disciplinary Rules 4-101(C)(2) and (3), reference to prior ABA opinions indicating that a lawyer should disclose the announced intention of a client to commit a crime in certain situations.

The courts were protected from client perjury in that, under Disciplinary Rule 7-101(A)(4), a lawyer could not suborn future client perjury. But clients were given somewhat enlarged protection under Disciplinary Rule 7-102(B)(1) because past client fraud

86 Id.
87 Id.
88 Frankel, supra note 30, at 882.
89 See ABA Code DR 4-101(C)(2) & (3) nn.15-17 (citing ABA Comm. on Professional Ethics and Grievances, Formal Op. 155, 156 (1936)); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 314 (1966). However, the Preamble to the ABA Code states in its first footnote reference that the ABA Code footnotes “are intended merely to enable the reader to relate the provisions of this code to the ABA Canons . . . adopted in 1908, as amended, the Opinions of the ABA Committee on Professional Ethics, and a limited number of other sources . . . .” See ABA Code Preamble n.1 (1969).
on a court could not be disclosed if the lawyer learned of the fraud through a privileged communication.\textsuperscript{90}

Finally, lawyers themselves were given greater protections than they previously had under the ABA Code. Disciplinary Rule 4-101(C)(4) allowed a lawyer to reveal confidential client information in light of accusations of wrongful conduct against the lawyer, seemingly from any source.\textsuperscript{91}

3. The Model Rules

Soon after the ABA Code was adopted, many concluded that its provisions were "inadequate for the needs of the profession."\textsuperscript{92} Professor Andrew Kaufman has commented on the factors that led to this conclusion:

Shortly after [ABA Code] was promulgated, the involvement of so many lawyers in Watergate focused the attention of the public and profession on lawyers' conduct. In addition, a number of substantive problems, especially conflict of interest and confidentiality, became part of the staple of lawyers' daily routine. Moreover, decisions of the Supreme Court held a number of the profession's rules relating to the provision of legal services unconstitutional. All these factors combined with a variety of particular criticisms to lead many people to conclude that the [ABA Code was inadequate].\textsuperscript{93}

The Model Rules of Professional Conduct ("Model Rules") were adopted by the ABA in 1983.\textsuperscript{94} They were designed as "rules of reason,"\textsuperscript{95} providing a "framework for the ethical practice of law."\textsuperscript{96} The Model Rules appear to be very much a "client-cen-

\textsuperscript{90} See Kaufman, supra note 50, at 175. There are commentators who do not view this exception as absolute. Professor Kaufman is of the view that past client perjury had to be revealed under DR 7-102(B)(1) if the client intended to repeat the perjury or intended "to secure a favorable judgment or settlement based on [the prior] false testimony." \textit{Id.} Professor Kaufman's view is that, in such a case since the lawyer had discretion under DR 4-101(C)(3) to disclose the announced intention of the client to commit a crime, \textit{i.e.}, future perjury or to commit another crime based on the prior false testimony, the information was not "privileged" under DR 7-102(B)(1). In other words, discretion to reveal future intended criminal conduct under DR 4-101(C)(3) removed any confidentiality protection as to the information and, as such, the past perjury had to be revealed because DR 7-102(B)(1) protected only "privileged information." \textit{Id.} at 175-177.

\textsuperscript{91} ABA Code DR 4-101(C)(4).

\textsuperscript{92} Kaufman, supra note 50, at 17.

\textsuperscript{93} Id.

\textsuperscript{94} Model Rules of Professional Conduct Definitions (1983).

\textsuperscript{95} Model Rules Preliminary Statement (1983).

\textsuperscript{96} Model Rules Scope, para. 2 (1983).
tered" code, the accuracy of which description is largely borne out by the confidentiality provisions of the Model Rules discussed below.

The organization of the Model Rules differs from that of the ABA Code as well as the ABA Canons. The Model Rules begin with a Preamble, which sets forth the various roles that a lawyer may perform: adviser, advocate, negotiator, intermediary, evaluator, and citizen.97 The Preamble also comments that the Model Rules attempt to prescribe terms for resolving conflicts among a lawyer's various responsibilities.98 The Preamble also strongly argues for the maintenance of an independent and self-governing legal profession.99

The Scope section follows the Preamble. The Scope section notes that some of the Model Rules are cast in obligatory terms while others are discretionary.100 While the Model Rules provide a framework for the ethical practice of law, they "do not exhaust, however, the moral and ethical considerations that should inform a lawyer."101 In addition, they are to be considered within the larger context of substantive law, which also has a bearing on appropriate lawyer conduct.102 The Scope section also provides that breach of the Model Rules is a basis for invoking the disciplinary process, although not necessarily a means for imposing civil liability or as a procedural tool.103 The Scope section ends by noting that each of the Model Rules is followed by a comment that "explains and illustrates the meaning and purpose of the Rule."104 The comments, which can be lengthy, "are intended as guides to interpretation, but the text of each rule is authoritative."105

Following the Scope section, the Terminology section defines a number of terms that are used in the Model Rules and comments.106 Thereafter, fifty-two Model Rules are set out, each of which is followed by a comment.107 Finally, notes comparing spe-

---

98 Id.
99 Id.
101 Id. para. 2.
102 Id. para. 3.
103 Id. para. 5 & 6.
104 Id. para. 9.
105 Id.
107 See generally Model Rules.
cific Model Rules to the ABA Code provisions are provided. Such "'notes' have not been adopted, do not constitute part of the Model Rules, and are not intended to affect the application or interpretation of the rules and comments."108 Among its many provisions, the Model Rules contain prohibitions as well as allowances in the areas of client confidentiality and disclosure.

a. Confidentiality Protections Under the Model Rules

The Model Rules follow through on the approach of the ABA Canons and ABA Code by providing for the protection from disclosure of client confidential information. Model Rule 1.6 provides that a "lawyer shall not reveal information relating to the representation of a client."109 Thus, Model Rule 1.6 "eliminates the two-pronged duty under the [Model] Code [to protect confidences and secrets] in favor of a single standard protecting all information about a client relating to representation."110 Model Rule 1.6 "imposes confidentiality on information relating to the representation even if it is acquired before or after the relationship existed. It does not require the client to indicate information that is to be confidential, or permit the lawyer to speculate whether particular information might be embarrassing or detrimental."111

From one perspective, Model Rule 1.6 enlarged the protections of client confidentiality previously existing under the ABA Code because it applies to all information about a client "relating to the representation."112 That definition avoids the constricted definition of confidence113 appearing in the ABA Code, as well as extends protection to information relating to the representation whether or not such information would be embarrassing or detrimental.114

On the other hand, inasmuch as Model Rule 1.6 and its commentary specify that, to be protected, the client information must "relate to the representation,"115 arguably the ABA Code, in pro-

108 Model Rules Scope, para. 9.
109 Model Rules Rule 1.6.
111 Id. at 89.
112 Id.
113 Id.
114 Id.
115 ABA Annotated Model Rules; see Model Rules Rule 1.6 cmt., paras. 4, 5. Note that the Model Rules do not number the paragraphs of the comments. Yet, for ease of
tecting from disclosure client "secrets" as well as "confidences" may, in certain instances, have afforded greater protection for embarrassing or detrimental client information that was not related to the representation of the client. There are numerous exceptions to client confidentiality under the Model Rules, as there were under its predecessor codes. These exceptions, of course, are the main focus of this article.

b. Exceptions to Client Confidentiality Under the Model Rules

The Model Rules provide several exceptions to client confidentiality. Model Rule 1.6 provides the initial exceptions to the protection from disclosure of information relating to the representation of a client. Under Model Rule 1.6(a), a lawyer may disclose client confidential information if the client consents. Moreover, disclosures that are impliedly authorized to carry out the representation also are allowed to be disclosed under Model Rule 1.6(a).

Under Model Rule 1.6(b), an exception to confidentiality regarding client announcement of certain types of future criminal conduct is set forth. Specifically, a lawyer may, under Model Rule 1.6(b)(1), reveal information relating to the representation of a client "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."

Under Model Rule 1.6(b)(2), a lawyer may reveal information relating to the representation of a client in self-interest or self-defense. That is, under Model Rule 1.6(b)(2), a lawyer may reveal protected client information:

[T]o the extent the lawyer reasonably believes necessary . . . 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 change [sic] 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

reference, they are numbered here according to paragraph order.

116 Model Rules Rule 1.6(a).
117 Id.
118 Model Rules Rule 1.6(b).
119 Model Rules Rule 1.6(b)(1).
lawyer's representation of the client.\textsuperscript{120}

Model Rule 3.3 and its commentary also set forth a quite substantial exception to maintaining client confidences in the context of the judicial process. Model Rule 3.3(a)(4) states that a "lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false. If a lawyer has offered material false evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures."\textsuperscript{121} The "reasonable remedial measures" referenced in Model Rule 3.3(a)(4) are found in the Model Rule's commentary:

If perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to remonstrate with the client confidentially. If that fails, the advocate should seek to withdraw if that will remedy the situation. If withdrawal will not remedy the situation or is impossible, the advocate should make disclosure to the court.\textsuperscript{122}

Thus, Model Rule 3.3(a)(4) and its commentary provide an explicit exception to the confidentiality protections of Model Rule 1.6 in the case of past client perjury.

c. Disclosures Consented to or Impliedly Authorized By the Client to Carry Out Representation

Under Model Rule 1.6(a), protected client information can be disclosed if the client consents.\textsuperscript{123} This also was clearly the case under the corresponding ABA Code provision, Disciplinary Rule 4-101(C)(1).\textsuperscript{124} Under the ABA Code, consent had to "be proceeded by communication with the client, fully disclosing the import of such revelation."\textsuperscript{125} Thus, the consent for disclosure obtained, while not specifically stated in the ABA Code, would have been "knowing." Consent to the lawyer for disclosure should, as well, be clearly given by the client and received by the lawyer; the best practice is to obtain written client consent to disclosure of protected information.\textsuperscript{126}

Yet "implied" consent, even though not specifically addressed in

\begin{footnotesize}
\item[120] \textsc{Model Rules Rule 1.6(b)(2).}
\item[121] \textsc{Model Rules Rule 3.3(a)(4).}
\item[122] \textsc{Model Rules Rule 3.3 cmt., para. 11.}
\item[123] \textsc{Model Rules Rule 1.6(a).}
\item[124] \textsc{ABA Code DR 4-101(C)(1) (1970).}
\item[125] \textsc{Gilda M. Tuoni, Massachusetts Attorney Conduct Manual, 4-45 (1992).}
\item[126] \textit{Id.}
\end{footnotesize}
the ABA Code, had been countenanced in matters arising under the ABA Code where it was necessary to the effective conduct of the representation.127 This notion, however, was expressly adopted in Model Rule 1.6(a). That is, the Model Rule "recognizes that a client impliedly consents to disclosures necessary to effect the purposes of the representation."128 As such, the Model Rules did not greatly alter the prior approach regarding client authorized disclosure under the ABA Code, although the Model Rules made specific allowance of "implied" client consent to certain necessary lawyer disclosures.

d. Disclosure of Announced Future Criminal Conduct

Model Rule 1.6(b)(1) permits disclosure of a client's prospective crime only when the lawyer reasonably believes such disclosure is 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 . . . ."129 This rule departs substantially from the prior ABA Code provision, Disciplinary Rule 4-101(C)(3). "While Disciplinary Rule 4-101(C)(3) [gave] lawyers discretion to report the announced intention of a client to commit any crime, Model Rule 1.6 (b)(1) gives discretion to reveal only certain types of proposed crime,"130 those potentially resulting in serious physical harm to a victim.

Both the ABA Code provision, Disciplinary Rule 4-101(C)(3), and Model Rule 1.6(b)(1) are in sync in not mandating disclosure of future criminal conduct in any instance. "However, unlike Disciplinary Rule 4-101(C)(3), [under the Model Rules] 'crimes the likely consequence of which are not substantial are not subject to disclosure.' Applying the Model Rules, crimes which are not substantial are those which do not involve the potential of imminent death or substantial bodily harm."131

Consequently, under Model Rule 1.6(b)(1), lawyers cannot disclose the announced intention of a client to commit a crime likely to result in financial injury.132 It has been stated that such provi-

129 MODEL RULES Rule 1.6(b)(1).
130 See Tuoni, supra note 125, at 4-57 (emphasis in original).
131 Id. (quoting ABA ANNOTATED MODEL RULES 71 (1992) (footnote omitted)).
132 See MODEL RULES Rule 1.6(b)(2) (Proposed Final Draft 1981) (providing an exception
sion is "based upon the interest in harm prevention, not the prevention of misconduct as such." Whatever the rationale, this aspect of the Model Rules has resulted in an enormous limitation of lawyer discretion to disclose client confidences when the interests of others are at stake. As discussed below, such restriction has, perhaps, resulted in an irresolvable conflict between the Model Rules' confidentiality obligations of lawyers toward clients and the interests of society and individuals in being protected from, among other things, financial injury.

In addition, the Model Rules, like the ABA Code, do not allow lawyer discretion to disclose client announced future conduct which is likely to physically endanger another if such conduct is not technically "criminal" in nature. Thus, if a client's intended action will "indirectly" harm another, "direct" conduct causing harm usually being criminal in nature, no lawyer discretion to disclose exists.

e. Disclosures By a Lawyer Due to Self-interest or in Self-Defense

Under Model Rule 1.6(b)(2), the instances in which a lawyer may disclose otherwise protected client information in so-called self-interest or self-defense have been enlarged. The ABA Code, Disciplinary Rule 4-101(C)(4), recognized exceptions to client confidentiality in order for a lawyer to establish or collect a fee or to defend against an accusation of wrongful conduct. As to the use of client confidences in fee disputes, "fairness considerations historically have been raised to support lawyers' revelation of client confidential information in order to protect their economic interests." In this regard, the ABA Committee on Professional Ethics commented as early as 1943:

[T]he adjudicated cases recognize an exception to the rule [that a lawyer should not reveal the confidences of his or her client], where the disclosure is necessary to protect the lawyer's interests arising out of the relation of lawyer and client

to client confidentiality which would have allowed lawyers to reveal client intended financial crime). But see Tuoni, supra note 125, at 4-57.

133 ABA ANNOTATED MODEL RULES 71 (1992).
134 MODEL RULES Rule 1.6(b)(2) cmt.
135 ABA CODE DR 4-101(C)(4).
136 See Tuoni, supra note 125, at 4-64 (citing CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 308 (1986)).
in which disclosure was made.137

Nonetheless, support for the former ABA provision has not been universal, and has even been referred to as "scandalously self-serving."138 And, of course, there were limitations to the extent of disclosure allowed under the ABA Code provisions. As indicated in Disciplinary Rule 4-101(C)(4), permitted disclosure was limited to the extent "necessary" to collect or establish the fee.139 The ABA Committee on Professional Ethics emphasized such limitations early on,140 and several bar associations echoed the same.141

The Model Rule 1.6(b)(2) provision, allowing a lawyer to reveal protected client information to the extent the lawyer reasonably believes necessary "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client," implicitly allows revelation of client information in a fee dispute with a client. But, of course, the matter in dispute need not, under the Model Rules, be limited solely to a fee question. Rather, "Model Rule 1.6(b)(2) enlarges the exception to include disclosure of information relating to claims by the lawyer other than for a fee—for example, recovery of property from the client."142

Model Rule 1.6(b)(2) does retain, in its commentary, the restriction on the amount of self-interest or self-defense disclosure that can be made, however. The commentary provides that a "lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure."143

The major change from the ABA Code in lawyer disclosures in

---

139 ABA CODE DR 4-101(C)(4).
141 See NYC Ethics Op. 1986-88 (1986); Ala. Ethics Op. 86-2 (1982); Ga. Ethics Op. 49 (1985); Phila. Ethics Op. 86-158 (1986). Under the Model Code, however, it was clear that a lawyer was to make reasonable efforts to collect a fee without resorting to litigation. ABA Code Canon 2 and ABA Code EC 2-23 provided that a "lawyer should be zealous in . . . efforts to avoid controversies over fees with clients and should attempt to resolve amicably any differences on the subject. [The lawyer] should not sue a client for a fee unless necessary to prevent fraud or gross imposition by the client." Id. As such, attorney disclosure of client confidences in order to collect a fee should have taken place under the Model Code only as a last and rather limited resort.
142 ABA ANNOTATED MODEL RULES 71.
143 MODEL RULES Rule 1.6(b)(2) cmt. 18 (1983).
self-interest or self-defense, however, comes in that portion of Model Rule 1.6(b)(2) regarding responding to accusations of wrongful conduct. Model Rule 1.6(b)(2) allows a lawyer to reveal confidential client information to the extent the lawyer reasonably believes necessary:

[T]o 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.\textsuperscript{144}

Under the ABA Code, Disciplinary Rule 4-101(C)(4) allowed a lawyer to reveal confidences or secrets necessary to defend the lawyer or his or her "associates against an accusation of wrongful conduct."\textsuperscript{145} In 1943, under the ABA Canons, the ABA Committee on Professional Ethics commented on such "defensive" disclosures:

But the lawyer may disclose information received from the client when it becomes necessary for [the lawyer's own protection], as if the client should bring an action against the lawyer for negligence or misconduct, and it became necessary for the lawyer to show what his [or her] instructions were, or what was the nature of the duty which the client expected [the lawyer] to perform. So if it became necessary for the lawyer to bring an action against the client, the client's privilege could not prevent the lawyer from disclosing what was essential as a means of obtaining or defending his [or her] own rights.\textsuperscript{146}

What was limited under the ABA Code Disciplinary Rule, however, were the circumstances allowing a lawyer to disclose information in self-defense. Disciplinary Rule 4-101(C)(4) addressed "accusations of wrongful conduct,"\textsuperscript{147} and the above-noted ABA Committee Opinion referenced a client bringing an "action."\textsuperscript{148} Judicial decisions, under the ABA Code, countenanced revelation when "a client call[ed] into public question the competence of his [or her] lawyer."\textsuperscript{149} The ABA Code footnote, which referenced to

\textsuperscript{144} Model Rules Rule 1.6(b)(2).
\textsuperscript{145} ABA Code DR 4-101(C)(4) (1980).
\textsuperscript{146} ABA Comm. on Professional Ethics and Grievances, Formal Op. 250 (1943).
\textsuperscript{147} ABA Code DR 4-101(C)(4).
\textsuperscript{149} See Tasby v. United States, 504 F.2d 332, 336 (8th Cir.), cert. denied, 419 U.S. 1125
illustrative situations involving lawyer disclosure, also cited instances of “actions” or litigation between lawyer and client.\textsuperscript{150}

Under the Model Rules, however, several situations are referenced in which a lawyer may disclose client confidences in self-interest or self-defense. Such disclosure under Model Rule 1.6(b)(2) can take place either by means of a claim or a defense in a controversy between a lawyer and a client.\textsuperscript{151} Further, disclosure can be made to establish a defense to a criminal charge or civil claim against the lawyer which charge or claim is based upon conduct in which the client was involved.\textsuperscript{152} Finally, disclosure of client information can be made in response to allegations in any proceeding concerning the lawyer’s representation of the client.\textsuperscript{153}

What these three provisions of Model Rule 1.6(b)(2) have done is to allow disclosure in contexts other than a dispute between lawyer and client. For example, the disclosure of client information can be made when third parties bring a claim against a lawyer based upon conduct in which the lawyer is involved. Further, the Model Rule does not require “a proceeding” already to have commenced before the lawyer’s ability to disclose arises. The commentary to Model Rule 1.6(b)(2) provides:

The lawyer’s right to respond arises when an assertion of . . . complicity has been made. Paragraph (b)(2) does not require the lawyer to await commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such assertion.\textsuperscript{154}

Thus, the Model Rules have liberalized the prior approach of both the ABA Canons and the ABA Code in the context of lawyer disclosures in self-interest or self-defense.\textsuperscript{155}

\textbf{f. Disclosure of Client Perjury}

Under Model Rule 3.3, a quite substantial exception to maintaining client confidences arises in the context of the judicial pro-

\textsuperscript{150} See ABA Code DR 4-101(C)(4) n.19.
\textsuperscript{151} MODEL RULES Rule 1.6(b)(2).
\textsuperscript{152} Id.
\textsuperscript{153} Id.
\textsuperscript{154} MODEL RULES Rule 1.6(b)(2) cmt. 17.
\textsuperscript{155} See ABA Annotated MODEL RULES 71-72. Of course Model Rules Rule 1.6(b)(2) still requires that a lawyer’s belief be “reasonable” regarding the extent of disclosure necessary.
cess when a client has committed perjury. Model Rule 3.3(a)(4) prohibits a lawyer from knowingly offering evidence that is false and, if the lawyer comes to know of the falsity of material evidence he or she has offered, the lawyer must remedy the situation.\textsuperscript{156} The "reasonable remedial measures" are contained in the commentary to Model Rule 3.3. They are to remonstrate with the client and, if that fails to withdraw.\textsuperscript{157} If withdrawal does not remedy the perjury or withdrawal is not possible, the lawyer must disclose the information to the court.\textsuperscript{158}

Model Rule 3.3(a)(4) radically changed past practice under both the ABA Canons and the ABA Code. As indicated, under the ABA Canons and the ABA Code, client confidentiality prevailed over duties of the lawyer to disclose fraud to the court. However, under the Model Rules, a lawyer is now obligated to disclose client perjury to the court if nothing else works in remedying the fraudulent testimony or evidence.\textsuperscript{159} The rightness or wrongness of this approach is not the main subject of this analysis although it has been discussed at length elsewhere and will be referenced below.\textsuperscript{160} What is the main focus here, however, is the irony of the Model Rules dramatically changing a lawyer's responsibilities by requiring disclosure of client confidences in order to protect the judicial process, while simultaneously restricting greatly the lawyer's discretion to disclose client information in order to protect societal and individual interests.

4. Hierarchy of Protections Under the Model Rules

a. Client Confidentiality Under the Model Rules versus Societal and Individual Interests

The Model Rules have contributed substantially to the juxtaposition of standards for lawyers regarding protection of client confidential information and the interests of society and of individual

\textsuperscript{156} \textbf{MODEL RULES} Rule 3.3(a)(4).
\textsuperscript{157} \textbf{MODEL RULES} Rule 3.3 cmt. 11.
\textsuperscript{158} Id.
persons other than clients. On the one hand, as seen above, the Model Rules have enhanced the protections given clients in the area of announced future criminal conduct. While doing so, protections afforded to society and individuals have been lessened with respect to clients who proclaim future criminal conduct. Future financial criminal conduct announced to one's lawyer or lawyers may not be divulged under any circumstances under the Model Rules. This is so notwithstanding the potentially substantial financial injury that may be caused to society as a whole or to individuals from the criminal conduct of one or several clients. The Model Rules have eliminated from a lawyer's discretion the ability to protect anyone from financial harm to be caused by one's client even when the tools for such protection are held by the lawyer and perhaps held only by the lawyer. All a lawyer may do in such situation is withdraw from the representation. Albeit under the commentary to Model Rule 1.6(b), a lawyer may disaffirm or withdraw an opinion, document, affirmation or the like previously made on behalf of a client when the lawyer also withdraws from representation. 161 While such disaffirmance may waive a "red flag" alerting others that all is not right with the client, 162 such notice hardly is explicit and is not likely to reach intended victims of the client's criminal design.

Simply put, Model Rule 1.6 has abandoned societal and individual interests in the context of announced future client criminal conduct which is not of a gravely physical nature. 163 Absent a threat by a client to kill or severely physically harm another, a lawyer under the guidance of Model Rule 1.6 can do nothing but turn his or her "moral" back and withdraw from the representation while a client engages in criminal conduct potentially ruinous of others. As seen below in the discussion of the hypotheticals, this approach is detrimental not only to society and its individual members, but also to the integrity of the legal profession and the

---

161 MODEL RULES Rule 1.6 cmt. 15 (1983).
163 MODEL RULES Rule 1.6(b)(1) (leaving it to lawyer's discretion to reveal client's announced intention to seriously, perhaps mortally, harm another); see also LAWYER'S ETHICS, supra note 160, at 104. But see Model Rules Rule 1.7(b) (Discussion Draft 1980) (mandatory disclosure to save a life was recommended); FREEDMAN, LAWYER'S ETHICS, supra note 160, at 103 n.87 (failure to mandate disclosure in such circumstances has long been argued to be plainly wrong and "unethical" in itself).
sustenance of its self regulation.

Moreover, the lack of ability to disclose client announced future conduct likely to result in grave physical harm, perhaps death to another, but which is not technically "criminal" in nature, is equally hard to justify. There does not appear to be any reasonable rationale which supports such an omission when there is at least discretion to disclose conduct, identical in future impact, which happens to fall under the definition of crime.

b. Client Confidentiality and Accommodating Lawyers' Own Interests

Perhaps the coup de grace of the Model Rules' "slap in the face" to the needs of those outside of the legal system is the enhancement of lawyers' ability to protect themselves through the use of confidential client information. Model Rule 1.6(b)(2) strikes an interesting accommodation of lawyers' own interests in the wake of client confidences. Notwithstanding a client's communication to a lawyer of confidential information, Model Rule 1.6(b)(2) provides that such a communication can be revealed in several circumstances, including where the lawyer has a need to collect a fee or defend himself or herself against accusations of wrongful conduct.

It is interesting to reflect on the fact that under the Model Rules, a lawyer's needs to divulge confidences for his or her own financial gain take precedence over a lawyer's responsibilities to save unsuspecting others from financial loss. In the wake of the substantial lessening of lawyer discretion in Model Rule 1.6(b)(1) to protect the public from the harmful acts of clients through disclosure of client information, the Model Rules nonetheless opt for greater disclosure opportunity when a lawyer needs to protect his or her own financial or representational interests. It is difficult to understand how a lawyer's self reputational interests are regarded as more worthy of protection than societal and individual interests in not being victimized by financial crime.

c. Client Confidentiality Under the Model Rules and Lawyers' Special Duty to the Courts

While departing radically from protections afforded society and individuals under prior lawyer codes of conduct, the Model Rules simultaneously greatly increase a lawyer's obligation to the courts. As referenced above, Model Rule 3.3(a)(4) and its commen-
orary put an affirmative obligation on a lawyer to, if all other efforts fail, disclose a client’s past fraudulent activity on a court through which the lawyer’s services were used. Such a rule obviously enhances the judicial process and societal confidence in it as a truth-seeking mechanism. But, the Model Rule does so in the context of a document, the entirety of the Model Rules, which lessens the protections afforded others.

The great difficulty of accepting Model Rule 3.3(a)(4) seemingly is in this odd juxtaposition. It is, of course, hard to argue that lawyers should suborn liars under oath! But, equally hard to advocate is that, under Model Rule 1.6(b)(1), lawyers should protect clients at the expense of extreme detriment to individuals because such potential future crime will not be imminently “physically” injurious to another.

And, as noted above, there is no mandate under the Model Rules to disclose potentially grievous bodily harm or death which a client announces he or she will cause another. As such, it appears at least odd if not appalling that such mandate occurs only in the instance of “saving” the judicial process from false evidence. The proclamation “God save this Honorable Court” takes on a rather different and bizarre meaning when juxtaposed against an accompanying sentiment of “and the public be damned.”

This peculiar approach to lawyers’ “ethics” is perhaps seen more explicitly in the study below of the operation of the Model Rules in the context of the hypotheticals. The “appropriate ethical” outcome of each hypothetical is viewed under the applicable Model Rule.

III. The Model Rules and the Hypotheticals

Discussed in this section are the resolution of the five hypotheticals set forth at the beginning of this article. The outcome under each hypothetical is studied in the context of the confidentiality and disclosure provisions of the Model Rules. Throughout, critique is rendered with regard to the protection, or most often, lack thereof, of societal and individual interests as compared to protections for lawyers and the courts.

A. Hypothetical One

The first hypothetical concerned the apparently wrongfully con-
victed defendant who ended up spending sixteen years in prison. The lawyer for the guilty codefendant knew, through a client confidence, that the wrongfully convicted defendant was innocent. Yet, he did not say anything, even after his own client died in prison. Moreover, the judicial system did not allow the lawyer to say anything about what his client had told him, the court having denied motions to such effect, only until such time as the relatives of the deceased client were found to release the lawyer from the lawyer-client confidentiality protections.

Under Model Rule 1.6(b)(1) this outcome clearly was required. Model Rule 1.6(b)(1) only allows a lawyer to reveal information relating to the representation of a client 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. Under the Model Rules, there is no discretion on the lawyer's part to disclose the information to the court of the wrongful conviction. The client's "criminal act" was past. He did not reveal an intention of doing something to cause any future harmful "criminal" conduct to another. All the client was going to do was to keep quiet. Obviously, the Fifth Amendment to the United States Constitution protects the client from incriminating himself. Likewise, the client had no responsibility to exonerate another, if in order to do so, he would have had to incriminate himself.

The situation posed in this hypothetical actually happened, with some variation, in Massachusetts a few years ago. The defendant, George Reissfelder, spent a decade and a half incarcerated for a crime he did not commit. The lawyer for the codefendant was released from his privilege only after persistent court-appointed lawyers contacted relatives of the deceased client. The relatives agreed to release the lawyer from the privilege, and he was at last free to tell the court what his client had told him. This information, along with other testimony, resulted in the defendant's release from prison.

Interestingly, the actual case was resolved in a jurisdiction that

---

164 Model Rules Rule 1.6(b)(1).
165 U.S. Const. amend. V.
166 See Commonwealth v. Sullivan, 239 N.E.2d 5, 7 (Mass. 1968); see also supra note 16 and accompanying text.
167 Id.
followed the ABA Code and not the Model Rules.\textsuperscript{168} The drafters of the \textit{Model Rules} maintained stringent client confidentiality, ignoring the potential for inflicting great harm to another, while simultaneously loosening the protections of confidentiality in lawyer and court-related contexts. For years, some commentators have argued, both under the \textit{ABA Code} and the Model Rules, for an exception to confidentiality when the potential of death or serious bodily harm to another is at issue.\textsuperscript{169} Clearly the incarceration of a wrongfully convicted defendant puts the defendant at risk of serious bodily harm. Some commentators have noted:

The most compelling reason for a lawyer to divulge a client’s confidence is to save a human life. These are two reasons to require divulgence in such a case. First, the value at stake, human life, is of unique importance. Second, the occasions on which a lawyer’s divulgence of a client’s confidence is the only thing that stands between human life and death and so rare that a requirement of divulgence would pose no threat to the systemic value of lawyer-client trust.\textsuperscript{170}

Nonetheless, the Model Rules did not adopt such a life or serious harm-saving exception to rules of client confidentiality. While the drafters originally proposed an exception mandating disclosure in such a circumstance,\textsuperscript{171} the final version of Model Rule 1.6(b)(1) was discretionary. Model Rule 1.6(b)(1) requires imminent “criminal” conduct to trigger lawyer discretionary disclosure. As noted, the codefendant’s statement to his lawyer regarding the other defendant was not such an announcement of an intention to commit a crime. Even where the codefendant admitted his own complicity in the crime to his lawyer, the crime had been committed and client confidentiality prevailed.

Model Rule 1.6(b)(1) requires that the client’s announced criminal act be likely to result in imminent death or bodily harm.\textsuperscript{172} In the hypothetical, such requirement of immediacy would have been a further obstacle toward disclosure. Particularly, where as here, the client’s revelation to the lawyer took place before trial, there

\textsuperscript{168} See 359 Mass. 787, 796 (1972); \textit{In re Adoption of Model Rules of Professional Conduct, Petition of the Boston Bar Assoc. S-4537} (Mass. 1988) (Massachusetts rejecting adoption of Model Rules).

\textsuperscript{169} \textit{See} \textit{Freedman, Lawyer’s Ethics supra} note 160, at 103 n.87.

\textsuperscript{170} \textit{Id.}

\textsuperscript{171} \textit{MODEL RULES} Rule 1.7(b) (Discussion Draft 1980).

\textsuperscript{172} \textit{MODEL RULES} Rule 1.6(b)(1).
was only the obvious immediate threat of injustice and not of great bodily harm, assuming the innocent codefendant's pre-trial and trial safety were assured.

Clearly, Model Rule 1.6(b)(1), as applied in the hypothetical, would result in the maintenance of confidentiality even in light of wrongful incarceration and the great physical, mental, emotional, and spiritual harm, such incarceration would cause to an innocent human being.\textsuperscript{173} Further, the result significantly undermines the legal system's proclamation as a truth-seeking process in the pursuit of justice. In the context of the hypothetical, Model Rule 1.6(b)(1) may not do substantially worse than its predecessor in this area, Disciplinary Rule 4-101(C)(3) of the ABA Code. Yet, this inquiry does not look at Model Rule 1.6(b)(1) alone. Rather, it studies the Model Rule's restrictive effects in light of the various other exceptions that the Model Rules made to client confidentiality in defense of lawyers and the courts. It is this author's position that the "ethics" behind such approach in the Model Rules needs to be seriously reexamined and remedied.

B. Hypothetical Two

In this hypothetical, the client who apparently murdered his wife and unborn child subsequently committed suicide. He never revealed the information concerning the events, which not only resulted in the deaths of his wife and child, but also tore a city apart because of its racial overtones. The result was appropriate under the Model Rules. Model Rule 1.6 prohibits a lawyer from revealing information relating to the representation of a client.\textsuperscript{174} The information the client told the lawyer in this case appears to have been in relationship to the representation. The client sought the lawyer out after the client's brother apparently told the police that the client's original version of the story was a lie. Thereafter the client went to the lawyer and presumably discussed the matter with him. A short time later the client killed himself. There was no opportunity, under Model Rule 1.6(a), for client consent to allow disclosure. Nor, under the same provision, was there implied client authorization of disclosure to carry out the representation. The representation effectively ended on the client's suicide.

\textsuperscript{173} See supra note 16 (discussing wrongful incarceration of George Reissfelder).
\textsuperscript{174} MODEL RULES Rule 1.6.
And under Model Rule 1.6(b), the client's statements were not in
the nature of announcements as to future crime, except, perhaps,
the future "crime" of suicide. Rather the client gave the lawyer
information regarding his participation in past events, which of
course, is protected under the Model Rules.

Under the ABA Code, the result most likely would have been
similar as the information related to a past crime. However, the
analysis of the court that decided the actual Massachusetts case,
In re John Doe Grand Jury Investigation,\textsuperscript{175} did not focus on
either the ABA Code or Model Rules. Rather, the Massachusetts
Supreme Judicial Court considered whether the attorney-client
evidentiary privilege should have been overridden given the cli-
ent's death and the compelling societal interests in obtaining the
truth of what occurred.

Yet, the court's inquiry has an indirect effect on the applicabil-
ity of the notion of "confidences" protected under Disciplinary Rule
4-101(A) of the ABA Code. As discussed earlier, Disciplinary Rule
4-101(A)'s definition of client "confidences" referenced information
protected by the attorney-client evidentiary privilege. The eviden-
tiary privilege is not so extensive as the ethical obligation.\textsuperscript{176}
Thus, the court's reasoning that the evidentiary privilege, which
was more limited than that of the ethical obligation of a lawyer to
maintain confidences,\textsuperscript{177} could not be waived in the circumstances
at issue and would apply even more strenuously to the ethical
protections.

The difficulty in learning the information Charles Stuart, the
client, had discussed with his lawyer was due to the legal proposi-
tion that the evidentiary privilege survives even the death of a
client.\textsuperscript{178} The Massachusetts court decided that "the attorney-cli-
ent privilege should not be overridden either before or after a cli-
ent's death on account of countervailing societal interests in ob-
taining evidence."\textsuperscript{179} The court stated:

\begin{quote}
[E]xtraordinarily high value must be placed on the right of
\vspace{1em}
\end{quote}

\textsuperscript{175} 562 N.E.2d 69 (Mass. 1990).
\textsuperscript{176} See ABA Code DR 4-10(A); see also supra notes 60-73 and accompanying text (discussing evolution of attorney-client privilege).
\textsuperscript{177} ABA Code Canon 4; ABA Code EC 4-4.
\textsuperscript{178} See supra notes 66-68 and accompanying text (discussing Massachusetts' attorney-client privilege).
\textsuperscript{179} See Tuoni, supra note 125, at 4-6 (citing In re John Doe, 562 N.E.2d 69, 71 (Mass. 1990)).
every citizen to obtain the thoughtful advice of a fully informed lawyer concerning legal matters. A rule that would permit or require a lawyer to disclose information given to him or her by a client in confidence, even though such disclosure might be limited to the period after the client’s death, would in many instances . . . so deter the client from “telling all” as to seriously impair the lawyer’s ability to function effectively.\(^{180}\)

Thus, the Massachusetts court rejected the notion that a “balancing test” ought to be employed in instances where societal interests in obtaining the protected client information is great while interests in non-disclosure are small.\(^{181}\) While at least two other jurisdictions have followed such a balancing approach,\(^{182}\) the Massachusetts Supreme Judicial Court declined to do so based on the “high value” of the attorney-client privilege.

A very strong and well-reasoned dissent suggested that a balancing test should be used, which focused both on the client’s and societal interests.\(^ {183}\) In particular, the dissent suggested that there should be “a limited exception to the privilege in those cases where the interests of the client are so insignificant and the interests of justice in obtaining the information so compelling, that the administration of justice is better served through [disclosure].”\(^{184}\) The dissent also argued that applying the balancing test would have led to the logical conclusion that societal interests in obtaining the information outweighed the potential harm to the client by such revelation was small as the client was dead, his estate had little assets, and “given the present reputation of [the client], it is difficult to conceive of any revelation which could further deface his memory.”\(^{185}\)

Thus, in this hypothetical, as well as in the actual case, the application of the attorney-client evidentiary privilege, the ABA

\(^{180}\) 562 N.E.2d 69, 71 (Mass. 1990).

\(^{181}\) Id. “A rule that would permit or require an attorney to disclose information given in confidence would probably defer a client from disclosing information which would seriously impair the attorney’s ability to function effectively.” Id.


\(^{183}\) 562 N.E.2d at 73 (Nolan, J., dissenting). “The test set out in Cohen involved consideration of: (1) the impact the disclosure would have on the client’s daily affairs; (2) whether the disclosure would likely lead to liability for the client or his estate; and (3) whether disclosure would ‘blacken the memory’ of the deceased client.” Id.

\(^{184}\) Id. at 72.

\(^{185}\) Id. at 73.
Code, and the Model Rules all would have led to the same resolution—no disclosure absent release of the lawyer by the client’s estate, which release was not forthcoming. Such result leaves at least this author, and clearly the dissent in the Massachusetts case, once again pondering the abandonment of societal, individual, and indeed administration of justice interests in the name of protecting client confidences. Particularly where the Model Rules have liberalized disclosure to protect lawyers and the courts, the lack of similar efforts to balance the needs of society and concerned citizens against minor client needs, is, in a word, inexplicable. 186

C. Hypothetical Three

Here a law firm had information indicating its client may have falsified certain documents in the course of proceedings before the Federal Home Loan Bank Board (the “Board”). The law firm did not alert Board officials of its “suspicions,” but rather chose to advocate the clients’ position before the Board.

Assuming that the law firm did not “know” of the falsity of the clients’ documents, notwithstanding the firm’s suspicions, under the Model Rules the firm is permitted to advocate the clients’ positions before third parties. Moreover, even if the representations were made before a court, the law firm’s conduct under the Model Rules would be appropriate, assuming that the law firm did not “know” of the falsity of the documents. Indeed, assuming the firm’s services were not used to offer such false evidence before a court, the Model Rules would not allow disclosure. Finally, if the firm learns that the clients are continuing to engage in fraudulent transactions, no disclosure is allowed under the Model Rules. The most that the firm could do is withdraw from the representation and disaffirm prior opinions.

It is not suggested that these events actually occurred in the recent savings and loan scandal involving Charles Keating, Lincoln Savings and Loan Association, and the American Continental Corporation. 187 However, government allegations were to such effect, with at least one Federal District Court judge finding that

186 Id. “There is no ‘safety valve,’ no mechanism by which the attorney-client privilege may ever be overridden by the court in the interest of justice.” Id.
187 See supra note 18 (discussing savings and loan scandal).
Lincoln Savings and Loan Association used its legal counsel to effectuate its fraudulent plans and to hinder regulatory action.\textsuperscript{188} There also were allegations that legal counsel may have affirmatively tried to deceive regulators as to the Lincoln Savings and Loan Association's falsifications.\textsuperscript{189} These allegations were not adjudicated because many of the law firms and accounting firms involved settled out-of-court.\textsuperscript{190} The settlement, by at least one of the law firms involved, was in the neighborhood of forty-one million dollars.\textsuperscript{191}

Assuming for our analysis of hypothetical three, the law firm did nothing wrong, at least not under the Model Rules. Model Rule 4.1 provides that, in the course of representing a client, "a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or
(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by rule 1.6.\textsuperscript{192}

If the law firm had only suspicions of the falsity of client documents, but did not know them to be false, under Model Rule 4.1(a), the firm could advocate the client's position, as stated in the documents, to others. Moreover, under Model Rule 4.1(b), even if the firm came to know of the fraudulent nature of the documents, the firm would be prohibited from disclosing such to others because the information would be protected client information under Model Rule 1.6.\textsuperscript{193}

If the representations on behalf of the clients were made by the

\textsuperscript{191} See OTS, Kaye Scholer Agree to Settle; Firm Will Pay $41 Million Restitution, 58 Banking Rep. 472 (BNA) (1992); see also Walters, supra note 190, at D1.
\textsuperscript{192} MODEL RULES Rule 4.1(a)-(b) (Discussion Draft 1983).
law firm to a court, the Model Rules inquiry switches to Model Rule 3.3. But, once again Model Rules 3.3(a)(1) and (2) prohibit a lawyer from "'knowingly' making false statements of material fact or law to a tribunal, 'knowingly' failing to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act, or offering evidence that the lawyer 'knows' is false." Absent knowledge of the falsity of client documents, a lawyer is not restrained from advocating the same. Although the commentary to Model Rule 3.3 provides that "a lawyer has authority to refuse to offer testimony or other proof that the lawyer believes is untrustworthy," there is no mandate to refuse to offer such testimony.

Of course, if the judicial process was involved—as it is not in hypothetical three—and if a lawyer learns that he or she has offered evidence to a court that was false, then the only mandate of disclosure under the Model Rules kicks in through Model Rule 3.3(a)(4). In such case, the Model Rule would require the lawyer to take "reasonable remedial measures," including disclosure to the court if that is the only measure which remedies the fraud on the court.

Assuming that after advocating on the clients' behalf, the law firm comes to know of the falsity of the clients' documents submitted to the Board and that the clients are involved in ongoing illegal activity on account of such, and further assuming that the judicial process is not involved, there is no ability to disclose under the Model Rules. As discussed above, Model Rule 1.6(b)(1) removed previously existing lawyer discretion under the ABA Code to disclose a client's intention to commit future crime with "only" potential financial impact. Notwithstanding the billions of dollars of losses possibly to be occasioned by a client's ongoing or intended future criminality of which a lawyer is aware, disclosure is not appropriate.

The outcome of nondisclosure would have been the same under the ABA Code and Model Rules except in the instance where the

194 MODEL RULES Rule 3.3(a)(1), (2), (4) (Discussion Draft 1983).
195 MODEL RULES Rule 3.3 cmt. 14 (emphasis added).
196 MODEL RULES Rule 3.3(a)(4); see also MODEL RULES Rule 3.3 cmt 11.
197 MODEL RULES Rule 1.6(b)(1).
198 See MODEL RULES Rule 1.16(a)(1); MODEL RULES Rule 1.6 cmts. 15-16; see also Ronald D. Rotunda, Notice of Withdrawal and the New Model Rules of Professional Conduct: Blowing the Whistle and Waving the Red Flag, 63 OR. L. REV. 455, 460 (1984).
client is engaged in ongoing criminal activity of a financial nature of which the law firm is aware. For example, if the law firms representing Charles Keating, Lincoln Savings and Loan Association, and the American Continental Corporation knew of their continuing fraudulent financial criminal behavior, under Model Rule 1.6, they could not disclose it, but under ABA Code Disciplinary Rule 4-101(C)(3) they could have done so. However, assuming the law firm knew of the clients' past fraudulent activities, which were no longer ongoing, but did not proffer such transactions as being proper to the Board or other regulators at the time the that firm knew them to be improper, the firm could not have disclosed the clients' information under the ABA Code or Model Rules. As the title of one commentator's column proclaimed in light of the charges leveled against the law firms involved in this matter: *Lawyers Can't be Stool Pigeons.*

In conclusion, hypothetical three was appropriately resolved by the law firm under the Model Rules. While the rules opt for mandatory disclosure of client fraud on the court, and permit disclosure of client confidences in lawyer in self-interest or self-defense, they do not allow disclosure of client confidences in cases of financial fraud on others—pure and simple.

**D. Hypothetical Four**

In this hypothetical, the criminal defendant, in the face of his lawyer's threats of disclosure of any future perjury, testifies truthfully at trial. The defendant wanted to testify that he had seen something, a silver object, in his victim's hand before he shot him. The testimony would have been false and the defendant's lawyer tells the defendant that he cannot perjure himself. Further, the lawyer tells the defendant that if he, the defendant, commits perjury, the lawyer will withdraw and tell the court. In light of his lawyer's threat of withdrawal and disclosure, the defendant testifies truthfully, is convicted, and is sentenced to a long term of imprisonment.

As should be clear from the above discussion of Model Rule 3.3(a)(4), the lawyer's conduct was proper. Model Rule 3.3(a)(4)

---


200 *See supra* note 19 (discussing Nix v. Whiteside, 475 U.S. 157 (1986)).
states that a lawyer shall not knowingly offer evidence that the lawyer knows to be false.\textsuperscript{201} And, coming to know of the falsity of material evidence offered, the lawyer must, again under Model Rule 3.3(a)(4), take reasonable remedial measures.\textsuperscript{202}

Reasonable remedial measures as defined in the Model Rules commentary include remonstrating with the client confidentially, seeking to withdraw, and ultimately, if need be, disclosing to the court, all in an effort to have the client “remedy” the perjury.\textsuperscript{203} Furthermore, “[t]he general rule—that an advocate must disclose the existence of perjury with respect to a material fact, even that of a client—applies to defense counsel in criminal cases, as well as in other instances.”\textsuperscript{204}

Thus, under the Model Rules, the lawyer did the right thing. He told the client that he would withdraw and reveal that the client lied on the stand. Model Rule 3.3(a)(4), and its commentary, envision such a result.\textsuperscript{205} And, Model Rule 3.3(b) specifically notes that the duties under Model Rule 3.3(a)(4) “apply even if compliance requires disclosure of information otherwise protected by Model Rule 1.6.”\textsuperscript{206}

Notwithstanding United States Supreme Court commentary to the contrary, this result most likely would not have been countenanced under the ABA Code provisions. I say “United States Supreme Court commentary to the contrary” because in 1986, the Supreme Court decided the case of \textit{Nix v. Whiteside},\textsuperscript{207} on which this hypothetical is based. In \textit{Nix}, the Court considered whether a criminal defendant was denied the effective assistance of counsel when his lawyer threatened to advise the trial court of his intention to commit perjury and also threatened to withdraw from representation.\textsuperscript{208} The Court concluded that the lawyer’s conduct did not rise to the level of prejudice required for a finding that the defendant’s Sixth Amendment rights were violated.\textsuperscript{209}

Yet, the Court in \textit{Nix} did not stop at the constitutional issue.

\textsuperscript{201} \textit{Model Rules} Rule 3.3(a)(4).
\textsuperscript{202} \textit{Id.}
\textsuperscript{203} \textit{Model Rules} Rule 3.3 cmt. 11.
\textsuperscript{204} \textit{Model Rules} Rule 3.3 cmt. 12.
\textsuperscript{205} \textit{See Model Rules} Rule 3.3(b).
\textsuperscript{206} \textit{Model Rules} Rule 3.3(b).
\textsuperscript{207} 475 U.S. 157 (1986).
\textsuperscript{208} \textit{Id.} at 159.
\textsuperscript{209} \textit{Id.} at 175.
The five Justices in the majority proclaimed that the defense lawyer had acted ethically under applicable rules of professional conduct\textsuperscript{210} by threatening the client with revelation of the perjury and withdrawal if the client went forward with his false testimony.\textsuperscript{211} The four concurring Justices, however, did not agree. Justice William Brennan, in one of the concurring opinions, noted that the majority's "essay regarding what constitutes the correct response to a criminal client's suggestion that he will perjure himself is pure discourse without force of law."\textsuperscript{212} Justice Brennan stated it was unfortunate that the majority seemed "unable to resist the temptation of sharing with the legal community its vision of ethical conduct," when it was clear, at least to Justice Brennan, that "the Court cannot tell the States or the lawyers in the States how to behave in their courts. . ."\textsuperscript{213} Also, Justice Harry Blackmun in writing another concurrence, stated that the only appropriate question before the Court was whether the defendant was deprived of his Sixth Amendment guarantees and not "[h]ow a defense lawyer ought to act when faced with a client who intends to commit perjury at trial. . . ."\textsuperscript{214}

Further, the \textit{Nix} Court cited the ABA Code, Disciplinary Rules 7-102(B)(1) and Model Rule 3.3(a)(4) as standing for the proposition that "the legal profession has accepted that a lawyer's ethical duty to advance the interests of his [or her] client is limited by an equally solemn duty to comply with the law and standards of professional conduct; it specifically ensures that the client may not use false evidence."\textsuperscript{215} The Court noted that the offense of perjury was a crime at common law\textsuperscript{216} and is now a felony in most states by statute, including Iowa, the state at issue.\textsuperscript{217} Pursuant to the Iowa statute, "[a] lawyer who aids false testimony by questioning a witness when perjurious responses can be anticipated, risks prosecution for subornation of perjury under the Iowa Code

\textsuperscript{210} \textit{Id.} at 171.
\textsuperscript{211} 475 U.S. 157, 166-171 (1986).
\textsuperscript{212} \textit{Id.} at 177 (Brennan, J., concurring).
\textsuperscript{213} \textit{Id.} (emphasis in original).
\textsuperscript{214} \textit{Id.} at 177-78 (Blackmun, J., concurring).
\textsuperscript{215} 475 U.S. at 168 (footnote omitted) (Model Rules not only authorize an attorney to disclose a client’s perjury but also require such disclosure to the court).
\textsuperscript{216} \textit{Id.} at 169 (discussing punishment for assisting or partaking in perjurious testimony); \textit{see also} 1 \textsc{William Burdick}, \textsc{Law of Crime} 475 (1976).
\textsuperscript{217} 475 U.S. at 169; \textit{see} Iowa Code § 720.2 (1985) (perjury is a class A felony).
The Court then went on to say that "[i]t is universally agreed that at minimum the lawyer's first duty when confronted with a proposal for perjurious testimony is to attempt to dissuade the client from the unlawful course of conduct." Referring to the commentary to the Model Rules, even though the rules were not at issue in the case, the Court stated "that a lawyer's revelation of his [or her] client's perjury to the court is a professionally responsible and acceptable response to the conduct of a client who has actually given perjured testimony . . . . [W]ithdrawal from representation [is] an appropriate response of a lawyer when the client threatens to commit perjury." Moreover, "under no circumstance may a lawyer either advocate or passively tolerate a client's giving of false testimony." The Court described these points as being "accepted norms of professional conduct," which "would [not] in any sense make out a deprivation of the Sixth Amendment right to counsel."

The Court's position in Nix, as to what constituted appropriate professional conduct, has been criticized for a number of reasons. First, the majority, perhaps inappropriately, voiced professional conduct standards for the states without the power to do so.

---

218 475 U.S. at 169; see IOWA CODE § 720.3 (1985) (suborning perjury is a class D felony).
219 475 U.S. at 169; see MODEL RULE 3.3 cmt. (1983). "Lawyer should seek to persuade client that the evidence [testimony] should not be offered." Id.; see also Steven H. Goldberg, *Heaven Help the Lawyer for a Civil Liar*, 2 GEO. J. LEGAL ETHICS 885, 906-07 (1989) (failure to take action by dissuading is "assisting within the contemplation of the Model Rules").
220 475 U.S. at 170 (emphasis added) (noting that conflicts of interest may arise, such as a mistrial); see US ex. rel. Wilcox v. Johnson, 555 F.2d 115, 120 (3d Cir. 1977). The trial judge stated that if the defendant insisted upon testifying he would permit the defendant's attorney to withdraw and force the defendant to represent himself. Id. The Third Circuit held that if counsel withdrew, the defendant was entitled to substitute counsel. Id. See generally Kevin A. Pituch, *Good Grades for Attorneys Nix v. Whiteside and the Supreme Court's Requirement That Counsel Disclose Client Perjury*, 19 U. TOLEDO L. REV. 185, 213-14 (1987) (advocating attorney's right to withdraw because it preserves a defendant's right to testify and yet permits an attorney to refuse to aid and abet perjury).
Moreover, it is apparent "that the trial lawyer's conduct approved by the majority in Nix represented [in the view of some commentators] a radical departure from traditional, standard practice," under the ABA Code.\textsuperscript{224} The "traditional" model mandated withdrawal from the case and not threatened revelation. While the Model Rules have departed from such "tradition" in the case of past client perjury, and now allows revelation, the approach under the ABA Code was not the same.\textsuperscript{225}

The ABA Code, Disciplinary Rule 7-102(B)(1), mandated that a lawyer reveal a client's perjury perpetrated on a person or tribunal and committed during the representation, except when the information regarding the perjury was protected as a privileged communication.\textsuperscript{226} A brief synopsis of the ABA Committee on Professional Ethics Opinions concerning disclosure of client perjury or fraud illustrates the Supreme Court's erroneous interpretation of the ABA Code's disclosure requirements.

Prior to the adoption of Disciplinary Rule 7-102(B)(1), there were several ethical opinions concerning this subject rendered under the ABA Canons. These opinions discussed the conflict between the confidentiality and disclosure of fraud provisions of the ABA Canons. In 1945, the ABA Committee on Professional Ethics held that a lawyer could not reveal a client's fraudulent claims of residence to a court.\textsuperscript{227} The Committee stated: "While ordinarily it is the duty of a lawyer as an officer of the court to disclose to the court any fraud that [the lawyer] believes is being practiced on the court, this does not transcend that to preserve client confi-

\textsuperscript{224} See Freedman, Lawyer's Ethics, supra note 160, at 139.


\textsuperscript{226} ABA Code DR 7-102(B)(1) ("The lawyer shall reveal the fraud to the affected person or tribunal, except when the information is protected as a confidence or secret."); see Nix. Whiteside, 475 U.S. 169, 174 (1986). In discussing the attorney's duty to repeat possible client perjury, the majority states that it extends to a "client's announced plans to engage in future criminal conduct." Id. But see U.S. v. ITT, 349 F. Supp. 22, 29 (D. Conn. 1972) ("Generally speaking, only the most egregious conduct, such as bribery . . . will constitute fraud on the court . . . .").

\textsuperscript{227} ABA Comm. on Professional Ethics and Grievances, Formal Op. 268 (1945) (discussing Canon 37 dealing with preserving client confidences).
In 1965, the Committee held that a lawyer could not reveal, in a divorce case, that his client was pregnant by another man.\textsuperscript{229}

The Committee, in a well known opinion, held that with respect to past client perjury, the client confidentiality protection of the ABA Canons outweighed the disclosure provisions.\textsuperscript{230} The Committee held that, as such, an lawyer who had secured a divorce for a client could not reveal to the court the client's previous commission of perjury when the lawyer later learned of it.\textsuperscript{231} The Committee held that the lawyer should urge the client to disclose the perjury to the court and, if the client did not to do so, the lawyer should withdraw.\textsuperscript{232} However, due to lawyer-client confidentiality, the lawyer could not reveal the fraud.\textsuperscript{233}

In 1975, the ABA Committee revisited the issue of whether a client's past fraud or perjury committed during the representation should be disclosed, but this time under the guise of the ABA Code.\textsuperscript{234} In ABA Formal Opinion No. 341, the Committee held that the 1974 Amendment to Disciplinary Rule 7-102(B)(1), that excepted from disclosure information about client fraud protected under the attorney-client privilege, "was necessary in order to relieve lawyers of exposure to... diametrically opposed professional duties."\textsuperscript{235} The Committee stated that the 1974 Amendment rein-

\textsuperscript{228} Id. See generally Goldberg, supra note 219, at 917-19 (discussing how an attorney should handle untruthful client under the Model Rules).

\textsuperscript{229} ABA Comm. on Professional Ethics and Grievances, Informal Op. 869 (1965) (attorney should advise client that he should be truthful if questioned under oath or he should assert Fifth Amendment privilege).

\textsuperscript{230} ABA Comm. on Professional Ethics and Grievances, Formal Op. 287 (1953); see John H. Wigmore, 13 Wigmore on Evidence § 2292 (3d ed. 1940) ("Where legal advice... is sought from a [lawyer]... communications are at his instance permanently protected from disclosure by himself... ").

\textsuperscript{231} Wigmore, supra note 230 (client disclosed to attorney when seeking advice in a professional capacity).

\textsuperscript{232} Wigmore, supra note 230; see Abraham Abramovsky, A Case for Increased Confidentiality, 13 Fordham Urb. L.J. 11, 16-17 (1985) (relating to disclosure as opposed to withdrawal, an attorney does not necessarily have to reveal a client's previous crime absent client consent).

\textsuperscript{233} See ABA Comm. on Professional Ethics and Grievances, Formal Op. 287 (1953). The committee addressed the question of what a lawyer should do when the client is to be sentenced based on misinformation about the client's lack of a previous criminal record. Id. The Committee held that, if the attorney learned of the client's previous record through client communications, the lawyer had no duty to correct the misinformation. Id. But, if the lawyer did not learn of the record from the client and the lawyer believed the court relied on the lawyer's silence as "corroboration," the lawyer "should inform the court not to rely on his [or her] silence as corroboration." Id.


\textsuperscript{235} Id.
stated "the essence" of ABA Formal Opinion No. 287, that a lawyer should not disclose a client's fraud. The Committee further stated that it was "unthinkable" that a lawyer "be subject to disciplinary action for failing to reveal information, which by law is not to be revealed without the consent of the client . . . ."236

Thus, under Disciplinary Rule 7-102(B)(1), disclosure by the lawyer could not take the place of information "protected as a privileged communication."237 The Committee interpreted the phrase "privileged communication" to mean "those confidences and secrets that are required to be preserved by Disciplinary Rule 4-101."238 However, the Committee held that such interpretation did not "wipe out" the disclosure provisions of Disciplinary Rule 7-102(B)(1) because not all information of client fraud which comes to a lawyer would be considered "privileged" under Disciplinary Rule 4-101.239 For example, the Committee noted:

[The duty imposed by Disciplinary Rule 7-102(B) would remain in force if the information clearly establishing a fraud on a person or tribunal and committed by a client in the course of representation were obtained by the lawyer from a third party (but not in connection with [the lawyer's] professional relationship with the client), because it would not be a confidence or secret of a client entitled to confidentiality.240

Interestingly, the Committee, in ABA Formal Opinion No. 341, made a statement about disclosure of future fraud, which would make the "before" perjury threat in Nix cognizable under the ABA Code, as well as Model Rules. The Committee discussed remaining disclosure provisions under the ABA Code:

Disciplinary Rule 4-102(C) sets out several circumstances under which revelation of a secret or confidence is permissible, and thus in cases where these exceptions apply, Disciplinary Rule 7-102(B) may make the optional disclosure of information under Disciplinary Rule 4-101 a mandatory one. For example, when disclosure is required by a law, the "privileged communication" exception of Disciplinary Rule 7-102(B) is not

236 Id.
237 ABA CODE DR 7-102(B)(1).
239 Id.
240 Id.
applicable and disclosure may be required.\textsuperscript{241}

The Committee also defined information "clearly establishing" fraud as "the sense of active fraud, with a requirement of \textit{scienter} or intent to deceive."\textsuperscript{242}

Indeed, under Disciplinary Rule 4-101(C)(3), a lawyer may have had the discretion to disclose the announced intention of a client to commit the crime of perjury. Such discretion could be exercised to disclose the client's intent prior to the client actually testifying falsely.\textsuperscript{243} There are those who disagree with this view, finding perjury to fall "outside of the future crime exception."\textsuperscript{244}

In 1978, the ABA Committee on Professional Ethics considered a situation where two opposing clients had created a fictitious car accident in order to defraud an insurance company.\textsuperscript{245} Although the case had been filed and fraudulent deposition testimony given, the case was dismissed by the lawyers once the deception was discovered. Inasmuch as the fraud "had never been consummated," the Committee considered it "quite debatable whether or not a fraud had been perpetrated upon a person or tribunal within the meaning of Disciplinary Rule 7-102(B)."\textsuperscript{246} Moreover, even if a fraud had been committed, the Committee reasoned that the disclosure by the clients to the lawyers was "protected as a privileged communication."\textsuperscript{247}

However, after the Model Rules were adopted, the ABA Committee "reconsidered" its 1953 and 1975 Opinions, Nos. 287 and 341, as well as others concerning revealing past client perjury.\textsuperscript{248} The Committee held in 1987 that Model Rules 3.3(a) and (b) represented:

\begin{quote}
\begin{center}
a major policy change with regard to the lawyer's duty as stated in Formal Opinions 287 and 341 when the client testifies falsely. It is now mandatory under these . . . provisions, for a lawyer, who knows the client has committed perjury, to
\end{center}
\end{quote}

\textsuperscript{242} Id.
\textsuperscript{243} See Massachusetts Bar Opinion No. 89-1 (1989).
\textsuperscript{246} Id.
\textsuperscript{247} Id.
disclose this knowledge to the tribunal if the lawyer cannot persuade the client to rectify the perjury.\textsuperscript{249}

Thus, as clearly indicated in its 1987 opinion, ABA Formal Opinion No. 353, and in light of the new Model Rules, the ABA Committee's position on the disclosure of client fraud or perjury clearly has changed from the views discussed in prior ethical opinions. Confidentiality is no longer favored over disclosure; indeed, just the opposite under the Model Rules. As such, the lawyer acted appropriately under the Model Rules in representing that he would have to reveal the past perjury if it was committed by the client.

It is also clear that under the Model Rules, the lawyer acted appropriately in letting the client testify after he had informed him of his intention to lie. In its same 1987 opinion, the ABA Committee held that under the Model Rules:

\begin{quote}
[M]andatory disclosure \ldots [was not] necessarily triggered when a client states an intention to testify falsely, but has not yet done so. Ordinarily, after warning the client of the consequences of the client's perjury, including the lawyer's duty to disclose it to the court, the lawyer can reasonably believe that the client will be persuaded not to testify falsely at trial. That is exactly what happened in \textit{Nix v. Whiteside}. Under these circumstances, the lawyer may permit the client to testify and may examine the client in the normal manner.\textsuperscript{250}
\end{quote}

Discussion of what to do about future perjury would not be complete, however, without reference to the \textit{American Bar Association Standards Relating to Criminal Justice} (the "ABA Standards").\textsuperscript{251} Just prior to consideration in 1979, there was a provision in the \textit{ABA Standards} concerning the responsibilities of a criminal defense lawyer regarding the testimony of a defendant. It provided:

(a) If the defendant has admitted to defense counsel facts which establish guilt and counsel's independent investigation established that the admissions are true but the defendant

\textsuperscript{249} Id.  
\textsuperscript{250} Id.; cf. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1318 (1975).  
insists on the right to trial, counsel must strongly discourage
the defendant against taking the witness stand to testify
perjuriously.
(b) If, in advance of trial, the defendant insists that he or she
will take the stand to testify perjuriously, the lawyer may
withdraw from the case, if that is feasible, seeking leave of
the court if necessary, but the court should not be advised of
the lawyer's reason for seeking to do so.
(c) If withdrawal from the case is not feasible or is not permit-
ted by the court, or if the situation arises immediately prece-
ding trial or during the trial and the defendant insists upon
testifying perjuriously in his or her own behalf, it is unprofes-
sional conduct for the lawyer to lend aid to the perjury or use
the perjured testimony. Before the defendant takes the stand
in these circumstances, the lawyer should make a record of
the fact that the defendant is taking the stand against the
advice of counsel in some appropriate manner without re-
vealing the fact to the court. The lawyer may identify the wit-
ness as the defendant and may ask appropriate questions of
the defendant when it is believed the defendant's answers will
not be perjurious. As to matters for which it is believed the
defendant will offer perjurious testimony, the lawyer should
seek to avoid direct examination of the defendant in the con-
ventional manner; instead, the lawyer should ask the defend-
ant if he or she wishes to make any additional statement con-
cerning the case to the trier or triers of the facts. A lawyer
may not later argue the defendant's known false version of
facts to the jury as worthy of belief, and may not recite or rely
upon the false testimony in his or her closing argument.

The proposed Standard was withdrawn, and thus, not consid-
ered by the ABA. Yet, although it "[was not the] official policy of
the ABA . . . some courts . . . nevertheless endorsed the
[s]tandard's recommended procedures." Yet, although it "[was not the] official policy of
the ABA . . . some courts . . . nevertheless endorsed the
[s]tandard's recommended procedures." However, several
others, including former Chief Justice Warren Burger in *Nix v. Whiteside*, have criticized the proposed ABA Standards.

---

252 ABA STANDARDS 4-7.7 (Proposed Standards) was approved by the ABA Standing Committee on Association Standards for Criminal Justice, but not submitted to the ABA House of Delegates and never adopted.

253 ABA STANDARDS 4-7.7 cmt. (Proposed Standard); see MASSACHUSETTS DEFENSE FUNCTION 13(b) which can be read as following Proposed Standard 4-7.7 to the extent that it does not prohibit "defense counsel from allowing a defendant to testify falsely if all other efforts to deter such testimony have failed, or if the lawyer learns of the intended false testimony at trial." *See Tuoni, supra* note 125, at 10-55; *see also* Norman Lefstein, *Client Perjury in Criminal Cases: Still in Search of an Answer*, 1 GEO. J. LEGAL ETHICS 521, 522 (1988).

254 *See* Nix v. Whiteside, 475 U.S. 157, 169 n.6 (1986); *see also* MODEL RULES Rule 3.3
In conclusion, the lawyer's behavior was appropriate under the Model Rules. While some commentators have suggested a lawyer making sure his client tells the truth is not to be encouraged, surely it does give pause that under the Model Rules a lawyer must disclose perjury, yet cannot disclose financial harm, and only may disclose future criminal conduct resulting in murder or great bodily harm. The drafters of the Model Rules opted for an extraordinarily high level of protection of the judicial process, over turning years of precedent. But they did not simultaneously reinstate previously existing protections for society and individuals. As noted below, such decision-making seems odd if not outrageous and potentially of great danger to the continued self-regulation of the bar.

E. Hypothetical Five

The Model Rules supported the lawyer's disclosures of confidential information in defense of the lawyer. Model Rule 1.6(b)(2) liberalized prior ABA Code provisions concerning lawyer disclosure of confidential client information in self-defense. Under this provision, a lawyer may reveal information necessary "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and 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." The commentary to this Model Rule states that "[t]he lawyer's right to respond arises when an assertion of complicity has been made." However, the commentary further provides that this rule "does not require the lawyer to await the commencement of an action or proceeding that charges complicity, so that the defense may be established by responding directly to a third party who has made such an assertion."

The only limitations as to the extent of the lawyer's discretionary disclosures under Model Rule 1.6(b)(2) also appear in the com-
mentary to the rule. It reads:

Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.260

Under these provisions, the lawyer arguably was justified in both disclosures he made of confidential information. The first disclosure was made to the Securities and Exchange Commission (the "SEC") before any allegation against the lawyer of wrongful conduct had occurred. Since the commentary to Model Rule 1.6(b)(2) provides that the rule "does not require the lawyer to await the commencement of an action or proceeding that charges complicity,"261 and since the lawyer did not wait for any charges to be brought, presumably the initial disclosure would be countenanced. The only difficulty with such analysis is that the "liberal" language of the Model Rule's commentary just cited is modified by the phrase: "so that the defense may be established by responding directly to a third party who has made such an assertion."262 In this hypothetical, there was no charge pending, and there was also an absence of an assertion or accusation against the lawyer in question. Thus, the quoted language of the commentary to Model Rule 1.6(b)(2) does not comport with the lawyer's actions, making "offensive" rather than "defensive" disclosures to the SEC. Consequently, notwithstanding the lack of a client or third-party accusation before the lawyer made the initial disclosure, it is not far-fetched to presume that the lawyer was making the disclosure to "defend" himself against potential future accusations, which of course, did eventuate.

However, there is no doubt that the second disclosure, to the lawyers for the plaintiff investors of the lawyer's former client,

260 Id.
261 Id.
262 Id.
was permitted under Model Rule 1.6(b)(2). At least two provisions of the Model Rule appear to be applicable. The lawyer's second disclosures would have been for the purpose either of establishing "a defense to a . . . 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."263 Clearly, the wide berth given to a lawyer under these two clauses of Model Rule 1.6(b)(2) would permit the second disclosure under the facts of hypothetical five.

It should be noted that, although not explicitly referenced under prior ABA Code provisions, at least one court applying the ABA Code did not quarrel with the entirety of a lawyer’s disclosures in the precise manner referenced in this hypothetical. In 1974, shortly after the ABA Code was adopted, the United States Court of Appeals for the Second Circuit decided *Meyerhofer v. Empire Fire Marine Insurance Co.*,264 on which hypothetical five is based. Applying the ABA Code provisions, the Second Circuit approved of the lawyer’s second disclosure of confidential information in order to avoid being named in a lawsuit by investors of the lawyer’s former client. Pursuant to the ABA Code provision, such disclosure would have been made in order “to defend [the lawyer] . . . against an accusation of wrongful conduct.”265 However, the Second Circuit did not comment on the first disclosure by the lawyer to the SEC other than noting it. No provision of the ABA Code presumably would have allowed such disclosure as no “accusation” had been levied against the lawyer. The lawyer made the initial disclosure apparently because he disagreed with the manner in which his firm had handled the client's stock registration statement.266 While such disclosure may have been defensively oriented, looking to potential future accusations which did in fact arise, such approach does appear appropriate under the ABA Code provision.

Clearly, Model Rule 1.6(b)(2) goes much further than ABA Code, Disciplinary Rule 4-101(c)(4) in permitting lawyer “self-defense” disclosures. The commentary to the Model Rule further liberalizes its approach. As such, simultaneous with restricting lawyer

263 *Model Rules* Rule 1.6(b)(2).
265 ABA Code DR 4-101(C)(4).
266 *Empire Fire*, 497 F.2d at 1193.
discretion to disclose client confidential information to protect others from wrongdoing, the Model Rules have enhanced lawyer self-interest and self-defense protections. Accompanying this enlargement of lawyer discretion to disclose confidences to protect themselves has been the mandate to disclose client information to protect the judicial process from fraud. Such hierarchy of protections, putting the courts and lawyers on the top, clients a close second, but the public and non-client individuals on the far "non-protection" end of the continuum is, at least, in this author's assessment, not only "strange" but also indefensible.

IV. RETHINKING CLIENT CONFIDENTIALITY

Much literature has been written about the rationale behind the protections of client confidences. Briefly, the arguments range from claims that allowing in-roads to client confidentially protections would chill client communications, to arguments that unfettered confidentiality allows lawyers to more adequately perform their roles as advisors and be able to counsel clients against their intended improper behavior without client fear of retribution. Whatever the rationale behind client confidentiality, there do seem to be alternatives which do not so blatantly place the profession's desired protections before the public interest. Suggestions of alternatives to strict client confidentiality are not new. Some are broadside attacks on the entire justice system. For example, Judge Marvin E. Frankel stated eighteen years ago that the adversary ideal must be modified, with truth being the paramount objective of lawyers, not the advancement of the client's interest. In such a system, the lawyer as truth-seeker, rather than combatant, would take on more of an "inquisitorial" role and

---

267 See supra notes 60-74 (discussing attorney-client evidentiary privilege).
270 Marvin E. Frankel, The Search for Truth: An Empirical View, 123 U. Pa. L. REV. 1031, 1031 (1975). Judge Frankel is critical of a system of justice that rewards "techniques which make a witness look unreliable although the look stems only from the counsel's artifice, cunning questions that stop short of discomforting revelations, [and] complacent experts for whom some shopping may have been necessary." Id. at 1039.
report all relevant evidence, untrue statements, or omission of material facts by his or her client to the court, however damaging to clients.  

More recent alternatives focus on limiting the extent of protections to address other vital interests. For example, in 1985 Professor Harry I. Subin proposed a rule of “limited-use” disclosure. Professor Subin analogized to the lawyer’s duty to disclose tangible evidence which comes into a lawyer’s possession via a client. Professor Subin would have rules mandating disclosure when a lawyer learns a client is or will engage in felonious conduct and the lawyer’s attempt to persuade the client otherwise fails. But if the information is privileged, the information would not be used against the client. Thus, the public and the courts would be protected and the client would not suffer as a result of lawyer disclosure.

So-called “use immunity” has arisen in many jurisdictions in the context of a lawyer who receives, from a client, physical or tangible evidence related to the commission of a crime. The ABA Code prohibits a lawyer from concealing or knowingly failing to disclose that which the lawyer is required by law to reveal. Several courts support the proposition that a lawyer “may be under special obligations to preserve physical evidence that is adverse to a client’s interests and possibly to turn the evidence over to the prosecutor.”

---

271 Id. at 1057-1058. For critical commentary on Judge Frankel’s suggestion see Albert W. Alschuler, The Preservation of a Client’s Confidences, 52 U. Colo. L. Rev. 549 (1981) (pointing out that required disclosure would be likely to discourage clients from “leveling” with attorneys, thus deterring search for truth); Monroe H. Freedman, Judge Frankel’s Search for Truth, 123 U. Pa. L. Rev. 1060, 1060 (1975) (finding fault with the basic premise that adversarial relationship is harmful to goal of truth-seeking); William T. Pizzi, Judge Frankel and the Adversary System,” 52 U. Colo. L. Rev. 357, 357 (1981) (suggesting more modest changes inspired by civil law).


273 Id. at 1123.

274 Id. at 1179. The author limits this type of disclosure to felonies for various reasons, including greater moral culpability and public outrage. Id. at 1176.

275 Id. at 1179.

276 ABA CODE DR 7-102(A)(3).

277 See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 645 (1986). There is, of course, a concurrent obligation on the part of attorneys not to destroy evidence; see JAMIE S. GORELLICK ET AL., DESTRUCTION OF EVIDENCE 256 (1989). The ABA Code provisions which generally relate to this duty are found in Canon 7, as well as DR 7-102(A)(3), (7) (prohibiting counsel from assisting client in illegal conduct); (8) (prohibiting counsel from engaging in conduct contrary to Disciplinary Rules); and 7-109(A) (prohibiting counsel from suppressing evidence that he is legally obligated to produce).
In *People v. Meredith*, the Supreme Court of California held that a lawyer who directed a defense investigator to retrieve a victim's partially burnt wallet in a trash can and thereafter examined it, could not subsequently claim the attorney-client privilege for the location of the evidence. In *Morrell v. State*, a "kidnapping plan" written by the client and left in the client's car was found by another individual who turned it over to the lawyer. The lawyer then instructed the individual to give the plan to the police. The Alaska Supreme Court concluded that by doing so the lawyer had not breached an ethical obligation to his client, nor were his services to the client ineffective. The court held that "a criminal defense lawyer must turn over to the prosecution real evidence that the lawyer obtains from his [or her] client. Further, if the evidence is obtained from a nonclient third party who is not acting for the client, the ... [attorney-client] privilege ... is inapplicable." In 1979, a California appellate court held that the attorney-client privilege did not give a lawyer the right to withhold evidence. The court stated that it would be an abuse of the lawyer's duty of professional responsibility to knowingly "take possession of and secrete instrumentalities of a crime." The Federal District Court for the Eastern District of Virginia in *In re Ryder*, held that the fruits and instrumentality of a crime, specifically money and a gun, could not be withheld by a lawyer on the grounds of the attorney-client privilege.

However, the Supreme Court of Washington, in *State v. Olwell*, held that a knife in the possession of defense counsel could be withheld by the lawyer for "a reasonable period" of

The Model Rules, however, are more specific in directly prohibiting the destruction of evidence. See Model Rules Rule 3.4(a). "A lawyer shall not ... unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value." Id.

---

279 Id. at 52-54. The court reasoned that this was a purely tactical move by the defense, concluding that "if defense counsel leaves the evidence where he discovers it, his observations derived from privileged communications are insulated from revelation. If, however, counsel chooses to remove evidence to examine or test it, the original location and the condition of the evidence loses the protection of the privilege." Id. at 54.
281 Id. at 1210-1211.
282 Id. at 1210.
284 Id. at 722.
286 394 P.2d 681 (Wash. 1964).
time.\textsuperscript{287} However, the court stated that "[t]he lawyer should not be a depository for criminal evidence . . . . It follows that the lawyer, after a reasonable period, should, as an officer of the court, on his [or her] own motion turn the [evidence] over to the prosecution."\textsuperscript{288}

The approach of these cases has been followed in other jurisdictions.\textsuperscript{289} Courts seem to be in agreement that a defense lawyer must turn over "either the products of apparent crime . . . or instrumentalities of crime . . . . [And] [s]ome courts have gone further and have required defense lawyers to turn over evidence that is neither contraband nor instrumentality."\textsuperscript{290}

Commentators have noted:

[C]ourts have drawn the line at the turn-over obligation just described and have generally protected under the attorney-client privilege the lawyer's information about the source of the incriminating evidence if that source is the lawyer's client. The privilege is waived, however, if the lawyer came into possession of the evidence unlawfully or if the lawyer has altered the location or changed the appearance of the evidence.\textsuperscript{291}

Professor Subin advocates this approach so that a lawyer can prevent a client from committing a crime without directly incriminating the client.\textsuperscript{292} So called "use immunity" could prevent subsequent prosecution of the client based solely on the information

\textsuperscript{287} Id. at 684.
\textsuperscript{288} Id. The court cautioned that:
the attorney-client privilege should and can be preserved even though the attorney surrenders the evidence he [or she] has in his [or her] possession. The prosecution, upon receipt of such evidence from an attorney, where charge against the attorney's client is contemplated (presently or in the future), should be well aware of the existence of the attorney-client privilege. Therefore, the State, when attempting to introduce such evidence at trial, should take extreme precautions to make certain that the source of the evidence is not disclosed in the presence of the jury and prejudicial error is not committed. By thus allowing the prosecution to recover such evidence, the public interest is served, and by refusing the prosecution an opportunity to disclose the source of the evidence, the client's privilege is preserved and a balance is reached between these conflicting interests. The burden of introducing such evidence at a trial would continue to be upon the prosecution.

\textsuperscript{289} See People v. Investigation into a Certain Weapon, 113 Misc. 2d 348, 348, 448 N.Y.S.2d 950, 951 (Sup. Ct. Kings County 1982).
\textsuperscript{290} See WOLFRAM, supra note 277, at 645 (footnotes omitted).
\textsuperscript{291} Id.; see People v. Meredith, 631 P.2d 46, 53 (Cal. 1981); In re Abuzza, 178 A.D. 757, 758, 166 N.Y.S. 105, 106 (1st Dep't 1917); Oklahoma Bar Association v. Harlton, 669 P.2d 774, 777 (Okla. 1983).
\textsuperscript{292} Subin, supra note 272.
given to the authorities by his own lawyer. Conversely, mandatory disclosure of the client’s intentions by the lawyer could prevent harm to others.

Professor William H. Simon proposed the exercise of “ethical discretion,” which would enable lawyers to take those actions most likely to promote justice. Yet, his analysis focused only on civil practice. He feared that there would be too many “qualifications and elaborations,” presumably constitutional in the main, in the criminal field for the exercise of such discretion.

Suggested is a hybrid of the Subin and Simon models, mandatory disclosure in cases wherein a client intended grave physical harm or death to another, whether or not criminal, and discretionary disclosure in other situations where the lawyer previously had discretion to disclose under the ABA Code. Under such system of professional conduct, the public, innocent individuals, the courts, lawyers, and clients would be, for all intents and purposes, equally protected.

Lawyers should have broader discretion to disclose the announced intentions of clients to engage in criminal conduct. Mandated disclosure would exist only as to those crimes and other noncriminal acts likely to seriously physically harm or kill another. Where necessary to promote justice or protect against other harm to innocent third parties, “ethical discretion” to disclose would be permitted, even in criminal cases. “Use immunity” would be utilized in all situations. As such, a lawyer’s disclosures, whether to prevent harmful conduct, physical or financial, or to promote justice, societal or individual interests, would not reverberate to the client’s detriment and constitutional problems would be avoided.

The “hybrid” system might be best described in reference to the hypotheticals discussed above. Under such a system, the lawyer for the codefendant in hypothetical one could disclose to the court that his client had told him that the other defendant did not commit the crime. Yet, such disclosure, permitted in order to save an innocent third party from harm as well as to promote the adminis-

294 Id. at 1084.
295 See Subin, supra note 272, at 1128-32 (discussion of value of public interest in choice of counsel questions arising under Sixth Amendment).
296 Id. at 1125-26; see also Pizzimenti, supra note 268, at 451.
tration of justice, would not be admissible against the codefendant. The disclosure would be mandatory if the innocent defendant was likely to be greatly physically harmed or to suffer death as a result of the mistake. Of course, whether the court would believe the defendant's exoneration of the codefendant is not certain. Whatever the court's decision, however, it would at least be enlightened by the exculpatory evidence given by the codefendant's lawyer—presumably of high probative value.

In hypothetical two, after the death of the client, the lawyer, in the interests of justice and society, would be permitted to disclose what his client had told him about the past crimes prior to the client's suicide. The balancing test of weighing the interests of society against protections of the client would be employed. Indeed, in the case of discretionary disclosures made solely to benefit the administration of justice, such balancing inquiry would be the only method for disclosure. In hypothetical two, the balance would weigh heavily in favor of disclosure given the strong societal interests in the information and less demanding needs for client confidentiality.

In hypothetical three, discretionary disclosure on the part of lawyer to prevent future financial crime would be reinstated under the new proposed approach to confidentiality. However, accompanying the same would be "use immunity" so that the lawyer's revelation could not be used against the clients in subsequent criminal prosecutions or civil lawsuits. Should such have been an option in the savings and loan events of the late 1980s and early 1990s, the possibility exists that millions of dollars lost to investors as well as taxpayers would have been saved.

In the context of protecting the judicial system, as in hypothetical four, or in protecting lawyers, as in hypothetical five, discretionary disclosure also would be retained. Yet, the judicial system, under the new approach to confidentiality, would not be vaulted over the interests of individuals and clients. As such, mandatory disclosure of past fraud on the court would be once again eliminated, comporting with scores of precedent in this area in effect prior to adoption of the Model Rules. In effect, there would no longer be a "hierarchy" of protections under such revised code of professional conduct. The new approach to confidentiality would employ discretionary disclosure "across-the-board," except in instances of the most grave client intended future physical
harm.

The emphasis of such a new system would be on the lawyer's appropriate exercise of discretion in deciding to disclose as well as on the protection of human life. This would not be the first time a code of conduct relied on the good judgment of lawyers, and as well, placed high ethical value on the well being of others.\textsuperscript{297}

The decision not to disclose should, of course, not be second-guessed or provide the groundwork for lawyer liability except in the most extreme situations, \textit{i.e.}, where life clearly was at issue and a lawyer failed to protect it. A stringent standard, perhaps as high as beyond a reasonable doubt, ought to be used in such situations where a lawyer's failure to disclose is questioned. That is, but for those situations where a lawyer knew beyond a reasonable doubt that a client was going to seriously injure or murder someone, a lawyer's exercise of discretion not to disclose would not lead to disciplinary, pecuniary, or punitive action.

Changes in client confidentiality of the nature described would not only protect the public and individuals who might otherwise be harmed, it would also benefit lawyers themselves to the extent that lawyers as individuals struggle with the burdens of "moral nonaccountability."\textsuperscript{298} By following the new hybrid system of confidentiality and disclosure, good lawyers could be or at least become good persons.\textsuperscript{299}

Under a new system of confidentiality, lawyers would retain autonomy to make important ethical decisions without fear of harming others. Also "ethics" would once again be returned to the rules of professional conduct for lawyers. In addition, it is clear that the profession's current rules concerning maintaining client confidences have contributed to public dissatisfaction with the legal profession, recently described by Professor Geoffrey C. Hazard as "a chronic grievance."\textsuperscript{300} Such dissatisfaction has, in part, led to greater involvement of public regulatory authorities in matters of

\textsuperscript{297} See \textit{supra} notes 23-59 and 74-90 (discussing ABA Canons and ABA Code).


lawyer conduct, previously wholly regulated by the bar. Thus, adopting changes in client confidentiality as proposed may save not only intended victims of client harmful conduct, but also the autonomy of the legal profession.

**CONCLUSION**

This Article used hypotheticals to demonstrate the unsupportable yet “ethical” outcomes of the Model Rules confidentiality provisions. Through a comparison of former ABA Canons and ABA Code provisions, ethics opinions, and judicial decisions this Article argued that the hierarchy of protections of client confidentiality under the *Model Rules* is unsupportable in that it has resulted in an approach to confidentiality that can hardly be said to be “ethical,” much less professionally “responsible.” Moreover, the hierarchy constructed under the Model Rules jeopardizes the continued self-regulation of the bar. Changes, heretofore local in nature, may soon be a matter of national regulatory scope since the public has begun to voice its displeasure with the current system. Self-regulation of the bar may soon be a thing of the past.

This Article has advocated a serious and immediate rethinking of confidentiality norms. Proposed is a redesigned system of client confidentiality and disclosure, which is, in certain situations imperative, and in others, discretionary. Under the proposed approach, disclosure would be mandated in life or death situations and discretionary where necessary for a traditionally moral outcome. Balancing societal interests in disclosure and client interests in confidentiality would be required in the latter situation. Finally, “use immunity” would be required in all situations so that clients are not directly harmed by disclosures in the public or individual interest.

The need for such change arises now. To persist under the current confidentiality provisions will only exacerbate the ever widening divide between lawyers and society. Perhaps, most importantly, client confidentiality does not warrant blinding ourselves to its often unsupportable end results. It is possible to remedy such effects without great alteration of our present justice

---

301 See Hazard, *supra* note 300, at 1279 (“the dominant normative institution for the legal profession will no longer be ‘the bar,’ meaning the profession as a substantially inclusive fraternal group . . . . In the emergent ‘legalized’ era, increasingly dominant power reposes in government regulatory authorities . . . .”).
system. Indeed, to fail to make such changes now may occasion much more substantial change in the adversary system and lawyering as we have come to know it. Without prompt action by the bar, it is possible that lawyers will not be given the opportunity to act on their own without public regulatory approval in the future.