RONALD D. ROTUNDA*

The Notice of Withdrawal and the New Model Rules of Professional Conduct: Blowing the Whistle and Waving the Red Flag

I

A problem that has been a leitmotif in the literature and case law of legal ethics concerns the ethical responsibility of the lawyer who learns that a client has committed or plans to commit perjury, or through a lie or misrepresentation commits some other fraud on a tribunal or on another party. Although this problem has been much debated by courts[1] and commentators,[2] and is the sub-

* Professor of Law, University of Illinois. The author gratefully acknowledges the support provided to him by the 1984 David C. Baum Memorial Research Award of the University of Illinois College of Law and a grant from the National Institute of Dispute Resolution in Washington, D.C. The author also wishes to thank Professors Bryant Garth, Sanford Levinson, Patricia Marschall, Deborah Rhode, Eugene Smith, and John Sutton, who read the manuscript and offered helpful suggestions, and Ms. Marie T. Reilly, for her helpful research and suggestions.

I am pleased to contribute this article to the issue dedicated to my good friend and colleague, Eugene Scoles.

[1] *See* People v. Schultheis, 638 P.2d 8 (Colo. 1981) (witness perjury); *In re* Friedman, 76 Ill. 2d 392, 392 N.E.2d 1333 (1979) (use of false testimony to trap bribers); Comm. on Prof. Ethics and Conduct of the Iowa State Bar Ass'n v. Crary, 245 N.W.2d 298 (Iowa 1976) (client perjury during deposition); Louisiana State Bar Ass'n v. Theirry, 366 So. 2d 1305 (La. 1978) (suborning perjury); *In re* A., 276 Or. 225, 554 P.2d 479 (1976) (misrepresentation in divorce suit).

[2] *See* M. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM (1975); Brazil, *Unanticipated Client Perjury and the Collision of Rules of Ethics, Evidence, and Constitutional Law*, 44 MO. L. REV. 601 (1979); Burt, *Conflict and Trust Between Attorney and Client*, 69 GEO. L.J. 1015 (1981); Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975); Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966); Greunbaum, *Clients' Frauds and Their Lawyers' Obligations: A Response to Professor Kramer*, 68 GEO. L.J. 191 (1979); Hoffman, *On Learning of a Corporate Client's Crime or Fraud—The Lawyer's Dilemma*, 33 BUS. LAW. 1389 (1978); Kramer, *Clients' Frauds and Their Lawyers' Obligations: A Study in Professional Responsibility*,

ject of several American Bar Association (ABA) Ethics Opinions,[3] the Model Code of Professional Responsibility is thoroughly confused on this issue. We find more guidance in the new ABA Model Rules of Professional Conduct (Model Rules) which, for the first time, provide for a "notice of . . . withdrawal."[4] The notice concept is a compromise solution to the problem. To understand the Model Rules on this issue, it is helpful to review briefly the history leading to their present development.

The ABA adopted the original Canons of Ethics (Canons) in 1908.[5] These Canons were amended through the years and remained in force until August 1969, when the ABA adopted its Model Code of Professional Responsibility (Code).[6] The ABA, with great success, lobbied the state and federal courts to adopt the new Code. Although many jurisdictions have added nonuniform amendments, virtually every state has now adopted the Code.[7]

---

67 GEO. L.J. 991 (1979); Lawry, *Lying, Confidentiality, and the Adversary System of Justice*, 1977 UTAH L. REV. 653; Lefstein, *The Criminal Defendant Who Proposes Perjury: Rethinking the Defense Lawyer's Dilemma*, 6 HOFSTRA L. REV. 665 (1978); Rotunda, *When the Client Lies: Unhelpful Guides from the A.B.A.*, 1 CORP. L. REV. 34 (1978); Sonde, *Professional Responsibility—A New Religion, or the Old Gospel*, 24 EMORY L.J. 827 (1975); Thurman, *Limits to the Adversary System: Interests that Outweigh Confidentiality*, 5 J. LEGAL PROF. 5 (1980); Wolfram, *Client Perjury*, 50 S. CAL. L. REV. 809 (1977); Rotunda, Book Review, 89 HARV. L. REV. 622 (1976) (reviewing M. FRIEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM (1975)).

[3] *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 341 (1975) (client perjury), Informal Op. 1318 (1975) (client intention to commit perjury), and Informal Op. 1314 (1975) (client intention to commit perjury); ABA Comm. on Professional Ethics, Formal Op. 314 (1965) (client fraud in preparation of tax returns and negotiations) and Informal Op. 1141 (1970) (lawyer's duty when asked to represent a fugitive); ABA Comm. on Professional Ethics and Grievances, Formal Op. 287 (1953) (client perjury).

The various proposals from courts, commentators, and the bar range from alpha to omega and exhaust all letters between them.

[4] MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 comment para. 16 (Final Draft 1983).

[5] These Canons descended from the Alabama State Bar Association's Code of 1887, which was based on G. SHARSWOOD, A COMPEND ON THE AIMS AND DUTIES OF THE PROFESSION OF LAW (1854). Also influential was D. HOFFMAN, A COURSE OF LEGAL STUDY (2d ed. 1846).

[6] The House of Delegates in 1964 created the ABA Committee to draft a new Code. *See, e.g.*, ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1420, 2 (1978). The Code became effective January 1, 1970.

[7] *In re* Griffiths, 413 U.S. 717, 727 n.19 (1973) ("The ABA Code of Professional Responsibility has since [1970] been approved and adopted in the District of Columbia and in 46 States . . . ."). *See also* 1 & 2 FEDERAL LOCAL COURT RULES *passim* (G. Fischer & J. Willis eds. 1979).

The Code is much more detailed than the Canons.[8] Perhaps because of its detailed approach, or perhaps because of changing consumer attitudes and post-Watergate thinking, the new Code quickly came under attack by commentators[9] and the courts.[10] By 1978 the ABA, in response to some of these attacks, including antitrust challenges,[11] publicly emphasized that its Code was only a "Model" Code, and that the state courts, rather than the ABA, provided the enforcement mechanism.[12]

In 1977 the ABA also responded to this criticism by creating a special commission to consider the call for a new Model Code. This Commission was popularly called the Kutak Commission, after its first chairman, Robert Kutak.[13] The Kutak Commission first presented a formal draft of its proposed Model Rules of Professional Conduct to the ABA House of Delegates on May 30,

---

[8] As Harlan Fiske Stone stated, "[The] canons of ethics for the most part [were] generalizations designed for an earlier era." Stone, *The Public Influence of the Bar*, 48 HARV. L. REV. 1, 10 (1934).

[9] *E.g.*, Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702 (1977); Patterson, *Wanted: A New Code of Professional Responsibility*, 63 A.B.A. J. 639 (1977).

[10] In the United States Supreme Court alone there were several major attacks on provisions of the original Code. *See, e.g.*, Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (successful first amendment challenge to state bar restrictions on advertising); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) (successful antitrust challenge to state bar minimum fee schedule). *Compare* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) (business solicitation restriction upheld), *with In re* Primus, 436 U.S. 412 (1978) (business solicitation restriction found to violate first amendment). *See generally* J. NOVAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 929-43 (2d ed. 1983).

[11] *See* Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) (plaintiff class alleged that operation of minimum fee schedule constituted price fixing in violation of § 1 of the Sherman Act).

[12] At one point the ABA sought to require its members to obey its Code, but several years prior to *Goldfarb* the ABA had stopped trying to enforce its Code by disciplinary action or otherwise. The ABA Ethics Committee eventually stated:

> Standing alone [the Code] has no force and effect and serves only as a guide—and as the model basis for interpretative opinions issued by the [ABA Ethics] committee to serve generally, and to whatever extent such opinions may be accepted, for advisory purposes. Enforcement of legal ethics and disciplinary procedures are local matters securely within the jurisdictional prerogative of each state and the District of Columbia.

ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1420, 5 (1978).

[13] *See generally* Patterson, *supra* note 9. Professor Patterson was the first reporter and later a consultant to this commission. The late Robert J. Kutak, a practicing lawyer, originally chaired this commission. After Kutak's death in early 1983, Robert Meserve, a former ABA President, became the new chairman. The reporter for most of the life of the commission has been Professor Geoffrey C. Hazard, Jr.

1981.[14] On August 2, 1983, after two years of sharp debate and many amendments, the ABA House of Delegates adopted these Model Rules by voice vote.[15]

Although the ABA amended the original Canons, they were not totally replaced for over sixty years. The Model Code had a much shorter life span, less than fifteen years. The bar's self-evaluation, in ever accelerating cycles, reflects its own self-interest. As Professor Rhode has already astutely noted, "Like any other occupational group, the ABA formulates and fulminates for its health, collectively speaking."[16]

It is with the Canons of 1908 that the struggle with the problem of the perjuring or fraudulent client begins.

II

THE APPROACH OF THE CANONS

When the ABA adopted the original Canons of Professional Ethics in 1908, Canon 15 required that a lawyer protect the client's interests with "warm zeal," but cautioned that such zeal must be "within and not without the bounds of the law."[17] Zealousness

---

[14] *See generally* Kutak, *Model Rules of Professional Conduct: Ethical Standards for the 80's and Beyond*, 67 A.B.A. J. 1116 (1981) (discussion of Model Rules).

[15] 52 U.S.L.W. 2077 (Aug. 9, 1983).

[16] Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689, 689 (1981). *See also*, Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702 (1977); Rotunda, *The Word "Profession" Is Only a Label—And Not a Very Useful One*, 4 LEARNING AND THE LAW 16 (Summer 1977).

[17] Canon 15, *reprinted in* ABA OPINIONS, *infra* note 24, at 56, provided:

> 15. **How Far a Lawyer May Go in Supporting a Client's Cause.**
>
> Nothing operates more certainly to create or to foster popular prejudice against lawyers as a class, and to deprive the profession of that full measure of public esteem and confidence which belongs to the proper discharge of its duties than does the false claim, often set up by the unscrupulous in defense of questionable transactions, that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause.
>
> It is improper for a lawyer to assert in argument his personal belief in his client's innocence or in the justice of his cause.
>
> The lawyer owes "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability," to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense. But it is steadfastly to be borne in mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of attorney

should not become overzealousness.[18] The attorney could not violate any law or engage in "any manner of fraud or chicane."[19] Canon 16 added that the lawyer must use "best efforts" to prevent the client from engaging in any wrongdoing, and if the client persisted, "the lawyer should terminate their relation."[20] Canon 22 emphasized that the lawyer's duty toward the court and other lawyers required both "candor and fairness."[21] A portion of Canon

---

does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane. He must obey his own conscience and not that of his client.

[18] Because of the slippery slope leading from zealousness to overzealousness, the Model Rules never use the term "zeal," although both Canon 15 and the Model Code require "zeal." *See, e.g.*, MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101 and EC 7-1 (1981).

The Model Rules do not adopt Lord Brougham's classic and single-minded view of the duty of an advocate. Said Brougham, when representing the Queen in Queen Caroline's Case:

> [A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. . . . [H]e must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.

Trial of Queen Caroline 8 (1821), *cited in* Frankel, *supra* note 2, at 1036 n.13.

[19] See *supra* note 17.

[20] Canon 16, *reprinted in* ABA OPINIONS, *infra* note 24, at 60, stated:

> 16. **Restraining Clients from Improprieties.**
>
> A lawyer should use his best efforts to restrain and to prevent his clients from doing those things which the lawyer himself ought not to do, particularly with reference to their conduct towards Courts, judicial officers, jurors, witnesses and suitors. If a client persists in such wrongdoing the lawyer should terminate their relation.

[21] Canon 22, *reprinted in* ABA OPINIONS *infra* note 24, at 66, provided:

> 22. **Candor and Fairness.**
>
> The conduct of the lawyer before the Court and with other lawyers should be characterized by candor and fairness.
>
> It is not candid or fair for the lawyer knowingly to misquote the contents of a paper, the testimony of a witness, the language or the argument of opposing counsel, or the language of a decision or a textbook; or with knowledge of its invalidity, to cite as authority a decision that has been overruled, or a statute that has been repealed; or in argument to assert as a fact that which has not been proved, or in those jurisdictions where a side has the opening and closing arguments to mislead his opponent by concealing or withholding positions in his opening argument upon which his side then intends to rely.
>
> It is unprofessional and dishonorable to deal other than candidly with the facts in taking the statements of witnesses, in drawing affidavits and other documents, and in the presentation of causes.
>
> A lawyer should not offer evidence which he knows the Court should re-

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."[22]

Finally, Canon 41, the most specific of all the Canons, strongly supported Canon 29's command to bring perjury to the attention of the prosecuting authorities. Canon 41 stated that if the client engaged in "fraud or deception" upon the court or a party, and the client refused the lawyer's advice to rectify the fraud, then the lawyer "should promptly inform the injured person or his counsel, so that they may take appropriate steps."[23]

These Canons appear to mandate whistle-blowing to rectify client fraud occurring in the course of legal representation. In 1953, however, the ABA Committee on Professional Ethics and Grievances, in Formal Opinion 287, interpreted the Canons otherwise.[24] The opinion presented two hypothetical fact situations in which a

---

ject, in order to get the same before the jury by argument for its admissibiity, nor should he address to the Judge arguments upon any point not properly calling for determination by him. Neither should he introduce into an argument addressed to the Court remarks or statements intended to influence the jury or bystanders.

These and all kindred practices are unprofessional and unworthy of an officer of the law charged, as is the lawyer, with the duty of aiding in the administration of justice.

[22] Canon 29, *reprinted in* ABA OPINIONS, *infra* note 24, at 131, stated:

29. **Upholding the Honor of the Profession.**

Lawyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession, and should accept without hesitation employment against a member of the Bar who has wronged his client. 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. The lawyer should aid in guarding the Bar against the admission to the profession of candidates unfit or unqualified because deficient in either moral character or education. He should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice.

[23] Canon 41, *reprinted in* ABA OPINIONS, *infra* note 24, at 181, in its entirety provided:

41. **Discovery of Imposition and Deception.**

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

[24] ABA Comm. on Professional Ethics and Grievances, Formal Op. 287 (1953), *excerpted in* T. MORGAN & R. ROTUNDA, PROBLEMS AND MATERIALS ON PROFES-

client committed fraud on a tribunal. In attempting to assess the lawyer's duty in each of the hypothetical situations, the Committee split three ways.

In the first hypothetical,[25] a lawyer successfully represented a client in a suit for a divorce on the grounds of willful desertion and abandonment by the wife. Another lawyer represented the wife and she fully understood the case against her. Three months after the divorce decree, the divorced husband confided to his attorney that he had falsely testified about the desertion and that his former wife was threatening to disclose the true facts to the court unless support money was forthcoming. Neither party had yet remarried. Must the husband's lawyer reveal his client's false testimony to the court?

The second hypothetical[26] before the Committee involved a defense attorney's representation at a criminal sentencing. The attorney knew, either from independent investigation or from the client, that the client had a criminal record. However, the custodian of the criminal records did not know of this prior record. If the judge relied on the custodian's information, must the defense lawyer disclose the true facts to the judge? If the judge asks the defendant about a criminal record and the defendant lies in open court, must the lawyer disclose the true information? Finally, if the judge turns to the defense lawyer and asks whether the client has a criminal record, how should the attorney respond?

The Committee's majority opinion interpreting the Canons was announced by Henry S. Drinker, who that same year authored his classic text, *Legal Ethics*.[27] Drinker argued that the various Canons, which seemed to require disclosure in such circumstances, only applied in civil cases, did not serve to protect the interest of the state, and were all subordinated to the Canons requiring nondisclosure of the client's confidences and secrets and undivided

---

SIONAL RESPONSIBILITY 117-18 (2d ed. 1981), and *reprinted in* ABA, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS 633 (1967) [herein cited as ABA OPINIONS].

A Formal Opinion overrules both earlier Formal and Informal Opinions necessarily in conflict, whether or not the earlier opinion is specifically mentioned in the later opinion. An Informal Opinion, on the other hand, only overrules Informal Opinions with which it is necessarily in conflict. An Informal Opinion cannot overrule an earlier Formal Opinion. ABA Comm. on Professional Ethics, Formal Op. 317 (1967), *reprinted in* ABA OPINIONS 4 (Supp. 1967).

[25] *See* ABA OPINIONS, *supra* note 24, at 634.

[26] *See id.*

[27] H. DRINKER, LEGAL ETHICS (1953).

fidelity to the client.[28]

Drinker relied on Canon 37,[29] requiring confidentiality, and oddly enough, on Canon 6,[30] which deals with conflicts of interest, not confidentiality. Canon 6 provides that the lawyer's obligation to represent the client with undivided fidelity and to protect the client's secrets or confidences forbids the lawyer from accepting employment by other clients when to do so would upset those secrets or confidences.[31]

The passing reference in Canon 6 to "secrets or confidences,"—terms not explicitly defined in the Canons—is probably best analogized to dictum in a judicial opinion. The most natural interpretation of Canon 6 would forbid certain retainers, the acceptance of which would require revealing confidences protected by Canon 37. The purpose of Canon 6 was not to create any new duty of "undivided fidelity." Given this purpose, one should con-

---

[28] ABA OPINIONS, *supra* note 24, at 637-38.

[29] Canon 37, *reprinted in* ABA OPINIONS, *supra* note 24, at 167, stated:

> 37. **Confidences of a Client.**
>
> It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, and extends as well to his 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 his employees or to the disadvantage of the client, without his knowledge and consent, and even though there are other available sources of such information. A lawyer should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client.
>
> If a lawyer is accused by his client, he is not precluded from disclosing the truth in respect to the accusation. The announced intention of a client to commit a crime is not included within the confidences which he is bound to respect. He may properly make such disclosures as may be necessary to prevent the act or protect those against whom it is threatened.

[30] Canon 6, *reprinted in* ABA OPINIONS, *supra* note 24, at 22, provides:

> 6. **Adverse Influences and Conflicting Interests.**
>
> It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.
>
> It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.
>
> The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

[31] *Id.*

sider Canon 6's brief reference to confidences as merely incorporating the requirements of Canon 37.

Yet Drinker thought otherwise. In both fact situations he concluded that the lawyer should seek to persuade the client to tell the truth.[32] In both instances, said Drinker, if the client refused to do so, the lawyer should withdraw from representation of the client, but should not violate the client's confidence.[33]

Drinker's theory of withdrawal is most unrealistic. In the middle of a trial, the court will typically not allow a lawyer to withdraw, particularly because, under Drinker's formulation, the lawyer could not explain to the judge the reason for withdrawal. To do so would violate Drinker's perception of the confidentiality requirements of Canons 6 and 37. Drinker paid only lip service to the disclosure requirements of Canons 15, 22, 29, and 41 by arguing that the lawyer's duty of loyalty to the court involved not only candor and frankness, but also the maintenance of court-created principles intended to ensure effective administration of justice, one of which was the lawyer's duty to preserve the client's secrets or confidences.[34] Drinker thus subordinated the disclosure requirements of these Canons to the confidence requirements of Canon 37, and what is, at most, dictum in Canon 6.

Drinker thought that the disclosure requirements in Canon 37 were also ineffective in limiting Canon 37's confidentiality requirements.[35] Though the second paragraph of Canon 37 expressly declines to protect the announced intention of a client to commit a crime as a confidence,[36] in the hypotheticals before Drinker "[t]he crime of perjury has already been committed."[37] Consequently, Drinker argued, the second paragraph of Canon 37 did not apply since these situations did not involve an intention to commit a crime.

---

[32] ABA OPINIONS, *supra* note 24, at 637.

[33] *Id.*

[34] We yield to none in our insistence on the lawyer's loyalty to the court of which he is an officer. Such loyalty does not, however, consist merely in respect for the judicial office and candor and frankness to the judge. It involves also the steadfast maintenance of the principles which the courts themselves have evolved for the effective administration of justice, one of the most firmly established of which is the preservation undisclosed of the confidences communicated by his clients to the lawyer in his professional capacity.

Id.

[35] *Id.* at 636.

[36] *See supra* note 29.

[37] ABA OPINIONS, *supra* note 24, at 636.

It takes little imagination to see that Drinker's distinction is meaningless. Assume a client tells the lawyer, "Put me on the stand so I can commit perjury." The lawyer will then respond under Canon 37, as interpreted by Drinker, "If you really intend to commit perjury, I will have to inform the court and the prosecuting authorities." The client, particularly an astute one, would reply, "Put me on the stand, I will tell the truth. The last thing I would want you to do is violate Canon 37." Our hypothetical client will then take the stand and commit perjury.[38] Under Drinker's theory, the lawyer then need not, indeed could not, reveal the client's already committed perjury. In fact, to be thoroughly honest with the client, the lawyer would warn, "If you plan to commit perjury and tell me beforehand, then I must tell the authorities. But if I am told about the perjury after you have committed it, my lips will be sealed." Drinker's formulation easily becomes a recipe for suborning perjury.[39]

Basically, Drinker's interpretation of Canon 37 is that in preparing a client to testify, a lawyer should explain that the client should testify truthfully, but that if the client lies, the lawyer will forever protect this secret as long as the client does not make the mistake of telling the lawyer beforehand that this lie will definitely take place. However, the only realistic and effective way to fulfill the disclosure responsibility imposed by the second paragraph of Canon 37 is to warn the client, "If you commit perjury, I will tell the court. To make certain that you will testify truthfully, I will tell the court if I later find out that you were lying."[40] Such an interpretation is in accord with Canon 29, which requires the lawyer to reveal already committed perjury to the prosecuting

---

[38] *See* T. MORGAN & R. ROTUNDA, *supra* note 24, at 292 (hypothetical).

[39] In a different context, Drinker explained that Canon 37's reference to intended crimes included fraud. H. DRINKER, *supra* note 27, at 137.

[40] There is always a question whether the lawyer "knows" that a client will commit perjury or some other fraud. "Knowing," under the Canons and the Model Code, must mean "knowing" pragmatically, not existentially. The Model Rules specifically state: " 'Knowingly,' 'known,' or 'knows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." MODEL RULES OF PROFESSIONAL CONDUCT Terminology (Final Draft 1983). As for fraud, the Model Rules provide: " 'Fraud' or 'Fraudulent' denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information." *Id.*

See also the American Trial Lawyers Association definition of knowing in the AMERICAN LAWYER'S CODE OF CONDUCT Terminology (Roscoe Pound-American Trial Lawyers Foundation, Revised Draft 1982).

authorities.[41]

Drinker also made a distinction based on how the lawyer receives the information. This distinction is difficult to understand and has not proven fruitful. In the case of the defendant's criminal record, if the lawyer learned of the confidential information from the client, according to Canon 37 the lawyer must keep the secret inviolate. But, said Drinker, if the lawyer learned of the client's prior record "without communication, confidential or otherwise, from his client, or on his behalf, *Canon 37* would not be applicable."[42]

Drinker offered no further examples of the situations contemplated by this distinction, which is meaningless because it is difficult to imagine how the lawyer could possibly gain the information other than from the client *or on the client's behalf.* The exception appears to include virtually all sources from which a lawyer would possibly discover such information. Normally, the lawyer will receive this information either from the client directly or from third parties and other sources, in which case the information would be collected on the client's behalf.

In any event, if there are cases in the criminal record hypothetical where the lawyer learned of the client's record without any confidential communication from the client or on the client's behalf, Drinker argued that the only ethical problem is the conflict between the "loyalties of the lawyer . . . to represent his client with undivided fidelity and not to divulge his secrets (Canon 6)" versus the lawyer's duty to "treat the court in every case in which he appears as counsel, with the candor and fairness (Canon 22) which the court has the right to expect of him as its officer."[43]

Drinker reasoned that if the court asked the lawyer whether the clerk's statement that the lawyer's client had no criminal record was correct, the lawyer would not be bound to knowingly speak an untruth to the court.[44] In such a situation, Drinker thought, the lawyer should ask the court to be excused from answering the question and withdraw.[45] Drinker quickly admitted that this course of action would "doubtless put the court on further inquiry as to the truth."[46]

---

41 *See supra* note 22.
42 ABA OPINIONS, *supra* note 24, at 637.
43 *Id.*
44 *Id.*
45 *Id.*
46 *Id.*

Drinker did not directly address whether the lawyer's refusal to answer and withdrawal could constitute a disclosure of client confidence. If the lawyer learned of the information without confidential communication from the client, or "on the client's behalf," Canon 37 confidentiality did not apply. The Canon 6 duty of fidelity, however, remained.[47] Drinker reasoned that the lawyer's silence in this case did not violate the lawyer's Canon 22 duty of candor to the court. "If the lawyer is quite clear that the court does not rely on him as corroborating, by his silence, the statement of the clerk or of his client, the lawyer is not, in our opinion, bound to speak out."[48] The lawyer, in fact, is silenced by what appears to be a duty of fidelity from Canon 6.

Drinker's purported distinction regarding the lawyer's source of information evaporates in reality. Where the lawyer learns of the information without communication from the client or on the client's behalf, the Canon 6 duty of fidelity would prevail to require the lawyer's silence. Drinker apparently sanctioned the lawyer's silence and withdrawal in such situations, even though it "put the court on further inquiry."[49]

Moreover, as a practical matter, Drinker's proposed conduct for the lawyer need not put a judge on notice. If the lawyer only tells the judge, "Your honor, I can't answer but don't rely on my personal knowledge as to whether my client has a criminal record," the judge may well conclude only that the lawyer personally does not know or remember.

Drinker's distinction may become clear when the situation at hand is contrasted with one where the lawyer learns of the client's record from the client and a Canon 37 duty of confidentiality arises. Canon 37 would apparently prevent any disclosure, including *any notice* to the court, "unless the provisions of *Canons 22, 29* and *41* require this."[50]

William B. Jones, later a federal judge in the District of Columbia, wrote a separate opinion, concurring in part and dissenting in part with Drinker.[51] Jones drew no distinction based on the source of the lawyer's information. He opined that the stringent Canon 37 duty of confidentiality applied to all information re-

---

[47] *See supra* notes 29-31 and accompanying text.

[48] ABA OPINIONS, *supra* note 24, at 638.

[49] *Id.* at 637.

[50] *Id.* Drinker recommends that the lawyer in such a situation try to persuade the client to tell the court the truth. If that fails, the lawyer should withdraw. *Id.*

[51] *Id.* at 638-39.

ceived by a lawyer.[52] Jones was even more protective of client fraud than Drinker.

Wilber M. Brucker and William H. White strongly dissented, arguing that Canons 29, 41, 15, and 22 required the lawyer to disclose the perjury to the court in both hypothetical situations.[53] The dissenters relied chiefly upon Canon 29, which required the lawyer, as an officer of the court, "to assist public authorities in stamping out perjury, no matter by whom committed."[54] "No longer is a trial supposed to be a Game to be played by unscrupulous laymen with lawyers as mere pawns."[55]

III

The Confusion in the Model Code

In 1969 the ABA House of Delegates adopted the new Model Code of Professional Responsibility.[56] This Code contained Disciplinary Rule (DR) 7-102(B)(1), which provided that if a lawyer received information clearly establishing that during the course of representation the client has perpetrated a fraud upon a person or tribunal, the lawyer "shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal."[57]

The strong language of DR 7-102(B)(1),[58] derived directly from Canon 41,[59] seemed to reverse the position of Formal Opinion 287. Yet a few months after the Code was adopted, the ABA issued its Standards Relating to the Defense Function in tentative draft form.[60] On February 8, 1971, the ABA House of Delegates approved these Standards, together with amendments recommended by the Special Committee on Standards for the Adminis-

---

[52] *Id.*

[53] *Id.* at 639-41.

[54] *Id.* at 639.

[55] *Id.*

[56] *See supra* notes 6-8 and accompanying text.

[57] Model Code of Professional Responsibility DR 7-102(B)(1) (1970).

[58] *See infra* note 64.

[59] *See supra* note 23.

[60] Standards Relating to the Defense Function (Tent. Draft 1970). The ABA Project on Standards for Criminal Justice began formally in August 1964 with the appointment of the Committee on Minimum Standards. These Standards are reprinted individually by the ABA and all 18 standards, covering areas such as the urban police function, electronic surveillance, and trial by jury, are reprinted together in Standards Relating to the Administration of Criminal Justice (1974).

tration of Criminal Justice.[61] The amendments to the Standards included certain commentary explaining the purpose of the amendments. But, at the end of the entire supplement, there was a one-sentence commentary which did not explain any amendments to the Standards; it simply was there. It announced:

> It should be noted that DR 7-102(B), which requires a lawyer to reveal a 'fraud' perpetrated by his client on a tribunal, is construed as not embracing the giving of false testimony in a criminal case.[62]

Construed by whom? How can a commentary to the ABA Standards place a gloss on the ABA Code? Why was this commentary, which interprets neither the amendments to the Defense Standards nor the Standards themselves, belatedly added?

The ABA has never incorporated into the Code, either in DR 7-102(B) or any other section, the gloss that the commentary attempted to place on DR 7-102(B). But several years later, in February of 1974, the ABA House of Delegates, apparently uncomfortable with a strong whistle-blowing role for attorneys, modified this disciplinary rule.[63] The amendment exempts a lawyer from a duty to reveal his client's fraud "when the information is protected as a privileged communication."[64]

This reference to "privileged communication" suggests the law of evidentiary privilege. But Canon 4 of the Model Code protects much more than that.[65] Unlike old Canon 6,[66] the Model Code

---

[61] *See* STANDARDS RELATING TO THE DEFENSE FUNCTION (Approved Draft 1971).

[62] STANDARDS RELATING TO THE DEFENSE FUNCTION (1971), *reprinted in* T. MORGAN & R. ROTUNDA, PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY 225 (1976).

[63] *See* Wolfram, *Client Perjury: The Kutak Commission and the Association of Trial Lawyers on Lawyers, Lying Clients, and the Adversary System*, 1980 AM. B. FOUND. RESEARCH J. 964, 973 n.57.

[64] MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B) (1981). DR 7-102(B) now reads:

> "A lawyer who receives information clearly establishing that: (1) His client has, in the course of representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication. (2) A person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal."

[65] Canon 4 admonishes the lawyer to "preserve the confidences and secrets of a client." The nine Canons of the Model Code are called "axiomatic norms" and in broad terms express the standards of professional conduct expected of lawyers. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preliminary Statement (1981).

[66] *See supra* note 30.

explicitly defines confidences and secrets. While "confidence" refers only to "information protected by the attorney-client privilege under applicable law," "secret" is defined more broadly; it refers to virtually any other significant information gained by the lawyer about the client that is not protected by the attorney-client evidentiary privilege.[67]

Was the purpose of the 1974 amendment to DR 7-102(B) to protect only the rather narrowly defined confidences, or did its umbrella of silence cover secrets as well? In 1975, in Formal Opinion 341, the ABA Committee on Ethics and Professional Responsibility opted for the latter, broader meaning of "privileged."[68] The lawyer cannot rectify the fraud, said the Committee in fiat-like terms, if it would violate a client confidence or secret.[69] Since secret includes any information likely to be embarrassing to the client, the Opinion at first appears to interpret the amendment to DR 7-102(B)(1) to engulf the entire disclosure requirement.

That may well have been the intent of the Committee, which explicitly said that the purpose of the 1974 amendment was to "reinstate the essence of Opinion 287 which had prevailed from 1953 until 1969."[70] Yet the logic and language of Formal Opinion 341 did not actually accomplish this goal of making a mirage out of the duty of disclosure in DR 7-102(B).

Formal Opinion 341 interpreted the words "privileged communication" in DR 7-102(B)(1) to mean "those confidences and secrets that *are required to be preserved by* DR 4-101."[71] However,

---

[67] MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(A) (1981). DR 4-101(A) defines "secret" as "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."

[68] ABA Comm. on Ethics and Professional Responsibility, Formal Op. 341 (1975), *reprinted in* 61 A.B.A. J. 1543 (1975), and *excerpted in* T. MORGAN & R. ROTUNDA, *supra* note 24, at 298-302. This Formal Opinion was preceded by several Informal Opinions, *e.g.*, Informal Op. 1314 (1975); Informal Op. 1318 (1975). *Cf.* Informal Op. 1141 (1970).

[69] 61 A.B.A. J. at 1544.

[70] *Id.* at 1543. "Essence," of course, was not defined. The Committee also stated that the term "fraud" means "active fraud, with a requirement of scienter or intent to deceive." *Id.* at 1544.

[71] *Id.* at 1544 (emphasis added).

Following the Drinker distinction discussed earlier, *see supra* text accompanying notes 27-50, the Committee concluded that the lawyer's duty under DR 7-102(B)(1) to reveal his client's fraud would apply only if the knowledge of the fraud was "obtained by the lawyer from a third party (but not in connection with his professional relationship with the client)." *Id.* Given the broad definition of "secret," it is difficult to imagine such a situation. *See* Wolfram, *supra* note 2, at 837 nn.105-06.

the Committee neglected to mention that subsection (c) of DR 4-101 provides various exceptions to its requirement of nondisclosure. For example, subsection (c)(3) states that the lawyer may reveal "[t]he intention of his client to commit a crime and the information necessary to prevent the crime."[72] Thus DR 7-102(B)(1)—which protects from disclosure only information protected by Canon 4—seems to require revelation of client frauds such as perjury, which would fall in the category of intention of the client to commit a crime. This exception for crimes in Canon 4 makes substantial inroads on the nondisclosure rule that the Committee had attempted to create in Formal Opinion 341.

Footnote seventy-one to DR 7-102(B)(1) supports this conclusion.[73] In this footnote, the drafters of the Model Code refer back to DR 4-101(C)(2).[74] DR 4-101(C)(2), in turn, contains another footnote that quotes pre-Code ABA Formal Opinions that require a lawyer to reveal information about the whereabouts of the lawyer's clients who have escaped or who have violated probation orders.[75] Being a fugitive from justice, like perjury, is a crime with consequences continuing until the client's wrongdoing is rectified. Although these footnotes do not carry as much weight as a disciplinary rule,[76] they are relevant and they point in the direction of disclosure, even though ABA Formal Opinion 341 tried to aim its sights in the opposite direction.[77]

---

[72] MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(3) (1981).

[73] MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B)(1) n.71 (1981).

[74] DR 4-101(C)(2) provides that a lawyer may reveal "[c]onfidences or secrets when permitted under Disciplinary Rules or required by law or court order."

[75] ABA Comm. on Professional Ethics and Grievances, Formal Op. 55 (1936) (communication by a client to his or her lawyer regarding the future commission of an unlawful act or a continuing wrong is not privileged from disclosure), and Formal Op. 156 (1936) (attorney who learns that the client has violated a probation order and whose client persists in doing so after the attorney has advised client not to do so has a duty to advise the proper authorities of the client's wrongdoing).

[76] *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Preamble n.1 (1981): "The footnotes are intended merely to enable the reader to relate the provisions of this Code to the ABA Canons of Professional Ethics adopted in 1908, as amended, the Opinions of the ABA Committee on Professional Ethics, and a limited number of other sources . . . ."

[77] The confusion in the present Model Code and Formal Opinion 341 is exacerbated by the Model Code's failure to adopt explicitly the portion of old Canon 16, which stated that "[i]f a client persists in . . . wrongdoing the lawyer should terminate their relation." *See supra* note 20. Under the Model Code, which is less than clear, the lawyer apparently may withdraw in such cases, but is not required to do so. *Compare* DR 2-110(C)(1)(b), (f) (permissive withdrawal) *with* DR 2-110(B)(2) (mandatory withdrawal).

IV

THE SOLUTION OF THE MODEL RULES

Enter the Kutak Commission.[78] The Kutak Commission originally proposed that the lawyer's duty to keep confidences had several important exceptions. Under the original draft of Rule 1.6, a lawyer "may," but is not required to, reveal otherwise secret information, if necessary:

> (1) to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm, or in substantial injury to the financial interests or property of another;
> (2) to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services had been used;
> (3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, or to establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer based upon conduct in which the client was involved; or
> (4) to comply with other law.[79]

At the February 1983 midyear meeting, the House of Delegates rejected all of subsection (2).[80] With substantial debate the House accepted only half of subsection (1).[81] A lawyer may reveal client secrets only to prevent the client "from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm." The House also rejected subsection (4).[82]

These same delegates, who waxed eloquent about the need to protect client confidences, accepted, without any debate, subsection (3), allowing the lawyer to breach the confidence to collect his fee.[83] In fact, the House of Delegates broadened this exception so that the lawyer now has a right "to respond to allegations in any

---

[78] *See supra* note 13.

[79] MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b) (Revised Final Draft, June 30, 1982), *reprinted in* T. MORGAN & R. ROTUNDA, PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY 85 n.* (2d ed. Supp. 1983).

[80] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (Final Draft 1983). *See also* 51 U.S.L.W. 2488-89 (Feb. 22, 1983).

[81] *See* 51 U.S.L.W. at 2488-89.

[82] *Id.* at 2489.

[83] *See id.* On the self-serving aspects of this provision, *see* Levine, *Self-Interest or Self-Defense: Lawyer Disregard of the Attorney-Client Privilege for Profit and Protection*, 5 HOFSTRA L. REV. 783 (1977).

proceeding concerning the lawyer's representation of the client."[84] The delegates also added to and strengthened the comment accompanying this Model Rule to make clear that the lawyer need not wait until any "formal" proceedings have begun. The charges may be made by a third party and the lawyer may respond directly to the third party charging the lawyer with complicity in the client's conduct or other misconduct.[85]

The original Kutak draft drew some important distinctions between types of crimes and allowed disclosure under circumstances more *narrow* than the present Model Code.[86] Canon 4 of the Model Code appears to allow the lawyer to disclose confidential information in order to prevent the client from committing *any* crime, ranging from violation of a Sunday blue law to large-scale securities fraud.[87] The original Kutak draft cabins this wide-open discretion.

Subsection (3) of the original Kutak draft also permitted disclosure where the client has misused the lawyer's services in order to promote any criminal or fraudulent act.[88] If the client used the lawyer's services to commit fraud, the original draft gave the lawyer the right of disclosure in order to extricate himself from charges of complicity. The lawyer knows that his involvement was unwitting to be sure, but the authorities, after the fact, might not believe later protestations in cases where the lawyer has, for a handsome fee, helped the client to commit fraud.

Oddly enough, while the February meeting rejected much of the original version of Rule 1.6, the House of Delegates accepted Rule 3.3(b), which created additional exceptions to the lawyer's duty of confidentiality when the client commits perjury.[89] Under Rule 3.3(a)(4), and 3.3(b), the lawyer may not offer any false evidence before a tribunal. If the lawyer later learns that material evidence was false, the lawyer *must* take "reasonable remedial

---

[84] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (Final Draft 1983).

[85] *See id.* at Rule 1.6 comment paras. 18-19.

[86] *See supra* text accompanying note 79. *Compare* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (Proposed Final Draft 1981) *with* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (Final Draft 1983).

[87] MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(3) (1981): "A lawyer may reveal . . . [t]he intention of his client to commit a crime . . . ." *See also supra* text accompanying notes 65-73.

[88] *See supra* text accompanying note 79.

[89] MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (Final Draft 1983) provides:

measures" *even if* compliance "requires disclosure of information otherwise protected by Rule 1.6," the confidentiality section.[90]

Why did the February House of Delegates accept the duty to undo perjury at a trial through Rule 3.3(b), but forbid a lawyer to undo client fraud other than perjury by rejecting subsection (2) of the original draft of Rule 1.6? Perhaps the House delegates thought candor toward a tribunal to be more important than candor toward an opposing party. Realistically, however, if the lawyer reveals the client perjury to the court, the disclosure inevitably will be made to the opposing party as well. Perhaps most members of the House of Delegates could not imagine defending a typical criminal defendant, a person likely to be tempted to commit perjury, while they could see themselves defending corporate officers and entities who would have greater opportunity to engage in securities or other financial fraud.[91] Or perhaps the House recognized that it would be difficult for a lawyer in the middle of a trial or hearing to withdraw, an option that is more realistic in nontrial circumstances.

In any event, other than serious threat to life or limb, the February draft did not allow the lawyer to make any disclosures to prevent criminal or fraudulent acts other than perjury, no matter how serious, even if the lawyer's services had been used to further the client's wrongdoing. The only recognition of any duty of the

---

Rule 3.3 **Candor Toward the Tribunal**

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

[90] *Id.*

[91] *Cf.* Rhode, *supra* note 16, at 713: "Insofar as the Model Rules' formulations have concrete effects, the net result may be that rich clients get richer while the poor get moral oversight."

lawyer to prevent his services from being used to commit fraud was in an amendment to Rule 1.16, allowing a lawyer to seek to withdraw.[92] This amendment nowhere mentioned any "notice of withdrawal."

Public outcry greeted the February 1983 actions.[93] Consider the following situation. You are a lawyer who has prepared for the client the necessary papers for a financial deal. The client is selling limited partnership interests to local doctors, dentists, and other professionals in your town. Relying on the papers that you have prepared, individuals, including some of your best friends and close relatives, prepare to invest. On the eve of closing the deal, you learn that your client is really planning to engage in massive financial fraud and that you, the lawyer, have been the unwitting tool of the client. You urge the client to stop the scheme to defraud your friends. The client laughs and says, "Quit if you want to, but with or without your participation, my plan will go through tomorrow."

What should you do? Under the present Model Code, there is some confusion but it appears that the lawyer may reveal the client's intention to commit a crime and the information necessary to prevent it.[94] The original Kutak draft would also allow disclosure.[95] But the February 1983 revision would discipline—and perhaps even disbar—a lawyer who would speak out to prevent the fraud. The lawyer could always seek to withdraw, but by si-

---

[92] Under this amendment a lawyer may withdraw, if doing so would not have a "material adverse effect on the interests of the client" or if "the client has used the lawyer's services to perpetrate a crime or fraud," or if the "client insists upon pursuing an objective that the lawyer considers repugnant or imprudent." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(b)(2), (3) (Final Draft 1983).

[93] *See, e.g.*, Berman, *Justice Be Damned—Full Fees Ahead*, USA Today, Feb. 15, 1983, at 10A, col. 3; Rotunda, *Fraud May Continue Even if Lawyer Knows*, *id.* at col. 6; Report of the Trustee Concerning Fraud and Other Misconduct in the Management of the Affairs of the Debtor, *In re* O.P.M. Leasing Services, Inc., (Bankr. S.D.N.Y.) Reorganization No. 81-B-10533 (BRL) 422-23 (Apr. 25, 1983) (published separately). *But see* Elam, *The Role of a Lawyer Isn't to Police Clients*, USA Today, Feb. 15, 1983, at 10A, col. 6 (seeking to justify the House action).

[94] *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(c)(B) (1981). In the hypothetical presented, the lawyer is counsel to the promoter. If the limited partnership papers represented that the lawyer is counsel to the partnership, the lawyer would have a duty to represent zealously *all* of the clients, *i.e.*, all the limited partners. *Cf.* Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1318 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978) (citing cases for proposition that each individual member of an unincorporated association is a client of the association's lawyer). A partnership is an aggregate, not an entity.

[95] *See supra* text accompanying note 79.

lently folding the tent and quietly slipping away, the lawyer would not stop such fraud.

The February ABA delegates spoke of the need to keep the client's confidences. Client confidentiality is important when the client has confessed past crimes to the lawyer and asked the lawyer to defend him or her against charges arising out of these past misdeeds. But what public policy justifies allowing the client to misuse the lawyer in order to commit future crimes?

The original Kutak draft was a fair attempt to clarify existing law, guide practitioners, and influence the future direction of the law. The February revisions failed all three goals. One ABA delegate at that meeting even argued that the ABA should abdicate its role in this area and let the courts take the lead without ABA influence. Courts will take, and have taken, the lead. But how useful are the Model Rules as a guide if they are preempted by, rather than reflective of, existing substantive law?[96] Since lawyers will have to comply with this substantive law in any event, the Model Rules cannot prevent disclosure, but they can mislead the lawyer who relies on them.

Under the law of evidence, the long-held and uniform rule is that the lawyer has no privilege to keep client information confidential if the client communication furthers client fraud or crime.[97] Whether the lawyer knew of the client's criminal or fraudulent purpose at the time that the lawyer's services were used or only learned of the improper purpose at a later date makes no difference.[98] Similarly, under the law of agency the lawyer as agent has no right to keep confidential the principal's crimes or frauds committed in the course of the representation.[99] Further,

---

[96] *See* Hodes, *The Code of Professional Responsibility, The Kutak Rules, and the Trial Lawyer's Code: Surprisingly, Three Peas in a Pod*, 35 U. MIAMI L. REV. 739 (1981); Sutton, *How Vulnerable Is the Code of Professional Responsibility*, 57 N.C.L. REV. 497, 514-17 (1979).

[97] *See* The Queen v. Cox and Railton, 14 Q.B.D. 153, 168 (1884). *See, e.g.*, United States v. Bartlett, 449 F.2d 700, 704 (8th Cir. 1971), *cert. denied*, 405 U.S. 932 (1972); Sawyer v. Barczak, 229 F.2d 805 (7th Cir. 1956), *cert. denied*, 351 U.S. 966 (1956); United States v. Weinberg, 226 F.2d 161 (3d Cir. 1955), *cert. denied*, 350 U.S. 933 (1956); Pollock v. United States, 202 F.2d 281 (5th Cir. 1953), *cert. denied*, 345 U.S. 993 (1953).

[98] *See, e.g.*, United States v. Calvert, 523 F.2d 895 (8th Cir. 1975), *cert. denied*, 424 U.S. 911 (1976); United States v. Aldridge, 484 F.2d 655 (7th Cir. 1973), *cert. denied*, 415 U.S. 921 (1974); State v. Phelps, 24 Or. App. 329, 335, 545 P.2d 901, 904 (1976) (conversations in furtherance of a crime are unprivileged even though at the time of conversation the lawyer was unaware of client's criminal intent.).

[99] Willig v. Gold, 75 Cal. App. 2d 809, 171 P.2d 754 (1946); Hale v. Mason, 160

neither the law of torts nor the law of agency allows the lawyer to commit any tort on behalf of the principal.[100]

In 1968, the Second Circuit clearly gave the bar more than a warning when it said in *SEC v. Frank*, "A lawyer *has no privilege* to assist in circulating a statement with regard to securities which he knows to be false simply because his client has furnished it to him."[101] Nor could the lawyer "escape liability for fraud by closing his eyes to what he saw and could readily understand."[102] More than a decade later, in *SEC v. National Student Marketing Co.*, the District Court for the District of Columbia endorsed these principles when it pronounced that the lawyer's duty is to "take steps to ensure" that the client discloses obviously material information to the shareholders.[103] The court strongly criticized the attorneys in that case because they made no effort to delay the closing of a transaction to allow disclosure to the shareholders. "[A]t the very least, they were required to speak out at the closing concerning the obvious materiality of the information . . . ."[104]

This basic principle of law is not surprising. Courts, and the Restatement (Second) of Torts, have imposed liability on professionals such as accountants for the negligent preparation of an audit report that harms a third party who reasonably and foreseeably relies on that report.[105] This basic principle of tort law logically can apply to lawyers as well as to accountants.

Of course, some fear that if a lawyer may disclose the client's plan to commit a serious fraud or crime, or the client's plan to use

---

N.Y. 516, 55 N.E. 202 (1899). *See also* RESTATEMENT (SECOND) OF AGENCY § 395 comment f (1957).

[100] The definition of "tort" includes the tort of fraud. *See, e.g.*, Office of Disciplinary Counsel v. Klein, 61 Hawaii 334, 603 P.2d 562 (1979); Miller v. Ortman, 235 Ind. 578, 136 N.E.2d 17 (1956); In re Callan, 122 N.J. Super. 103, 312 A.2d 881 (1973), *rev'd on other grounds*, 66 N.J. 411, 331 A.2d 612 (1975).

[101] 388 F.2d 486, 489 (2d Cir. 1968) (Friendly, J.) (emphasis added). The court also quoted United States v. Benjamin, 328 F.2d 854, 863 (2d Cir.), *cert. denied*, 377 U.S. 953 (1964): "In our complex society the accountant's certificate and the lawyer's opinion can be instruments for inflicting pecuniary loss more potent than the chisel or the crowbar." 388 F.2d at 489.

[102] 388 F.2d at 489.

[103] 457 F. Supp. 682, 713 (D.D.C. 1978).

[104] *Id.*

[105] *See* RESTATEMENT (SECOND) OF TORTS § 552 (1977). Many courts go beyond the requirements of the Restatement by imposing liability on those who reasonably relied on a professional's supposedly detached judgment. *See, e.g.*, Citizens State Bank v. Timm, Schmidt & Co., 113 Wis. 2d 376, 387-88, 335 N.W.2d 361, 367 (1983) (accountants may be held liable for negligence affecting third parties where reliance by these third parties on the accountants' representations was reasonable).

the lawyer's services to commit such acts, such a breach of confidence would prevent any client from ever again trusting his or her lawyer.[106] The case law of torts and agency rejects this domino theory.[107]

The theory also finds little support from experience under the prior ethical standards governing the legal profession. Under these prior standards, from the original Canons in 1908 until Formal Opinion 287 was promulgated in 1953, we lived with a rule mandating disclosure. Under the present Model Code, from 1970 to 1974, until DR 7-102(B)(1) was amended, we lived with a duty to rectify client fraud. Even after that amendment, Canon 4 still gives the lawyer discretion to reveal the intent of a client to commit a crime, whether malum in se or malum prohibitum. In addition, most states have rejected the 1974 amendment to DR 7-102(B)(1), and, since at least 1969, have imposed upon their lawyers a mandatory duty to prevent fraud.[108]

One must take with a grain of salt the protestations of those who fear that the sky will fall if the lawyer must reveal fraud. Such predictions ignore the other exceptions to the confidentiality rule adopted by the February ABA delegates. These exceptions allow a lawyer to breach confidentiality to defend himself or herself against a charge of wrongful conduct, to collect a fee, or to undo perjury before a tribunal.[109] If these inroads to the duty of confidentiality—and particularly these first two self-serving inroads[110]—do not cause the sky to fall, neither will disclosure of the client's intent to defraud upset the heavens.

The cases dealing with the law of evidence also make clear that the attorney-client privilege, far from requiring the attorney to "maintain inviolate the confidence, and at every peril to himself to preserve the secrets, of his client,"[111] is already riddled with exceptions. For example, business advice is not within the privilege.[112] Ordinarily, information regarding the existence,

---

[106] *See* M. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM (1975). *See also* Burt, *supra* note 2.

[107] *See supra* notes 97-100.

[108] *E.g.*, Florida DR 7-102(b)(1). Thirty-eight states mandate disclosure of fraud committed in the course of representation. Burt, *supra* note 2, at 1017 n.14.

[109] *See* MODEL RULES OF PROFESSIONAL CONDUCT (Final Draft 1983) Rule 3.3(a), *supra* note 89, and Rule 1.6, as amended, *supra* text accompanying notes 79-88.

[110] *See* Rhode, *supra* note 16, at 712.

[111] CAL. BUS. & PROF. CODE § 6068(e) (West 1974).

[112] *See, e.g.*, United States v. Vehicular Parking, Ltd., 52 F. Supp. 751, 753-54 (D. Del. 1943).

execution, or place of custody of a document is unprivileged.[113] Also, a client's identity, address, and the object or scope of his employment of the lawyer are ordinarily not privileged.[114] Communications to the attorney in the presence of a third person who is not the agent of either the attorney or the client are similarly unprivileged.[115] An attorney's advice to a client is not privileged when the client expects the attorney to prepare a letter to a third person setting forth the client's position, because the client's knowledge that the lawyer will reveal the conversation to third persons negates the privilege.[116]

There are many other ways that a client may lose the protection of confidentiality. The point is that the duty of confidentiality operates within very narrow boundaries that are often crossed. Unsophisticated lay persons and lawyers[117] frequently lose the lawyer-client privilege because they fail to recognize that the privilege is one that the law grudgingly grants and easily withdraws.[118]

After the outcry following the February meeting, John Elam, the former President of the American College of Trial Lawyers who had fought vigorously for many of the February amendments, proposed an addition to the Comment to Rule 1.6, governing confidentiality. This Comment, which serves as a "guide" to interpretation of the Rule,[119] indicates that there is no breach of confidence if the lawyer notifies anyone that he or she has with-

---

113 8 WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2309 (McNaughton rev. 1961).

114 C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 90 (2d ed. 1972).

115 8 WIGMORE, *supra* note 113, § 2311, at 601-02.

116 *See, e.g.*, United States v. Tellier, 255 F.2d 441 (2d Cir.), *cert. denied*, 358 U.S. 821 (1958). *See also* Wilcoxon v. United States, 231 F.2d 384 (10th Cir.) (client's private instructions to attorney to ask certain questions of a witness not privileged), *cert. denied*, 351 U.S. 943 (1956).

117 *See, e.g.*, Note, *The Attorney-Client Privilege in Multiple Party Situations*, 8 COLUM. J.L. & SOC. PROBS. 179, 180-81 (1972) (survey of lawyers indicates a general lack of awareness as to when the attorney-client privilege applies to inter-attorney exchanges of information in joint attorney conferences).

118 Professor Wigmore and others have noted that the privilege "ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle." 8 WIGMORE, *supra* note 109, § 2291, at 554. *Accord*, C. MCCORMICK, *supra* note 114, § 87, at 176-77. *See also* Foster v. Hall, 29 Mass. (12 Pick.) 89, 97 (1831) ("[T]his rule of privilege, having a tendency to prevent the full disclosure of the truth, ought to be construed strictly.").

119 *See* MODEL RULES OF PROFESSIONAL CONDUCT Scope (Final Draft 1983). "The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. . . . The Comments are intended as guides to interpretation, but the text of each Rule is authoritative."

drawn his or her work product and has withdrawn from further representation of the (former) client. Even if the client tells the lawyer to keep secret the withdrawal, the lawyer need not respect this request. This Comment provides:

> Neither this rule [1.6] nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer *from giving notice of the fact of withdrawal,* and the lawyer may *also withdraw or disaffirm any opinion, document, affirmation, or the like.*[120]

The cross references in this Comment emphasize the breadth of this new power to give a notice of withdrawal. Rule 1.8(b) provides that a lawyer cannot use a client's secret to disadvantage the client.[121] Rule 1.16(d) requires the withdrawing lawyer to "take steps to the extent reasonably practicable to protect a client's interests."[122] Neither of these subsections impinge on this power to send a notice of withdrawal.

It is also very significant that this Comment does not limit to whom a lawyer may send a notice of withdrawal. The Comments in the March 1983 draft implied that notice of withdrawal should be sent only to the third parties who had relied on the lawyer's work product,[123] but the June 1983 draft, approved by the House

---

[120] MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 comment para. 16 (Aug. 2, 1983, as enacted by the ABA House of Delegates) (emphasis added). This language authorizing a notice of withdrawal is even broader than the original proposal. *See* Rule 1.6 comment (Interim Final Draft, Mar., 1983), *reprinted in* T. MORGAN & R. ROTUNDA, *supra* note 79, at 88-89.

See also MODEL RULES Rule 1.16 comment para. 7 (1983): "Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client." *Cf. id.* at Rule 1.16(b)(1), (2), (3).

[121] MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(b) (Final Draft 1983).

[122] *Id.* at Rule 1.16(d).

[123] The Comment on notice of withdrawal originally stated:

> A lawyer can have made a misstatement on the basis of information supplied by a client. It can also happen that a lawyer is misled by the client into furthering a course of conduct that is criminal or fraudulent. Such conduct on the part of the lawyer if uncorrected could constitute a violation of Rule 4.1 or Rule 1.2(d). Furthermore, the lawyer has a legitimate interest in dissociating himself from such a transaction. If the lawyer discovers the true situation, the lawyer should if practical ask the client to rectify the situation or permit the lawyer to do so. In any case, the lawyer should render no further assistance unless the situation is rectified for, inasmuch as the lawyer has become aware of the facts, such assistance would then constitute a violation of Rule 1.2(d). Furthermore, if the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1). Such would be the case, for example, where the lawyer has prepared a written or oral opinion to be provided to a third party in a transaction and subsequently discovers that the opinion was based on materially inaccurate information, yet the

of Delegates on August 2nd, 1983, eliminates that implication.[124] For example, in the case of a public stock offering where it is impractical to notify all third parties, the lawyer presumably may now notify the Securities and Exchange Commission or other relevant agency that the lawyer is withdrawing and disavowing his or her work product. In doing so, the lawyer guards against a later charge of facilitating the client's wrongful behavior.[125] While the lawyer may not tell the third party or government agency the reason for the withdrawal (only the client may do that), the recipients

---

client persists in using the opinion to complete the transaction. Furthermore, the opinion should be withdrawn or disaffirmed and the third party given notice to that effect if it appears that the transaction may go forward. If the client will not give such notice, the lawyer should do so. If in any such situation the lawyer is asked about the basis of withdrawal, the lawyer should state that explanation must be obtained from the client.

After withdrawal the [the attorney] is required to refrain from making disclosure about the transaction, except as otherwise provided in Rule 1.6. See Rule 1.9. However, Rule 1.6 does not prevent the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like that might materially mislead a third person. Thus, a lawyer who orally has conveyed a materially misleading statement to a third party on behalf of a client, and then withdraws from the representation upon discovering the misleading character of the statement, may notify the third person that the statement is withdrawn or disaffirmed if the client has not done so; so also a lawyer who had tacitly affirmed such a statement may withdraw the affirmation. Again, the lawyer should state that explanation of the withdrawal must be obtained from the client.

Where a lawyer has completed the representation before discovering the criminal or fraudulent nature of the transaction, notice of withdrawal of the opinion, document, affirmation, or the like may be given in the same way as stated above.

See T. MORGAN & R. ROTUNDA, *supra* note 79, at 89.

[124] The Comment to Rule 1.6 now states:

If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1).

After withdrawal the lawyer is required to refrain from making disclosure of the clients' confidences, except as otherwise provided in Rule 1.6. Neither this rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 comment paras. 15-16 (Final Draft 1983).

[125] *See* Hazard, *How Far May a Lawyer Go in Assisting a Client in Legally Wrongful Conduct*, 35 U. MIAMI L. REV. 669 (1981). *Cf.* Peter, *Vicarious Morality and the Law*, 14 CREIGHTON L. REV. 1379 (1981). *See also* RESTATEMENT (SECOND) OF AGENCY §§ 343, 348 (1957); 2 F. MECHEM, A TREATISE ON THE LAW OF AGENCY §§ 1451-58 (1923); G. REUSCHLEIN & W. GREGORY, HANDBOOK ON THE LAW OF AGENCY AND PARTNERSHIP §§ 124-27 (1979).

of the notice of withdrawal are certain to be put on notice that something is wrong.

The Kutak Commission members who were displeased with amendments adopted at the February meeting warmly accepted the Elam compromise. The Commission had thought that a noisy notice of withdrawal amounted to a breach of client confidences, but the American College of Trial Lawyers thought otherwise. This notice of withdrawal appears to amount to disclosure[126] and thus accomplishes indirectly what the original Kutak draft sought to accomplish directly. The lawyer need not withdraw silently. To prevent being held liable to those injured by the client's wrongful conduct,[127] the lawyer has every incentive to file a noisy notice of withdrawal with all relevant parties.

In some respects the decision to file a noisy notice of withdrawal may hurt clients more than open disclosure. This type of notice of withdrawal enhances the power of the lawyer enormously because of the potential prejudice to the client. The new notice procedure virtually amounts to a practical disclosure, an especially difficult situation for the client, who now has no lawyer. The lawyer, on the other hand, may effectively coerce disclosure, if necessary, without having to bite the bullet and reveal secrets and confidences. Furthermore, the lawyer may be more willing to coerce disclosure here, since he or she can put pressure on the client without having to run the risk that disclosure is improper. This re-

---

[126] *Compare* AMERICAN LAWYER'S CODE OF CONDUCT Rule 6.5 (Roscoe Pound-American Trial Lawyers Foundation, Revised Draft 1982), which prohibits withdrawal in a civil case if such withdrawal would be a "direct violation of confidentiality" *and* Rule 6.6, which prohibits withdrawal if it would result in a "direct or indirect divulgence of a client's confidences," even if the lawyer knows withdrawal is necessary to avoid the lawyer's commission of a disciplinary violation. *See* T. MORGAN & R. ROTUNDA, *supra* note 79, at 289.

[127] *Cf.* Tarasoff v. Regents of the Univ. of California, 17 Cal. 3d 425, 131 Cal. Rptr. 14, 551 P.2d 334 (1976). In *Tarasoff* a psychotherapist knew of his client's plan to commit a murder but did not warn the intended victim. Notwithstanding the psychotherapist's plea of privilege the court held that a cause of action in tort existed:

> When a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger. The discharge of this duty may require the therapist to take one or more of various steps, depending upon the nature of the case. Thus it may call for him to warn the intended victim or others likely to apprise the victim of the danger, to notify the police, or to take whatever other steps are reasonably necessary under the circumstances.

13 Cal. 3d at 431, 131 Cal. Rptr. at 20, 551 P.2d at 340. *See also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(3) (1981).

sult—which may be in the best interests of lawyers—may help explain the paradox of why the notice of withdrawal was so easily accepted.

Filing a notice of withdrawal, state the Model Rules, is a discretionary rather than obligatory act. Nothing "prevents" the lawyer from giving such a notice, and the lawyer "may withdraw" prior papers.[128] The "Scope" section of the Model Rules emphasizes this point: the lawyer's decision not to disclose information under Rule 1.6 should not be subject to reexamination.[129]

However, this hope expressed in the Model Rules may not come to pass. Just as the Model Code[130] (and now the Model Rules)[131] expressed the hope, to no avail, that violation of the ethics provisions would not lead to civil liability,[132] this latest caveat will probably have little effect.[133] When other law requires disclosure, and the Model Code or the Model Rules do not mandate confidentiality, the lawyer cannot seek protection in the discretionary aspects of the lawyer's ethical duty. The discretion to reveal, coupled with the duty to reveal expressed in other law, means that the lawyer must disclose or be held liable for damages to injured third parties.[134] Thus, filing a notice of withdrawal may at times be a duty, rather than a subject of unreviewable discretion.

This concept of a notice of withdrawal helps to make consistent sections of the Model Rules that otherwise would appear to be quite inconsistent. This role of the notice-of-withdrawal-Comment to Rule 1.6—the only reference anywhere in the Model Rules to this new concept—is very important, for it undermines any expected argument that the Comment is not authoritative.[135]

---

[128] *Cf.* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(3) (1981) (lawyer may reveal the intention of the client to commit a crime).

[129] MODEL RULES OF PROFESSIONAL CONDUCT Scope para. 8 (Final Draft 1983).

[130] MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preliminary Statement para. 5 (1981): "The Model Code . . . [does not] undertake to define standards for civil liability of lawyers for professional conduct."

[131] MODEL RULES OF PROFESSIONAL CONDUCT Scope para. 6 (Final Draft 1983): "Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached."

[132] *E.g.*, Greenebaum-Mountain Mortg. Co. v. Pioneer Nat'l Title Ins. Co., 421 F. Supp. 1348 (D. Colo. 1976); In re Charles L., 63 Cal. App. 3d 760, 132 Cal. Rptr. 840 (1976). *See also* R. MALLEN & V. LEVIT, LEGAL MALPRACTICE § 256 (2d ed. 1981); Sutton, *supra* note 96, at 514-16.

[133] *See* Rhode, *supra* note 16, at 710 (1981).

[134] *See generally* Tarasoff v. Regents of the Univ. of California, 17 Cal. 3d 425, 131 Cal. Rptr. 14, 551 P.2d 334 (1976).

[135] *See supra* note 119.

Consider Model Rule 4.1. It provides, in subsection (b), that while representing a client the lawyer may not knowingly "fail to disclose a material fact . . . when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, *unless disclosure is prohibited by Rule 1.6.*"[136] Rule 4.1 appears to state that when disclosure is prohibited by Rule 1.6, the lawyer must keep secret material facts even if such nondisclosure would assist a client's criminal or fraudulent act. But if the lawyer does assist in such an act through his or her nondisclosure, the lawyer will be held liable by other law.[137] Such nondisclosure also appears to violate Rule 1.2(d).[138] The Comment to Rule 1.2 makes clear that a "lawyer may not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent. Withdrawal from the representation, therefore, may be required."[139] The remedy for the apparent inconsistency may be found in the concept of filing a notice of withdrawal.

Thus, while the lawyer cannot assist criminal or fraudulent client conduct under Rule 1.2(d), under Rule 4.1(b) the lawyer must keep the client's secrets, protected by Rule 1.6, even if doing so assists the client's fraud or crime. The only possible solution to this dilemma between Rule 1.2(d) and Rule 4.1(b) is to withdraw, and then file a notice of withdrawal in order to alert the victims of the client's wrongdoing.

The new notice of withdrawal does not completely reestablish the original Kutak proposal. Recall that originally subsection (b)(1) of Model Rule 1.6 allowed the lawyer to reveal client information if necessary "to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in . . . substantial injury to the financial interests or property of another."[140] The notice of withdrawal will not be helpful in preventing such financial harm if there is no representation from which to withdraw.[141] The apparent purpose of the no-

---

[136] MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.1(b) (Final Draft 1983) (emphasis added).

[137] *See generally* Hazard, *supra* note 125.

[138] "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . . ." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(d) (Final Draft 1983).

[139] MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 comment para. 7 (Final Draft 1983).

[140] *See supra* text accompanying note 79.

[141] For example, a lawyer representing a client in a divorce may learn from that client that the client plans to defraud some prospective investors in a housing project

tice of withdrawal provision is to permit the lawyer to undo that which the lawyer has already participated in or aided, rather than to assist the lawyer in preventing future harm of which the lawyer has simply become aware.

IV

CONCLUSION

The final draft of the Model Rules does forbid blowing the whistle on the client, but it allows the lawyer to wave the red flag. This final draft draws some very fine distinctions. But since the effect of a notice of withdrawal is to wave the red flag and put almost everyone on clear notice,[142] the concept of a notice of withdrawal is a significant addition to the law of ethics. Whether they know it or not—the notice of withdrawal provision was never mentioned in the August debate—the August 1983 House of Delegates undid much of the harm done by the February meeting.

The responsibility of a lawyer to blow the whistle, or to withdraw silently or noisily, or to continue representation as if nothing had happened, is an important matter for the courts and practitioners. The Model Rules tell us that a lawyer need not be a hired gun. Nor is the lawyer a Pontius Pilate, who tries to wash his or her hands of the whole affair and silently walk away. Nor is the lawyer a fifth columnist or an undercover cop on the beat.[143] Instead, the Model Rules in this area attempt to balance complex and competing interests and to steer between disclosure and silence in order to assure that zealous representation does not become overzealous representation.

---

unrelated to the divorce. Withdrawing from the divorce can hardly furnish any relevant notice.

[142] Admittedly, there may be situations where the third party receiving the notice is unrepresented by counsel and thus does not appreciate the significance of the notice. Or the third party may be represented by an attorney who does not understand the ethical implications of the notice. The withdrawing lawyer may then wish to notify the relevant legal authorities as well, since the notice of withdrawal may apparently be given to anyone.

[143] *See* D'Amato & Eberle, *Three Models of Professional Ethics*, 27 ST. LOUIS U.L.J. 761 (1983).