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Richard D. Kuhn

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# DISCLOSURE VERSUS CONFIDENTIALITY

RICHARD D. KUHN\*

One of the most controversial topics in legal ethics is canon four, the ethical canon requiring the confidentiality of an attorney.<sup>1</sup> Neither lawyers nor the general public are satisfied with the guidelines promulgated by the Bar in this area.<sup>2</sup>

In the past, arguments concerning canon four have been lively. The House of Delegates for the American Bar Association and the Federation

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\* Member of the firm Holcka, Donahue & Kuhn, P.C.; L.L.B. Columbia University, 1958; L.L.M. Taxation, Georgetown University, 1963.

<sup>1</sup> See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1980). The present canon on confidentiality, applicable in New York, states:

DR 4-101 Preservation of Confidences and Secrets of a Client.

(A) "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.

(B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:

- (1) Reveal a confidence or secret of his client.
- (2) Use a confidence or secret of his client to the disadvantage of the client.
- (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

(C) A lawyer may reveal:

- (1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.
- (2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.
- (3) The intention of his client to commit a crime and the information necessary to prevent the crime.
- (4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

(D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee.

*Id.*

<sup>2</sup> See Taylor, *Of Lawyers, Ethics and Business*, N.Y. Times, Feb. 6, 1983, at F4, col. 3; Taylor, *Ethics and the Law: A Case History*, N.Y. Times, Jan. 9, 1983, §1 (Magazine), at 31.

of New York State Judges believe that the present canon four results in lawyers' excessive involvement in immoral behavior of clients, and the stage is now set for debate in each state as to whether the applicable canon will be changed, as recommended by the American Bar Association. To evaluate and understand the limitations of the canon, its philosophical objectives must be identified. This requires, in turn, an analysis of the role lawyers play in civilized society. It should be obvious that canon four cannot be justified merely to establish a comfortable relationship between lawyers and clients without meeting the additional standard of assuring that the particular practices of lawyers that the canon justifies serve an appropriate social function.<sup>3</sup>

It is a purpose of this Article to suggest some considerations that previous debates concerning the canon have not addressed. A major concept is that the solution may lie in first recognizing that it is impossible for a single canon to provide proper guidelines for all lawyers, because there are two qualitatively different levels of practice, each requiring different ethical principles. As long as one canon is operative with respect to all areas of practice there will be irreconcilable inconsistencies between proper morality and effective legal practice in a variety of situations. The inevitable logical extension of this premise is that there must be two distinct rules operating in the distinct areas of practice. Indeed, the adversary system of judicial resolution of controversies serves a well recognized function, and justifies certain canons which enable it to operate effectively.<sup>4</sup> However, this justification may not be appropriate in those areas of practice not involving litigation or other controversy, such as business negotiation, securities, and corporate law, in which society reasonably demands different behavior.<sup>5</sup>

Historically, it has been presumed that an adversary system implemented by the legal profession is the best method of judicial resolution of controversies.<sup>6</sup> This presumption reflects the notion that human nature is not perfect. Given a conflict, a person cannot be relied upon always to speak the truth or to conduct himself at the highest level of morality. It is presumed that the more fundamental motivation in such a setting is the survival instinct. Given a conflict between a person's perception of his

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<sup>3</sup> See Gardner, *A Re-Evaluation of the Attorney-Client Privilege*, 8 VILL. L. REV. 279, 331-33 (1963).

<sup>4</sup> See, Lawry, *Lying, Confidentiality, and the Adversary System of Justice*, 1977 UTAH L. REV. 653, 654-65. "Certainly truth will not always be achieved by a one-sided investigation into the 'facts' . . . . It takes the cutting edge of dialogue, the thrust and parry of two intellects in vital exchange, in order to crystallize a question and distill an answer." *Id.* at 655.

<sup>5</sup> See *SEC v. National Student Mktg. Corp.*, [1971-1972 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 93,360 (D.D.C. Feb. 3, 1972).

<sup>6</sup> See 8 J. WIGMORE, *EVIDENCE* §§ 2290-2291 (3d ed. 1940).

material or bodily self interest on the one hand, and his commitment to truth or unquestionably moral behavior on the other hand, the presumption is that in litigation he will often elect to compromise the latter.

It is a fundamental strength of our system of justice that it recognizes this basic aspect of human nature and is consequently organized to take it into account. In the administration of justice it is the adversary system that has been constructed to deal with this aspect of human nature. It is not presumed that each side will always tell the truth. Rather, it is presumed that in pursuance of self-interest a litigant may not tell the truth or may tell a distorted version of the truth. Given this problem, in litigation procedure it is assumed that the best solution is for each party to present its conception of the truth and for the trier of fact to be the final arbiter.<sup>7</sup>

To represent their clients zealously, attorneys are expected to exploit this system. Obviously however, there must be rules and principles by which lawyers must act within the adversary system and this has been the classic function of the canon of ethics.

The dual purpose of canon four has been to establish standards of moral professional behavior and to permit a method by which lawyers can be effective in an adversary setting.

In defining the lawyer's position in the adversary system, virtually absolute sanctity has been accorded to the right of confidentiality. The privilege of confidentiality, founded on both the law of evidence and the law of agency, has few exceptions.<sup>8</sup> These exceptions principally relate to disclosure of an avowed intention to commit a crime likely to result in serious bodily harm.<sup>9</sup> For example, a recent opinion by the Association of the Bar of the City of New York asserted that an attorney must not reveal to an opposing attorney the fraud of a client's representation that he owned certain property and had executed mortgages and notes upon which the client's action was based. While there are varied interpretations

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<sup>7</sup> See Lawry, *supra* note 4, at 656.

<sup>8</sup> See 8 J. WIGMORE, *supra* note 6, at §§ 2290-2291.

<sup>9</sup> See *Hawkins v. Kings County*, 24 Wash. App. 338, 602 P.2d 361 (1979) (dictum). The *Hawkins* case addresses the issue of whether an attorney had a duty to warn his client's mother that the client might be dangerous when released from confinement, even though the mother was already aware of the risk. The court found that there was no duty to disclose, since the attorney received no information from the client that the client intended to assault anyone. "We believe that the duty of counsel to be loyal to his client and to represent zealously his client's interest overrides the nebulous and unsupported theory that our rules and ethical code mandate disclosure of information which counsel considers detrimental to his client's stated interest." *Id.*; see also MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(c)(3) (permitting a lawyer to reveal "[t]he intention of his client to commit a crime . . .").

by commentators,<sup>10</sup> the privilege has been extended questionably by some to permit a lawyer to elicit testimony from a client even when he has reason to believe the testimony is perjured. Monroe Freedman, Dean of Hofstra Law School and author of a well-known book on legal ethics, has advocated some forms of deception even in the courtroom:

The criminal defense attorney, however unwillingly in terms of personal morality, has a professional responsibility as an advocate in an adversary system to examine the perjurious client in the ordinary way and to argue to the jury, as evidence in the case, the testimony presented by the defendant.<sup>11</sup>

If a lawyer has a client who commits perjury, Professor Freedman contends, an attorney has the professional responsibility to ask questions that do not contest this testimony and even to use the false testimony in making the best case for the client to the court and the jury. Undoubtedly, this can involve lying,<sup>12</sup> and such instances are not uncommon in actual practice.<sup>13</sup> Perjury has traditionally been abhorred more than other forms of lying, and yet, perjury has come to be enthusiastically defended, albeit by a minority of commentators. Defended, moreover, not just as a regrettable practice at times excusable, but actually as part of one's professional responsibility as an attorney.

Despite its questionable use and abuse by some attorneys, it is not the purpose of this Article to criticize the classic function of the canon of confidentiality as used in the adversary system. Rather, an important objective of this Article is to establish that there is a different level, apart from the adversary systems at which lawyers operate. This level involves clients of a different disposition in a moral setting unlike that found in the adversarial world, and as such, lawyers involved at this level of practice should be expected to answer to a much higher standard of moral behavior.

It is a phenomenon perhaps unique to the commercially productive western world that there has developed a widely followed business ethic based upon trust, reliability, soundness of product and other moral values of a high order. Of course, throughout the world lip service is paid to such principles. However, in the productive commercial countries, there is actually a significant element of the business community that adheres to these values. It is arguable that adherence to trustworthiness is the cata-

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<sup>10</sup> Compare Gardner, *supra* note 3 with M. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* (1975).

<sup>11</sup> S. BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* 158-59 (1978) (quoting M. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 40-41 (1975)).

<sup>12</sup> See Noonan, *The Purposes of Advocacy and the Limits of Confidentiality*, 64 *MICH. L. REV.* 1485, 1488 (1966).

<sup>13</sup> See M. FREEDMAN, *supra* note 10, at 40-41.

lyst that allows the economic system to function effectively in the commercially profitable countries, as compared with the countries in the western world whose economies have not flourished despite promising potential. In contrast, it is revealing that in the stagnant economies of the western world there tends to be profound mistrust in the business community. Corruption, kickbacks, and the assumption that the person with whom one is dealing is likely to cheat characterize commercial dealings. Anyone with substantial experience in business dealings in the economically stagnant countries cannot fail to be impressed by the pervasiveness of business dishonesty. Certainly in the United States today, an important portion of the business community has come to recognize that prosperity in business dealings depends fundamentally upon a reputation for honest dealings and reliability. Such businessmen tend to seek not only the highest business morality for themselves and those with whom they do business, but also from their counsel and other representatives. In such a context the highest moral behavior by members of the bar becomes not only desirable in an abstract sense, but highly practical. It is reasonable at this level of practice to impose on practitioners a standard that differs qualitatively from the standard appropriate when there is an adversarial resolution of problems. It is therefore apparent that in a context in which the adversary system must be relied upon to solve problems, the standard for practitioners must be different from a context in which mutual cooperation, honesty, and total reliance upon good faith dominate. This is particularly appropriate with respect to the issue of disclosure versus confidentiality.

The highly publicized case of *In re O. P. M. Leasing Services, Inc.*<sup>14</sup> presents in microcosm the conflicting dynamics involving the confidentiality canon. O.P.M. Leasing Company, Inc. engaged in a number of fraudulent leasing arrangements involving non-existent equipment, artificial inflation of values, and bribery. The victims were the investing public, pension funds, and almost every party with which the company conducted business. At a certain point, the law firm that represented the company had reason to know of the fraudulent activities. The attorneys retained expert counsel to advise them as to their responsibilities under the canons. The attorneys for O.P.M. were advised that they could continue to engage in additional transactions for the company pending efforts to discover details of illegality, and that they were bound to keep information already learned confidential. When they finally decided to resign, the firm was asked by the incoming counsel whether there were any

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<sup>14</sup> See *In re O.P.M. Leasing Servs., Inc.*, 13 Bankr. 64 (S.D.N.Y. 1981), *aff'd*, 670 F.2d 383 (2d Cir. 1982); Taylor, *The O.P.M. Fraud: Report Faults Many*, N.Y. Times, Apr. 27, 1983, at D1, col. 5; Taylor, *Ethics and the Law: A Case History*, N.Y. Times, Jan. 9, 1983, §1 (Magazine), at 31.

questionable practices by the client of which new counsel should be aware, and there was no disclosure of the situation. The new counsel proceeded unwittingly and provided representation in additional fraudulent transactions.

The result of this interpretation of the canon was that the law firm continued representation despite significant reason to be on notice of the probability of substantial fraud. The justification for continuing representation appears to have been that only if there was *absolute knowledge* of ongoing fraud would there be a compulsion to resign.<sup>15</sup> There was no obligation imposed to investigate obvious possibilities that counsel was participating in a continuing fraudulent situation. Instead, the firm's desire to continue to receive substantial legal fees was satisfied by reliance primarily on the absolute sanctity of the confidentiality canon.

The *O. P. M.* case permits the best possible setting in which to consider the confidentiality canon. If one were about to choose an area in which lawyers and clients should be bound by a requirement of absolute disclosure, it would be in matters involving the investing public. Similarly, such an obligation should exist in presentations for bank financing. The decision helped refocus attention on the proper balance between disclosure and confidentiality in various circumstances. Lack of significant restriction on confidentiality is being questioned,<sup>16</sup> because there is uneasiness that disclosure was prevented in circumstances in which it was obviously an essential requirement,<sup>17</sup> such as the area of public investment.

Protection of consumers and the investing public is largely a twentieth century development. It is a creation of statutory enactment and evolution in judicial decisions. There has developed a highly sophisticated set of doctrines which afford public protection by imposing requirements of accountability, disclosure and due diligence by lawyers to an extent not known in previous centuries. Rules regarding confidentiality in the legal profession have not evolved correspondingly. Accountability, disclosure, and due diligence as imposed by statutes and court decisions are undermined if lawyers and clients can operate in a conspiracy of silence. Confidentiality in an adversary system is an ancient concept.<sup>18</sup> Its proper evolution in accord with twentieth century developments has been re-

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<sup>15</sup> Cf. *Hawkins v. Kings County*, 24 Wash. App. 338, 602 P.2d 361 (1979) (attorney had no duty to disclose information of potential violence of client when client himself did not tell attorney that client may be violent).

<sup>16</sup> *Id.*; see also Noonan, *supra* note 12, at 1492.

<sup>17</sup> See Note, *Limited Waiver of the Attorney-Client Privilege Upon Voluntary Disclosure to the SEC*, 50 *FORDHAM L. REV.* 963 (1982).

<sup>18</sup> 8 J. WIGMORE, *supra* note 6, § 2290, at 549; Hazard, *An Historical Perspective on the Attorney-Client Privilege*, 66 *CALIF. L. REV.* 1061, 1069-84 (1978).

sisted unduly by the Bar.<sup>19</sup>

The areas of protection of consumers and the investing public are not the only areas in which disclosure and forthrightness are accepted as fundamental requirements. A significant portion of the successful business community<sup>20</sup> and lawyers who serve them expect as much in the areas of contract negotiations, business acquisitions, commercial leasing, testamentary planning and real property transactions. Thus, the ethic of responsible disclosure is not a utopian ideal, but is a widely accepted principle to which canons of professional ethics should attempt to conform. The proposed rule as adopted by the American Bar Association's House of Delegates at its 1983 meeting is consistent with this view. Essentially, the new rule requires withdrawal if the lawyer's services are being employed by the client to commit fraud. Further, the rule permits the lawyer to inform a court of the withdrawal and to withdraw or disaffirm any opinion, document, affirmation, or the like. Since the rule is binding on practitioners only if adopted by the highest courts or legislatures of their states, debate at the state level will certainly take place in the near future. It is submitted that the proposal should be considered in the context that it would apply in limited areas of practice, while at the same time strict confidentiality would prevail in other areas of practice. A major source of resistance to the new proposal has been from the trial bar. The restriction of the new standard to non-litigated or non-adversary situations would perhaps eliminate resistance by the trial bar, and would be justified by the concepts described earlier in the Article.

In considering dual standards, it is certainly easy to point out many of the conflicts that could arise in the ambiguous twilight zones that all lawyers are equipped to imagine. The fact that there are ambiguous areas, and that precise rules are hard to establish for all situations, should not prevent definition of two fundamentally different conceptual areas. Confidentiality could be virtually absolute when employed within the adversary system, the purpose for which it was conceived.<sup>21</sup> This would apply, for example, in litigation. The broader disclosure responsibilities would be applicable in the areas of consumer and investment protection and the similar areas described above, when either by statute or current prevailing business morality society already is demanding such behavior by the public and its counsel.<sup>22</sup>

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<sup>19</sup> See N.Y. Times, Feb. 8, 1983 at A1, col. 2 (reporting vote of American Bar Association Congress against disclosure by attorney of fraudulent activity on part of his client).

<sup>20</sup> *Business and Ethics*, 62 PERSONNEL J. 604 (1983); Haeg, *Sources of International Business Ethics*, 23 MGMT. INT'L REV. 73 (1983).

<sup>21</sup> See *Prizel v. Karelsen*, 74 F.R.D. 134, 138 (S.D.N.Y. 1977); *People v. Belge*, 83 Misc. 2d 186, 372 N.Y.S.2d 798 (Onondaga County Ct. 1975).

<sup>22</sup> See *SEC v. National Student Mktg. Corp.*, [1971-1972 Transfer Binder] FED. SEC. L.

The English Solicitor/Barrister dichotomy suggests one method of dividing areas of practice.<sup>23</sup> Notwithstanding the traditional reluctance of the Bar to recognize areas of specialty, the direction in the future will likely be towards recognizing and licensing special areas, as has been done in medicine and dentistry. This may produce a redefinition of distinctive areas of practice that could conform to distinctive ethical systems.

The theory of a "limited waiver" has been suggested as a useful solution.<sup>24</sup> The theory deals with the strict standard of waiver normally applied to the attorney-client privilege, and whether this waiver can be relaxed in a particular context—that involving cooperation with the SEC in a non-public investigation through the disclosure of otherwise privileged material. The term "limited waiver" contemplates that the privilege is waived only as to the SEC, and remaining in force and effect as to the rest of the world. Several decisions have already supported the principle that important public policy is served in certain situations by relaxing the waiver standard.<sup>25</sup> Such relaxation has already been contemplated by the courts, for example, in disclosures in joint defense,<sup>26</sup> accounting situations,<sup>27</sup> settlement negotiations,<sup>28</sup> and in expediting complex discovery.<sup>29</sup>

The argument in favor of a limited waiver is based on the perception that relaxation of the strict standard of confidentiality will serve the im-

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REP.(CCH) ¶ 93,360 (D.D.C. Feb. 3, 1972).

<sup>23</sup> See M. FREEDMAN, *supra* note 10, at 105 (explaining this dichotomy).

<sup>24</sup> See Note, *supra* note 17.

<sup>25</sup> See *Diversified Indus. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1978)(en banc); *Brynes v. IDS Realty Trust*, 85 F.R.D. 679, 687-89 (S.D.N.Y. 1980) (courts found "limited waiver" with respect to disclosure of information from SEC investigations).

<sup>26</sup> See, e.g., *Wilson P. Abraham Constr. Corp. v. Armco Steel Corp.*, 559 F.2d 250, 253 (5th Cir. 1977). It is stretching the holding of the case to say that a waiver standard has been relaxed; rather, the court wanted more definite information as to whether the present controversy was similar to the prior case. If matters in the two cases were similar, then there would be an attorney-client privilege of confidentiality *Id.*; see also *Hanydee v. United States*, 355 F.2d 183, 184-85 (9th Cir. 1965) (admission by defendant made to his attorney is privileged and should not be introduced at trial, even though admission may influence position of co-defendant's attorney); *In re LTV Sec. Litig.*, 89 F.R.D. 595, 600-12 (N.D. Tex. 1981) (defendant corporation can assert privilege in action to discover materials generated by corporation's attorneys in the course of SEC investigation); *Transmirra Prod. Corp. v. Monsanto Chem. Co.*, 26 F.R.D. 572, 576-78 (S.D.N.Y. 1960) (information about defense strategy of previous third party defendants privileged, thus, immune from disclosure).

<sup>27</sup> See *United States v. Kovel*, 296 F.2d 918, 921 (2d Cir. 1961).

<sup>28</sup> See *In re Grand Jury Subpoena Dated July 13, 1979*, 478 F. Supp. 368, 373 (E.D. Wis. 1979); *Burlington Indus. v. Exxon Corp.*, 65 F.R.D. 26, 45 (D. Md. 1974); *American Optical Corp. v. Medtronic, Inc.*, 56 F.R.D. 426, 431 (D. Mass. 1972); *International Bus. Machs. Corp. v. Sperry Rand Corp.*, 44 F.R.D. 10, 13 (D. Del. 1968).

<sup>29</sup> See *Permian Corp. v. United States*, 32 FED. R. EVID. SERV. 2d (Callaghan) 429 (D.D.C. 1980), *rev'd on other grounds*, 665 F.2d 1214 (D.C. Cir. 1981); *Champion Int'l Corp. v. International Paper Co.*, 486 F. Supp. 1328, 1332 (N.D. Ga. 1980); *SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508, 515 (D. Conn.), *appeal dismissed*, 534 F.2d 1031 (2d Cir. 1976).

portant policy of encouraging cooperation with the SEC.<sup>30</sup> Although the theory dealt solely with the attorney-client privilege and confidentiality in a specific context, a valid principle of broader implication has been suggested. To the extent that there are strong policy reasons for an ethical standard that requires an attorney to forego absolute client confidentiality in a certain context, this may be achieved without destroying the legitimate need for complete confidentiality in an adversarial context. It is certainly possible to conceive that the use of the limited waiver concept would permit two distinct areas of practice suggested above to develop with different rules as to confidentiality.

#### CONCLUSION

Although the twentieth century has witnessed some of the worst degradations of civilization and disasters in human behavior, it has also produced enormous progress with respect to higher standards of civilized morality and responsibility. New definitions of public accountability and disclosure obligations reflect a morality not structured in earlier centuries. Are lawyers to be the promoters or the resisters of this morality?

The adversary system of judicial administration represented a great social advance over trial by combat and ordeal by fire. Will not higher moral standards of public responsibility and disclosure represent a similarly great advance in areas of consumer protection, investment protection and business ethics over adversarial morality in these contexts?

Are lawyers like any other agent, or are they not to be held to a higher standard in their agency than the standard of conspiratorial confidentiality traditionally sanctioned by the agency concept? Is it also a nobility for which the bar should be revered that if society is to advance toward a higher ethic from which we will all benefit, that lawyers be at the forefront of this progress instead of impeding it? No rules of professional ethics can or should exempt lawyers from the general legal proscription against wilful blindness to their clients' crimes or reckless participation in them. Let us hope that the debate on the confidentiality canon will continue in this spirit.

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<sup>30</sup> See Note, *supra* note 17, at 980.