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The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm

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SUMMARY:

... One question, however, has plainly provoked the most attention and controversy: how should the lawyer's obligation of loyalty to the client be balanced against the need to protect individuals and society from a client's unlawful conduct? The problem relates specifically to the rules of confidentiality, and arises when the lawyer possesses information, generally provided by the client, which demonstrates either that the client is engaging, or plans to engage, in unlawful conduct; or that the client has engaged in unlawful conduct, the present or future consequences of which will be harmful. ... The question addressed is whether we should opt for the narrow view of confidentiality represented by the attorney-client privilege, which would permit relatively wide disclosure of client misconduct, or the expansive view represented by the *Model Rules*, which would prohibit it. ... The first nationally codified ethical rule of confidentiality appeared to do just that. ... Similarly, when the client attempts to use the properly retained attorney to reach legitimate goals by illegal means, the communication is ultra vires the term of employment, and the crime or fraud exception permits disclosure. ... From an initial point at which there was substantial symmetry between the standards of the attorney-client privilege and the *Canons of Ethics*, the bar expanded the attorney's obligation of confidentiality, all but eliminating the duty to disclose and leaving disclosure of the client's intention to commit a crime to the attorney's discretion. ...

TEXT:

[*1092] INTRODUCTION

The second half of the twentieth century has been marked by extraordinary growth in the size and influence of the legal profession. In our increasingly complex society it has become difficult, and in some respects impossible, to conduct one's affairs effectively without expert legal advice. Moreover, it appears that the trend toward the lawyering of America has intensified in the past two decades. n1 We may not be a nation of lawyers, but we are certainly a nation unimaginable without them.

Not surprisingly, the advent of the lawyer as a major force in society has heightened our interest in the rules that govern the profession. In earlier times concern over this subject was slight. The organized bar did adopt the *Canons of Professional Ethics* in 1908, n2 but it left them in place for sixty **[*1093]** years despite the fact that the professional world for which they were designed had vanished. Writers largely ignored the subject of legal ethics, n3 law schools offered few courses in professional responsibility, and most law students believed those offered unimportant. n4 Neither the profession nor the courts appeared particularly interested in enforcing the rules that did exist. n5

In the past two decades this picture has changed significantly. In the mid-1960's the American Bar Association undertook its first wholesale review of the *Canons.* That review resulted in the 1969 *Code of Professional Responsibility,* which in some form was speedily given the force of law in every state. n6 Only a decade later, Watergate inspired a comprehensive review of the *Code,* which produced the proposed *Model Rules of Professional Conduct.* n7 At the same time, and no doubt prompted by the same forces, academic interest in legal ethics increased, n8 and professional responsibility **[*1094]** joined a small group of mandatory law school courses. n9 There are, moreover, signs that the profession is growing more interested in its disciplinary mechanisms. n10 Perhaps most intriguing, there are indications that persons in powerful places have concluded that the regulation of lawyers' conduct is too important to be left to the practitioners. n11

[*1095] The discussion of legal ethics during the past two decades has been far-ranging. n12 One question, however, has plainly provoked the most attention and controversy: how should the lawyer's obligation of loyalty to the client be balanced against the need to protect individuals and society from a client's unlawful conduct? The problem relates specifically to the rules of confidentiality, and arises when the lawyer possesses information, generally provided by the client, which demonstrates either that the client is engaging, or plans to engage, in unlawful conduct; or that the client has engaged in

unlawful conduct, the present or future consequences of which will be harmful.

Such situations can arise in all phases of the practice of law. The litigator must decide how to deal with testimony by the client, or by witnesses produced by the client, that the lawyer knows to be untrue. n13 Negotiators must decide what action to take if they learn that their assertions were based on false information provided by the client. n14 The advisor must determine how to react to clients who persist after being told that their conduct is unlawful. n15

No field of practice is immune from the problem. The corporate lawyer may learn that reports filed with the government were false, n16 or that the company is engaging in illegal n17 and possibly dangerous business activities. n18 The legal services lawyer may discover that a client's welfare claims are fraudulent. n19 The securities lawyer may uncover fraud in a public offering, n20 **[*1096]** and the tax lawyer may find willful failure to report income. n21 Personal injury lawyers may deal with clients who make spurious claims. n22 Criminal lawyers may deal with defendants engaged in ongoing racketeering activities, n23 and with clients whose abnormalities or predilections make them dangerous to the community. n24 In each of these situations lawyers may find themselves in the position of being the most probable, if not the only, source of information that will prevent harmful client conduct ranging from threats of physical injury, to corruption of the judicial process, to devastating financial loss to the client's victims.

Few lawyers face problems like these on a daily basis, but most active practitioners probably encounter them, if often in less cataclysmic form, with some regularity. Moreover, because such painful choices would have to be made, one suspects that most lawyers worry about how they would react if the problem were to arise. The desire to help prevent harm would instinctively move many lawyers to disclose what they have learned from their clients, especially where the client would be the cause of the harm: everything else being equal, it is the morally proper thing to do.

The problem is that for the lawyer, everything else is not equal: the lawyer is admonished that loyalty to the client is a professional virtue of the highest order and that our system of justice depends upon the lawyer's adherence to that admonition. n25 Without confidentiality, it is argued, clients would be reluctant to communicate with their lawyers, and this reluctance would prevent lawyers from protecting clients' rights. n26 And because individual rights can be fully protected only if lawyers guide the individual through the legal process, confidentiality is said to be fundamentally important to preserving individual autonomy. n27 It is this "rights-based" argument that has been used to justify placing lawyers on a different moral footing than others. n28

[*1097] There is also an instrumental defense of strict client confidentiality. It is based on the fact that, as the profession is organized, the rewards for taking a position adverse to the client's interests are not likely to be earthly ones. The most decent clients probably seek lawyers whom they can consider friends, albeit "special-purpose friends," n29 strongly devoted to their interests and willing to resolve all moral, as well as legal, doubts in their favor. n30 The most venal clients no doubt choose "alter-ids" n31 whenever they can find them. Given the choice, very few clients are likely to seek an attorney (or stay with one) who sees his role in part as one of policing the client's baser instincts. The point of the instrumentalist argument is not (or not simply) that the legal superego would starve. Rather, it is contended that society is best served if clients are not put to such a choice, which can lead only to their refusal to reveal wrongdoing or to their selection of the lowest common denominator of the profession -- lawyers who are all too willing to tolerate, if not join in, the misconduct. If conscientious lawyers can guarantee confidentiality, it is argued, they will learn what their clients have in mind, and will be able to dissuade them from wrongful conduct. n32

The rights-based and instrumental defenses of confidentiality are hardly irrational. They have, however, been grossly overstated. To borrow a phrase from David Luban, the defense of confidentiality has ended where it ought to have begun, "with a chorus of deeply felt but basically unexamined rhetoric." n33 I shall offer such an examination here. I believe it will reveal that there is a strong case for imposing on attorneys a broad duty to disclose client misconduct. It also will reveal that present law is closer to requiring such a duty than is generally understood, and that enhancing the duty to disclose will neither subvert individual rights nor impair the attorney's ability to ensure that the client complies with the law. Confidentiality has its place, but it is a much smaller place than has been contended for, even in a system of justice devoted to the preservation of individual rights. It is both possible and right for the attorney to provide the client with access to the system while providing others with protection **[*1098]** against the client, even if the attorney must become the source of the information used to prevent the client's encroachments. What must be sacrificed to accomplish this is not, as some have claimed, n34 the principle of representational justice, but the extravagant version of it advocated by those who insist on an almost mystical bond between attorney and client and who view that bond as the *sine qua non* of our way of life. n35

At present, the law of confidentiality is in a state of chaos. At some

points it is incomprehensible; at others it gives no guidance; at still others it instructs attorneys to perform in a morally intolerable manner. This situation has several causes. The most important of them is the legal system's failure to acknowledge that confidentiality rules stem from two sources that are inconsistent in critical respects. The first source is the attorney-client privilege, an ancient part of the law of evidence. The privilege always has been interpreted narrowly, reflecting judicial hostility to the suppression of relevant testimony. The second source is the ethical rules of confidentiality written by the organized bar and adopted by the states to control attorney conduct. These rules reflect the bar's traditional support for a broad rule of confidentiality.

An anomolous situation has resulted from the interfacing of these two sets of rules. The profession, with increased stridency of late, proclaims the sanctity of confidentiality and orders its members to preserve it at almost any cost. n36 At the same time, judges enforcing the attorney-client privilege brand it a necessary evil, an exception to the duty to provide evidence that should be construed as narrowly as possible. n37 As a consequence, an attorney may be subject to professional discipline for disclosing what would be contemptuous to conceal in court. For the attorney, then, what is legal or ethical is a function of who is applying the pressure at the moment.

A second cause of the chaos in the area is that the proposed solutions to the confidentiality-disclosure conflict have been too narrowly focused. No principled and coherent set of disclosure rules has been articulated. Ethical rules are discussed and adopted without considering the relationship of those rules to the attorney-client privilege, of which no serious reevaluation has been undertaken. n38 Proposals are made to resolve particular problems of an occupational subspecialty, or particular predicaments **[*1099]** in which lawyers find themselves, without regard for the impact of such resolutions on other disclosure problems. Thus, in the securities field writers have dealt at length with the allegedly special conflict between the obligation of the securities lawyer to preserve confidentiality and the obligation to disclose facts to investors and to the SEC. n39 Other writers have sought to justify a moral right for the criminal lawyer to conceal confidential information that is different than for his civil counterpart. n40 An inordinate amount of attention has been paid to the question whether there is a duty to disclose client perjury, n41 and an almost equal amount to whether a lawyer's duty to disclose tangible evidence of a crime, received from a client, can be reconciled with the rule of confidentiality. n42

This Article attempts to demonstrate that the ethical rules and the attorney-client privilege can and must be reconciled, that the disclosure problems of all types of legal specialists are essentially the same, and that all types of disclosure predicaments can be resolved by applying the same general principles.

The Article is divided into four sections. Section I puts forth a paradigm case in order to illustrate dramatically the clash of values underlying the confidentiality-disclosure debate. n43 Section II considers the legal **[*1100]** dimension of the confidentiality issue. n44 It describes the attorney-client privilege, n45 the ethical rules of confidentiality, n46 and the relationship between them. It also considers how the rule of confidentiality relates to an individual's constitutional rights. n47 Of almost equal importance is the question of an attorney's right to disclose confidences in self-defense n48 -- a question that appears to have been consciously avoided by the bar but which threatens to become increasingly important and which has stunning implications for the rule of confidentiality.

In Section II particular attention is devoted to the confidentiality provisions of the recently adopted *Model Rules of Professional Conduct.* n49 The *Model Rules* represent the most radical position yet assumed by the bar on the confidentiality issue, virtually eliminating an attorney's right to disclose client wrongdoing. At the time of this writing many states are considering adoption of the *Model Rules* as the official rules governing attorneys. There is, therefore, a rather urgent need to discuss them.

Section III appraises the moral arguments that have been advanced for strict confidentiality. n50 The question addressed is whether we should opt for the narrow view of confidentiality represented by the attorney-client privilege, which would permit relatively wide disclosure of client misconduct, or the expansive view represented by the *Model Rules*, which would prohibit it. I will argue that the burden of demonstrating that the expansive view should be accepted is on its advocates, and that they cannot sustain the burden.

Section IV proposes a rule that mandates the disclosure of client misconduct n51 in a range of situations in which serious harm could otherwise occur. The imposition of such a duty must, however, be accompanied by a guarantee of absolute protection for the client against use in a criminal prosecution of anything revealed by the attorney, if the attorney learned about it in a privileged communication. The Article concludes with a brief commentary on the effect such a rule would have on the adversary system.

[*1101] I. EXHUMING BURIED BODIES IN SEARCH OF A THEORY OF DISCLOSURE

In this Section I shall present a hypothetical designed to sharpen the

focus of the confidentiality-disclosure debate which is to follow. The hypothetical was inspired by *People v. Belge*, n52 the so-called "Buried Bodies" case, which has become a standard in discussions of the issue.

In September of 1973 attorney Francis Belge found the body of a young woman. She had been murdered, dismembered, and placed in a makeshift grave. n53 Belge knew who the woman was and that she had been the object of an intensive search by the police. n54 For six months he kept secret what he had found, n55 even spurning the desperate pleas of the victim's father for help in locating her. n56

When Belge ultimately disclosed the women's whereabouts he was widely condemned by the community for his silence. n57 The uproar resulted in his indictment for violating a public health law, which required the reporting of deaths known to have occurred with no medical personnel in attendance. n58 His public and legal defenses were the same: it was his duty to engage in this peculiar behavior because his client, while awaiting trial on another murder charge, had admitted responsibility for the murders. n59 Belge argued that revealing the confidential information would have violated not only his ethical duty as an attorney to preserve his client's confidences, but his client's constitutional rights to be represented by counsel and to be free from self-incrimination. n60

It is not clear whether the general public was persuaded by this explanation, but it appears that the legal profession was. The New York courts dismissed the criminal charges, n61 and the New York State Bar Association absolved Belge of charges of ethical misconduct. n62 Calling the criminal charges "trivial," the courts decided that safeguarding the client's privilege against self-incrimination was paramount to any duty to disclose. n63 Affirming the primacy of the attorney's ethical obligation to preserve confidences, the bar association reached the same conclusion. n64

[*1102] The literature on confidentiality and commentaries on the adversary system have treated the *Belge* case as paradigmatic. n65 It is somewhat difficult, however, to understand why. *Belge* was gory enough, but the confidentiality issue was not very difficult to resolve. Once one accepts Belge's premise that revealing the whereabouts of the body could incriminate his client -- not necessarily the case but at least possible n66 -- there is little to say in favor of disclosure. n67 Keeping the client's secret might have resulted in his escape from punishment, and that is indeed significant. But it is a consequence we must tolerate unless we are willing to abandon altogether present concepts of representational justice. Keeping the confidence also might have lengthened the time the young woman's loved ones experienced anxiety over her fate, but the prospect of that harm, because of its speculative nature, raises at best a weak case for disclosure. Finally, preserving the confidence might (and did) subject the attorney to personal harm: Belge was publicly vilified and criminally prosecuted. Even these consequences, however, seem rather petty in this case. Enduring personal attacks for performing the professional role seems a necessary, and rather small, price to pay for the perquisites that members of the profession enjoy. Moreover, the contempt with which the criminal charge was ultimately treated by the courts was surely predictable. It seems improbable that Belge even considered that he might incur criminal liability. He was probably only slightly more surprised by the allegation that he violated the decent burial law than was the district attorney who discovered this obscure but handy means by which to extricate himself from a political difficulty.

The use of *Belge* to advance the case for the principle of inviolable confidentiality is therefore unpersuasive. n68 It does, however, bring the proper issue into focus: how well the confidentiality principle fares as a moral proposition if the consequences of continued secrecy had been far more calamitous than shoddy treatment of the dead, and relatively minor inconvenience for the lawyer.

[*1103] Another "buried body" case might provide a better clue. n69 This case also arose in the 1960's, and involved the kidnapping of Barbara Jean Mackle, daughter of a Georgia real estate tycoon. n70 Gary Steven Krist abducted her from a motel room in Atlanta and ordered her to enter a coffin-like box equipped with an apparatus to permit breathing, and a limited supply of food and water. n71 He then buried her alive. n72 Krist sent a ransom note to her father, who placed five hundred thousand dollars in a suitcase and left it as instructed. n73 When Krist went to pick up the suitcase he was spotted by two police officers, but in the ensuing chase he escaped, although he dropped the money. n74 Shortly thereafter, Krist obtained the money and revealed the still-living woman's whereabouts. n75

If slightly altered, this case tests the proper limits of confidentiality better than *Belge*. Suppose that when Krist first attempted to take the suitcase he had been caught by the pursuing police officers. Suppose also that he had acted alone and that no one witnessed the crime. Had these been the facts, then these events might have followed: After booking Krist, the police interrogate him. Advised of his rights, Krist demands to speak to an attorney. The attorney seeks to elicit the facts of the case, after assuring Krist that the attorney's legal and ethical obligations required him to preserve the client's confidences. Convinced, Krist admits to the kidnapping. In response to the attorney's questions concerning the victim's whereabouts, Krist, after being reassured about the inviolability of the relationship, makes the disclosure.

The plot thickens a bit at this point. Krist asks the attorney what the likely result of the case will be. The attorney replies that Krist could at most be convicted of possession of stolen property -- the ransom money -- but even that is doubtful. n76 If, however, the kidnap victim could identify him, he probably would be convicted of kidnapping, and might face life **[*1104]** in prison or even death. n77 The attorney then advises Krist that the morally right thing for Krist to do would be to inform the police of the woman's whereabouts. The lawyer also tells Krist that he would be guilty of murder if she died. n78 Krist then thanks the attorney for his advice, reminds him of his pledge of confidentiality, and says that he will not be needing his services any longer.

The attorney's dilemma is nearly perfect. If the attorney does not disclose the client's confidence, the victim will almost certainly die and the client will almost certainly go free. If the attorney discloses the confidence, the victim will live and the client will be convicted n79 and, possibly, suffer the death penalty. To add a perhaps unnecessarily aggravating factor, the attorney might reasonably wonder about his own liability, not for **[*1105]** depriving one of a decent burial, but as an accomplice in precipitating the need for one. n80

The scenario presented in the Krist hypothetical is more than an academic fancy. Within today's legal community, many lawyers favor strict confidentiality rules even in the most desperate situations. n81 Indeed, some champions of confidentiality would require the lawyer to remain silent even if that meant that the woman buried alive would die. n82 Others would permit disclosure only in this situation -- where persons face imminent danger of death as a result of criminal acts. n83 They would not permit disclosure when the stakes are "merely" possible death to the victim not caused by criminal conduct, n84 or life-threatening situations that are not **[*1106]** "imminent," n85 or if the calamity "simply" involves devastating financial loss to the client's victims, n86 or corruption of the judicial process. n87 The kind of society suggested by this position is not one that most people, including some of us lawyers, are likely to find very habitable. Moreover, it is neither legally necessary nor morally appropriate for us to inhabit it.

II. CONFIDENTIALITY: THE LEGAL DIMENSION

A. Sources of the Law of Confidentiality

The law of confidentiality stems from two distinct sources: the attorney-client privilege, which is a component of the law of evidence, and the confidentiality provisions of the ethical rules governing the profession. Because both sources impose binding obligations on lawyers, an examination of both is critical to an understanding of the law of confidentiality. The importance of this fact cannot be overstated, because in important respects the obligations are inconsistent. It might be useful to begin the discussion with an explanation of how this peculiar situation came about.

The law of confidentiality had its origins in the attorney-client privilege, which emerged in its modern form in sixteenth-century England. n88 The privilege, which has always been a part of American law, is evidentiary -- it excludes attorney testimony about matters communicated in confidence by or to the client. n89 Strictly speaking, the privilege is not relevant to the attorney's out-of-court treatment of client confidences. But it always has been understood that if attorneys were free to divulge confidences out of court that were protected by the privilege in court, the privilege would be of limited value, if not useless. n90 Thus, what the attorney cannot reveal **[*1107]** in court cannot be revealed out of court, either, on pain of civil sanctions. n91 Historically, then, all that attorneys needed to know to govern their behavior was which communications were protected by the privilege and which were not. Over the past 150 years a rather complex body of law has developed with respect to the privilege, n92 but that in itself did not create an overwhelming problem. Lawyers are quite accustomed to working with complex bodies of law. What they cannot be expected to become accustomed to is two contradictory bodies of law covering the same subject matter. This, however, is what has occurred during the last several decades as a result of engrafting ethical rules onto the law of confidentiality.

The process of articulating ethical rules began innocently enough as an effort by the bar to provide guidance on a range of matters relating to the practice of law. n93 Many of these matters were not otherwise addressed by the law, n94 and thus ethical rules concerning them, even if adopted as state law, created no conflict. But the law of evidence already regulated confidentiality. If conflicts were to be avoided, the ethical rules would have had to provide that an attorney who violated the attorney-client privilege would be behaving unprofessionally, and nothing more. The rule would have been precisely the same as the rule declaring violations of the penal law to be unprofessional, but leaving the legislature to define crimes. n95

The first nationally codified ethical rule of confidentiality appeared to do just that. The American Bar Association's *Canons of Ethics*, as orginally adopted in 1908, made only passing reference to confidentiality. n96 When amended in 1928, the *Canons* dealt directly with the subject, but simply required the attorney to preserve the client's confidences, without defining **[*1108]** the term. n97 The superseding *Code of Professional Responsibility* in 1969, however, clearly extended protection to communications which

went far beyond the attorney-client privilege -- a privilege that rather grudgingly accepted the need to protect certain types of private communications between attorneys and clients. n98 The *Code* also ordered attorneys not to reveal "secrets" of the client, and a "secret" was defined as just about anything having to do with the client. n99 The message from the organized bar was clear: confidentiality, viewed historically as an obstacle, albeit a necessary one, to the disclosure of pertinent information, was now to be treated as a good of the highest order. The *Code*'s thrust was that disclosure was the evil, and rarely if ever necessary. It is true that the *Code* gives discretion to disclose n100 in certain situations, but it is also true that the wisest course under the *Code* is to remain silent. n101 Thus, the bar's action was in effect the same as if it had not only condemned as unprofessional the violation of the penal law, but had created its own definitions of the crimes as well.

If the states had adopted the *Code*'s confidentiality provisions without qualification, near total conflict between the ethical rules and the attorney-client privilege would have occurred. This danger was too plain not to be recognized at the time the ethical rules were considered. Obviously something had to be done. The most reasonable solution would have been to adopt either the bar's expansive notion of confidentiality, or the more restrictive common law approach. Instead, the ethics codifiers proposed, and the legislatures and courts accepted, a simple division of territory: an attorney must observe the ethical rules concerning confidentiality unless some other law requires a different course of action. n102 In practice, therefore, virtually all information concerning the client is considered confidential until a formal demand (one made in or enforced by a court) for disclosure **[*1109]** is made. At that point the much narrower evidentiary rule, the attorney-client privilege, becomes operative.

It is difficult to discern a valid reason for the adoption of two divergent rules of confidentiality. One possible explanation is that the ethical rules were consciously made broader than the privilege because it was believed desirable to limit the attorney's power to make unilateral disclosure decisions. Had this been the objective, however, the ethical rules simply could have precluded disclosure until judicial authorization was obtained. Such a rule would have protected the client against an erroneous decision by the attorney. n103 Instead a wholly separate standard was adopted, and the result is that the scope of protection accorded to information derived from or pertaining to a client is a function of whether a demand is made for the information. n104

Before examining the attorney-client privilege and the rules of confidentiality in detail, it may be useful to examine the consequences of their inconsistency in the context of an actual case. A classic example is found in a recent bankruptcy case in which an employee of a computer leasing company, O.P.M. Leasing Services, discovered evidence that the principals of the company had defrauded banks in order to keep their business afloat. n105 Fearing personal liability, the employee considered two approaches: reporting his suspicions to the United States Attorney, or reporting them to the company's law firm, n106 which, apparently ignorant of the frauds, n107 had performed the legal work on virtually all of the fraudulent transactions. n108 The employee chose the latter course, and eventually the **[*1110]** law firm confronted the principals of the company, who admitted the frauds. n109 The law firm, faced with the question of what action, if any, it should take, retained two attorneys to provide it with expert advice about the firm's ethical obligations. n110 The firm was told by the experts that it had neither the duty nor even the right to disclose the frauds, because the information was received from the client and was therefore confidential. n111 The firm was advised further that the ethical rules' exceptions to confidentiality were inapplicable. n112 The first exception permits disclosure of the client's "intention . . . to commit a crime." n113 This was deemed irrelevant because all of the frauds were thought to be in the past, and therefore beyond the "intention" stage. n114 The second exception mandates disclosure of frauds on third parties if the client refuses to rectify the frauds. n115 This was deemed irrelevant n116 because the provision excepted "privileged" statements, which the American Bar Association had interpreted to include all "secrets" of the client. n117

Some time after the initial confrontation with the principals the firm discovered that the fraudulent operations had continued, despite contrary assurances. n118 When the new frauds were discovered, however, new assurances were given to the law firm that the frauds had stopped. The firm decided once more that the past crime rule applied, and that it could not disclose the information. n119 The firm did, however, resign. Then O.P.M. obtained other counsel, who attempted to discover the reasons for the first firm's resignation. n120 The first firm said nothing about the frauds, again believing that the information could not be disclosed because it was privileged. The unsuspecting replacement firm then proceeded to perform the legal work on another series of fraudulent transactions. n121 Ultimately the scheme collapsed when counsel for the victimized banks, unencumbered by conflicting ethical obligations, blew the whistle. n122

While an argument for disclosure by the law firm might have been **[*1111]** made, the ethical advice the law firm received to remain silent was

not clearly wrong. n123 But if the O.P.M. officer who first alerted the law firm to the wrongdoing had instead reported the matter to the United States Attorney, the law firm just as clearly would have been obliged to disclose the frauds. A likely scenario would have been this: the prosecutor would have convened a grand jury to investigate the case. The O.P.M. attorneys would have been among those the grand jury might have subpoenaed because they were involved in all phases of the company's activities. Asked about the frauds, they probably would have asserted the attorney-client privilege. Had they done so they would have been told by the court that the communications with O.P.M. principals were not within the privilege, because the relationship between O.P.M. and the firm was based on fraud. Taking the traditionally narrow, common-law view of the evidentiary rule, the court would have applied the exception to confidentiality for communications in furtherance of a crime, because the *communication* preceded, or was contemporaneous with the crime; it was thus irrelevant that the crime had occurred at the time of the demand for disclosure. n124

The fortuitous choice of the O.P.M. employee, therefore, controlled which of two inconsistent laws governed the situation, and postponed the disclosure by several months. That choice of forum resulted in the potential loss of tens of millions of dollars in fraudulent loans obtained by O.P.M. from the lending institutions. n125

One other peculiarity of the law of confidentiality might be noted in the context of the *O.P.M.* case. I refer here not to an inconsistency between the privilege and the ethical rules, but to an exception to confidentiality which, in the context of cases such as this, may very well make the rule meaningless. This is the self-defense exception which exists under both doctrines. n126 Pursuant to this exception, the law firm members could **[*1112]** have revealed the frauds in order to exculpate themselves from actual or potential civil or criminal liability. There was a real enough chance that such liability would attach because the law firm was inextricably involved in all of the fraudulent transactions. There was, in the argot of the criminal law, ample *actus reus* to support an inference of *mens rea* sufficient to obtain an indictment (let alone to justify a civil complaint) and quite probably a conviction, unless a jury were persuaded that the lawyers did not know of the frauds. That would be likely only if the lawyers were permitted to put the full blame on their clients, and to explain that they took the appropriate steps to disassociate themselves from the client when they learned the awful truth. Thus, even if the experts' ethical advice were correct, and even if a court upheld the claim of privilege, the attorneys would have a right to reveal information in order to protect themselves.

It is difficult to envision a system which would not grant lawyers such a right. It is also difficult to understand, however, why *lawyers* should be protected against client misconduct and others should not be. And if that is so, it becomes equally difficult to take the argument for strict confidentiality seriously.

I shall now turn to a more complete exposition of the issues just raised. I will begin with the attorney-client privilege because the ethical rules cannot be understood without reference to it. I shall then discuss the present ethical rules as well as their proposed replacements. We will see that, if the latter are adopted, the law of confidentiality will reach a new level of schizophrenia because the gap between the ethical rules and the privilege will be even greater than at present. The concluding sections of the Article will explain why less confidentiality is the preferred prescription for the health of the profession.

B. The Attorney-Client Privilege

1. The Scope of the Privilege: The Good Faith-Bad Faith Dichotomy

An attorney who comes into possession of information concerning client misconduct might initially perceive an obligation to conceal it. The tradition of loyalty to the client is a long one, and is felt deeply by many. As McCormick put it, in speculating on the feasibility of abolition of the attorney-client privilege:

Our adversary system of litigation casts the lawyer in the role of fighter for the party whom he represents. A strong sentiment of loyalty attaches to the relationship, and this sentiment would be outraged by an attempt to change our customs so as to make the lawyer amenable to routine examination upon the client's confidential disclosures regarding professional business. n127

[*1113] As strong as the tradition of loyalty may be, however, it is not without limits. The law of confidentiality may create a presumption against disclosure of private communications between attorney and client, but it is not an irrebutable one. This section discusses the extent to which it can be rebutted when the client has engaged in wrongful conduct.

The attorney-client privilege is an exception to the testimonial rule, which requires a person with information relevant to a matter that is the subject of a judicial proceeding to produce it in response to a demand. n128 The Supreme Court has stated that the reason for the exception is

to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy . . . depends upon the lawyer's being fully informed by

the client . . . . "The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." n129

Defining an attorney's "professional mission" and what is needed to carry it out are central issues in determining whether the attorney can be required or permitted to reveal information that will prevent the client from performing unlawful acts or will prevent acts already completed from harming others. The wording of the privilege helps define "professional mission" as the Court uses the term. The authoritative statement is Wigmore's:

(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived. n130

For our purposes, the most significant elements of the privilege are those that limit it to client communications the *purpose* of which is to seek *legal* advice. Statements made for other reasons and communications designed to obtain the attorney's assistance in activities the client knows to be illegal are not privileged. n131 The latter limitation -- essentially denying protection to communications made in bad faith -- is made doubly clear by cases that have considered the so-called "crime or fraud" exception to the privilege. n132 Because of the importance of this doctrine to our inquiry, **[*1114]** and because there appears to be considerable misunderstanding as to its precise meaning, we must examine it a little more closely.

The crime or fraud exception historically has limited the attorney-client privilege. n133 Its rationale was explained by Justice Cardozo in the Supreme Court's decision in *Clark v. United States.* n134 *Clark* involved the prosecution of a juror for obstruction of justice for having lied during the voir dire. n135 The defendant asserted the juror's privilege in an attempt to bar admission into evidence of discussions that occurred during jury deliberations. n136 The Court rejected the claim of privilege:

[W]e think the privilege does not apply where the relation giving birth to it has been fraudulently begun or fraudulently continued. . . . The privilege takes as its postulate a genuine relation, honestly created and honestly maintained. If that condition is not satisfied, if the relation is merely a sham and a pretense, the juror may not invoke a relation dishonestly assumed as a cover and cloak for the concealment of the truth. In saying this we do not mean that a mere charge of wrongdoing will avail without more to put the privilege to flight. There must be a showing of a prima facie case sufficient to satisfy the judge that the light should be let in. n137

Noting the lack of authority on this point in juror privilege cases, the Court found an analogy in the attorney-client privilege: "A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told." n138 The Court indicated, moreover, that this rule was not limited to the situation in which the client and the attorney were accomplices in the fraud: "The attorney may be innocent, and still the guilty client must let the truth come out." n139 It concluded, "[a] privilege surviving until the relation is abused and vanishing when abuse is shown to the satisfaction of the judge has been found to be workable technique for the protection of the confidences of client and attorney." n140

The Court in *Clark* relied upon the leading British case, *Regina v. Cox,* n141 which contains a useful statement of the rationale behind the crime or fraud exception. In *Cox* the defendants sought an attorney's advice as **[*1115]** part of a plan to avoid execution of a judgment. As a result of what they learned from the lawyer, but apparently without his connivance, they backdated a bill of sale of property that could have been taken to satisfy the judgment. The defendants were indicted for conspiracy to defraud the creditor, and the Crown sought the testimony of the attorney. n142 The court rejected the claim of privilege, noting that in such a case

[t]he client must either conspire with his solicitor or deceive him. If his criminal object is avowed, the client does not consult his adviser professionally, because it cannot be the solicitor's business to further any criminal object. If the client does not avow his object he reposes no confidence, for the state of facts, which is the foundation of the supposed confidence does not exist. The solicitor's advice is obtained by a fraud. n143

Clark and *Cox,* thus, make it clear that whether a communication falls within the crime or fraud exception is a function of the client's intent. While problems may arise in determining intent in a particular situation, n144 *Clark* and *Cox* and subsequent cases show that the relevant inquiry is whether the client knowingly seeks the lawyer's aid either in committing n145 or in unlawfully concealing involvement in a crime or fraud. n146 Communications designed to accomplish those ends are not privileged.

[*1116] Despite the explicit language of *Clark* and *Cox* with respect to the singular importance of the client's intent, that issue has frequently been dealt with incorrectly, largely as a result of a misunderstanding of the temporal element of the crime or fraud exception. Because the rule excludes from protection communications "in furtherance" of crimes or torts, it is sometimes thought not to apply if the unlawful act has already taken place. n147 Similarly, some have suggested that *any* communication about a prospective

crime or fraud is within the exception. n148 This focus on the wrongful event in turn has led to strained attempts to categorize specific crimes or frauds as past or future ones, as well as to the hopeless task **[*1117]** of categorizing ongoing crimes or frauds. n149

The whole inquiry is unnecessary. The application of the crime or fraud exception is not a function of *when* the misconduct took place, or that it related to a future crime or fraud, but rather *why* the conversation occurred. The notion that the exception applies to consultations in which aid is sought in furtherance of a "future" crime or fraud is simply a way, albeit an unfortunate one, of making the point that a client may as a general proposition safely admit past criminal or fraudulent acts in order to obtain representation. n150 In other words, a person charged with a crime can admit guilt to the attorney in the course of defense preparation without fear that the attorney will be able to reveal the information. The temporal criterion means little more than this. It may give us general direction, but it will not necessarily resolve specific cases. The statement "I robbed the bank" is more likely to be privileged than the statement "my coconspirators are now robbing the bank," and much more likely to be privileged than the statement "I am going to rob the bank tomorrow." However, without knowing the client's purpose in making the statements, one cannot say with assurance whether any of the three statements are privileged. n151

The crime or fraud exception, then, is designed to deny the protection of the privilege to a client who consciously employs an attorney for the purpose of attaining an illicit goal, or who uses a properly employed attorney to attain a legitimate end by illicit means. Communications for those purposes are not privileged, and can be disclosed whether the objective sought by the client has been reached, is being reached, or is yet to be reached. The exception applies, moreover, whether or not the attorney knew of the client's intent. The type of service the lawyer is asked to render is also irrelevant.

The rationale behind the crime or fraud exception is that the purposes of the attorney-client privilege are plainly not at stake. The lawyer's task is to assist clients in pursuing legally acceptable goals, or in defending their legal rights by legal means. When the attorney is used to pursue goals that the client knows are illegal, invocation of the crime or fraud **[*1118]** exception is simply another way of saying that no attorney-client relationship has been formed. Similarly, when the client attempts to use the properly retained attorney to reach legitimate goals by illegal means, the communication is ultra vires the term of employment, and the crime or fraud exception permits disclosure.

In contrast to communications falling within the crime or fraud exception are those made in good faith, that is, in order to obtain legal advice. It is with respect to these communications, which can relate as much to client misconduct as can bad faith communications, that the difficult disclosure questions arise. Let me illustrate the good faith-bad faith distinction through two of the cases that I discussed earlier. Consider first the *O.P.M.* case, in which an O.P.M. principal admitted the massive frauds to the O.P.M. lawyers. n152 If the attorney-client privilege, rather than the ethical rules, had been invoked, the communications clearly would not have been protected n153 because the law firm had been used to perpetrate the frauds throughout the period in which it had represented O.P.M. n154 The law firm was a critical participant in the "client's" criminal scheme, but could no more be considered to be in an attorney-client relationship with O.P.M. with respect to the illicit activities than could a person who happened to have a law degree be considered counsel to a bank robber who hired him to be a lookout for a robbery. Whether the frauds had already occurred, were continuing, or had not occurred is irrelevant. The communications between the O.P.M. principals and their lawyers would be unprivileged, not because they dealt with crimes not yet committed, but because they involved unlawful exploitation of the attorney-client relationship. Procuring the services of the law firm as part of a scheme to defraud was precisely the practice condemned in *Regina v. Cox.* n155

Contrasting *O.P.M.* with the *Krist* hypothetical clarifies the nature of the crime or fraud exception and the real disclosure problem. Krist's admission of guilt was plainly in good faith, that is, for the purpose of obtaining legal advice. Not allowing the privilege, because the kidnapping was "continuing" at the time of the communication or because the "future" crime of murder would be committed if the woman were not freed, would render the privilege meaningless in a vast number of cases. In contrast to the *O.P.M.* case, all that the defendant sought from the attorney was that to which he was entitled under the law -- an assessment of the state's case against him. He did not attempt to use the attorney **[*1119]** to further his plan; he did not ask the attorney to attempt to vindicate him by illicit means. Hence the communications were privileged. If that characterization means that the lawyer is prohibited from revealing the communications under any circumstances, then the victim will perish should the attorney obey the law.

Given the moral repugnance of that conclusion, we must ask whether the law could be changed to permit disclosure. One quick solution might be to create an exception to the privilege for drastic situations such as that presented in the *Krist* hypothetical. California, for example, has adopted such an exception to the doctor-patient privilege. n156 The difficulty with this

solution is that the analogy between the medical and legal privileges is false, because each privilege protects different interests. While public policy generally favors protection of doctor-patient communications, no constitutional basis exists for the protection. Lawyer-client communications stand on a different footing. Recall the justification offered by Belge for his refusal to reveal the whereabouts of his client's victim. n157 To do so, he said, would undermine his client's constitutional right to counsel and constitutional privilege against self-incrimination. Were this true in *Belge,* it would be true in *Krist.* The *Krist* attorney's revelation of the victim's whereabouts would not tend simply to incriminate Krist, it would make his attorney the agency through which his guilt would be established beyond a reasonable doubt of a crime with which he otherwise might not even be charged. In other words, it may not be constitutionally possible to create any exception to the attorney-client privilege which would require or permit disclosure of good faith communications. To determine if this is so, we must examine the constitutional foundations of the attorney-client privilege.

2. The Privilege and Fundamental Law: Constitutional Limitations on the Disclosure of Good Faith Communications

Two constitutional principles must be considered in determining the extent to which good faith communications concerning client misconduct must be protected by the attorney-client privilege -- the fifth amendment privilege against self-incrimination n158 and the right to access of counsel. n159

[*1120] *a. Disclosure and the Privilege Against Self-Incrimination*

The more important of the two principles for our purposes is the privilege against self-incrimination. The relevant fifth amendment doctrine can be summarized as follows: The privilege against self-incrimination prevents the use, in a criminal prosecution, of a defendant's testimony elicited by compulsion. Testimony includes both actual speech and implied speech. Implied speech accompanies certain physical acts that the defendant may be compelled to perform, that is, acts which involve an implicit attestation that the thing demanded exists, that it is possessed by the defendant, and that it is what it purports to be. n160 A person who is subpoenaed to appear before a tribunal, to give testimony or to produce some tangible thing, presents the quintessential case of compelled testimony. n161 The fact, however, that such testimony is compelled does not mean that it cannot be obtained. The constitution only prohibits using the information in a criminal prosecution. Hence, an assertion of the fifth amendment privilege by a witness can be overcome by a promise that the information will not be used against the witness in a criminal prosecution. n162 To be coextensive with the constitutional guarantee, the **[*1121]** grant of immunity must prohibit both direct and derivative use of the compelled testimony. n163 If the prosecution can prove a case against the defendant without using the immunized information, it is free to do so. n164 Likewise, the prosecution can even introduce evidence identical to that which is obtained from the defendant, if it can establish that it also obtained it from a source independent of the defendant. n165

The question we are addressing here is not how these fifth amendment principles apply to the situation in which an attempt is made to compel information from a potential defendant, but how these principles apply to attempts to compel attorneys to produce incriminating testimony about their clients. It is apparent that this question involves the interface between the fifth amendment and the attorney-client privilege. This is a subject on which the Supreme Court, in *Fisher v. United States,* n166 has recently shed light.

Fisher involved an IRS subpoena ordering an attorney to produce his client's tax records. n167 The issue was whether the attorney could avoid production by asserting his client's fifth amendment rights. n168 In ordering compliance, the Court held that the fifth amendment privilege was irrelevant because the information in question was not protected by the fifth amendment. n169 Even if it were protected, the attorney could not assert it because the privilege against self-incrimination is personal. n170 If the attorney had any standing to object to the subpoena, the Court concluded, **[*1122]** it was based on the attorney-client privilege. n171 The Court took the traditionally limited view of the scope of the privilege: because the privilege has the effect of withholding relevant information from the trier of fact, n172 it protects "only . . . those disclosures -- necessary to obtain legal advice -- which might not have been made absent the privilege." n173

The Court defined disclosures which "might not have been made" as those against which the client could invoke the fifth amendment privilege:

As a practical matter, if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice. n174

Thus, *Fisher* describes this rule: If the client reveals to the attorney information that the client could not have been forced to reveal, and the purpose of the disclosure was to obtain "informed legal advice," the attorney-client privilege protects against compulsory disclosure of that information by the

attorney. n175

It is important to stress the two-pronged nature of this rule. In order for the communication to be protected not only must it involve a matter that could not have been compelled from the client, but it must be made to an attorney consulted for the purpose of providing professional services, as that term is defined in both the general rule of the privilege, and the crime or fraud exception. If the attorney is not being so consulted, the communication is in effect simply one to an ordinary second party, and is not confidential. At the same time, since the communication was not compelled, it is not protected by the fifth amendment. As interpreted by the Court, therefore, the fifth amendment protects only what we have denoted "good faith" communications to the lawyer, namely those made for the purpose of obtaining legal advice.

Although the *Fisher* analysis has not been expressly applied to the kind of good faith communications with which we are concerned -- those which relate to continuing or future crimes, or past crimes with continuing consequences -- there is a line of cases addressing a similar problem. These cases deal with the question of a lawyer's duty to disclose tangible **[*1123]** evidence of a client's criminality which comes into the lawyer's possession. n176

Disclosure of tangible evidence has been given a good deal of special attention. n177 But like certain other confidentiality issues, it has been treated as if it were a discrete problem, rather than a variation of the general problem of confidentiality. The reason for this is probably that many courts have tended to focus on the need for a rule which permits the lawyer to avoid liability for possession of the property, rather than focusing on the consequences to the client. Because the criminal law prohibits anyone from possessing the fruits of a crime, or from concealing evidence of a crime, cases in which a client has given such material to the lawyer have held simply that the attorney-client privilege did not require the attorney to commit a crime. n178 Many of these cases pay no attention to the competing proposition that the right of an attorney to avoid committing a crime does not mean that a client can be deprived of his privilege against self-incrimination. If the client's transmittal of the property was part of a good faith "communication," the property, which could not have been obtained from the client through any means requiring his actual or implicit testimony, would be obtained from the lawyer in contravention of *Fisher.* n179

Several courts have recognized the problem, and have pointed to a solution that provides a satisfactory answer to the general self-incrimination question. For example, in *State ex rel. Sowers v. Olwell,* n180 the Washington Supreme Court considered a subpoena duces tecum issued to an attorney, ordering him to turn over a weapon received from a client during a conference about the case. n181 The court directly confronted the dilemma. It found that enforcing the subpoena would be "tantamount to requiring the attorney to testify against the client without the latter's consent," n182 which would violate the attorney-client privilege. On the other hand, the court recognized that the "public interest in criminal investigation" required that the evidence be turned over to the state. n183 However, the court recognized the defendant's fifth amendment rights protected by the privilege, concluding that the prosecutor "should take extreme precautions to make certain that the source of the evidence is not disclosed." n184

[*1124] The tangible evidence cases balance the need to protect attorney-client communications against law enforcement needs by giving the prosecution access to the evidence, but precluding the use of it in a manner that would indicate its source -- the attorney -- and thus incriminate the defendant. If this resolution is constitutionally valid in the tangible evidence cases, it is valid in all cases involving the disclosure of client misconduct in order to prevent harm. Note also that in the tangible evidence cases the attorneys turned over evidence of clients' *past* crimes, communications that would ordinarily be the least penetrable. A fortiori, disclosure would be permissible in cases in which the crime was either continuing or simply planned. n185

[*1125] The courts did not discuss the constitutional implications of resolving the tangible evidence cases by ordering production but prohibiting use of the testimonial aspects of the evidence, but surely their approach is constitutionally valid. Consistent with the Constitution, a state may compel a person to produce incriminating evidence, tangible or verbal, provided that he is given immunity coextensive with the fifth amendment privilege. n186 This bars the state from using the testimony itself, or any evidence derived from it, in a criminal prosecution against that person. n187 Here, then, is the answer, which has been discussed surprisingly little, n188 to the argument that the fifth amendment privilege against self-incrimination precludes disclosure of communications protected by the attorney-client privilege. **[*1126]** So long as the communications are not used by the state in a criminal prosecution against the client, the fifth amendment does not bar revelation. As in the tangible evidence cases in which the state can obtain property that it may not be able to use to convict the person who possessed it, n189 in the client communication cases the state may obtain from the attorney the client's statements in order to interrupt or prevent the danger, although the state cannot directly or indirectly use those statements to incriminate the client.

n190

[*1127] Although the tangible evidence cases suggest that this constitutionally required "use immunity" already exists as part of the common-law attorney-client privilege, the law is quite obscure. It would seem highly desirable to make the rule explict by the adoption of legislation. A statute immunizing attorney revelations of client misconduct could eliminate doubt as to whether derivative use is barred. n191 It would also resolve the apparent conflict between preservation of the client's privilege against self-incrimination and the attorney's right to reveal the client's confidences in self-defense. Even more important, it would provide clear guidance to attorneys whose concern over the self-incrimination issue has deterred them from disclosing information which would prevent substantial harm.

b. Disclosure and the Right of Access to Counsel

The other relevant constitutional right is that of access to counsel, which encompasses both the sixth amendment right to counsel in criminal cases and the fourteenth amendment due process right to counsel in civil cases. The right inures as follows: Everyone has a right to have rights and obligations determined by a court. This is the plain, indeed the literal, meaning of the due process clause. n192 Because of the law's complexity, everyone has a corollary right to have professional assistance in court, at least in the sense that a court cannot refuse to permit one to be represented by counsel. n193 It follows that individuals must have meaningful access to attorneys in order to prepare a case and be advised of their rights. n194

Although the sixth amendment right to effective assistance of counsel is usually cited in arguments to support confidentiality based upon the **[*1128]** right to counsel, n195 I intentionally have cast the argument in broader, due process terms. The issue, of course, is not limited to criminal cases. While courts may be more sensitive to claims of denial of counsel in criminal than in civil cases, n196 the argument that disclosure of confidences by the attorney violates the client's rights is essentially the same in both contexts.

The counsel-based argument against disclosure has two prongs. First, the right to counsel requires that incriminating communications from the client to the attorney be considered privileged, and therefore nondiscloseable. n197 Second, whether privileged or not, permitting or requiring the lawyer to disclose such information renders it impossible for the attorney to provide effective representation, either because it destroys the client's trust in the attorney, or because it puts the attorney in the intolerable position of being a witness against the client. n198

The argument that the right to counsel requires that incriminating communications by the client be considered privileged can be dealt with in short order. The so-called "incrimination rationale" n199 has been rejected **[*1129]** by most courts. n200 The right to counsel may be violated by compelled disclosure of *privileged* information, n201 but only because such information is related to the attorney's professional task of providing legal advice, and not because it may be incriminating. Hence, a mere showing that the attorney was forced to disclose nonprivileged, albeit incriminating, information will not be sufficient to prove a denial of the right to counsel. n202 If the incrimination rationale were the law, the attorney-client privilege, which contains a host of qualifications -- including, of course, the crime or fraud exception -- would be converted into a constitutionally mandated absolute rule. n203

Attempts to link the right to counsel and the privilege therefore fail as a means of expanding the client's protection beyond that accorded by established rules of privilege. However, this does not dispose of the right-to-counsel issue. It is also necessary to deal with the argument that requiring the attorney to disclose destroys the attorney's ability to represent the client. Under this theory it is plain that the disclosure of privileged information would be prohibited; n204 but disclosure of nonprivileged information also would be prohibited because that would equally undermine the attorney-client relationship. n205

One answer to this argument is that it does not necessarily follow that the disclosure of incriminating information by the attorney destroys the attorney-client relationship. n206 But even if disclosure would have that **[*1130]** effect, that does not compel the conclusion that the client can prevent the attorney from making the revelation. The client's right is to effective representation, and not to a particular attorney. n207 Thus, in situations in which society's need for disclosure outweighs its interest in preserving a particular attorney-client relationship, the relationship can be destroyed so long as the client is provided with another attorney or an opportunity to retain another attorney. n208 While that choice cannot be interfered with **[*1132]** arbitrarily, n209 it must yield to a greater public interest. n210

That is all the constitution requires. The sixth amendment is no more a guarantee of an absolute right to a particular attorney than the fifth amendment is a guarantee of an absolute right to silence. As a grant of immunity resolves the fifth amendment problem, disqualification and the appointment of counsel, not burdened by a duty to disclose, resolves the counsel issue.

In sum, it is plain that the attorney-client privilege does have constitutional implications, relating both to self-incrimination and the right to counsel. When a demand is made of an attorney to disclose privileged communications, the defendant's fifth amendment rights may be jeopardized. Such

communications can consist of the client's statements, or of the testimonial aspects of his transmission of tangible evidence. In either case a court should not permit disclosure in the absence of a constitutionally adequate immunity provision. The invocation of such a provision would, however, resolve the self-incrimination problem.

As to the right of access to counsel, again it is possible that a constitutional issue can be raised by requiring the attorney to disclose communications, whether they are privileged or not, because such disclosure would undermine the attorney-client relationship. If the attorney is compelled to disclose, however, the client's sixth amendment rights can be protected by providing the client with another attorney or an opportunity to retain one. n211

[*1133] The Eighth Circuit decision in *Whiteside v. Scurr* n212 will serve as a useful vehicle to illustrate how the constitutional analysis offered in this section of the Article would be applied. The facts of the case, recounted above, n213 can be briefly summarized here: an attorney, confronted by the client's announced intention to commit perjury, threatened to withdraw, inform the court, and testify against the client if he did so.

Let us consider the fifth amendment implications of the question first. Suppose that the client had in fact proceeded to commit perjury, and the lawyer carried out his threat. n214 Would his revelation of client perjury constitute a violation of the client's fifth amendment privilege against self-incrimination? On the facts given here, the answer would clearly be no because the client's fifth amendment right with respect to statements voluntarily communicated to another only survives when a privileged condition exists. Here, the client's communication to an attorney of his intention to commit perjury would not be privileged. It is a classic example of a situation in which the crime or fraud exception would apply. n215 Only if the client consulted the attorney in good faith to obtain legal advice concerning perjurious testimony itself would the attorney-client privilege have to be applied in order to protect the client's fifth amendment rights. n216 In such a case, if revelation were mandated, it would appear that the client **[*1134]** would have to receive immunity against the use of that information in a criminal prosecution. n217

As to the right to access to counsel, what has just been said disposes of the "incrimination rationale," under which it is argued that the sixth amendment is violated if the attorney discloses incriminating information. n218 As I have suggested, such a rule would require a wholesale reworking of the attorney-client privilege, which contains a number of exceptions permitting the disclosure of nonprivileged, incriminating information. n219

The second prong of the right to counsel analysis raises the question whether either the threat of disclosure or the act of disclosure undermines the trust necessary for an effective attorney-client relationship. To answer the question properly, it is necessary to parse it. n220 Let us consider first the actual situation in *Whiteside,* in which the attorney simply threatened disclosure. Under present law, it would seem highly unlikely that such a threat, without more, would constitute ineffective assistance. n221 Even if it did, however, it would be highly inappropriate to conclude that it would be proper for the attorney to remain silent. The client can be adequately protected in such a situation if he is provided a new attorney. n222

Assuming that the attorney makes the disclosure after the client commits the perjury, the question whether the client's right to counsel was infringed upon would depend on the circumstances surrounding the disclosure. Revealing to the trier of fact, directly or indirectly, that the client has committed perjury would probably constitute a denial of the right to counsel because it would make the attorney a de facto witness for the prosecution. If the disclosure were to be made in some other way, the issue would not be as clear. n223 Again, however, the conclusion that the right to counsel would be denied in any of these situations does not in turn compel the conclusion that the attorney should remain silent.

3. Beyond the Privilege: Disclosure of Client Misconduct in Self-Defense

The discussion of disclosure of client misconduct thus far has centered upon an analysis of the defendant's rights under the attorney-client privilege and the Constitution. I have argued that these rights are not fatally undermined by attorney disclosure. n224 There will without doubt be those in the profession who argue for a reading of the constitution that provides broader protection for attorney-client communications. The question we must ask **[*1135]** of them is this: How can such a view be reconciled with the well-established right of the attorney to disclose confidences in self-defense? This exception to the rule of confidentiality seems obviously necessary, but fundamentally inconsistent with the absolutist position. The subject is of increasing importance because of the trend toward focusing public investigations and private litigation on lawyers as participants in transactions with their clients. Increasingly, attorneys are subject to disciplinary and even criminal sanctions in connection with the issuance of securities, providing advice on the sheltering of income, and participation in racketeering activities. n225 Rules of civil liability also are changing in a manner that makes attorneys more vulnerable. n226

I am concerned here with the attorney's options in responding to attacks

by third parties for alleged wrongs committed during the course of representing a particular client, but not with the well-established right to defend against attacks by the client. The latter has traditionally justified attorney disclosure on the grounds that the client's actions constituted an implied waiver. n227 When the attorney is challenged by a party other than the client, a different and far more difficult problem arises. Here the doctrine of implied waiver cannot possibly be invoked to authorize disclosure.

This problem theoretically could arise in a host of situations. It is particularly relevant to those attorneys who engage in ongoing relations with clients and who assist ongoing clients in the conduct of their business affairs. In such situations a natural assumption arises that the attorney is privy to, and participates in, the client's affairs. What is the lawyer to do if a public body -- a regulatory agency or a grand jury -- makes that assumption and sues or indicts the attorney as an accomplice? Suppose the attorney has obtained from the client privileged, confidential, and exculpatory information. Plainly, if the information also exculpates the client the problem is relatively minor, although even then information the client might wish to remain confidential would become public. But the problem **[*1136]** is of major importance if the client is *inculpated* by the disclosure. The question whether an attorney can disclose confidences of a client to defend against a third-party attack, in the context of both the attorney-client privilege and the *Code of Professional Responsibility*, has received little attention from commentators. n228 Moreover, with one possible exception, n229 this issue was not the subject of a single reported judicial opinion until 1975, when the Second Circuit decided *Meyerhofer v. Empire Fire & Marine Insurance Co.* n230

The reasons for this neglect are obscure. The best explanation may be that third-party attacks on lawyers are a modern phenomenon, and hence the issue simply did not arise earlier. n231 The historical difficulties involved in bringing private actions against attorneys by third parties are only now being alleviated. Without privity of contract there was previously no private cause of action, and hence no need for an attorney to defend **[*1137]** on the merits. n232 Additionally, during much of our history public agencies were not engaged in the kind of investigatory work that they are engaged in today. Likewise, the nature of commercial activities (and indeed criminal ones) has changed dramatically, and with it the nature of the practice of law: to a degree unknown in the past, attorneys function not simply to prosecute or defend in ripened disputes between parties, but as integral parts of ongoing enterprises. Today, as never before, the attorney can be identified as an associate of the client, and not merely as a detached, post facto legal representative. n233

In view of this history, it is not surprising that the first case dealing with the question of self-defense against a third-party attack arose in the securities field. The involvement of a securities attorney in a client's ongoing affairs is extensive. Indeed, clients cannot function in the securities field without the assistance of highly specialized practitioners, who must in effect carry the client through the maze of regulations and statutes designed to control business practices. n234 In addition, in recent years the Securities and Exchange Commission has taken an aggressive investigatory posture and has, in particular, asserted its right to control the behavior of securities **[*1138]** lawyers. n235 Fraud statutes abound, n236 and have been interpreted in a manner that exposes attorneys to an unaccustomed degree of liability. n237 Finally, the stockholder has emerged as a comparatively new type of adversary, unaffected by privity. This includes stockholders whose specific purpose in buying a share of the corporation is to challenge the manner of its operation. n238

These forces were all in place when Stuart Charles Goldberg was working on behalf of his law firm on a registration statement for Empire Fire & Marine Insurance Company. n239 Goldberg discovered that a finder's fee had been paid to the firm in connection with the stock offering in question, **[*1139]** and he believed that the securities laws required the fee to be reported. n240 When the law firm refused to do so, Goldberg resigned, drafted an affidavit on the matter, and sent it to the SEC. As a result, the SEC contacted Empire, and told the company to correct its statement. After Empire made the correction, a group of shareholders sued for damages, naming Empire, the law firm, and Goldberg as defendants. n241 At that point Goldberg contacted the plaintiffs' attorneys and argued that he should not be joined in the suit because he had advocated disclosure. n242 As proof of that, he gave them a copy of the affidavit he had filed with the SEC. n243 The plaintiffs' attorneys were persuaded, and dropped Goldberg as a defendant. n244 Empire then brought a motion to disqualify the plaintiffs' attorneys, and to enjoin them and Goldberg from revealing confidences to successor counsel. n245 The theory of the motion was that Goldberg had violated Empire's privilege, as enforced by the *Code of Professional Responsibility*. n246 The district court agreed, n247 and an appeal was taken. The court of appeals reversed, stating:

[The *Code*] recognizes that a lawyer may reveal confidences or secrets necessary to defend himself against "an accusation of wrongful conduct." This is exactly what Goldberg had to face when, in their original complaint, plaintiffs named him as a defendant who willfully violated the securities laws.

The charge, of knowing participation in the filing of a false . . . statement, was a serious one. The complaint alleged violation of criminal statutes and civil liability computable at over four million dollars. The cost in money of simply defending such an action might be very substantial. The damage to his professional reputation which might be occasioned by the mere pendency of such a charge was an even greater cause for concern.

Under these circumstances, Goldberg had the right to make an appropriate disclosure with respect to his role in the public offering. n248

[*1140] *Meyerhofer,* then, clearly stands for the proposition that an attorney may disclose privileged information in self-defense. n249 Although the court was interpreting canon 4 of the *Code of Professional Responsibility,* and not the attorney-client privilege, the court could have reached the same result had the litigation arisen in a context in which the attorney-client privilege was relevant. n250

This conclusion is supported by a case decided prior to *Meyerhofer, United States v. Aldridge.* n251 In *Aldridge* several principals and their attorney were indicted for a securities and mail fraud violation. n252 At trial the attorney was acquitted after testifying about his conversations with the other defendants. n253 The principals were convicted and on appeal claimed that their attorney-client privilege had been violated by the attorney's testimony. n254 The court ruled against their claim, reasoning that because the conversations in question were criminal, they were not privileged. n255 The court also seems to have concluded, however, that the claim of privilege was not appropriate because the lawyer's testimony was offered as part of his own defense and not as evidence in the government's case. n256 This appears to be at least a tacit recognition of the self-defense exception to the privilege.

Aldridge and *Meyerhofer,* therefore, treat similarly the right to self-defense. The central difference between them is the timing of the attorney's assertion of the right. In *Meyerhofer* the attorney acted preventively, and avoided involvement in the lawsuit. n257 In *Aldridge* the attorney acted later, but the result in terms of the privilege was the same.

In my view, the attorney must be afforded the right to defend himself **[*1141]** because the alternatives are unacceptable. Although the attorney-client privilege may be important enough to justify suppressing evidence that allows a guilty person to escape civil or criminal liability, it cannot be important enough to justify imposing such liability on an innocent person. To be sure, abuses can be imagined: simply adding the attorney as a target of a civil or criminal complaint conceivably could allow discovery that otherwise would not be available and could disrupt the attorney-client relationship. n258 The answer to that argument, however, is not to prohibit altogether third-party suits against attorneys because doing so would in effect immunize the attorney from liability. Rather, the answer must lie in the establishment of appropriate safeguards against the use of an attorney's statements against a client. n259 Such safeguards would control attempts to use attorneys simply for discovery purposes. n260 They also would have to include protection against the use of the privileged statements in a criminal prosecution against a client in cases in which discovery of the statements from the attorney is appropriate. In the self-defense context, moreover, unlike others in which there is a perceived societal need for disclosure, there would seem to be no choice but to afford the client at least that much protection because the alternative available in other contexts -- the state forgoing the information -- is not available. The information must be disclosed, not because the state desires it, but because the attorney has the right to have it disclosed.

[*1142] I have noted that there are few reported cases raising the self-defense issue. One case which comes close to demonstrating the need for the kind of immunity provision outlined above is *United States v. Rasheed.* n261 In *Rasheed,* an attorney before a grand jury produced documents obtained from and incriminating the defendant. n262 The court held that the attorney did not represent the defendant, and that the communications between them were not privileged. n263 The court added, however, that:

> Even if a privilege did exist, there is substantial doubt whether [the attorney's] testimony was in breach of the privilege. Because [the attorney] was in possession of documents that [the defendant] had failed to produce to the grand jury pursuant to a valid subpoena duces tecum, he was in danger of becoming an accessory to the obstruction of justice . . . . *Cf.* Code of Professional Responsibility, Disciplinary Rule 4-101(C)(4) (attorney may reveal confidences necessary to defend against charge of wrongful conduct). n264

Had the communication been privileged, the disclosure by the attorney in self-defense would have required the court to face the fifth amendment issue -- the client was charged with obstruction of justice for not turning over the documents, and the conversation in question related to the client's obligation to do so. n265 If the prosecution used either the documents or the attorney's testimony, the court would have been forced to address the propriety of a conviction based upon that evidence.

A similar situation arose in the well-known securities case, *In re Carter and Johnson,* n266 in which the Securities and Exchange Commission reversed an administrative judge's finding that the defendants, prominent securities lawyers, had aided and abetted a securities violation by failing to

disclose their client's false reporting. n267 The SEC held that, while the case presented a close issue given the involvement of the attorneys in the affairs of the client, their actions did not amount to aiding and abetting. n268 There was euphoria among some securities lawyers over what was considered the **[*1143]** SEC's vindication of the sanctity of the attorney-client relationship after an unconscionable assault on it by the administrative judge. n269 It would appear, however, that more solace was to be found in the SEC's holding than in the SEC's justification for the decision. Carter and Johnson were exculpated because they disclosed that they had told the company president (who was also its treasurer, board chairman, and principal stockholder) to tell the truth. Far from affirming the privilege, then, the SEC simply acknowledged the self-defense exception to it. n270

In *Carter* the person informed on was apparently not prosecuted criminally, and so once again we do not have a case that squarely presents the self-incrimination/self-defense issue. But it is easy to imagine more cases like *Rasheed* and *Carter.* As I shall explain, it is unclear whether current law provides any solution: a client probably cannot be vicariously immunized from the incriminating effect of his attorney's disclosures. n271 If that is the case, and if there is an increase in attempts to link attorneys to the unlawful activities of their clients, a collision of values is inevitable. n272

4. Summary: Dislosure of Misconduct and the Attorney-Client Privilege

The attorney-client privilege is designed to prevent compelled disclosure of communications between client and lawyer made for the purpose of obtaining legal advice. These "good faith" communications are **[*1144]** to be contrasted with those made for any other purpose, and in the present context, particularly those the purpose of which is to obtain the attorney's aid in committing an unlawful act, or in gaining a lawful end by unlawful means. These "bad faith" communications are generally defined as falling within the "crime or fraud" exception, and are not protected against disclosure.

The protection afforded by the privilege against disclosure of good faith communications is not absolute. Despite the fact that the client's privilege against self-incrimination may be implicated by such a disclosure, it can still be made if the client is immunized against the use of the statement in a criminal prosecution. Similarly, even though disclosure may impact on the client's right of access to counsel, it can be compelled, albeit at the expense of providing the client with new counsel and, if necessary, of relitigating the controversy. Finally, the client's right to confidentiality in his communications may yield to the attorney's right to self-defense, if charged by a third party with complicity in the client's activities. Morally, if not at present legally, it would seem to follow that if under the self-defense exception the attorney, despite the privilege, can extricate himself from harm caused by the client, others should be able to as well.

C. Ethical Rules of Confidentiality

The second source of the law of confidentiality is the ethical rules governing the conduct of lawyers. Since the beginning of this century these rules have been promulgated by the American Bar Association. The ethical rules were first codified in the *Canons of Professional Ethics* in 1908, with substantial additions in 1928. n273 The *Canons* were replaced by the *Code of Professional Responsibility* in 1969. n274 The *Model Rules of Professional Conduct* in turn replaced the *Code* in 1983. n275 Both the *Canons* and the *Code* were generally adopted in full by the states. n276 At the time of this writing four states have adopted the new *Model Rules*, but in the rest the *Code* remains in force. n277

[*1145] Notwithstanding their official status, ethical rules are subservient to other statutory law or judicially established rules of evidence. n278 Therefore, an attorney cannot invoke the ethical rules of confidentiality to resist a court order to disclose communications outside the attorney-client privilege. Conversely, an attorney would not be free to disclose that which the ethical rules permitted to be disclosed, if the attorney-client privilege precluded disclosure.

Despite these restrictions, the ethical rules of confidentiality need not be identical to the evidentiary rules of the attorney-client privilege. The ethical rules cannot diminish the protection afforded by the privilege, because that would deprive the client of his legal rights. But the attorney-client privilege is a rule of evidence which applies only in judicial proceedings. Until that occurs the ethical rules can -- and, as we shall see, do -- expand the privilege's protection, requiring lawyers to keep confidential a broad range of communications that a court could order disclosed if the issue arose before it. Thus, in many instances the law of confidentiality functions according to whether anyone asks a court to order a communication disclosed. Since, moreover, virtually all legal business is conducted outside of the courts, these "subservient" rules in fact influence attorney behavior far more than the "dominant" attorney-client privilege.

This section summarizes briefly the confidentiality rules of the *Canons of Ethics* and the *Code of Professional Responsibility* and then examines the *Model Rules of Professional Conduct.* I shall argue that the present *Code* inadequately treats the issue, and that the *Model Rules* are even more seriously flawed.

1. The Canons of Ethics

The original 1908 *Canons* did not contain a specific confidentiality rule, but one was included among the 1928 amendments. n279 Canon 37 declared that "[i]t is the duty of a lawyer to preserve his client's confidences" and went on to define that duty in terms identical to those used **[*1146]** in defining the attorney-client privilege. n280 Canon 37 contained two exceptions to the confidentiality rule:

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. n281

Both of the canon's exceptions were long-standing features of the attorney-client privilege, n282 although the future crime exception was stated differently from the traditional statement of the crime or fraud exception to the privilege. The likely reason for this was the drafters' desire to distinguish between situations in which an attorney would be *free* to reveal what he potentially could be compelled to disclose and situations in which an attorney would be *obliged* to reveal his client's actions. Canon 37 generally gave the attorney discretion to reveal the client's criminal intentions. In two situations, however, the attorney was directed by other canons to act *as if* a demand had been made to disclose. The first concerned perjury. Canon 29 stated: "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." n283 An attorney also had a duty to disclose when the client had perpetrated a fraud or deception on a court or a party. Canon 41 stated:

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. n284

The confidentiality formulation in the three canons was awkward because, if interpreted literally, the provisions mandating disclosure of **[*1147]** perjury and fraud could have been read to require disclosure not only when the crime or fraud exception would render the communication unprivileged, but also when the communication was in good faith. n285 The rule was clarified in opinions of the ABA Committee on Ethics and Professional Responsibility, which indicated that canon 37 was coextensive with the attorney-client privilege, and that the disclosure provisions of canons 29 and 41 did not permit disclosure of privileged information. n286 Thus, the *Canons'* confidentiality rules were essentially consonant with the law of privilege. This consonance was to be weakened significantly by the *Code of Professional Responsibility*, and all but destroyed by the *Model Rules.*

2. The Code of Professional Responsibility

The 1969 *Code* consolidated and changed the format of the *Canons of Professional Ethics.* n287 With respect to confidentiality, canon 4 replaced the confidentiality provisions of canon 37, while the perjury and fraud provisions of canons 29 and 41 were consolidated into canon 7. Canon **[*1148]** 4 greatly expanded the duty of confidentiality. Dropping the word "confidences" that had been used in canon 37, the provision not only barred disclosure of information protected by the attorney-client privilege, but barred disclosure of the client's "secrets" as well. A secret was defined as "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." n288 This expanded the ethical obligation of confidentiality far beyond the evidentiary rules. In effect it established a presumption that the attorney could not reveal anything of a damaging nature about the client, regardless whether a privileged communication existed, and regardless of the source of the information.

While canon 4 dramatically expanded the scope of confidentiality provided by canon 37, it retained the exceptions of its predecessor. These exceptions excluded from protection "the intention of his client to commit a crime and the information necessary to prevent a crime" n289 and "[c]onfidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct." n290

The discretion given lawyers to reveal their clients' intention to commit a crime is virtually identical with the provision found in canon 37. One suspects that like the *Canons,* the *Code* was intended as nothing more than a restatement of the exception to the attorney-client privilege for statements in furtherance of crime. n291

The *Code*'s self-defense provision also is similar to canon 37. However, the *Code*'s language is broader than that of canon 37, which stated that if a lawyer is accused "by his client" he may defend himself by revealing confidences. n292 Subdivision (C)(4) of disciplinary rule 4-101 contains no such limitation. n293 As to the perjury and fraud exceptions, the original text of the *Code* appeared simply to restate the *Canons,* with its mandatory **[*1149]** duty to disclose frauds on persons or courts. n294 The *Code*'s language in canon 7, however, left unclear whether the disclosure duty extended beyond the crime or fraud exception to require the disclosure of

good faith communications. The *Code* was amended in 1974 to deal with that problem, limiting the duty to that which could be accomplished without violating the privilege. n295 The ABA later even further limited canon 7's disclosure rule by holding that canon 4's expanded notion of confidentiality was intended to qualify the canon 7 duty to report -- an attorney had no duty to disclose frauds on the court or on persons if to do so would reveal even a "secret" of the client. n296 In the few jurisdictions adopting that view, therefore, the disclosure duty effectively was obliterated. n297

This discussion shows how great the gap was that developed between the protection afforded by the privilege and that required by the *Code.* Consider again the *O.P.M.* case, and the ethical advice given to O.P.M.'s attorneys. Because the attorneys first learned of the frauds perpetrated by their clients from a source other than the clients, the information probably was not "confidential" within the meaning of the attorney-client privilege. n298 This would be irrelevant under canon 4; regardless of the source of the information, if it could embarrass the clients, it is a secret and cannot be disclosed. Similarly, the clients' own disclosures of the frauds would be unprotected under the privilege because they fall within the crime or fraud exception, n299 but under the ethical rules would be protected secrets. One court's fear of turning the law office into a "nest of vipers," n300 is realized.

At bottom, the *Code*'s confidentiality rules redefine the professional mission. Consider in this regard the original rationale behind the crime or fraud exception to the privilege: "The reason on which the [privilege] **[*1150]** is said to rest cannot include the case of communications . . . intended to further any criminal purpose, for the protection of such communications cannot possibly be otherwise than injurious to the interests of justice, and to those of the administration of justice." n301 As expressed in the *Code,* the profession's view of the interests of justice was quite different. In that view the protection of communications with a criminal purpose might well serve the interests of justice because disclosure could critically undermine the attorney-client relationship. The limitations long associated with the privilege recognized the value of that relationship along with the value of other competing interests. The *Code* declared that one value -- the attorney-client relationship -- stood above the others.

Still, even under the *Code* there are some limits. The duty to disclose even unprivileged information has been all but eliminated by the ABA's interpretation of the fraud reporting provisions, but many jurisdictions have not adopted that interpretation. Moreover, the attorney retains the discretion to reveal the client's intention to commit a crime. This, for example, could have led the ethical advisors in *O.P.M.* to conclude that the frauds could be revealed had they viewed the ethical rules as embodying the definition of "crime" employed by courts in cases involving the privilege. n302 Finally, the right to disclose in self-defense survived the reformulation.

Most of the existing "loopholes" in the *Code*'s rule of inviolable confidentiality seem to have rankled the organized bar. With the adoption of the *Model Rules* the ABA has come perilously close to asserting that confidentiality is not just an important interest of the justice system, but the only one.

3. The Model Rules of Professional Conduct

The format of the *Model Rules* differs from the *Code*'s. The rules themselves are intended to operate like the former disciplinary rules, but the *Code*'s ethical considerations have been replaced by comments, which are designed to guide attorneys in interpreting the rules. n303 To understand the *Model Rules'* confidentiality provisions requires one to follow a rather serpentine path through the rules and the comments. Like its predecessors, the *Model Rules* has three separate confidentiality and disclosure provisions; rule 1.6 states the general rule; rule 3.3 addresses fraud on tribunals; and rule 4.1 addresses frauds on individuals outside of the litigation context.

[*1151] *a. Rule 1.6*

Rule 1.6, replacing canon 4, states the basic position on confidentiality. It maintains the presumption in favor of confidentiality, but abandons the *Code* terms "confidence" and "secret." Instead, it states that a lawyer "shall not reveal information relating to representation of a client," a phrase plainly including any information, from any source, so long as it is relevant to the representation. n304 The scope of confidentiality under the *Model Rules,* therefore, is at least as broad as under the *Code,* and probably broader. n305

Apart from a limited provision regarding fraud on the tribunal, n306 there are only two exceptions in the *Model Rules* to the requirement of confidentiality: n307

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary: (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client. n308

Compared to the *Code* (let alone the attorney-client privilege) this provision

restricts disclosure to a startling extent. Even the *discretion* to reveal a crime or fraud is eliminated, except in situations so dire that they are likely to occur only in hypothetical form: this is an ethical standard that **[*1152]** accounts for people buried alive by kidnappers. n309 Apart from this situation, the rule in effect states this: No matter what the nature of the client's fraudulent or criminal design, and even if the client's only purpose in employing the attorney was to further that design, the attorney is prohibited from disclosing what the client has done, is doing, or will do, even if disclosure would avert the harm. There is one exception to this rule: disclosure of any of these matters, including good faith communications, is justified to safeguard the interests of the attorney.

The explanation offered for eliminating even the discretionary power to disclose intended criminality is utterly unconvincing. The comment to rule 1.6 states:

[T]o the extent a lawyer is required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. The public is better protected if full and open communication by the client is encouraged than if it is inhibited. n310

Of course it has never been advocated, so far as I know, that lawyers should maintain a hotline to the prosecutor's office in order to report a client's "purposes." Rather, the issue is what the lawyer should do when he knows or "reasonably believes" that the client intends to ignore the attorney's advice and *act* for criminal or fraudulent purposes, or when the attorney discovers that he has been used to commit a crime by a client who is fully aware of the conduct's illegality. It is far from evident that the public is "better protected" by having the attorney stand silently by while the client commits all manner of fraud or "even" non-life-threatening violence. As I shall more fully argue later, if the client knows that his confidences can be divulged if he acts on his illegal intent, he might be deterred from doing so. n311 In any event, it is incumbent on the American Bar Association to explain why society has not been protected adequately **[*1153]** by the provision respecting disclosure of the client's intention to commit crime, which it has endorsed for the past fifty years. n312

While rule 1.6 steps backward regarding disclosure of a client's purposeful unlawful activities, the commentary to the rules contains some potential relief for the lawyer whose faith in the gospel of confidentiality is less than perfect. Thus, in a preliminary section entitled "Scope" one finds this statement:

[F]or purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists . . . . [T]here are some duties, such as that of confidentiality under Rule 1.6, that may attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact. n313

The statement suggests this question: Despite the sweeping language of rule 1.6, may a lawyer disclose a client's intention to commit a crime or fraud because, under "principles of substantive law external to these Rules," among which would be the rules of evidence, the communications are unprivileged and therefore not the communications of a "client"? n314 Such an interpretation is completely inconsistent with the rule, however, because it would open the door to a good deal of disclosure that rule 1.6 appears designed to exclude.

Beyond the improbable exception based on the definition of "client," the comment accompanying rule 1.6 approves back door disclosure through withdrawal of representation. The withdrawal provision seems designed primarily to protect the lawyer rather than to alert others to dangers the lawyer has discovered, but some spillover benefits may ensue. Withdrawal operates as follows: When confronted with a client engaged in criminal or fraudulent acts, the attorney may not continue to provide assistance in the accomplishment of those ends. n315 He must either withdraw or attempt to withdraw. n316 In a comment, the drafters add this: "After withdrawal the lawyer is required to refrain from making disclosure of **[*1154]** the client's confidences . . . . [Nothing in this rule] 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." n317

Thus, while the lawyer cannot give the reasons for withdrawal, he can alert others to the fact of withdrawal and, of particular interest to lawyers engaged in commercial transactions, notify others that his work also is being withdrawn. An earlier draft of the *Model Rules* indicated that a lawyer who is asked the reason for withdrawal should in effect say "ask my client." n318 This apparently was dropped because it came too close to revealing that the withdrawal was due to the client's unlawful activities. Because nothing was substituted for the provision, third parties are now left to their own devices in determining the nature of the client's dereliction. Competent lawyers will recognize the code words and presume that fraud is afoot. One hopes that potential victims who are neither lawyers nor represented by lawyers will also discover the truth. n319

Solicitude for victims suddenly appears in the self-defense provision of rule 1.6, which for the first time expressly permits the lawyer to disclose client confidences to defend against third-party attacks. n320 This disclosure provision, as I already have noted, is appropriate enough once one passes the question of the timing of the disclosure. n321 It would be difficult to envision a different rule. n322 But it is ethically inappropriate for the *Model Rules* to protect attorneys from wrongful actions of the client while protecting no one else -- except, of course, the prospective victims of that commonly encountered client, the homicidal maniac.

b. Rule 3.3

This is perhaps the most mystifying provision of the *Model Rules.* It *mandates* disclosure to a tribunal when "necessary to avoid assisting a **[*1155]** criminal or fraudulent act by the client," n323 or when the lawyer discovers that the evidence he has offered is false. n324 In part the provision restates the mandatory reporting provisions of canons 29 and 41 of the *Canons of Ethics*, and disciplinary rule 7-102(B) of the *Code of Professional Responsibility.* Like the older rules, rule 3.3 is designed to protect against frauds related to litigation. Moreover, the rule reinstates the mandatory language of the old *Canons* and the original *Code*, which the ABA had neutralized by excluding from its coverage frauds learned of through both privileged and secret information. n325

In one sense rule 3.3's scope is much more limited than its predecessors because the duty to report exists only until "the conclusion of the proceeding." n326 If, therefore, the attorney discovers after the verdict that his client has used his services, say, to put on a totally spurious case in which every witness has committed perjury and every document offered was a forgery, he may not disclose that. Again, one can see the extent to which the ABA has departed from the theory underlying the attorney-client privilege: any court would require the attorney to testify to this paradigm of the crime or fraud exception. The drafters' reason for this limitation on the reporting duty is that "[a] practical time limit on the obligation to rectify the presentation of false evidence has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation." n327 The drafters do not explain why this sort of practical time limit must be established. Certainly it is unrelated to the policies embodied in statutes of limitation. Perhaps it was adopted because of the drafters' misconception that the crime or fraud exception would not permit disclosure of past acts, n328 but that rationale is nowhere indicated.

The mandatory reporting provision of rule 3.3 does not expressly deal with disclosure of privileged information. Rule 3.3 requires reporting n329 despite the confidentiality obligation of rule 1.6, but that is not dispositive of the privilege issue. The *Model Rules* do not purport to supervene the evidentiary privilege, nor could they, insofar as the privilege is constitutionally mandated. n330

[*1156] At most, then, the mandatory disclosure provision of rule 3.3 requires the attorney to report frauds on the court that are known prior to the completion of the proceeding and as a result of unprivileged communications. The rule is therefore of limited significance. It is curious nonetheless, because it is defended on grounds fundamentally inconsistent with the arguments in other contexts against disclosure. Thus, the drafters justify the general rule of nondisclosure as necessary to preserve the client's right to counsel and to ensure effective performance of the lawyer's policing function. In the context of frauds on the tribunal, however, the drafters' rationale for disclosure is that, "unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent." n331

[*1157] It would have been one thing had the drafters simply concluded that fraud on a tribunal, like the imminent danger of homicide, was a matter grave enough to justify an exception to confidentiality. n332 It is quite another to justify the exception on the theory that the threat of disclosure is necessary to deter the client. If that is true in the context of fraud on the tribunal, it is difficult to see why it is not true generally.

Why was this proposition not applied to all cases involving the corrupt use of lawyers by incorporating the crime or fraud exception? In the absence of some persuasive distinction, one must view rule 3.3 as a sort of "judicial exception" to the rule of confidentiality. And like its "attorney exception" (self-defense) counterpart, it seems defensible only as a means of serving the interests of the profession.

c. Rule 4.1

The final "disclosure" provision of the *Model Rules* is rule 4.1, "Truthfulness in Statements to Others." It provides that a lawyer shall not fail "to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client," n333 and then virtually self-destructs by excepting from the rule disclosures prohibited by rule 1.6 n334 -- that is, "information relating to the representation of the client." n335 All that is left is the obligation to keep oneself out of jail, and that is the stated purpose of the provision, which "recognizes that substantive law may require a lawyer to disclose certain information to avoid being deemed to have assisted the client's crime or fraud." n336 **[*1158]** One is

reminded of Professor Hazard's speculation that it is rather difficult to justify candor to protect the lawyer's own interests, but not those of anyone else. n337

In conclusion, the *Model Rules'* treatment of disclosure of client wrongdoing regresses from the present *Code*, itself unnecessarily protective of client confidences. The *Model Rules* represent a triumph for those who believe that preserving client confidences is more important than preventing harm by disclosing client misconduct. Apart from a virtually meaningless right to reveal imminent homicidal behavior and a limited obligation to report fraud in a litigation context, the attorney is instructed to conceal any information the disclosure of which might adversely affect the client. Jurisdictions adopting the *Model Rules* will reject the crime exception in canon 4 and the broader antifraud provisions of canon 7, and will exacerbate the present conflict between evidentiary and ethical rules.

Only the right to disclose in self-defense has thrived under the *Model Rules.* Adoption of the *Model Rules* will eliminate any doubt about the application of the self-defense exception to third-party attacks. The drafters are silent on the constitutional implications of disclosing client confidences in the self-defense context. Why attorneys and courts should receive protection against harm from clients, protection denied others, is not explained. Perhaps the ABA could not defend the distinction. Failure to justify these exceptions, however, undermines the ethical moorings of the ABA's stand against disclosure.

The *Model Rules* highlight the need for a unified approach to the problem of disclosing client misconduct, one which conforms constitutional, evidentiary, and ethical rules. Such an approach must choose between the expansive notion of confidentiality reflected in the *Model Rules*, and the limited protection afforded by the attorney-client privilege. In the next section I shall argue that the bar's position cannot be sustained. In the final section I shall propose a unified approach to confidentiality that will better balance the client's basic rights with the need to prevent the client from harming others.

[*1159] *4. Summary: Disclosure of Client Misconduct and the Ethical Rules*

Legislative and judicial endorsement of ethical rules of confidentiality has had a profound effect on the problem of disclosing client misconduct. While the ethical rules cannot contract the protection afforded by the attorney-client privilege, they can, and have, dramatically expanded that protection in all situations in which the privilege is not invoked.

The history of the organized bar's regulation of confidentiality has been one of increasing hostility to disclosure. From an initial point at which there was substantial symmetry between the standards of the attorneyclient privilege and the *Canons of Ethics*, the bar expanded the attorney's obligation of confidentiality, all but eliminating the duty to disclose and leaving disclosure of the client's intention to commit a crime to the attorney's discretion. Moreover, the bar gave no guidance as to when or how such discretion should be exercised. Except in the defense of the lawyer's own interests, the new *Model Rules* go still further and eliminate even the discretion to disclose.

The coexistence of two disparate sets of confidentiality rules has resulted in incoherent and unprincipled standards governing disclosure of client misconduct. In order to rationalize the law, one standard must be adopted. Whether that standard should incorporate the bar's broad view of confidentiality depends on whether it can sustain its defense of confidentiality.

III. THE CASE FOR CONFIDENTIALITY: AN APPRAISAL

Clients who seek professional services undoubtedly expect that what they say in confidence will not be repeated to others without their consent. There is a strong moral case for preserving secrets, n338 a case that is even stronger when the secret is elicited in exchange for help that only the professional can give. In general, therefore, the notion that a lawyer should "preserve the confidences and secrets of a client" n339 is unexceptional. The question is whether the moral balance shifts when the client's wrongful acts threaten harm to others, for then a conflicting moral proposition -- that we should prefer the victim of wrongdoing over the perpetrator -- emerges. The answer given by the advocates of strict confidentiality is that the values served by confidentiality require sacrificing the victim in almost all cases. The principle of confidentiality is thought to be so important that the *Model Rules*, the organized bar's most recent pronouncement about the matter, barely recognize the propriety of subordinating it to the value of human life. The *Model Rules* permit the victim **[*1160]** of Krist's kidnapping to be unearthed, but would deny the right to rescue in virtually every other case. If we are to accept this answer as a moral proposition, its advocates must bear the burden of proving it, since it is hardly self-evident that it leads to correct results. But the burden cannot be sustained.

The defense of strict confidentiality rests on two distinct arguments. The first states that confidentiality is essential to the preservation of individual rights. The second states that confidentiality enables attorneys to prevent their clients from violating the law.

A. The Rights-Based Defense of Confidentiality

The rights-based defense of confidentiality is this: (a) the primary objec-

tive of the legal system is the preservation of individual autonomy, through the protection of an individual's rights against encroachments by other individuals or the state; (b) in a complex society individuals can have meaningful access to the legal system, and therefore to the mechanism by which their rights can be protected, only if they are represented by attorneys who have the skill to guide them through the process; (c) attorneys can perform this function only if they are privy to all the the client's information, because otherwise they would not be able to diagnose properly the legal problem or prescribe a resolution of it; (d) clients will not provide attorneys with all of the facts, including possibly damaging and embarrassing facts, if they believe that the attorney will disclose those facts; (e) therefore, confidentiality is essential to the preservation of individual autonomy. This is the classic defense of the privilege, expressed in the early nineteenth century by Lord Brougham n340 and reiterated today by those who share his almost mystical view of the attorney-client bond. n341

The argument has two difficulties. First, if one accepts its premises, it does not follow that all communications must be protected against disclosure. At best, the preservation of individual rights depends on the protection given to good faith communications. Second, and equally important, even if one accepts the proposition that attorneys need all of the facts in order to represent their clients, n342 the assumption is unwarranted that the client will not divulge these facts unless confidentiality is guaranteed.

[*1161] *1. The Parameters of the Right to Protection of Communication*

At the heart of the rights-based defense of strict confidentiality is the proposition that access to counsel is essential to the preservation of individual autonomy. n343 Individuals obviously need professional assistance to preserve their legal rights, even those "rights" which, if vindicated, will cause disproportionate pain to others relative to the right-holder's gain. n344 The attorney-client privilege is, of course, based precisely upon this view. But the advocates of strict confidentiality have espoused clients' rights far beyond those which the privilege affords. They would protect bad faith as well as good faith communications; and they would prohibit disclosure, rather than simply prohibiting the use of disclosed information.

[*1162] Much can be said in support of protecting communications intended to safeguard legal rights. Nothing can be said, however, for a person's "right" to use an attorney to aid in the pursuit of an unlawful goal. Nor does preservation of individual autonomy require protection of confidences in such situations. Yet the advocates of strict confidentiality have taken precisely this position. This is clear under the *Model Rules,* which all but ignore the crime or fraud exception that has been developed over the centuries as part of the attorney-client privilege. The crime or fraud exception exists because, as the courts have repeatedly said, the ends of justice are not served by protecting the confidences of persons who would enlist the attorney as an accomplice in crime. The absolutists' rejection of the exception compels them to defend the ludicrous proposition that to preserve the individual's access to the legal system, the individual must be protected against disclosure of his attempts to subvert it. n345 The client may have the "power" to subvert the process, but surely has no "right" to do so.

In addition to the unwarranted protection of bad faith communications, the proponents of strict confidentiality would also give the client a right to have protected communications concealed, instead of merely restricting the use of such communications against the client. The ABA relies on the constitutional rights to be free from compulsory self-incrimination and to have access to counsel. But these constitutional provisions have never been interpreted to extend the protections asserted by the ABA. The fifth amendment does not guarantee a right to silence; it assures only that compelled testimony will not be used against a person in a criminal prosecution. n346 Neither the sixth amendment nor the due process clause guarantees the assistance of counsel in committing crimes or frauds; they assure professional help in certain lawful pursuits. n347 The organized bar's reliance on these constitutional provisions, then, is unpersuasive.

I conclude, therefore, that the rights-based defense of confidentiality fails at least in the first instance because it has been extended to include the intentional misuse of the lawyer-client relationship by the client, and that the client cannot rationally be said to have a right to do that. Acceptance of this proposition would resolve many cases in which the attorney was in a position to prevent harm by disclosing client misconduct. It would not, however, resolve them all. The clash between the rule of confidentiality and the need for disclosure may well arise when the client reveals harm-threatening conduct while legitimately seeking legal advice. Such a client obviously has a right to legal representation; under our system **[*1163]** even the kidnapper Krist has a right to know his legal status and to be defended against criminal charges. What must be assessed is the extent to which vindication of that right depends upon assurances that the client's communications will be held in confidence. n348

2. The Need for Confidentiality

The conclusion that confidentiality is essential to adequate representation rests upon the premise that without it clients would not disclose all the facts that the attorney needs to know to perform competently. But that premise

lacks empirical support. Little data exists, and that which does exist is at best inconclusive. n349 We do not even know whether clients believe promises of confidentiality.

Claims of the importance of strict confidentiality, n350 then, are intuitive and ignore competing propositions, equally intuitive, but of equal or greater persuasive force. Consider these intuitions: most clients feel the need for professional legal services to help them with the complexities of our legal system. Therefore, the attorney's mere statement that he needs all of the facts to perform adequately is likely to induce the client to disclose them, for nondisclosure jeopardizes the client's goals. Individual clients can and do make such choices vis-a-vis their attorneys, just as they do with many other professionals (who might either be free or required by law to divulge the information). In many instances, moreover, the client will have no **[*1164]** real choice whether to disclose information to the attorney. This is particularly true in cases involving ongoing commercial transactions in which clients will need legal services if they wish to function at all. In such situations the added inducement of confidentiality is unnecessary to encourage the client's candor.

I suggest that people base decisions to reveal what they would rather keep secret on an assessment of self-interest that extends well beyond the question whether the revelation will be disclosed, and, quite possibly, despite a known risk that it will be. Whether the decision to speak is based on the conclusion that one cannot obtain help otherwise, or because of the urge to cleanse oneself through confession, or on some subconscious desire to seek help, n351 there obviously exist forces that operate regardless of a confidentiality rule.

One can question, then, whether a pledge of confidentiality is needed to assure adequate communication from client to lawyer. It also is highly debatable whether the rule of confidentiality results in fuller disclosure than would occur without it. Lawyers have reported both client reluctance to tell the lawyer all, and client lying. n352 This occurs despite assurances of confidentiality. Many clients, particularly when revealing the kinds of illicit behavior under discussion here, probably disbelieve the lawyer. Even if clients believe their confidences will be kept, they may doubt whether the attorney, knowing the awful truth, will continue to represent the client **[*1165]** enthusiastically. Clients in such situations may lie or distort the truth according to their view of how the truth will sound to the lawyer; discretion may seem the better part of candor.

Everything I have said thus far about the impact of confidentiality on client disclosures assumes that the lawyer informs the client about the rules of confidentiality in general terms, implying an absolute ban on disclosure, rather than in sufficient detail to reveal the many qualifications and exceptions to the rule. But imagine a client's reaction if his attorney were to advise him of the attorney's right to self-defense -- that is, that his communications will be kept confidential so long as the lawyer is not sued, or subjected to official scrutiny for actions taken on the client's behalf. How, moreover, might the client's willingness to confide be affected if the client were told that confidential communications can be aired if the client accuses the attorney of poor performance, or if he simply does not pay his fee? And what might the client decide about revealing information after being told that despite the attorney's pledge of absolute confidentiality some of what is disclosed might have to be disclosed in court under the law of the attorney-client privilege if a formal demand is made for the information? Finally, would a client decide to reveal questionable plans or actions if told that the lawyer might be compelled or at least permitted to withdraw after hearing about them?

If we were to learn that clients would speak freely to lawyers despite a full explanation of the limits of confidentiality, the absolutist case for confidentiality would be all but shattered. No client could be confident -- particularly when the information is of a suspect nature -- as to what could safely be revealed. If, on the other hand, attorneys do not explain the rules to their clients, n353 an equally telling blow is dealt to the rights-based **[*1166]** defense of confidentiality. For if the goal of the justice system is, as advocates of strict confidentiality claim, protection of individual autonomy, then lawyers should be obligated to inform the client fully of the implications of a decision to disclose sensitive information. The lawyer who seeks to encourage the client to reveal all by stating a rule of absolute confidentiality is hardly faithful to that goal. Unless that lawyer is prepared to keep everything confidential, regardless of moral considerations and legal consequences to himself or others, his pledge defrauds the client. The organized bar is alarmed by proposals for disclosure of client misconduct because such proposals in effect would require that *Miranda* warnings be given to the client. n354 The fact of the matter is that such warnings are highly appropriate under current law because of the exceptions to the rule of confidentiality.

B. The Instrumental Defense of Confidentiality

The instrumental defense of confidentiality posits that if clients are encouraged to disclose their plans and activities to lawyers, lawyers will be able to dissuade them from engaging in wrongful conduct, that lawyers will in fact do so, and that this will better protect society than would a requirement of disclosure. n355 What might be gained by disclosure in the immediate

case -- preventing a particular client from harming others -- would be outweighed by the loss in terms of future protection, because future clients would no longer disclose wrongdoing. n356

If anything, the instrumental defense of confidentiality is less persuasive than the rights-based defense. First, it assumes that clients now reveal wrongdoing because of the pledge of confidentiality, and would not do so if there were no such pledge. As I have suggested, this is a rather slim reed upon which to anchor a defense of confidentiality. It is not strengthened by the assertion that attorneys at present adequately perform the policing role. Even assuming that lawyers regularly advise their **[*1167]** clients to adhere to the law, it does not necessarily follow that lawyers are effective as law enforcers. At best it demonstrates only that many clients seek the advice of attorneys to determine whether they can do certain things, and, having received the advice, keep their activities within the law. Of course, this is a valuable role, but it is more educational than deterrent. In other words, these clients act precisely as they would act if they had access to, and a means of comprehending, positive law and judicial opinions.

We are not, however, concerned with the law-abiding client. The difficult clients are those who either know without asking an attorney that a course of action is illegal and who nevertheless seek an attorney's help, or those who learn from a lawyer that conduct is illegal and engage in it anyhow. How confidentiality serves society in such situations is not clear. When a client knows of the illegality, the attorney does not even have an educational role to play; by definition he has only the choice whether to join a conspiracy or not. When clients first learn of the illegality of their conduct, the attorney should attempt to persuade them to desist. But if the client chooses to ignore that advice, there seems no reason to prevent the attorney from disclosing the facts. n357 If the misconduct is revealed, it is argued that clients in the future will not disclose such things to their attorneys. One answer to this argument, as I have noted, is that a sizable number of clients probably have no choice but to disclose. In addition, even if clients of this sort were deterred from speaking openly by fear of disclosure, we would hardly be worse off than we are when the lawyer knows of the misconduct and, having failed to dissuade the client, does not reveal it. As Jeremy Bentham put it, if clients keep these matters to themselves, "wherein will consist of the mischief?" n358

[*1168] The right or duty of the attorney to withdraw from representation to avoid participating in client misconduct n359 is another major flaw in the instrumental argument. Proponents of confidentiality usually uphold without a second thought this power or duty to withdraw. n360 Withdrawal, however, creates problems that are almost identical to those used to justify nondisclosure. Thus, if the client knows that revealing misconduct will keep the secret but lose the lawyer, will the client not quickly learn not to reveal such things? Even worse, will the client not be encouraged to continue revealing them until he finds the profession's lowest common denominator, who will lend the misconduct active support? Moreover, withdrawal may simply be a devious form of disclosure, as even a lay person might realize. n361

The instrumental defense of confidentiality proves only that it is not irrational to have a system in which the lawyer has the first crack at preventing harm. With that it is difficult to disagree, but it is hardly the point. The real question is what the attorney should do when he clearly has not persuaded the client to desist, or to rectify the damage which the client has done. Even assuming that the public good would be better served on the whole by leaving this aspect of law enforcement to the lawyer, it is asking a great deal of the public to accept this argument without any empirical evidence, either for the critical importance of confidentiality, or for the lawyer's effectiveness in preventing crime. Moreover, the proponents of the argument have a clear self-interest at stake. However dubious the instrumental claim for confidentiality, present rules of confidentiality **[*1169]** unquestionably serve lawyers' financial interests far better than would a duty to disclose. n362

The transparent weakness of both the rights-based and instrumental arguments has obviously not deterred many attorneys from espousing strict confidentiality. Perhaps for them the issue cannot be approached objectively. Total loyalty to the client is treated as an article of faith. For such lawyers it may be irrelevant to demonstrate that present law extensively qualifies the requirement of confidentiality, or that there are no insurmountable constitutional obstacles to imposing even greater disclosure obligations, or even that it is irrational to preserve the secrets of one who has used the lawyer to further unlawful ends. Total devotion to the client seems to be a critical aspect of these lawyers' professional self-image. It is, I believe, emotionally unacceptable for them to acquiesce willingly to a system that would require the attorney to be a whistle-blower. As a result, proposals that would obligate, or even permit lawyers to disclose confidences are resisted passionately, even though all lawyers know that there are many circumstances in which disclosure is both legally permissible and morally necessary. n363

Consider, in this regard, the continued glorification by modern advocates of strict confidentiality of the somewhat maniacal view of the attorney's role offered nearly two centuries ago by Henry (later Lord **[*1170]** Chancellor) Brougham. In a speech made to the House of Lords during his defense of

the Queen in a royal divorce action, Brougham defined the advocate this way:

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is the 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. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion. n364

It may well be that the future Lord Chancellor of England did not mean to be taken literally, n365 any more than those who quote him approvingly would act in the fanatical manner that his view of the lawyer's role would permit, if not require. The modern Broughamites do not, however, appear able to resist the temptation at least to speak as if they would. n366

If the exigencies of the professional role do not account for this attitude, we are left to speculate about a different explanation. Perhaps we **[*1171]** should look inward to find it. I believe that the extravagant version of the confidentiality rule is the profession's attempt to cope with the discomfort that is regularly experienced in the representative function, at least until the socialization process is so complete that attorneys have, as Chesterton put it, "got used to it." n367 It is simply not possible, I believe, to accept on an emotional level the standard rationalizations offered to explain why lawyers do some of the things they do. Charles Fried, for example, has argued in a highly publicized piece that a lawyer's preference for his client is morally right in the same way one's preference for one's family or friends is right. n368 As many have pointed out, the friendship analogy is seriously flawed. n369 In any case, it would not be surprising to find that most lawyers see themselves functioning a considerable portion of the time more as alter ids than alter egos. n370 Nor do I think many lawyers find solace in claims such as those made by Monroe Freedman that the attorney in our adversary system is a defender of human dignity. To be sure, the lawyer's role permits one to experience that posture. But, to use one of Freedman's most intriguing examples, no one who has attempted to impeach a truthful witness, particularly on behalf of a guilty or liable client, can feel that in so doing he has struck a blow for human dignity. n371 Neither, I suspect, can an attorney who has used delay to win a case, or filed an exaggerated claim to force a settlement, or discovered some tortuous route through the *Internal Revenue Code* to avoid taxes for his wealthy client. I am not arguing that these and countless similar activities are wrong, although it would not be unreasonable to make that argument. I am simply suggesting that it is not possible, at least for the nonsociopathic attorney, to feel very ennobled as a result of doing those things.

If, however, lawyers can justify such actions on the ground that they are in the service of the lofty principle of loyalty, it may be possible to avoid feelings of guilt, or at least discomfort, over using distasteful means or providing assistance in the achievement of distasteful ends. Loyalty *is* ennobling: it is "the most basic obligation of any lawyer, an obligation that gives his work great dignity and purpose -- the obligation to serve his client rather than to become part of the official machinery that judges **[*1172]** him." n372 The attorney, as champion, n373 enters the lists for his Lady, whether the 'Lady' be Guinevere or Macbeth. With such a perspective, one can, like Brougham, be righteously indifferent to all consequences other than those which are coterminous with the client's ends.

Perhaps, then, the loyalty excuse works on an emotional level -- it makes lawyers feel better; but when posited as a moral principle it works no better than the other attempts to rationalize strict confidentiality. However much we all might want a lawyer of singular loyalty (I share Professor Freedman's desire in that regard), it hardly follows that a system which permitted us to have one in all circumstances would be a moral one. It simply is not true that "[t]he system becomes substantially more just when a client can rely on his attorney without question or doubt -- when he can know as well as he is likely ever to know the future that giving the truth to his attorney will not hurt him," when that means, as the author of that comment intended it to mean, that a lawyer will be forced to remain silent in the face of terrible and unjustified harm to others. n374 The system would be substantially more just if clients were hurt by such truth, if not in the sense of being punished, then at least in the sense of having their ends frustrated.

This analysis of the arguments offered in defense of confidentiality suggests that a sweeping rule is not required to protect the rights of individuals or society. A rule that would obligate attorneys to disclose serious client misconduct in order to prevent harm would be consistent with present law, and might well reduce the danger of the harm occurring. Let us now explore the components of such a rule.

IV. A LAW OF DISCLOSURE

A. The Nature of the Disclosure Duty

To bring coherence to the law of disclosure we need a single set of rules to define the lawyer's responsibilities and procedures to assure adequate protection of the client's rights. The first major principle upon which such a

system should rest is this: an attorney should have a legal duty **[*1173]** to disclose information obtained during the course of representation in order to prevent serious harm. "Harm" would be defined as any conduct that would constitute a felony and the continuing consequence of any conduct that would constitute a felony. The lawyer's duty to disclose would modify restrictions on disclosure under the present attorney-client privilege and would replace the restrictions contained in the present or proposed ethical rules, as well as the discretionary disclosure powers granted by those rules. The duty to disclose would arise when the lawyer believes there to be a substantial likelihood that the harm would occur, and after attempts to dissuade the client from engaging in the unlawful conduct have failed. The second basic component of such a disclosure rule would be the extension of immunity laws to protect against violations of the client's right against self-incrimination that could result from an attorney's disclosure of information covered by that right. This would require prohibiting the use of the incriminating information in a criminal prosecution of the defendant.

The duty proposed here is based on the proposition that the attorney should, if necessary, play a role in law enforcement. It has nothing to do with the attorney's right to self-defense, which presents a different disclosure situation, n375 one which also should be qualified by a prohibition against the use of privileged information to prosecute the client. The duty is imposed because the attorney can conveniently provide the information and because there is no sufficiently countervailing reason to require silence. The duty of the lawyer would be the precise equivalent of a doctor's duty to report gunshot wounds, communicable diseases, or dangerous patients, under pain of criminal n376 or civil n377 liability. With minor and limited exceptions, lawyers currently have no such duty. n378

[*1174] The disclosure debate has persistently focused on whether disclosure, assuming it is authorized, should be left to the attorney's discretion. The argument against mandatory disclosure is based on the view that a mandatory disclosure rule would prevent the attorney from attempting to dissuade the client from acting, or from persuading the client to rectify the harm already caused. There is no reason, however, why the attorney's duty to disclose should replace the obligation to advise the client to desist. The attorney ordinarily should take all steps possible to prevent the harm and preserve the confidence. The duty to disclose arises if persuasion fails or is not possible: it compels Krist's lawyer to act once it becomes clear that his advice is being ignored.

Once an unsuccessful attempt to persuade is made, a duty to disclose seems preferable to leaving disclosure to the attorney's discretion. First, the imposition of a duty increases the client's risk in noncompliance. Second, a duty increases the probability that harm will be avoided even if the client does not desist. Under the present ethical rules attorneys are not likely to exercise their discretion to disclose. The lawyer has no legal duty to disclose to third parties; n379 the only legal threat to the lawyer comes from the client, who might claim damages for wrongful disclosure. n380 It is no answer that the lawyer eventually might be vindicated; the immediate vulnerability alone is enough to discourage disclosure.

A third argument in favor of a mandatory disclosure rule is that it would substitute society's judgment for that of the lawyer. The present *Code* gives attorneys no guidance in the exercise of their discretion. The proposed *Model Rules* provide guidelines of questionable appropriateness. The *Model Rules* guidelines are: the attorney's relationship with the client and the client's victims; the attorney's involvement in the transaction in **[*1175]** question; and extenuating circumstances. n381 With deference, I suggest that these guidelines invite the wolf to tend the flock.

Mandatory disclosure is not without its own problems. Imposing a duty to disclose could be considered an undesirable infringement on the lawyer's autonomy. Persons generally are not obligated to report crime. n382 An exception to that rule commonly applies when a person has undertaken some special responsibility with respect to other individuals or to society as a whole. n383 Arguably, although lawyers have assumed certain of these responsibilities, they have hardly agreed to become law enforcement officers. One might conclude, therefore, that the lawyer's duty to disclose should go no further than the scope of the special responsibilities of the lawyer -- to misconduct that threatens the integrity of the legal process.

This conclusion has merit. On the other hand, we require persons in some situations to provide information simply because they are a convenient source for it, n384 and on balance we should require the same of lawyers. In the first place, many of the situations in which the lawyer will face a duty to disclose will involve misconduct directly related to the representation, and therefore will fall within the type of duty to disclose imposed on other professionals. Second, imposing a mandatory rule on lawyers is less intrusive than would be a duty imposed on society generally; the lawyer's obligation would encompass only misconduct that comes to his attention in the professional relationship with a client.

Finally, I am not proposing penal sanctions for nondisclosure, with their attendant enforcement problems. Because of the potential civil liability of an attorney who failed to report, mandatory disclosure would in most cases be self-enforcing. For the rest, the bar's disciplinary mechanism could be

invoked.

B. The Scope of Mandatory Disclosure

Mandatory disclosure of client misconduct, in the face of competing demands for confidentiality, is premised on the overriding need to prevent harm. But disclosure of all wrongdoing is not necessary. In some situations the benefits of confidentiality might outweigh those of disclosure, but as was suggested earlier, individual attorneys should not have the authority to make such distinctions. The best solution may be a division between felonious and nonfelonious acts. Despite the occasional arbitrariness of the felony-misdemeanor distinction in many jurisdictions, n385 limiting disclosure to threatened felonious acts has certain compelling advantages. **[*1176]** In the first place, a moral basis supports the distinction -- felonious acts are generally believed to cause the greatest harm and are the crimes most condemned by society. In addition, it is a much simpler disclosure process than one that would define discloseable harm in terms of both civil and criminal wrongs. An attorney would adequately comply with the duty to reveal by reporting the information to those authorities charged with the responsibility to investigate and prosecute crime.

The purpose of this proposal is not punishment of the offender; it is to avoid harm to others. Therefore, no disclosure should be required of information relating to wholly completed acts. At the same time, the duty to reveal would arise if those acts have continuing harmful consequences that could be avoided by disclosure.

We are still left with the question of what standard an attorney should employ in determining whether the duty to disclose exists. The right to disclose under canon 4 of the *Code* arguably arises only when the attorney has proof beyond a reasonable doubt that the client intends to commit a crime. n386 On the other hand, the crime or fraud exception to the attorney-client privilege can be invoked on the basis of a prima facie showing of criminal or fradulent intent. n387 Given the significance of disclosure under these circumstances, a standard approaching the more rigorous standard of canon 4 is preferable, although requiring that the law's highest burden be met seems too restrictive. A requirement of a substantial likelihood of the crime occurring seems most appropriate. Present rules requiring the lawyer to take other steps before disclosure -- to dissaude the client from causing the harm, to persuade him to cease the unlawful behavior, or to rectify the consequences of it -- should be retained. The client's failure to respond to such admonitions would give rise to the duty and also constitute adequate proof, in most cases, that a substantial likelihood existed that the client would cause the harm.

C. Protecting Confidential Communications: Vicarious Immunity

If the attorney learns of the client's misconduct in communications not subject to the attorney-client privilege, no legal issue is raised by disclosure. When the information comes from protected communications, constitutional rules require that the information not be used in a criminal prosecution. When persons are compelled to supply information, they are granted immunity if the information is incriminating. When an attorney is compelled to disclose information incriminating another, that other -- the client -- should be immunized against use of the testimony; hence the term "vicarious immunity."

[*1177] The occasion for a grant of immunity could arise in two contexts: first, if a court were asked to compel the testimony, and second, if the attorney were to come forward on his own initiative in response to his duty to do so. In either case we would want to avoid allowing the attorney to create immunity for the defendant by disclosing the information. Otherwise the attorney could disrupt ongoing investigantions because, without advance knowledge of the fact that the information was to be provided, a prosecutor or other investigating agency might not be able to create a record showing that the facts disclosed by the attorney were not used in a subsequent prosecution. n388 To avoid this problem, either the court or, in a criminal case, the prosecutor, should control whether the information will be revealed. This could easily be accomplished if the attorney were responding to a formal demand. The problem is more complex if the attorney provides unsolicited information in response to a duty to do so. We cannot require the attorney to reveal the information and then decide whether to grant immunity. Therefore, the attorney should be required to disclose to the court or prosecutor only the fact that he possesses information relevant to a particular crime and that the information is privileged. It will be up to the court or prosecutor to determine whether the information should be immunized. If the decision is that immunity should be granted, the prosecution will then have time to protect its case. n389

Consistent with present immunity law, the client would be protected against the use of the immunized information in a criminal prosecution and against the use of any information derived from it. The prosecutor, moreover, bears a "heavy burden" to demonstrate that no such use has been made of the information. n390 From a constitutional standpoint this adequately protects the client: he is in the same position with respect to being incriminated as he was prior to the communication. n391 At the same time, the client may be exposed to civil penalties and to suits for damages as a result of his actions. The fifth amendment does not protect against such use of immunized testimony, n392 and there appears to be no compelling reason

for the law of confidentiality to prohibit the use of the information in civil suits.

[*1178] *D. Preventing Abuse in Compelling Attorney Disclosure*

Many attorneys have expressed concern over the potential for abuse inherent in granting others, particularly government officials, the power to compel attorneys to testify about their clients. Two kinds of abuse have been noted: first, that the attorney will be used as a source of information which could not be obtained from the client; n393 second, that the opposing party will use the power as a means of creating a conflict of interest by compelling the attorney to testify, n394 which will force the attorney to withdraw. n395 Either practice, if engaged in, would constitute an intolerable interference with the right to counsel.

As we have already noted, the potential for abuses of these kinds should not force us to conclude that opposing parties, civil or criminal, must be barred from seeking information from attorneys. Rather, what is required is careful judicial monitoring of such demands for testimony. n396 This was the position taken by the Second Circuit Court of Appeals in the recent case of *In re Grand Jury Subpoena Served Upon Joe Doe, Esq.,* n397 in which the Government subpoenaed an attorney to testify before a grand jury concerning fees paid by his client. It was conceded that if the attorney were compelled to testify he would not be able to continue to represent the client. n398 The court concluded that the public interest in obtaining the information outweighed the right of a defendant to be represented by a particular attorney. n399 It held, however, that such a right, even though qualified, required the Government to show that the information it sought was relevant and that the need for the information could not reasonably be met without requiring the attorney to testify. n400 In reaching this conclusion, the court thus required that special consideration be given to the situation in which the attorney is compelled to testify. n401 The result, which is consistent with prevailing law providing special protection to the attorney-client **[*1179]** relationship n402 appears to be appropriate and should afford the requisite protection against abuse.

E. Summary of Proposed Disclosure Law

An attorney who believes there is a substantial likelihood that a client intends to engage, or is engaged, in conduct constituting a felony should take whatever measures are feasible to dissuade the client from undertaking or continuing the action and to rectify the consequences of misconduct which already has occurred. If the client persists, the attorney has an affirmative duty to disclose the information to a court or law enforcement authority.

If the information to be disclosed was not learned in a communication protected by the evidentiary privilege, the attorney should simply make full disclosure. If the information is privileged, the attorney should alert the court or law enforcement authority to the fact that he possesses information regarding the client that must be disclosed. Unless there is a successful challenge to the assertion of the privilege, the information, when disclosed, would be immunized; it could not be used directly or indirectly against the client. Alerting the prosecutor prior to disclosure would enable him to take steps to guard any existing evidence from being tainted by the immunized information.

The duty to disclose also includes a duty to reveal the information related to the client's unlawful conduct to successor counsel, should the latter request it. If the attorney negligently or in bad faith fails to comply with the disclosure obligation, he could be subject to professional discipline or civil liability from injured third parties. Similar consequences could result from negligent or bad faith failure to disclose privileged information.

An attorney may be subpoenaed to testify about information of the type subject to the proposed duty to disclose. The moving party must demonstrate a need for the testimony and that other means of obtaining the information have been exhausted.

F. The Rescue

We may now apply the theory of disclosure advanced here to the *Krist* hypothetical. Happily, a speedy rescue for the lady in the box is (at last) in sight. Having become persuaded that the client was telling the truth, the attorney advises the prosecutor that he has information regarding the whereabouts of the missing woman, that her situation is urgent, and that he will disclose the details if he is assured that the information cannot be used against the person from whom it was obtained. In circumstances such as this, it is plain that the prosecutor would offer immunity. The **[*1180]** attorney then reveals the location of the box, and the woman is freed.

Because the information is protected by the privilege, and thus cannot be used, the defendant will go free. Not only can the lawyer's testimony not be offered, the fruits of that testimony -- the testimony of the woman herself -- cannot be used either, because there is no source for it independent of the immunized statement. At best, because the self-incrimination privilege does not protect against civil liability, Krist could be liable for damages.

The rule of disclosure posited above results, as is shown by the *Krist* hypothetical, in the protection of the victim's most fundamental rights and at the same time in a vindication of the rights of the client. Without question, the additional advantages that a client would have under a rule prohibiting disclosure are lost, but it is difficult to conceive of an equitable argument as

to why such advantages should be retained.

V. CONCLUSION: THE ATTORNEY AS SUPEREGO

The controversy over the law of confidentiality reflects, I believe, the larger debate which has emerged in recent years over the adversary system of justice. Today, as never before, persuasive challenges have been made to the basic claims of that system -- that it in fact operates to preserve individual autonomy, n403 and that it is in fact a powerful mechanism for determining the truth. n404 These challenges have in turn raised questions about the need for and propriety of the kind of single-minded loyalty to the client which the adversary system spawns. n405

I have not attempted to address the larger debate in this Article. I am convinced of the weaknesses of the adversary system, but with one of its critics, I believe that lacking a superior alternative it should not be replaced. n406 This does not mean, however, that the limits on client loyalty cannot be more carefully and narrowly defined. It is possible to impose upon lawyers the duty to try to prevent their clients from committing harmful acts, by disclosure if necessary, without destroying those values of the adversary system which deserve preservation. What would be destroyed is that distorted version of the system which sees confidentiality as a categorical imperative, not subject to weighing against other values.

I have tried to demonstrate that it is both legally feasible and morally proper to impose upon the attorney a duty to attempt to prevent serious harm as a result of the client's misconduct. I have argued that the approach taken in the newly adopted ethical rules should be rejected and **[*1181]** that the attorney-client privilege should be clarified to assure that constitutional rights are fully protected after disclosure. I have suggested, finally, that debate over whether this should occur may well be overtaken by events, as more attention is paid by government agencies and private litigants to the attorney as a target of their investigations or actions. As the incidence of breaches of confidentiality grows in aid of the lawyer's own defense, the case for disclosure to protect others will become increasingly irresistible.

Should all of this occur, traditional notions about the attorney-client relationship will be shaken. That would be a positive development. It would of course be wrong for lawyers to continue to deal with clients in the same way if changes such as those under discussion here were institutionalized. Lawyers would have to acknowledge openly -- as they should even now -- that the terms of employment include the possibility that what the client says will be divulged. The client presented with those terms will perhaps not be as comfortable in the lawyer's office as he is now, but he probably will not be less forthcoming. Moreover, the client will not risk losing the protection against self-incrimination to obtain legal advice. If the client has a good faith doubt about the legality of his action, the plan may be revealed without fear of disclosure, unless the client chooses to ignore the advice that the plan is unlawful. Even if the client acts, however, he will not be subject to criminal punishment by virtue of the lawyer's disclosure of the misconduct. The client will know, however, that the lawyer will act to prevent others from suffering at his hands. It is difficult to imagine how one dealing with an honorable profession could expect anything else.

FOOTNOTES:

n1 *See generally* M. MAYER, THE LAWYERS (1967). The author observed that one of every 250 members of the labor force is an attorney. *Id.* at 13. He quoted Justice Frankfurter's observation that "[o]ur society, now more than ever, is a legal state in the sense that almost everything that takes place will sooner or later raise legal questions." *Id.*

The trend toward the lawyering of America also has been spurred by judicial action. The sixth amendment guarantees the accused's right to counsel "[i]n all criminal prosecutions." U.S. CONST. amend. VI. Modern perceptions of due process and fundamental fairness have driven courts to expand upon the earlier, more limited, construction of this right. The result has been the requirement of court appointed counsel in more and more kinds of criminal cases. *See, e.g., Powell v. Alabama, 287 U.S. 45, 71 (1932)* (due process violated by failure to provide appointed counsel to illiterate defendants charged with capital offense); *Gideon v. Wainwright, 372 U.S. 335, 339, 342 (1963)* (sixth amendment right to appointed attorneys extended to all felony cases and applicable to states); *Argersinger v. Hamlin, 407 U.S. 25, 37 (1972)* (sixth amendment right to appointed attorneys applicable to all cases in which accused faces imprisonment). Similarly, courts have recently determined that appointed counsel is required in the following types of noncriminal proceedings: parental status termination proceedings of indigent parents, *see, e.g., Lassiter v. Department of Social Servs., 452 U.S. 18, 33-34 (1981);* involuntary transfers of mentally ill indigent prisoners to state hospitals for treatment, *see, e.g., Vitek v. Jones, 445 U.S. 480, 496-97 (1980);* and proceedings to determine whether a juvenile should be institutionalized for delinquency, *see, e.g., In re Gault, 387 U.S. 1, 27-28 (1967); see also Maness v. Meyers, 419 U.S. 449, 470 (1975)* (Stewart, J., concurring).

n2 CANONS OF PROFESSIONAL ETHICS 3 (1908). The *Canons* relied heavily on the 50 resolutions in 2 D. HOFFMAN, A COURSE OF LEGAL STUDY 752-75 (2d ed. Baltimore 1836), *reprinted in* H. DRINKER, LEGAL ETHICS app. E (1953), G. SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS (1854), and the code of ethics adopted by the Alabama State Bar Association in 1887, *reprinted in* H. DRINKER, *supra*, app. F. *See* Wright, *The Code of Professional Responsibility: Its History and Objectives, 24 ARK. L. REV. 1, 3 n.8 (1970); see also Developments in the Law: Conflicts of Interest, 94 HARV. L. REV. 1244, 1247 n.2 (1981).* The original *Canons of Ethics* contained 32 canons; thirteen more were added in 1928. Armstrong, *Codes of Professional Responsibility*, in PROFESSIONAL RESPONSIBILITY, A GUIDE FOR ATTORNEYS 3 (ABA ed. 1978).

n3 "For long years, except for a flurry of interest in the early 1950's prompted by the writing of that interesting maverick, Charles P. Curtis, the field of professional responsibility had lain fallow." Kaufman, *Introduction: A Professional Agenda, 6 HOFSTRA L. REV. 619, 619 (1978)* (footnote omitted).

n4 My experience in law school was, I believe, typical. If there were courses offered in professional responsibility, neither I nor the classmates I have consulted can recall them. In our preparation for the bar examination we were told that there would probably be a question on professional responsibility, but that it would not be graded and could be safely dealt with by opining that the lawyer should not do whatever it was that was proposed.

n5 *See, e.g.*, ABA SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 219-24 (1970); J. LIEBERMAN, CRISIS AT THE BAR 197-211 (1978); Note, *The Lawyer's Duty to Report Professional Misconduct, 20 ARIZ. L. REV. 509, 524-26 (1978).* For an excellent review of the grievance system and the problem of nonenforcement, see ASS'N OF THE BAR OF THE CITY OF N.Y., REPORT ON THE GRIEVANCE SYSTEM (1976); *see also* Bonomi, *Professional Responsibility Practice and Procedure: A Disciplinary Void*, N.Y.L.J., June 25, 1981, at 1, col. 1; *id.*, June 26, 1981, at 1, col.1; Thode, *The Duty of Lawyers and Judges to Report Other Lawyers' Breaches of the Standards of the Legal Profession, 1976 UTAH L. REV. 95.*

n6 Armstrong, *supra* note 2, at 4.

n7 MODEL RULES OF PROFESSIONAL CONDUCT (1983). The adoption of the *Model Rules* by the House of Delegates of the American Bar Association has not, in and of itself, changed the standards of conduct to which attorneys are held. The *Model Rules* will only have legal force if they are adopted by the states. *See infra* text accompanying note 277.

n8 *See generally* M. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM (1975); G. HAZARD, ETHICS IN THE PRACTICE OF LAW (1978); D. MELLINKOFF, THE CONSCIENCE OF A LAWYER (1973). Numerous casebooks have also appeared, *see, e.g.*, A. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY (2d ed. 1984); T. MORGAN & R. ROTUNDA, PROFESSIONAL RESPONSIBILITY: PROBLEMS AND MATERIALS (3d ed. 1984); M. PIRSIG & K. KIRWIN, CASES AND MATERIALS ON PROFESSIONAL RESPONSIBILITY (4th ed. 1984); N. REDLICH, PROFESSIONAL RESPONSIBILITY: A PROBLEM APPROACH (2d ed. 1983); M. SCHWARTZ, CASES AND MATERIALS ON PROFESSIONAL RESPONSIBILITY AND THE ADMINISTRATION OF CRIMINAL JUSTICE (1961). The literature on professional ethics is too voluminous to cite in detail. Pieces focusing on confidentiality are cited throughout this Article. For works of particular note, see D. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE? (1974); Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation, 85 YALE L.J. 1060 (1976);* Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics, 1978 WIS. L. REV. 29;* Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1 (1975).

n9 ABA, APPROVAL OF LAW SCHOOLS -- STANDARDS AND RULES OF PROCEDURE Std. 302(a)(iii) (1973).

n10 *See* ABA SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT, *supra* note 5, at 219-24; J. LIEBERMAN, *supra* note 5, at 197-211; Note, *supra* note 5, at 524-26; *see also* ASS'N OF THE BAR OF THE CITY OF N.Y., *supra* note 5; Bonomi, *supra* note 5, June 25, 1981, at 1, col. 1; *id.*, June 26, 1981, at 1, col. 1; Thode, *supra* note 5, at 95.

n11 The Supreme Court has modified the ethical rules, which previously had restricted severely a lawyer's business activities. *See Bates v. State Bar, 433 U.S. 350, 357-58, 383-84 (1977)* (prohibiting pervasive restrictions on advertising); *Goldfarb v. Virginia State Bar, 421 U.S. 773, 781-82, 792 (1975)* (outlawing mandatory fee schedules).

The Securities and Exchange Commission has asserted broad powers, separate from those exercised by courts and grievance committees, in regulating the conduct of lawyers practicing before it. *See, e.g., SEC v. National Student Mktg. Corp., 360 F. Supp. 284, 293 (D.D.C. 1973)*

(SEC characterized attorneys' role in alleged scheme of issuing false and misleading financial statements as "not a passive one, nor was their involvement simply that of lawyers representing their clients"); Sommer, *The Emerging Responsibilities of the Securities Lawyer,* [1973-1974 Transfer Binder] *FED. SEC. L. REP. (CCH) P79,631, at 83,690 (Jan. 1974)* (suggesting that securities lawyer has "an obligation to do more than simply act as the blind scrivener of the thoughts of his client"); *see also Meyerhofer v. Empire Fire and Marine Ins. Co., 497 F.2d 1190, 1194-95* (2d Cir.), *cert. denied, 419 U.S. 998 (1974)* (tacitly approving attorney disclosure of client fraud to SEC).

The practices of tax lawyers also have come under stricter scrutiny. *See United States v. Baskes, 433 F. Supp. 799, 810-12 (N.D. Ill. 1977)* (upholding indictment of attorneys for role in developing illegal tax evasion scheme); PROFESSIONAL RESPONSIBILITY IN FEDERAL TAX PRACTICE (B. Bittker ed. 1970); B. WOLFMAN & J. HOLDEN, ETHICAL PROBLEMS IN FEDERAL TAX PRACTICE 59-143 (1981); Goldfein & Cohn, *Final Circular 230 Amendments Prescribe Disciplinary Standards for Shelter Opinions, 60 J. TAX'N 330, 330 (1984);* Kennedy, *Problems Faced by the Tax Adviser in Registration of Tax Shelter Securities with the SEC,* in 2 NEW YORK UNIVERSITY, PROCEEDINGS OF THE THIRTY-THIRD INSTITUTE ON FEDERAL TAXATION 1365, 1382-86 (1975); Sax, *Lawyer Responsibility in Tax Shelter Opinions,* 34 TAX LAW. 5, 39-44 (1980); *see also* Watts, *Professional Standards in Tax Practice: Conflicts of Interest, Disclosure Problems Under Regulatory Agency Rules, Potential Liabilities,* in 1 NEW YORK UNIVERSITY, PROCEEDINGS OF THE THIRTY-THIRD INSTITUTE ON FEDERAL TAXATION 649, 658-59 (1975); *New Salvos in the Tax Shelter War,* Nat'l L.J., Mar. 12, 1984, at 1, col. 1; Mundheim, *"Abusive" Tax Shelters and Developing Standards for Tax Attorneys,* (address delivered before the Securities Regulation Institute at San Diego, California, on January 18, 1980, excerpts published in *10 TAX NOTES 213 (1980)).*

n12 For a very useful presentation of many of the prominent issues, see G. HAZARD, *supra* note 8.

n13 A useful discussion of the subject is found in Wolfram, *Client Perjury, 50 S. CAL. L. REV. 809, 843-66 (1977).* The issue has arisen in a large number of cases and has been discussed by commentators to the point of excess. *See* Brazil, *Unanticipated Client Perjury and the Collision of Rules of Ethics, Evidence, and Constitutional Law, 44 MO. L. REV. 601 (1979);* Dunetz, *Surprise Client Perjury; Some Questions and Proposed Solutions to an Old Problem, 29 N.Y.L. SCH. L. REV. 407 (1984);* Lefstein, *The Criminal Defendant Who Proposes Perjury: Rethinking the Defense Lawyer's Dilemma, 6 HOFSTRA L. REV. 665 (1978);* Wolfram, *supra,* at 843-66.

n14 *See* Rubin, *A Causerie on Lawyers' Ethics in Negotiation, 35 LA. L. REV. 577, 583-88 (1975).*

n15 *See* Callan & David, *Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct in an Adversary System, 29 RUTGERS L. REV. 332, 363-65 (1976).*

n16 *See* ASS'N OF THE BAR OF THE CITY OF N.Y., *Professional Responsibility in the Practice of Corporation Law: The Murky Divide Between Right and Wrong,* in PROFESSIONAL RESPONSIBILITY OF THE LAWYER -- THE MURKY DIVIDE BETWEEN RIGHT AND WRONG 27, 34-37 (1976); *see also* Hoffman, *On Learning of a Corporate Client's Crime or Fraud -- the Lawyer's Dilemma, 33 BUS. LAW. 1389, 1411 (1978).*

n17 *See, e.g., Upjohn Co. v. United States, 449 U.S. 383, 386-87 (1981)* (corporation's general counsel informed by hired independent accountants that one of corporation's foreign subsidiaries had made questionable payments to foreign government officials to secure business).

n18 *See* Ferren, *The Corporate Lawyer's Obligation to the Public Interest, 33 BUS. LAW. 1253, 1253-59 (1978).*

n19 *See* Bellow & Kettleson, *The Mirror of Public Interest Ethics: Problems and Paradoxes,* in ABA, PROFESSIONAL RESPONSIBILITY -- A GUIDE FOR ATTORNEYS 219, 248-58 (1978).

n20 *See* Lipman, *The SEC's Reluctant Police Force: A New Role for Lawyers, 49 N.Y.U. L. REV. 437, 448-53 (1974).*

n21 *See* Paul, *The Lawyer as a Tax Advisor, 25 ROCKY MTN. L. REV. 412, 431 (1953).*

n22 *See, e.g., Gebhardt v. United Rys., 220 S.W. 677, 678-79 (Mo. 1920)* (lawyer learned before trial that his client, who was seeking personal injury damages from trolley car accident, was never on trolley).

n23 *See, e.g., United States v. Loften, 518 F. Supp. 839, 842-43 (S.D.N.Y. 1981)* (attorney indicted in racketeering conspiracy on the grounds that he gave investment advice concerning clients' funds which he knew were the proceeds from narcotics activities).

n24 *See* J. KUNEN, "HOW CAN YOU DEFEND THOSE PEOPLE?" -- THE MAKING OF A CRIMINAL LAWYER 153-64 (1983).

n25 ABA Comm. on Professional Ethics and Grievances, Formal Op. 250 (1943) (quoting 2 F. MECHEM, MECHEM ON AGENCY, § 2297 (2d ed. 1914)):

To permit the attorney to reveal to others what is so disclosed, would be not only a gross violation of a sacred trust upon his part, but it would utterly destroy and prevent the usefulness and benefits to be derived from professional assistance. Based upon considerations of public policy, therefore, the law wisely declares that all confidential communications and disclosures, made by a client to his legal advisor for the purpose of obtaining his professional aid or advice, shall be strictly privileged . . . .

n26 *Upjohn Co. v. United States, 449 U.S. 383, 392 (1981).*

n27 M. FREEDMAN, *supra* note 8, at 1-2.

n28 Wasserstrom, *supra* note 8, at 3.

n29 The term is Professor Charles Fried's. *See* Fried, *supra* note 8, at 1071-72.

n30 *See id.*

A lawyer is a friend in regard to the legal system. He is someone who enters into a personal relation with you -- not an abstract relation as under the concept of justice. That means that like a friend he acts in your interests, not his own; or rather he adopts your interests as his own. I would call that the classic definition of friendship.

Id. For a particularly telling critique of Fried's friendship analogy, see Simon, *supra* note 8, at 108, in which Simon observes that Fried's description of the lawyer-client relationship more closely defines prostitution than friendship.

n31 This term was used by Professors Dauer and Leff in their response to Fried's characterization of the lawyer-client relationship. *See* Dauer & Leff, *Correspondence, 86 YALE L.J. 573, 583 (1977)* (Responding to Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation, 85 YALE L.J. 1060 (1976)).*

n32 *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 comment (1983).

n33 Luban, *The Adversary System Excuse,* in THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 83, 90 (D. Luban ed. 1983).

n34 *See supra* note 25.

n35 *See* M. FREEDMAN, *supra* note 8, at 9.

n36 *See infra* text accompanying notes 303-37 for a discussion of the confidentiality provisions of the recently adopted *Model Rules of Professional Conduct.*

n37 *See In re Horowitz, 482 F.2d 72, 81 (2d Cir. 1973)* (The court noted that because privilege stands in derogation of the public right to evidence and as "an obstacle to investigation of the truth . . . 'It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.'") (quoting 8 J. WIGMORE, EVIDENCE § 2291, at 554 (J. McNaughton rev. ed. 1961)).

n38 *See, e.g.*, Hoffman, *supra* note 16. The author purports to provide guidance to the corporate attorney on the disclosure issue by presenting a thorough analysis of the ethical rules governing disclosure. There is no discussion, however, of what the attorney is to do if called upon by a court or grand jury to disclose, in which situations the ethical rules would be irrelevant, because they are subservient to (as well as inconsistent with) the law of the attorney-client privilege.

The activity surrounding the passage of the present Federal Rule of Evidence 501 demonstrates the congressional and Supreme Court intention to leave the law of privileges unchanged. *See* 120 CONG. REC. H12254 (daily ed. Dec. 18, 1974) (statement of Chairman Hungate of the House Judiciary Subcommittee explaining final conference report). The proposed article V, as approved by the Supreme Court, contained 13 very specific rules on privileges. There was no room in the proposed article V for change or reassessment; it represented a narrow codification of federal privilege law. Since the adoption of the present rule 501, the Supreme Court has narrowed further the scope of federal privileges, notwithstanding the existence of the common law authority to expand the scope. *See Trammel v. United States, 445 U.S. 40, 53 (1980)* (divesting accused's privilege to bar adverse spousal testimony); *United States v. Gillock, 445 U.S. 360, 373 (1980)* (in federal criminal proceedings against state legislator, no privilege bars evidence of legislative acts); McCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § § 77-95 (E. Cleary 2d ed. 1984) [hereinafter cited as McCORMICK ON EVIDENCE].

n39 *See* Hoffman, *supra* note 16, at 1404 n.38 (collecting cases and articles on the issue).

n40 *See* M. FREEDMAN, *supra* note 8, at 1-2; Schwartz, *The Zeal of the Civil Advocate,* in THE GOOD LAWYER: LAWYERS' ROLES AND LAWYER'S ETHICS 150 (D. Luban ed. 1983).

n41 *See, e.g.*, Brazil, *supra* note 13, at 601; Dunetz, *supra* note 13, at 407; Wolfram, *supra* note 13, at 843-66.

n42 *See, e.g.*, Comment, *Fruits of the Attorney-Client Privilege: Incriminating Evidence and Conflicting Duties, 3 DUQ. L. REV. 239 (1965)* [hereinafter cited as Comment, *Incriminating Evidence*]; Note, *Ethics, Law and Loyalty: The Attorney's Duty to Turn Over Incriminating Physical Evidence, 32 STAN. L. REV. 977 (1980);* Comment, *The Right of a Criminal Defense Attorney to Withhold Physical Evidence Received from His Client, 38 U. CHI. L. REV. 211 (1970)* [hereinafter cited as

Comment, *Right to Withhold*].

n43 *See infra* text accompanying notes 52-87. The paradigm was inspired by the famous "buried bodies case," *People v. Belge, 83 Misc. 2d 186, 372 N.Y.S.2d 798* (Onondaga Co. Ct.), *aff'd, 50 A.D.2d 1088, 376 N.Y.S.2d 771 (1975), aff'd, 41 N.Y.2d 60, 359 N.E.2d 371, 390 N.Y.S.2d 867 (1976),* which has received much attention in the literature. *See* M. FREEDMAN, *supra* note 8, at 1-8; A. KAUFMAN, *supra* note 8, at 127-30; N. REDLICH, PROFESSIONAL RESPONSIBILITY: A PROBLEM APPROACH 11-14 (2d ed. 1983); Note, *Legal Ethics: Confidentiality and the Case of Robert Garrow's Lawyers, 25 BUFFALO L. REV. 211, 220-22 (1975).*

n44 *See infra* text accompanying notes 88-337.

n45 *See infra* text accompanying notes 127-272.

n46 *See infra* text accompanying notes 273-337.

n47 *See infra* text accompanying notes 160-211.

n48 *See infra* text accompanying notes 225-72.

n49 *See infra* text accompanying notes 303-37.

n50 *See infra* text accompanying notes 338-74.

n51 *See infra* text accompanying notes 375-406.

n52 *83 Misc. 2d 186, 372 N.Y.S.2d 798* (Onondaga Co. Ct.), *aff'd, 50 A.D.2d 1088, 376 N.Y.S.2d 771 (1975), aff'd, 41 N.Y.2d 60, 359 N.E.2d 377, 390 N.Y.S.2d 867 (1976).*

n53 Syracuse Herald Journal, June 19, 1974, at 42, cols. 3-4.

n54 *See* N.Y. Times, June 20, 1974, at 1, col. 2 (city ed.).

n55 *83 Misc. 2d at 187, 372 N.Y.S.2d at 799.*

n56 N.Y. Times, June 20, 1974, at 1, col. 2 (city ed.).

n57 *83 Misc. 2d at 189, 372 N.Y.S.2d at 801-02.*

n58 *Id. at 187, 372 N.Y.S.2d at 799.*

n59 Syracuse Herald Journal, June 19, 1974, at 42, col. 3.

n60 *83 Misc. 2d at 190, 372 N.Y.S.2d at 802.*

n61 *Id. at 191, 372 N.Y.S.2d at 803.*

n62 N.Y. State Bar Ass'n, Comm. on Professional Ethics, Op. 479 (1978), *reprinted in 50 N.Y. ST. B.J. 259, 259-62 (1978).*

n63 *83 Misc. 2d at 191, 372 N.Y.S.2d at 803.*

n64 *See* N.Y. Sate Bar Ass'n, *supra* note 62, at 259-62.

n65 *See, e.g.,* M. FREEDMAN, *supra* note 8, at 1-8; Note, *supra* note 43, at 220-22. The opinion has become a fixture in professional responsibility casebooks, *see, e.g.,* A. KAUFMAN, *supra* note 8, at 127-30; N. REDLICH, *supra* note 43, at 11-14.

n66 If Belge had anonymously informed the police of the woman's whereabouts, it is possible that the link between the woman and the client would not have been made. The attorney, of course, could not have been sure of that, since, for example, some item of tangible evidence might have been discovered establishing the connection.

n67 I am assuming at this point that the self-incrimination problem is unsolvable, as it might well have been in the *Belge* case. However, as I shall demonstrate below, the problem could be overcome by legislation that applied the doctrine of immunity to such situations. *See infra* text accompanying notes 160-91.

n68 This position has been taken by Professor Freedman in M. FREEDMAN, *supra* note 8, at 5. Freedman believes Belge's actions were justified because of the "sacred trust" of confidentiality that exists between attorney and client, *id.* at 8, which requires communications between them to be "inviolable," *id.* at 5. To permit the breach of confidentiality would destroy the attorney-client relationship, which in turn would destroy the adversary system, since it depends on the kind of access to professional advice and services which only complete confidentiality can assure. *Id.* Destruction of the adversary system would cause the loss of society's best, if not only, defense against the subjugation of the individual by a totalitarian state. *Id.* at 2. Belge's actions, therefore, were justified not simply because he made the proper choice between competing needs, but because it is always (or almost always; Freedman is vague on the point) proper to opt for the preservation of the client's confidences. *Id.* at 1-8. The moral scales are, as Freedman suggests, prebalanced: the avoidance of specific, individualized harm can never, or almost never, outweigh the need to preserve the system which guarantees autonomy for all. *Id.* at 1-2.

n69 *Krist v. State, 227 Ga. 85, 85-88, 179 S.E.2d 56, 57-59 (1970).*

n70 *Id. at 85-88, 179 S.E.2d at 57-59.*

n71 *Id. at 86-87, 179 S.E.2d at 57-58.*

n72 *Id. at 86-87, 179 S.E.2d at 57-58.*

n73 *Id. at 87, 179 S.E.2d at 58.*

n74 *Id. at 87, 179 S.E.2d at 58.*

n75 *Id. at 88, 179 S.E.2d at 59.*

n76 In order to convict for possession of stolen property, it must be proven beyond a reasonable doubt that the defendant "knew" that the property was stolen. *See* W. LAFAVE & A. SCOTT, CRIMINAL LAW 685-88 (1972). Under the circumstances posited here -- that the defendant when arrested was carrying a suitcase -- it would seem difficult to establish the requisite *mens rea.*

n77 The court cited Georgia Code § 26-1601, which defined the crime

as follows: "Every person who shall forcibly abduct or steal away any person, without lawful authority or warrant, and hold said person against his will, shall be guilty of kidnapping." *227 Ga. at 89, 179 S.E.2d at 59.* The offense, according to Georgia Code § 26-1603, was punishable by imprisonment for "not less than four years, nor more than seven years: Provided that kidnapping for ranson shall be punishable by death," although the jury was given the option of recommending life imprisonment. GA. CODE ANN. § 26-1603 (1967) (current version at GA. CODE § 16-5-40 (1984)).

n78 Note that, while the death of the woman would make Krist legally responsible for murder, there would be no way based on these facts to connect him to the body even if it were discovered.

n79 The conclusion that Krist could be convicted is based on the assumption that the testimony of the victim could be used in court against him. It should be noted that that assumption is not free from doubt. The attorney-client privilege would preclude the testimony of the attorney at his client's trial despite the fact that the information is no longer confidential. *See* 8 J. WIGMORE, EVIDENCE § 2315, at 632; *see also Matison v. Matison, 95 N.Y.S.2d 837, 838 (N.Y. Sup. Ct. 1950).* The question is whether the law of privilege also precludes derivative use of the testimony, here the testimony of the victim. There is little authority on this question. The treatises do not consider it, and the few cases which have been discovered seem to go both ways. *Compare Himmelfarb v. United States, 175 F.2d 924, 931-32 (9th Cir. 1949)* (data obtained through voluntary and indirect disclosure by attorney would violate the privilege if admitted) *with State v. Sullivan, 60 Wash. 2d 214, 218-21, 373 P.2d 474, 476 (1962)* (attorney who revealed location of client's murdered husband could not testify about client's disclosure because implication would be same as testifying that the client had revealed the location, but attorney could testify as to what he found at location).

Moreover, these cases do not purport to deal with the constitutional question raised in *Belge,* that disclosure of incriminating information provided to the attorney in confidence would undermine fifth amendment rights. Assuming for the moment that such disclosure would violate the fifth amendment, the question whether the fruits of such a violation would be precluded by operation of the exclusionary rule arises. *Cf. Wong Sun v. United States, 371 U.S. 471, 487-88 (1963)* (evidence inadmissible if obtained by exploitation of primary illegality).

Whether the exclusionary rule is applicable to a voluntary breach of the privilege by an attorney is not clear because its invocation is generally limited to instances of state involvement in the violation of individual rights in a criminal context. *See Burdeau v. McDowell, 256 U.S. 465, 475 (1921)* (fourth amendment is a restraint only on activities of sovereign authority and governmental agencies). A clearer case for the application of an exclusionary rule would be presented if, as will be advocated here, a mandatory duty were imposed on the attorney to disclose client confidences to prevent harm. *See* discussion of fifth amendment *infra* text accompanying notes 160-91. I shall argue that the client's fifth amendment rights should be protected in such cases and could be by adoption of a rule which immunizes the client against the use of the attorney's disclosures in a criminal prosecution. *See infra* text accompanying notes 375-402.

n80 One who "counsels" another in the commission of a crime is guilty of aiding and abetting. *See, e.g., 18 U.S.C. § 2* (1982). Whether this attorney's conduct constituted that crime is perhaps doubtful, but if the district attorney in *Belge* felt pressure to test the propriety of the conduct, a district attorney in this case would be even more likely to do so. If the charge were brought, the question would be the propriety of the attorney exculpating himself by saying that the client alone was responsible and that the attorney advised the client to free the woman. For a discussion of the question of the lawyer's right to self-defense, see *infra* text accompanying notes 225-72.

n81 When the American Bar Association decided to review the *Code of Professional Responsibility,* it formed the Commission on Evaluation of Professional Standards, the so-called Kutak Commission, which was headed by attorney Robert Kutak. The Commission's proposals would have compelled attorneys to disclose confidences when necessary to prevent death or serious bodily harm, to protect the court or parties from the consequences of false evidence or testimony, and to prevent a client from gaining an advantage by fraud in negotiation. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (Discussion Draft 1980). In addition, the proposal would have given the attorney the discretion to disclose confidences to prevent or rectify the consequences of any deliberately wrongful act. *Id.* The Kutak Commission's proposals were soundly rejected by the ABA membership. Following the lead of Professor Freedman and the American Trial Lawyers Association, *see* THE AMERICAN LAWYER'S CODE OF CONDUCT § § 1.1-1.6 (alternative B) (Discussion Draft, June 1980), the ABA adopted instead the most extensive rule of confidentiality in its history. *See* MODEL RULES OF PROFESSIONAL CONDUCT (1983), discussed *infra* at text accompanying notes 303-37. For a discussion of the debate over disclosure within the bar, see Subin, *War Over Confidentiality: In Defense of the Kutak Approach,* NAT'L L.J., Jan. 19, 1981, at 22, col. 1.

n82 This is not the position of the ABA, but was advocated by one group

within the American Trial Lawyers Association, *see* THE AMERICAN LAWYER'S CODE OF CONDUCT, *supra* note 81, § § 1.1-.4 (alternative B).

n83 *See infra* text accompanying notes 305-22.

n84 *See, e.g., Spaulding v. Zimmerman, 263 Minn. 346, 116 N.W.2d 704 (1962).* In that case the defense attorney in a negligence action knew that the plaintiff had suffered a life-threatening aorta aneurysm in a car accident with his client. The fact was not known to the plaintiff or his counsel, and the defense attorney did not reveal it. *Id. at 348-49, 116 N.W.2d at 706-07.* Two years later the plaintiff sought to set aside the settlement and was successful for reasons not relevant here. *Id. at 351, 355, 116 N.W.2d at 708-09, 711.* What is relevant is that the court, apparently as ardent as present day advocates of confidentiality, noted in passing that, because the parties were in an adversary relationship, "'no rule required or duty rested upon defendants or their representatives to disclose this knowledge.'" *Id. at 352, 116 N.W.2d at 709* (quoting the trial court opinion).

n85 *See, e.g.,* State Bar of Cal., Standing Comm. on Professional Responsibility and Conduct, Formal Op. 58 (1981) (an attorney who hired engineer in connection with litigation concerning client's building may not reveal engineer's statement that building may be unstable after client tells him not to do so) (unpublished opinion).

n86 *See* Report of Trustee, *In re* O.P.M. Leasing Servs., Inc., Reorg. No. 81-B-10533 (BRL) (Bankr. S.D.N.Y. Apr. 25, 1983) [hereinafer cited as Report, *In re* O.P.M.] discussed *infra* at text accompanying notes 105-25.

n87 Again, the ABA qualifies the confidentiality requirement in this area. *See infra* text accompanying notes 323-32. The American Trial Lawyers Association split over whether to keep secret the fact that the client had bribed a juror, but agreed that client perjury could not be disclosed. *Compare* THE AMERICAN LAWYER'S CODE OF CONDUCT, *supra* note 81, § 1.5 (alternative A) (may reveal bribery) *with* alternative B (no exception for bribery).

n88 8 J. WIGMORE, *supra* note 79, at 542.

n89 *Id.* § 2324, at 631-32.

n90 *Id.* § 2325, at 632.

n91 The improper disclosure of a client's confidences subjects the lawyer to malpractice liability. *See* R. MALLEN & V. LEVIT, LEGAL MALPRACTICE § 94, at 135-36 (1977). Moreover, if the attorney makes a disclosure, either without the express consent of the client or in conscious derogation of the client's interests, the privilege will generally prevent the attorney from testifying in court. *See supra* note 79.

There are, however, several important gaps and ambiguities in the protection afforded confidential communications under the common law. As a result, some courts express their distaste for the privilege by adopting a very broad definition of waiver. Some courts have stretched to find waiver even when the client expressly instructed the attorney not to disclose and the attorney, through inadvertence or incompetence, disclosed the information anyway. *In re Grand Jury Investigation of Ocean Transp., 604 F.2d 672, 674-75* (D.C. Cir), *cert. denied, 444 U.S. 915 (1979); see also* 8 J. WIGMORE, *supra* note 79, § 2325, at 632 (waiver doctrine applies when attorney reveals negligently, or when information is obtained by surreptitious invasion of attorney-client relationship). *See generally* Note, *The Attorney-Client Privilege After Disclosure, 78 MICH. L. REV. 927 (1980).*

n92 8 J. WIGMORE, *supra* note 79, § 2290, at 545.

n93 *See* Armstrong, *supra* note 2, at 2-5.

n94 *See* CANONS OF PROFESSIONAL ETHICS Canon 27 (1908) (rules governing advertising).

n95 This is what was done in some parts of the *Code of Professional Responsibility.* For example, disciplinary rule 1-102(A)(3) states that a lawyer shall not "[e]ngage in illegal conduct involving moral turpitude." CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(3) (1969).

n96 The only reference to confidentiality in the original *Canons* was in canon 6, which dealt primarily with conflicts of interests and forbade attorneys from accepting employment which might require the divulgence of the client's "secrets or confidences." CANONS OF PROFESSIONAL ETHICS Canon 6 (1908).

n97 *Id.* Canon 37.

n98 8 J. WIGMORE, *supra* note 79, § 2290, at 544.

n99 "Secret" is defined in disciplinary rule 4-101(A) as "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." CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(A) (1969).

n100 Under the *Code of Professional Responsibility,* while an attorney is never required to disclose a confidence or secret, there are certain situations in which the lawyer is given permission to do so. For example, an attorney is permitted to disclose "the intention of his client to commit a crime." *Id.* DR 4-101(C)(3). Another disciplinary rule permits disclosure to collect a fee and to defend the attorney against a charge of unlawful conduct. *Id.* DR 4-101(C)(4).

n101 *See infra* text accompanying note 380.

n102 CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C) (1969): "A lawyer may reveal: . . . (2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order."

n103 This is plainly not what was intended under the *Code of Professional Responsibility,* which grants the attorney certain discretion to disclose, but nowhere requires the attorney to obtain judicial approval before doing so. *See* CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1969); *see also supra* note 100.

n104 The problem is not simply that the ethical rules and the attorney-client privilege define differently the scope of confidential communications. Equally serious is the difficulty caused by the uncertainty as to whether the ethical rules are intended to embody the definition of terms that have evolved in case law development of the privilege. The attorney is admonished not to violate the confidences or secrets of the "client." Nowhere in the codes of ethics, however, is that term defined. Yet under the law of attorney-client privilege it is possible to argue, for example, that the privilege does not extend to the person who uses a lawyer to commit a fraud. That person would not be considered a "client" because no relationship would form between that person and an attorney in such circumstances. See *infra* text accompanying notes 139-52 for a discussion of the crime or fraud exception. If this definition of "client" were used by an attorney interpreting the ethical rules, the attorney could conclude that the command not to reveal confidences or secrets would not apply. It does not appear, however, that the ABA, which interprets the ethical rules, has ever qualified its opinions on confidentiality in this way. This makes it difficult to discern precisely what the definition of "client" is under those rules.

n105 Report, *In re* O.P.M., *supra* note 86.

n106 *Id.* at 305-06.

n107 *Id.* at 409-11.

n108 *Id.*

n109 *Id.* at 373-75, 393-401.

n110 It is an interesting, if not sad, commentary on the state of the rules of confidentiality that a law firm faced with a situation such as this felt the need to hire experts to explain its obligations.

n111 *Id.* at 388-89.

n112 *See id.*

n113 CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(3) (1969).

n114 Report, *In re* O.P.M., *supra* note 86, at 388-89.

n115 CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B)(1) (1969).

n116 Report, *In re* O.P.M., *supra* note 86, at 388-89.

n117 CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(A) (1969); *see infra* text accompanying note 308.

n118 Report, *In re* O.P.M., *supra* note 86, at 390, 394, 399.

n119 *Id.* at 402.

n120 *Id.* at 405-06.

n121 *Id.* at 405.

n122 *Id.* at 470-73.

n123 Thus, had the law firm's ethical advisors adopted the definition of "client" embodied in the attorney-client privilege, they might have concluded that the O.P.M. principals did not qualify. *See supra* note 104. On the other hand, it was not unreasonable for the law firm to reach the opposite conclusion, notwithstanding the way the principals had used the attorneys, since disciplinary rule 4-101 does not define "client." Similarly, for reasons explained in the accompanying text, had its advisors followed rulings on the attorney-client privilege with respect to the crimes or fraud exception, they might have disclosed. On the other hand, in opinions interpreting the *Code of Professional Responsibility*'s version of the crime or fraud exception, the ABA has indicated that, if the crime has been committed, disclosure is barred. *See* ABA Comm. on Professional Ethics and Grievances, Op. 287 (1953).

It might also be noted that the law firm had told its advisers that in view of the fact that O.P.M. owed them $ 700,000 in fees, they would prefer not to be compelled to resign, let alone disclose anything, if they did not have to. *See* Report, *In re* O.P.M., *supra* note 86, at 379. Like good lawyers in the adversary system, the advisers found a way to achieve their clients' ends.

n124 *See infra* text accompanying notes 131-51.

n125 Report, *In re* O.P.M., *supra* note 86, at 408.

n126 The lawyer's right to disclose in self-defense is considered *infra* in the text accompanying notes 225-72.

n127 McCORMICK ON EVIDENCE, *supra* note 38, § 87, at 205-06.

n128 8 J. WIGMORE, *supra* note 79, § 2192, at 70.

n129 *Upjohn v. United States, 449 U.S. 383, 389 (1981)* (quoting *Trammel v. United States, 445 U.S. 40, 51 (1980)).*

n130 8 J. WIGMORE, *supra* note 79, § 2292, at 554.

n131 *Id.* § 2296, at 566.

n132 *Id.* § 2298, at 572.

n133 *Id.* The subject has not, however, received much attention in the

literature. *But see* Callen & David, *supra* note 15, at 332; Gardner, *The Crime or Fraud Exception to the Attorney-Client Privilege, 47 A.B.A. J. 708 (1961).*

n134 *289 U.S. 1 (1933).*

n135 *Id. at 6-7.*

n136 *Id. at 12-13.*

n137 *Id. at 14.*

n138 *Id. at 15.*

n139 *Id.*

n140 *Id. at 16.*

n141 *14 Q.B.D. 153 (1884), cited in Clark, 289 U.S. at 15.*

n142 *14 Q.B.D. at 154-55.*

n143 *Id. at 168.*

n144 *See* Callan & David, *supra* note 15, at 345-49.

n145 As was indicated in *Clark* it is immaterial whether the attorney knows the client's true intentions. *See supra* text accompanying note 139. Of course, if the attorney does know of the unlawful intentions and provides assistance anyway, the attorney can be equally guilty of the crime as an accomplice. *Cf. 18 U.S.C. § 2* (1982) (crimes against United States).

Most of the cases in which the privilege has been denied involve a person who attempted to use an attorney in the commission of a crime or fraud either by inducing the unsuspecting attorney to file a spurious lawsuit, or by providing the attorney with false information on the basis of which some business was transacted. A classic example of the former is *Gebhardt v. United Rys. Co., 220 S.W. 677 (Mo. 1920).* The case involved a suit for damages resulting from injuries allegedly suffered because of the negligence of the defendant railroad. *Id. at 677.* After the suit was filed the plaintiff admitted to her attorney that she had not been on the train at all, but sought to continue the action. *Id. at 678.* The attorney withdrew and was later called to testify for the defendant. *Id. at 679.* Rejecting plaintiff's claim of privilege, the court observed that "[t]he law does not make a law office a nest of vipers in which to hatch out frauds and perjuries." *Id. at 679.* An example of the use of an attorney in an unlawful business transaction is *In re* Special Sept. *Grand Jury (II), 640 F.2d 49 (7th Cir. 1980).* In that case the client provided the attorney with false records of political contributions to be used in tax return preparation. *Id. at 64.* The court held that the attorney had to turn over to the grand jury documents related to the representation. *Id. at 65.*

n146 By far the most common instance of concealment is the case of client perjury. The issue has caught the imagination of the academic community like none other in the field. *See, e.g.*, Brazil, *supra* note 13, at 601; Lefstein, *supra* note 13, at 665; Wolfram, *supra* note 13, at 809. Much of the literature seems to have been inspired by Professor Monroe Freedman's provocative, if unpersuasive, argument that lawyers are obliged to tolerate perjury committed by their clients, at least in criminal cases. *See* Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions, 64 MICH. L. REV. 1469, 1478 (1966).* It has never been clear to me why the perjury issue has received so much attention, since it is indistinguishable from any other unlawful act for purposes of applying the privilege. Clearly, a client's statement that he intends to commit perjury, or a statement that he intends to testify to facts which the attorney knows to be false, is covered by the crime or fraud exception. *See United States v. Gordon-Nikkar, 518 F.2d 972, 975 (5th Cir. 1975)* (discussions of prospective perjury not privileged); *Sawyer v. Barczak, 229 F.2d 805, 808-09 (7th Cir. 1956)* (client statement to attorney that he was prepared to commit perjury to have charges pending against him in another case dismissed held not privileged); *People v. Salquerro, 107 Misc. 2d 155, 156-57, 433 N.Y.S.2d 711, 713 (N.Y. Sup. Ct. 1980)* (attorney cannot knowingly present perjured testimony and does not violate confidence of client by informing court of client's intent to commit perjury). Just as clearly, a statement by a client that he has already committed perjury will be protected if made for the purpose of obtaining legal advice, but not if no attorney-client relationship has formed. *See supra* text accompanying note 132.

What seems to have caught the interest of the writers is what the attorney is to do when faced with a privileged communication revealing perjury, since many feel it intolerable for an attorney, as an officer of the court, to allow perjurious testimony to stand. I agree, but I find it no less intolerable for a woman buried alive to remain in that condition in the name of the attorney-client privilege. Hence, I shall propose a method to resolve both problems. *See infra* text accompanying notes 375-406. Professor Freedman, in contrast, distinguishes the criminal defendant from other witnesses, apparently arguing that because the defendant has a constitutional right to testify and present a defense he has a constitutional right to commit perjury. Some support for that position appears to have emanated recently from the *Eighth Circuit, Whiteside v. Scurr, 744 F.2d 1323, motion for reh'g en banc denied, 750 F.2d 713 (8th Cir. 1984), cert. granted sub nom. Nix v. Whiteside, 105 S. Ct. 2016 (1985).* This writer believes it extremely unlikely that the position taken by the Eighth Circuit will be sustained. *See infra* note 208.

n147 This argument was advanced in *State v. Phelps, 24 Or. App. 329,*

333, 545 P.2d 901, 903 (1976), and properly rejected by the court: "We find no reason why the exception to the attorney-client privilege should be applied differently if a client commits a contemplated crime before his attorney discloses his intention to do so." *Id. at 335, 545 P.2d at 904-05.*

n148 *McKissick v. United States, 379 F.2d 754 (5th Cir. 1967),* seems to reach this conclusion, holding the client's admission of perjury to be unprivileged, apparently basing its decision on the grounds that the admission occurred prior to the conclusion of the case without making specific reference to the requirement that the admission also had to be directed at gaining the attorney's assistance in furthering the crime. *See id. at 761.* The facts, however, are not clear, and that finding may have been implicit. If the above is not the finding, then the opinion is wrong, the court committing the temporal error explained in the text immediately below.

n149 *See* Brazil, *supra* note 13, at 618-19.

n150 Note that all I am conceding at this point is the general proposition that a client's admissions of past crimes cannot be revealed by the attorney. It shall be seen that this is not always the case. *See infra* note 151 and accompanying text.

n151 Thus, the statement concerning the past crime would be within the crime or fraud exception if it was made to an attorney in the hope of procuring assistance in fleeing the jurisdiction. The statement concerning the continuing crime would be outside of the exception, and in fact, privileged if the client sought advice as to how to limit his liability for the conspiracy. The statement of future intention would not be one in furtherance of a crime if the client's intention to commit the robbery were revealed in the context of a discussion in which he claimed coercion as an excuse. In such a situation the client could legitimately be seeking advice as to whether duress would be a defense to the robbery charge.

n152 Report, *In re* O.P.M., *supra* note 86, at 373-75, 393-40.

n153 I have suggested that the advice given the law firm under the ethical rules was arguably correct, even though it would have been incorrect if the advisers were interpreting the attorney-client privilege. The problem arises because, even though the terms used in the ethical rules (e.g., "intention to commit a crime") were derived from the attorney-client privilege, they are open to different interpretations.

n154 Report, *In re* O.P.M., *supra* note 86, at 333-411.

n155 *Cox,* 14 Q.B.D. at 168.

n156 *See Tarasoff v. Regents of the Univ. of Cal., 17 Cal. 3d 425, 432-44, 551 P.2d 334, 342-49, 131 Cal. Rptr. 14, 22-29 (1976).* The ABA adopted a similar exception in the *Model Rules.* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983). That section permits disclosure of confidences where there is an imminent danger of death caused by the client's criminal act. *Id.* It should be noted, however, that no analogous exception to confidentiality is contained in the attorney-client privilege.

n157 *See supra* text accompanying notes 59-60.

n158 U.S. CONST. amend. V: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

n159 The Constitution does not refer to a right to access to counsel in those terms and only refers to a right to counsel in criminal cases. *See* U.S. CONST. amend. VI. Nevertheless, the broader construction of the right employed here appears to be justified as an aspect of due process. *See infra* text accompanying notes 195-96.

n160 *Fisher v. United States, 425 U.S. 391, 410-12 (1976).* The so-called production and authentication doctrines are of central importance to the question whether a person can be compelled, over a fifth amendment objection, to turn over tangible evidence, as *Fisher* and the recent case of *United States v. Doe, 104 S. Ct. 1237 (1984),* make clear. In *Fisher* the Court stated that the rationale behind the fifth amendment was to prohibit compelled self-incrimination, and not, as prior cases had suggested, *see Boyd v. United States, 116 U.S. 616, 630 (1886),* to protect privacy, which the Court said was the function of the fourth amendment. *Fisher, 425 U.S. at 401.* It therefore followed that the fifth amendment provided no protection against the contents of the thing compelled from the person, but only for the testimonial acts which the divulgence of the object would require -- that the object produced existed and was possessed by the defendant (the production doctrine) and that the object was what it purported to be (the authentication doctrine). *Id. at 408-09.* Since *Fisher* dealt with the production of business records, it remained uncertain how more personal types of documents or other objects would be treated, that is, whether a privacy rationale was still viable. *See id. at 414-15* (Brennan, J., concurring). Such doubt would seem to have been extinguished by *Doe,* which rejected the privacy rationale in a case involving personal business records. *104 S. Ct. at 1241-42.* Justices Marshall and Brennan cling to the hope that a right to privacy in purely personal records might survive, *id. at 1246* (Marshall, J., concurring in part and dissenting in part), but there would seem to be nothing in the Court's opinion in *Doe* to justify that hope since the majority reiterated the essential nature of the requirement that the writing be compelled. *Id. at 1245.* For a useful discussion of the testimonial aspects of the production and authentication of documents, see *In re Grand Jury Subpoena Duces Tecum Dated June 8, 1982 (Passports), 544 F. Supp. 721, 722-27 (S.D. Fla. 1982).*

n161 For an extensive discussion of compelled testimony and admissions in the custodial interrogation situation, see *Miranda v. Arizona, 384 U.S. 436, 455-91 (1966).* However, I am not concerned with that aspect of the self-incrimination question here.

n162 *Kastigar v. United States, 406 U.S. 441, 462 (1972),* discussed *infra* at text accompanying notes 186-90.

n163 *Id.; see New Jersey v. Portash, 440 U.S. 450 (1979),* in which the Court made clear that no derivative use could be made of immunized testimony either. *Id. at 459-60.* The Court contrasted immunized testimony that was truly compelled with testimony that was obtained in violation of the *Miranda* rule, but was not compelled. *Id. at 459.* While the latter could be used to impeach a witness, *see Harris v. New York, 401 U.S. 222, 223, 226 (1971),* immunized testimony could not, *Portash, 440 U.S. at 459.*

n164 This is the distinction between "use" immunity and "transactional" immunity. In jurisdictions in which the latter applies, the defendant cannot be prosecuted for any crime related to the transaction about which he testified. *See* 1 W. LAFAVE & D. ISRAEL, CRIMINAL PROCEDURE § 8.11, at 685 (1984). Use immunity is all that is constitutionally required. *Kastigar v. United States, 406 U.S. 441, 459-60 (1972).*

n165 *Wong Sun v. United States, 371 U.S. 471, 485 (1963).* For example, if the police investigation in the *Krist* hypothetical had produced a witness who told the police where the victim was buried, the fact that the prosecutor had obtained the same information from Krist's attorney would not bar the victim from testifying.

n166 *425 U.S. 391 (1976).*

n167 *Id. at 394.*

n168 *Id. at 395.*

n169 *Id. at 414.*

n170 The Court found that the information was not protected by the fifth amendment because it consisted of accountant's workpapers, the production of which could not incriminate the defendant. *Id. at 400.* Since the subpoena was directed at the attorney, moreover, any fifth amendment claim, which he might have, could only be asserted by him. *Id. at 401.*

n171 *See id. at 400-01.*

n172 *See id. at 403.*

n173 *Id.*

n174 *Id.* The Court explained the point further with this quotation from 8 J. WIGMORE, *supra* note 79, § 2307, at 592: "It follows, then, that *when the client himself would be privileged* from production of the document, either as a party at common law . . . or as exempt from self-incrimination, the attorney having possession of the document is not bound to produce." *Fisher, 425 U.S. at 404* (emphasis in original). The Court further noted that "[t]he purpose of the privilege requires no broader rule." *Id.*

n175 *425 U.S. at 403-05.*

n176 *E.g., In re Ryder, 263 F. Supp. 360* (E.D. Va.), *aff'd, 381 F.2d 713 (4th Cir. 1967);* State *ex rel. Sowers v. Olwell, 64 Wash. 2d 828, 394 P.2d 681 (1964).*

n177 *See* Comment, *Incriminating Evidence, supra* note 42; Note, *supra* note 42; Comment, *Right to Withhold, supra* note 42.

n178 *See In re Ryder, 263 F. Supp. 360* (E.D. Va.), *aff'd, 381 F.2d 713 (4th Cir. 1967).*

n179 *See supra* text accompanying notes 174-75.

n180 *64 Wash. 2d 828, 394 P.2d 681 (1964).*

n181 *Id. at 830-31, 394 P.2d at 683.*

n182 *Id. at 833, 394 P.2d at 684.*

n183 *Id., 394 P.2d at 684.*

n184 *Id. at 834, 394 P.2d at 685.* A similar result was reached in *Anderson v. State, 297 So. 2d 871 (Fla. App. 1974),* in which the defendant, charged with possession of stolen property, delivered the property to his attorney's office. The attorney then turned the property over to the prosecution. At the trial of the defendant, the attorney was called to testify as to the source of the property. *Id.* He objected on the ground of the privilege, and the prosecution responded by arguing that the delivery of the property by the client was not a "communication" and therefore was not privileged. *Id. at 872.* The court disagreed, noting that the act of delivery had communicative aspects that were protected. *Id. at 875.* The court noted with approval the following language from McCORMICK ON EVIDENCE, *supra* note 38, § 89:

> A confidential communication may be made by acts as well as by words, as if the client rolled up his sleeve to show the lawyer a hidden scar, or opened the drawer of his desk to show a revolver there. Certainly the fact that the client made the communication and its contents would be privileged against disclosure

297 So. 2d at 872. The court added:

> [I]f [the attorney] is required to divulge the source of the [property], the petitioner is very likely to be convicted because of an action he took in connection with a matter for which he retained [the attorney] in the first place . . . . In the final analysis, the petitioner would not have delivered the items to [the attorney] any more than he would have talked to [him] about them except for the fact that [the attorney was representing him].

Id. at 875.

To the same effect is *Morrell v. State, 575 P.2d 1200 (Alaska 1978),* in which the attorney representing a client charged with kidnapping came into possession of a plan of the kidnapping written by the client. *Id. at 1206.* The case is somewhat distinguishable from *Olwell* and *Anderson* because the attorney obtained the evidence from a third party. *Id. at 1207.* The court held, therefore, that the plan was outside of the privilege. *Id. at 1208.* The case is nevertheless interesting because it applies the duty to disclose not to the fruits of a crime or contraband, but to mere evidence of the crime -- the written plan. The court suggested that under Alaskan law the continued possession of the plan by the attorney might constitute the crime of concealment of evidence, *id. at 1211,* but felt that in any event the attorney had an ethical obligation to disclose it. *Id. at 1210-11.* This would be so, according to the court, even if the plan had been received from the client. *Id. at 1211.* In that case, however, the *Olwell* rule would be applied and the attorney would not be compelled to testify as to the source of the evidence. *Id. at 1211 n.17.*

n185 Note that in none of these cases was there a question whether the crime or fraud exception applied. All of them involved good faith communications (that is, the "testimonial aspects" of the property transfer, discussed in the text immediately below) about completed crimes. If any communications appear to be protected by the attorney-client privilege as defined in *Fisher,* these would.

It is also significant that the attorneys in these cases had in their possession physical evidence of a crime, as opposed to merely the client's words concerning a crime. There is, to be sure, a difference between disclosing tangible evidence and disclosing the client's words. This difference, however, has only to do with the fact that tangible evidence could be used in a criminal prosecution if the implied speech problem could be avoided. I noted above that there might be a difference in effect between disclosure of tangible property received from the client and disclosure of the client's words. It is with respect to the application of the immunity law that this difference is seen. When the client's words are disclosed by the attorney, it would be impossible to use those words or evidence derived therefrom without violating the immunity requirement established in *Kastigar.* The same may not always be the case with respect to the disclosure of tangible evidence when the only fifth amendment problems are those related to production and authentication of the object. If, for example, the existence of the property is a "foregone conclusion," compelled production does not violate the right against self-incrimination. *Fisher, 425 U.S. at 411; see also Davis v. United States, 636 F.2d 1028, 1041 (5th Cir. 1981).* Likewise, it has been held that if the property can be authenticated by a source independent of the defendant, there is no illegal use of his testimony. *United States v. Authement, 607 F.2d 1129, 1132 (5th Cir. 1979).*

Whether immunity can ever work to permit the use of tangible evidence obtained from a defendant when either the "foregone conclusion" or "independent source" rationale does not apply is open to question. It is plain that immunity can be granted with respect to the testimonial act of production. *See United States v. Doe, 104 S. Ct. 1237, 1245 (1984).* How an object so produced could become a part of a criminal prosecution without violating the *Kastigar* rule against use, however, is not clear. Curiously, the *Doe* Court, in affirming the right of the prosecutor to grant immunity to obtain evidence for a grand jury, does not comment on the problem. It was alluded to, however, by the court below, which appeared to doubt that the use problem could be overcome. *In re Grand Jury Empanelled March 19, 1980, 680 F.2d 327, 332 (3d Cir. 1982)* (noting that immunity might be appropriate with respect to authentication, but does not address production problem). The Supreme Court affirmed the Third Circuit's decision that the documents in question could not be compelled because the Government had not obtained immunity, but reversed that part of the opinion in which the court of appeals, in the judgment of the Supreme Court, used a privacy rationale under the fifth amendment. *Doe, 104 S. Ct. at 1245 & n.18.*

n186 *See Counselman v. Hitchcock, 142 U.S. 547, 585-86 (1892).*

n187 *See Kastigar v. United States, 406 U.S. 441, 453 (1972).* *Kastigar* settled the question whether immunity had to be "transactional," which prohibits prosecution for the crime to which the testimony referred, by holding that such protection was not required. *Id.* The prosecution can take place so long as the testimony is not a part of it. *Id.*

n188 Only one proposal along these lines has been found. *See Attorney-Client Confidentiality: A New Approach, 4 HOFSTRA L. REV. 685 (1976).* The concept of immunity was also alluded to in Levine, *Self-Interest or Self-Defense: Lawyer Disregard of the Attorney-Client Privilege for Profit and Protection, 5 HOFSTRA L. REV. 783, 824-25 (1977),* but was rejected for reasons which are obscure. *See id. at 825.*

n189 *See supra* text accompanying notes 177-84. A variation on the tangible evidence issue has arisen recently. The federal government has begun to subpoena attorneys to testify before grand juries, and even trial juries, with respect to the source and amount of fees paid by their clients. *See In re Grand Jury Subpoena Duces Tecum (Simels), 605 F. Supp. 839 (S.D.N.Y. 1985), rev'd on other grounds,* No. 85-6066 (2d Cir. June

27, 1985). The Government's purpose is to enforce forfeiture laws applicable to racketeering enterprises. *See 21 U.S.C. § 848* (1982) (permitting Government to seek forfeiture of all profits and proceeds of profits obtained from a racketeering enterprise).

Fee information can also be used as evidence of conspiracy. *See In re Grand Jury Subpoena Duces Tecum (Simels), 605 F. Supp. at 847-48.* The assertion of the privilege as to fee information has been unavailing because communications concerning fees are traditionally regarded as not privileged. *See In re Shargel, 742 F.2d 61 (2d Cir. 1984).* The fifth amendment obstacles, based on the argument that the attorney's testimony was compelled, are eliminated because under *Fisher* a communication to an attorney outside of the privilege constitutes a waiver of fifth amendment rights by the client. *Fisher, 425 U.S. at 414.*

The fee exception might well deserve reexamination. *See United States v. Rogers, 602 F. Supp. 1332 (D. Colo. 1985).* Fee discussions are plainly an integral part of the communication between attorney and client, and excluding them from the privilege puts the client in an unnatural dilemma. However, deeming discussions concerning fees as privileged would not affect the power of the government to obtain the information. It has as much right to compel the attorney to turn over contraband money as it does to compel the attorney to turn over payment in kind, such as narcotics which enable defendants to afford the best in legal services. The defendant's fifth amendment rights would not be violated if no use could be made of communications related to the funds.

As to the sixth amendment implication of the free issue, see *infra* text accompanying notes 192-211.

n190 Note that the need to immunize the client's statements as a condition of the attorney's disclosure extends only to good faith communications. Bad faith communications require no such protection, as *Fisher* demonstrates. *See supra* text accompanying notes 166-75. This point has apparently been missed by at least one prominent commentator, who insists that the fifth amendment prevents an attorney from revealing the client's perjury in all contexts, and not simply in the situation when the attorney knows of the falsity as a result of a privileged conversation. *See* Freedman, *Are the Model Rules Unconstitutional?, 35 U. MIAMI L. REV. 685, 693 (1981).*

Further proof that the fifth amendment does not protect against disclosure of client perjury when the disclosure would not reveal a protected communication may be found in the "perjury exception" to the law of immunity. Despite the fact that a grant of immunity is the "essence of coerced testimony" for fifth amendment purposes, *New Jersey v. Portash, 440 U.S. 450, 459 (1979)* and that immunity is coextensive with the privilege against self-incrimination, *Kastigar v. United States, 406 U.S. 441, 462 (1972),* immunity does not prevent prosecution for perjury. *United States v. Apfelbaum, 445 U.S. 115, 130 (1980).* If a defendant's own testimony can be used against him in such a situation, it is inconceivable that the use of his attorney's damaging testimony could violate the defendant's fifth amendment privilege.

n191 *See infra* text accompanying notes 388-402.

n192 U.S. CONST. amend. V: "No person shall be . . . deprived of life, liberty, or property, without due process of law."

n193 *See Maness v. Meyers, 419 U.S. 449, 471 (1975)* (Stewart, J., concurring) (quoting *Powell v. Alabama, 287 U.S. 45, 69 (1932)):* "If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it . . . would be a denial of a hearing, and, therefore, of due process in the constitutional sense. . . ." No expansion of this well-established principle is necessary to hold that a state court also may not arbitrarily prohibit or punish counsel's good-faith advice. *Maness, 419 U.S. at 471-72.*

n194 U.S. CONST. amend. VI: "In all criminal prosecutions the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." "The purpose of the privilege is to encourage clients to make full disclosure to their attorneys." *Fisher, 425 U.S. at 403.* Without the privilege, the client "would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice." *Id.*

n195 *See, e.g.*, Freedman, *supra* note 190, at 687-94; Seidelson, *The Attorney-Client Privilege and the Client's Constitutional Rights, 6 HOFSTRA L. REV. 693, 707-09 (1978).*

n196 One example of that sensitivity is the requirement in criminal cases that counsel be appointed for the indigent. *See, e.g., Argersinger v. Hamlin, 407 U.S. 25, 26-27 (1972); Gideon v. Wainwright, 372 U.S. 335, 343-44 (1963).* Another example is the implied sixth amendment requirement that counsel for the defendant be "effective." *Powell v. Alabama, 287 U.S. 45, 71 (1932).*

There is no general right to appointed counsel in civil cases. Likewise, there is no general requirement of effectiveness in civil cases. The Court, however, has indicated on due process grounds that the right to counsel extends to any case which threatens the loss of physical liberty, even in a civil proceeding. *Lassiter v. Department of Social Servs., 452 U.S. 18, 25 (1981).*

n197 *See, e.g., In re Grand Jury Proceedings (Twist), 689 F.2d*

1351, 1352 (11th Cir. 1982); In re Grand Jury Proceedings (Pavlick), 680 F.2d 1026, 1028-29 (5th Cir. 1982); United States v. Rogers, 602 F. Supp. 1332, 1348-49 (D. Colo. 1985).

n198 The counsel issue is explored at length in *In re Grand Jury Subpoena Duces Tecum (Simels), 605 F. Supp. 839, 844-48 (S.D.N.Y. 1985).* The case involved a subpoena of an attorney representing a defendant charged under *21 U.S.C. § 848* with operating a continuing narcotics enterprise. *Id. at 844-45.* The statute permits the Government to seek forfeiture of funds derived from the enterprise. *See 21 U.S.C. § 848*(a)(2) (1982). The Government sought, as part of its forfeiture action, to compel the attorney by subpoena to reveal what fees the defendant had paid him. The subpoena also sought information regarding the defendant's possession of large sums of money to prove the existence of the illegal enterprises. *In re Grand Jury Subpoena Duces Tecum (Simels), 605 F. Supp. at 845.* Defense counsel moved to quash the subpoena in part on sixth amendment grounds, arguing that forced disclosure by the attorney would destroy the client's trust in the attorney and would require the attorney to act as a witness against the client. *Id. at 845-48.* The court rejected the defense argument. It held that, since disclosure of fee information did not involve any legitimately privileged matter, there would be no loss of trust brought about as a result of the attorney's disclosure. *Id. at 848.* As to the attorney being required to testify, the court held that that might require disqualification, but that the right to counsel did not imply an absolute right to a particular lawyer. *Id. at 852-53.*

n199 *In re Shargel, 742 F.2d 61, 62 (2d Cir. 1984).*

n200 *See, e.g., In re Grand Jury Investigation No. 83-2-35, 723 F.2d 447, 454 (6th Cir. 1983), cert. denied, 104 S. Ct. 3524 (1984).*

n201 *United States v. Valencia, 541 F.2d 618, 621 (6th Cir. 1976); In re Grand Jury Subpoena Duces Tecum (Simels), 605 F. Supp. 836, 846 (S.D.N.Y. 1985).*

n202 *See McKissick v. United States, 379 F.2d 754, 761-62 (5th Cir. 1967)* (right to counsel not denied by attorney's reporting of client's perjury revealed to attorney because client has no right to an attorney for such purposes); *see also In re Shargel, 742 F.2d 61, 62 (2d Cir. 1984); United States v. Melvin, 650 F.2d 641, 645-46 (5th Cir. 1981); United States v. Pappadio, 346 F.2d 5, 9 (2d Cir. 1965), vacated on other grounds sub nom. Shillitani v. United States, 384 U.S. 364, 365 (1966).*

n203 The crime or fraud exception is, of course, not the only limitation on the extent of the privilege. The client also must be wary about consulting the attorney as a friend, a business adviser, an accountant, a "mere" scrivener, or an agent because these instances fall outside the privilege. *See* McCORMICK ON EVIDENCE, *supra* note 38, § 88, at 208-09. The privilege also may be lost if the communication is made in the presence of some, but not all, third parties. *Id.* § 91, at 217-19. Likewise, what was privileged comes to be discloseable in the event that the client attacks the lawyer's representation or refuses to pay the fee. *Id.* § 91, at 220-21.

n204 *See United States v. Melvin, 650 F.2d 641, 645 (5th Cir. 1981); United States v. Valencia, 541 F.2d 618, 621-23 (6th Cir. 1976).*

n205 *See In re Grand Jury Subpoena Duces Tecum (Simels), 605 F. Supp. 839, 846-48 (S.D.N.Y. 1985)* (defendant, while conceding that information was not protected by attorney-client privilege, claimed sixth amendment protected against disclosure of fee information).

n206 *Id. at 851* (citing *United States v. Freeman, 519 F.2d 67 (9th Cir. 1975); United States v. Hall, 346 F.2d 875* (2d Cir.), *cert. denied, 382 U.S. 910, 947 (1965)).*

n207 *See In re Grand Jury Subpoena Duces Tecum (Simels), 605 F. Supp. 839, 852 (S.D.N.Y. 1985),* and cases cited therein; *see also United States v. Flanagan, 679 F.2d 1072, 1075* (3d Cir.), *rev'd on other grounds, 104 S. Ct. 1051 (1984); United States v. Rogers, 602 F. Supp. 1332, 1347 (D. Colo. 1985).*

While it is clear that an accused who is financially able to retain counsel of his choosing must not be deprived of a reasonable opportunity to do so, it is also clear that the right to retain counsel of one's choice is not absolute. *See Urguhart v. Lockhart, 726 F.2d 1316, 1319 (8th Cir. 1984).* The right to retain counsel "must be carefully balanced against the public's interest in the orderly administration of justice." *Linton v. Perini, 656 F.2d 207, 209 (6th Cir. 1981), cert. denied, 454 U.S. 1162 (1982).*

n208 *See In re Grand Jury Subpoena Duces Tecum (Simels), 605 F. Supp. 839, 852-53 (S.D.N.Y. 1985).* The issue has arisen on numerous occasions in connection with the disclosure of client perjury. *See McKissick v. United States, 379 F.2d 754, 761 (5th Cir. 1967).* In *McKissick,* the defendant revealed that he had committed perjury and, while the trial was still going on, the attorney reported that fact to the court, and moved for a mistrial. *Id. at 758.* The defendant claimed that he had been denied assistance of counsel, in that he had not authorized the attorney's action, and should have had other counsel present when the attorney made the disclosure. *See id. at 759, 761-62.* The court held that there was no sixth amendment violation in not providing other counsel because a defendant has no right to the assistance of counsel in the commission of the continuing crime of perjury. *Id. at 761-62.* However, the court found that the defendant's sixth

amendment rights were violated by the attorney's unauthorized motion for a mistrial since that placed him in a position adverse to that of the client. The court found that, while it was proper for the attorney to disclose the perjury, he should have withdrawn. *Id.*

The *McKissick* court made clear the distinction between the right to *conflict-free* counsel and the right to counsel who remains silent in the face of client perjury or other misconduct. Unfortunately, that distinction has been lost on other courts. In *Lowery v. Cardwell, 575 F.2d 727 (9th Cir. 1978),* the defendant denied in testimony certain facts which the attorney knew to be true in a nonjury trial. The attorney moved to withdraw from representation and the court denied the motion. *Id. at 729.* The court of appeals found this to be a denial of the defendant's right to a fair trial because the attorney's action had the effect of revealing to the trier of fact that the client was lying. *Id. at 729-30.* The court approved the procedure contained in ABA, *Standards Relating to the Prosecution and Defense Function,* § 7.7, which advises the attorney faced with a client who announces his intention to lie to state that the client wishes to make a statement, but to refrain from examining him or referring to the statement in summation. *Lowery, 575 F.2d at 730 & n.3.* How this procedure avoids the problem that the court had with the motion to withdraw is not clear. How, in any event, it can be said that revelation of the defendant's attempt to corrupt the trial deprives the defendant of a fair trial is even less clear.

Judge Hufstedler concurred in the result. *Id. at 732* (Hufstedler, J., concurring). Relying on *McKissick,* she found a sixth amendment violation based on the adverse relationship which resulted from the attorney's action. *Id.* (Hufstedler, J., concurring). This position, as that taken in *McKissick,* would permit the disclosure, albeit at the cost of beginning the proceeding again.

Since *McKissick* and *Lowery,* the Supreme Court has announced a major decision on the right to counsel. Although not concerned with the question of client perjury, *Strickland v. Washington, 104 S. Ct. 2052 (1984),* informs the issue in a significant way. In *Strickland* the Court ruled that claims of ineffective assistance of counsel would be judged in accordance with this test: "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id. at 2064.* To prove this, it would be necessary for the defendant to demonstrate not only that the attorney's performance, when measured against objective standards, was defective, but that the defendant was prejudiced thereby. *Id. at 2069-70.* In certain circumstances, the Court said, a conflict of interest between the attorney and client would produce a presumption of prejudice. *Id.*

Applying the *Strickland* standard to the *McKissick* and *Lowery* cases, it would appear that at best the conflict of interest rationale used in the former and by Judge Hufstedler in the latter would still be good law: the lawyer's disclosure to the trier of fact of perjury by the client in effect makes the lawyer a witness against the client, which would appear to create a quintessential conflict. The notion advanced by the majority in *Lowery* that the disclosure deprives the defendant of a fair trial, however, would seem now to have less force than ever.

Further enlightenment on the constitutional dimensions of the client perjury issue is likely to come shortly. The Supreme Court has recently granted certiorari in *Whiteside v. Scurr, 744 F.2d 1323, motion for hearing en banc denied, 750 F.2d 713 (8th Cir. 1984), cert. granted sub nom. Nix v. Whiteside, 105 S. Ct. 2016 (1985),* a case which involved not the disclosure of client perjury, but the *threat* to disclose. In *Whiteside,* the defendant told the attorney that he planned to testify falsely (the court of appeals assumed that the testimony would in fact have been false). *See 744 F.2d at 1326-27.* The attorney told the defendant that if he did so, he would withdraw, advise the judge, and testify against the defendant. *Id. at 1326.* Presumably as a result of this warning, the defendant testified truthfully. He was convicted. *See id.* The court of appeals ruled that the defendant had been denied the right to counsel. *Id. at 1329.* It found a presumption of prejudice under *Strickland,* based on the attorney's threat to testify. *Id. at 1330.* It also based the reversal on a ground akin to that relied upon by the *Lowery* majority -- that the attorney's threat to disclose the perjury deprived the client of the right to testify which deprived him of a fair trial. *Id. at 1329-30.* Whether the mere act of threatening to become an adversary if the client commits perjury, as opposed to disclosure of the perjury, is sufficient to create a conflict of interest under *Strickland* is dubious. As Judge Gibson stated in his dissent from the denial of the motion for rehearing en banc, it is difficult to see how the client could demonstrate prejudice in such a situation. *750 F.2d at 715* (Gibson, J., dissenting). Still, the conflict of interest argument is one which is probably best judged on the facts of specific cases, and seems to be a rational one. The same cannot be said for the court's alternate holding. Conceding that the right to testify does not include the right to commit perjury, *744 F.2d at 1328* (citing *Harris v. New York, 401 U.S. 222, 225 (1971)),* the court nevertheless found that the attorney's threat forced the client to choose between two constitutional rights -- "the right to testify in one's own behalf and the right to effective assistance of counsel, and infringed both." *744 F.2d at 1330.*

The implications of the alternative holding are alarming: an attorney could not disclose perjury, or even threaten to do so. It would seem to be just as improper to threaten withdrawal since if the client did not want to lose his attorney this might also affect the way in which he testified, also interfering with his "right" to lie. If the Supreme Court were to endorse the views of the Eighth Circuit in *Whiteside,* the result, ironically, would be to undermine one of the major arguments of the proponents of confidentiality. As I shall discuss *infra* in the text accompanying notes 355-74, the instrumentalist defense of confidentiality rests on the notion that confidentiality is required to permit the attorney to dissuade clients from engaging in unlawful activity, which is precisely what the attorney in *Whiteside* succeeded in doing. The clear message of the Eighth Circuit's decision is that that is inappropriate, leaving one to wonder whether there is much justification for confidentiality beyond its effectiveness in protecting the relationship between the client and the "hired gun."

n209 *United States v. Flanagan, 679 F.2d 1072, 1075 (3d Cir. 1984).*

n210 *In re Grand Jury Subpoena Served Upon John Doe, Esq., 759 F.2d 968, 975-76 (2d Cir. 1985)* (upon showing of relevance and need, attorney will be compelled to testify as to source of fees despite the fact that testimony will require disqualification). *But cf.* United States v. Badalamenti, S.S. 84 Cr. 236 (PNL) slip op. (S.D.N.Y. July 10, 1985), where, in dicta, Judge Laval suggested that a statute permitting forfeiture of attorney's fees, where the funds came from illegal enterprises, would violate the sixth amendment because the defendant would be completely deprived of counsel: no lawyer would risk taking the case on a fee basis, and at the same time, the defendant would not qualify for free counsel. *Badalamenti,* slip op. at 7. Judge Laval's reasoning is flawed. If all of the funds from which the defendant had to pay an attorney were derived from criminal activity, the defendant would not have funds available to pay an attorney and therefore would be entitled to free counsel. Protection against abuse of the power to compel attorney testimony is further discussed *infra* at the text accompanying notes 393-402.

n211 It has also been argued that compelling the attorney to testify against the client would have the effect of forcing the client to elect between two constitutional rights. The issue has been put this way:

Rather clearly, the considerations affecting the availability of the fifth amendment right against self-incrimination and the attorney-client privilege, after client has retained counsel, are intimately related to client's sixth amendment right to counsel. If the retention of counsel and subsequent intercourse between client and counsel jeopardize client's fifth amendment right against self-incrimination or his privilege of confidentiality, client may be dissuaded from retaining counsel. This dissuasive effect would be in basic opposition to the suspect's right to counsel.

Seidelson, *supra* note 195, at 713; *see also* Note, *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement, 91 HARV. L. REV. 464, 485-86 (1977).*

Professor Seidelson cites *Simmons v. United States, 390 U.S. 377 (1968),* Seidelson, *supra* note 195, at 713, in which the Court held that testimony by a defendant necessary to the success of a motion to suppress illegally obtained evidence could not be used at trial against defendant. *390 U.S. at 394.* The Court found it "intolerable that one constitutional right should have to be surrendered in order to assert another." *Id.*

In a subsequent case the Court modified the language of *Simmons,* stating that it did not mean to suggest that a defendant could not be put to a choice between rights of a constitutional dimension, but that it would be impermissible to put a defendant to such a choice where "compelling the election impairs to an appreciable extent any of the policies behind the right involved." *McGautha v. California, 402 U.S. 183, 213 (1971).* Even under this more restrictive language, however, forcing a client to choose between the privilege against self-incrimination and his right to counsel plainly would seem to be unconstitutional. Since, however, the disclosures under consideration in this discussion would be made only if there were a grant of immunity, the client would not give up his fifth amendment right, and hence would not be forced to choose between constitutional protections.

n212 *744 F.2d 1323,* discussed *supra* at note 208.

n213 *See supra* note 208.

n214 This is the only conceivable way in which the fifth amendment issue could arise, since no communication by the lawyer to the client, however threatening, would raise a fifth amendment issue.

n215 *See supra* text accompanying notes 132-51.

n216 An example would be if a person told an attorney that he intended to testify falsely because of threats of physical harm, to determine whether that would be a defense to a perjury charge.

n217 *See supra* text accompanying notes 186-90.

n218 *See supra* text accompanying notes 199-203.

n219 *See supra* text accompanying notes 199-203.

n220 As the following discussion will demonstrate, the failure of the court in *Whiteside* to do so largely accounts for the peculiar result it reached.

n221 *See supra* note 208.

n222 *See supra* text accompanying notes 207-10.

n223 *See supra* note 208.

n224 *See supra* text accompanying notes 158-211.

n225 *See supra* note 11.

n226 The doctrine of privity, which traditionally has impeded recovery by third parties for lawyer negligence, is eroding. *See* McMonigle & Mallen, *The Attorney's Dilemma in Defending Third Party Lawsuits: Disclosure of the Client's Confidences or Personal Liability?, 14 WILLAMETTE L.J. 355, 359-60 (1978)* (noting two exceptions to the privilege -- crime (fraud) and self-defense). Stockholders have sued not only attorneys' clients, but also the attorneys themselves for securities frauds. *See Meyerhofer v. Empire Fire and Marine Ins. Co., 497 F.2d 1190, 1192-93* (2d Cir.), *cert. denied, 419 U.S. 998 (1974).* Attorneys have also been sued under the civil forfeiture provisions of RICO. *See RICO Used by Insurers to Sue Attorneys,* Nat'l L.J., Mar. 26, 1984, at 3, col. 1 (attorney sued for alleged involvement in insurance fraud).

n227 Disclosure has always been held to be justified in these circumstances. *See* McCORMICK ON EVIDENCE, *supra* note 38, § 91, at 220-21; 8 J. WIGMORE, *supra* note 79, § 2327, at 638. The *Code of Professional Responsibility* holds to the same effect. *See* CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(4) (1969).

n228 The most extensive review of the subject is found in Levine, *supra* note 188, at 783; *see also* McMonigle & Mallen, *supra* note 226; Note, *ABA Code of Professional Responsibility; An Attorney's Right to Self-Defense, 40 MO. L. REV. 321 (1975);* Note, *Disclosure of Client Confidences by Securities Attorney Named as a Defendant in a Civil Action Does Not Violate Code of Professional Responsibility, 29 U. MIAMI L. REV. 376 (1975).* Both McCormick and Wigmore limit their treatment of the subject to situations in which the attorney has been attacked by the client. *See* McCORMICK ON EVIDENCE, *supra* note 38, § 91, at 220-21; 8 J. WIGMORE, *supra* note 79, § 2327, at 638.

n229 *See Rochester City Bank v. Suydam, Sage & Co., 5 How. Pr. 254 (N.Y. Sup. Ct. 1851).* In *Suydam* an attorney turned over records of correspondence between him and his client to the plaintiff bank. *Id. at 255.* The court held that "where the attorney has an interest in the facts communicated to him, and when their disclosure becomes necessary to protect his own personal rights, he must of necessity be exempted from the obligation of secrecy." *Id. at 261.* As one commentator has pointed out, however, *Suydam* may not be an exception at all. *See* Levine, *supra* note 188, at 796. It appears that the bank was a nominal party, and the suit was really for the benefit of the attorney because if the suit was successful the attorney would be relieved of liability on the notes. *See 5 How. Pr. at 261.* Hence the case appears to address an attorney-client conflict, not one involving a third party. Levine, *supra* note 188, at 796.

n230 *97 F.2d 1190* (2d Cir.), *cert. denied, 419 U.S. 998 (1974).*

n231 One commentator has suggested that disclosure by an attorney to defend against third-party attack was not permitted under the common law and that a radical departure was taken by the ABA in 1969 when it promulgated the *Code of Professional Responsibility,* which permitted disclosure of confidences by a lawyer to "defend himself . . . against an accusation of wrongful conduct." CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(4) (1982); Levine, *supra* note 188, at 796-809. The theory that the *Code* introduced a novel concept, however, is unpersuasive. In the first place, the author's only support for the assertion that such disclosures were not permitted under the common law is that all of the cases discovered by the author dealt with the question of the attorney's defense against attack by the client. *See id.* at 797. While there were no cases until *Meyerhofer* that authorized disclosure in the face of third-party attack, no case can be found that prohibits such disclosure. As to the assertion that the ABA's approach was a departure, the language chosen was broad enough to authorize disclosure in the face of a third-party attack, but nothing in the *Code of Professional Responsibility* suggests that the ABA intended to deal with anything other than the attorney's right to defend against client attacks. One can assume that the *Code*'s drafters would have recognized a radical departure in the rules of confidentiality had they seen one and would at least have offered some explanation. There is, however, nothing in the ethical considerations accompanying canon 4 that refers to the matter. Moreover, the authorized footnotes to the right to self-defense in disciplinary rule 4-101(C)(4) suggest that the *Code* was simply restating the rule that permitted an attorney to defend himself against a client. CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(c)(4) nn.18-19 (1982). The footnotes refer to canon 37 of the *Canons of Professional Ethics,* which states expressly that a lawyer is not precluded from disclosing the truth "[i]f a lawyer is accused by his client." CANONS OF PROFESSIONAL ETHICS Canon 37 (1928). The only other reference in the notes is to ABA Comm. on Professional Ethics and Grievances, Op. 202 (1940), which also deals with a lawyer-client conflict.

While there is doubt as to what the drafters of the *Code* intended with respect to self-defense, there is none with respect to the recently adopted *Model Rules of Professional Conduct,* which explicitly extends the excep-

tion to situations involving third-party attacks. *See infra* text accompanying note 308.

n232 *See supra* text accompanying note 226, in which the question of the attorney's tort liability to third parties is discussed. My colleague, William Nelson, has suggested to me that another reason for the absence of third-party suits against lawyers, at least in the civil context, is that lawyers traditionally did not have the "deep pockets" which would make them attractive parties to be named in a suit. That situation clearly has changed, at least for some in our profession. Another, albeit more insidious, explanation also occurs to me: the absence of third-party attacks on lawyers is a result of a kind of Lawyer's Golden Rule: "If you don't sue me, I won't sue you."

n233 Also, one cannot discount the possibility that there may have been widespread ignorance in the bar as to what the rules of confidentiality are. The result may be that attorneys assumed that it would be futile to join other lawyers as defendants in civil suits, or to make them targets of criminal investigation, because the privilege gave them a kind of immunity. This appears to have been the view taken by the attorneys in *Sullivan v. Chase Inv. Servs., 434 F. Supp. 171 (N.D. Cal. 1977),* discussed *infra* at note 258.

n234 *See* Goldberg, *Policing Responsibilities of the Securities Bar: The Attorney-Client Relationship and the Code of Professional Responsibility -- Considerations for Expertizing Securities Attorneys, 19 N.Y.L.F. 221, 221 (1973)* ("Transformation of a simple larcenous intent into a complex securities swindle almost invariably requires the assistance of a securities practitioner."); Shipman, *The Need for SEC Rules to Govern the Duties and Civil Liabilities of Attorneys Under the Federal Securities Statutes, 34 OHIO ST. L.J. 231, 237 (1973).*

n235 *See* Sommer, *supra* note 11, P79,631, at 83,687. Commissioner Sommer suggested that "the old verities and truisms about attorneys and their roles are in question" and that in securities matters "the attorney will have to function in a manner more akin to that of the auditor than to that of the advocate." *Id.* P79,631, at 83,689. Control over attorneys is exercised by the Commission through its power to regulate those who practice before it. *See* 17 C.F.R. § 201.2(e) (1984). "Practice" includes "transacting any business with the SEC." *Id.* § 201.2(g). Thus a suspension or disbarment by the SEC would virtually end an attorney's securities practice.

n236 *See* Rule 10b-5, 17 C.F.R. § 240.10b-5 (1984); *15 U.S.C. § § 77q*(a), 78(b) (1982).

n237 The SEC has taken the position that an attorney is guilty of aiding and abetting in a securities violation if he fails to act to prevent a violation of the securities laws. That position was upheld in *SEC v. National Student Mktg. Corp., 457 F. Supp. 682, 712 (D.D.C. 1978)* (attorney acquiescence in closing of merger based on incorrect financial statements found to support guilty verdict), and reiterated in *In re* Carter and Johnson, [1981 Transfer Binder] *FED. SEC. L. REP. (CCH) P82,847, at 84,145* (Feb. 22, 1981) (association of law firm with client lends air of legitimacy and authority to actions of client). There are occasions in which, but for the law firm's association, a securities violation could not have occurred. Under those circumstances, if the firm were cognizant that it was being used to achieve improper ends and tacitly acquiesced, or if the firm benefited from the violation more than it would have in a normal legal relationship, inaction would probably give rise to an inference of intent. *Id. P82,847, at 84,169.*

The novelty of the SEC position is demonstrated by the rather furious reaction of the securities bar to the filing of the complaint in *National Student Marketing. See* Hoffman, *supra* note 16, at 1390, and the flood of articles which have been produced on the matter, *see id.* at 1404 & n.38. It might be noted that while the SEC has indicated that an attorney may be required to act to avoid liability for aiding and abetting, neither it nor the courts have indicated precisely what an attorney is required to do. In particular, it has not been held that the attorney must, to avoid liability, report the facts to the SEC or some other governmental agency. However, the SEC position creates a significant possibility that the attorney will be placed in an adversary position in relation to his client to avoid charges of aiding and abetting a securities violation.

n238 The attorney representing a corporation represents the entity, not just the officers or directors. *See Garner v. Wolfinbarger, 430 F.2d 1093, 1102 (5th Cir. 1970), cert. denied, 401 U.S. 974 (1971)* (corporation cannot assert attorney-client privilege against stockholders in a derivative action). When stockholders sue the corporation, therefore, they are not in a third-party situation vis-a-vis the attorney.

n239 *See Meyerhofer v. Empire Fire & Marine Ins. Co., 497 F.2d 1190, 1193 (2d Cir. 1974).*

n240 *Id.*

n241 *Id. at 1192.*

n242 *See id. at 1193.*

n243 *Id.*

n244 *Id.*

n245 *Id.*

n246 *Id.* The specific provisions of the *Code of Professional Responsibility* were canon 4, "A Lawyer Should Preserve the Confidences and

Secrets of a Client," and canon 9, "A Lawyer Should Avoid Even the Appearance of Professional Impropriety." *Id. at 1193-94 & n. 1.* I shall attempt to explain the meaning of canon 4 later. *See infra* text accompanying notes 287-302. I shall make no attempt to explain the meaning of canon 9 because, as can be seen from the quoted language, any attempt to do so ultimately would be circular; that is, the appearance of impropriety is what it appears to be.

n247 *See id. at 1193.*

n248 *Id. at 1194-95.*

n249 It should be noted that the opinion is unclear as to whether the communication between Empire and the law firm was privileged. Assuming that the failure to report the finder's fee was unlawful, if Empire knew it was unlawful, then communication between Empire and the law firm regarding the finder's fee would not be privileged, and the case could have been disposed of under the crime or fraud exception. The failure of the court to treat the case this way supports the conclusion that it was in fact dealing with the right of self-defense as an exception to the privilege.

n250 *497 F.2d at 1195.* The court said as much while discussing whether Goldberg could be enjoined from violating the rules which prohibit an attorney from representing the adversary of a former client. The court held that these rules were not applicable, noting that "[a]t most the record discloses that Goldberg might be called as a witness for the plaintiffs . . . ." *Id.* Clearly, though, he could not be called as a witness if to do so would violate the attorney-client privilege.

n251 *484 F.2d 655 (7th Cir. 1973).*

n252 *Id.*

n253 *Id.*

n254 *Id. at 658.*

n255 *Id.*

n256 *Id.*

n257 *497 F.2d at 1195.* Note that the attorney also acted, even before that, to avoid civil or criminal penalties which might have arisen out of the securities fraud violation, by reporting the matter to the SEC. *Id. at 1193.* The court never commented on the propriety of that action directly, but plainly its analysis would permit such action. *See id. at 1194-95.*

n258 This point was effectively made in *Sullivan v. Chase Inv. Servs., 434 F. Supp. 171, 188-89 (N.D. Cal. 1977),* another case involving alleged securities frauds, for which plaintiffs sought damages, naming the attorneys as aiders and abettors in the fraudulent acts. The court, cognizant of the suit's potentially adverse impact on the attorney-client relationship, *id. at 188,* enumerated the abuses which could occur as a result of such results:

> The intentional circumvention of the attorney-client privilege is a potential abuse that is unique to allowing attorneys to be sued as aiders and abettors. Ordinarily, of course, parties may not discover an opponent's confidential communications to his attorney . . . . An attorney may, however, reveal such communications if doing so is necessary to his defense against accusations of wrongful conduct.

Id. at 188 (citing *Meyerhofer*).

> Thus, an innocent attorney sued as an aider and abettor of his client's misconduct is faced with the unenviable choice of either revealing confidential communications or sacrificing his own defense. The prospect of obtaining potentially damaging and otherwise unavailable evidence will encourage plaintiffs to sue defendant's attorneys routinely as aiders and abettors. In addition to causing attorneys great nuisance and expense, such a development could seriously undermine the willingness of clients to be completely open with their counsel.

Id. at 188.

n259 The court in *Sullivan* pointed out that while there were indeed hazards in permitting suits against attorneys for aiding and abetting, "the alternative is even less desirable," *id. at 189,* because it would in effect immunize attorneys involved in wrongdoing. Because communications relating to fraud are not privileged, the attorney-client privilege should not protect attorneys from liability for aiding clients in the perpetration of fraud. *Id.* The answer, the court said, was not to immunize the lawyer, but to allow the court to control the discovery process. *Id.*

n260 *See id.*

n261 *663 F.2d 843 (9th Cir. 1981).*

n262 *Id. at 853.*

n263 *Id. at 854.*

n264 *Id.*

n265 *Id. at 853.*

n266 [1981 Transfer Binder] *FED. SEC. L. REP. (CCH) P82,847, at 84,145* (Feb. 22, 1981).

n267 *Id.* at 84,169.

n268 The SEC stated:

> Our review of the record, which includes respondents' periodic exhortations to Hart to improve the quality of National's disclosure, leads us to believe that respondents did not intend to assist the violations by their inaction or silence. Rather, they seemed to be at a loss for how to deal with a difficult client.

Id.

n269 *See* Bialkin, *SEC Clears Air Concerning Lawyers' Disclosure Duties,* N.Y.L.J., Mar. 17, 1981, at 1, col. 3. The author, a leader in the securities bar, declared that the SEC's ruling was a "giant step" in bridging disagreements that had developed between the bar and the SEC, a disagreement that resulted from the SEC's tendency to intrude upon the "traditional role of counsel and interfere with the lawyer's duty to advise the client as to the full extent of the client's rights." *Id*. at 15, col. 5. The fact that Carter and Johnson revealed to the SEC the advice that they had given their client is noted without comment. *Id*.

n270 It may be that there was no violation of the attorney-client privilege in a technical sense, because by the time the disclosures were made by Carter and Johnson, the company was in bankruptcy and therefore in the control of a receiver. The receiver could have waived the privilege for the company, but whether this is what occurred is not known. It seems doubtful (and absurd), however, to think that the attorneys would have accepted their suspension rather than reveal the advice that they gave had there been no waiver.

n271 *See infra* text accompanying notes 388-402.

n272 It should be emphasized that this issue cannot be resolved by any change in the rules of confidentiality, unless the notion of immunizing attorneys, as opposed to immunizing the statements of their clients, is taken seriously -- an unlikely and unwarranted possibility. Moreover, the problem cannot be avoided by easing the lawyer's obligation to avoid certain kinds of conduct. It ultimately does not matter, for example, whether the SEC has taken an erroneous position with respect to the obligations of the attorney to the investing public, or with respect to the definition of aiding and abetting. If the SEC were to adopt the position that the sole obligation of the securities lawyer is to the client and that a person must have criminal intent to be guilty of aiding and abetting a securities violation, the incidences of the problem might be reduced, but the issue would be qualitatively the same. The nature of the relationship between securities lawyers (and, for that matter, tax, corporate, antitrust, and other attorneys) and their clients is such that a kind of presumption of complicity frequently arises. The SEC has merely made that presumption more difficult to rebut. What concerns us, however, is that, whatever the nature of the presumption, rebuttal may be required. When rebuttal requires the disclosure of client misconduct, the problem of the attorney's duty arises.

n273 The original *Canons of Ethics* contained 32 canons. CANONS OF PROFESSIONAL ETHICS (1908). Thirteen others were added in 1928. *See* Armstrong, *supra* note 2, at 3.

n274 *See* CODE OF PROFESSIONAL RESPONSIBILITY (1969). A revised edition of the *Code* was published in 1982. *See* CODE OF PROFESSIONAL RESPONSIBILITY (1982).

n275 The adoption of the *Model Rules* by the House of Delegates of the ABA does not change the standards of conduct to which attorneys are held. The *Model Rules* will only have the force of law if, as happened with the *Code of Professional Responsibility,* they are adopted by the states.

n276 *See* Armstrong, *supra* note 2, at 3-4.

n277 While a number of states are presently considering the adoption of the *Model Rules,* only four states, New Jersey, Arizona, Minnesota, and Montana have adopted them. ABA, LAWYER'S MANUAL ON PROFESSIONAL CONDUCT (BNA), at 433 (Oct. 3, 1984); *Minnesota, Montana Adopt Versions of Model Ethics,* NAT'L L.J., Aug. 5, 1985 at 8, col. 1. The New Jersey Supreme Court, however, took a position on disclosure of misconduct almost diametrically opposed to that advocated in the *Model Rules. See* ABA, LAWYER'S MANUAL ON PROFESSIONAL CONDUCT (BNA), at 334 (July 25, 1984) (mandatory disclosure of crimes or frauds that would result in death, substantial bodily injury, or serious financial loss). The Arizona rule is also more liberal with respect to disclosure, permitting -- although not mandating -- disclosure of a client's intention to commit a crime. ABA, LAWYER'S MANUAL ON PROFESSIONAL CONDUCT (BNA), at 445-46 (Oct. 3, 1984). The Minnesota rule appears to be similar, while Montana adopted the *Model Rules'* disclosure provision without change. *Minnesota, Montana Adopt Versions of Model Ethics, supra,* at 8, col. 1.

n278 The *Code*'s disciplinary rule 4-101(C)(2) provides, for example, that a lawyer may reveal "confidences or secrets when . . . required by law or court order." CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(2) (1969).

n279 CANON OF PROFESSIONAL ETHICS Canon 37 (1928).

n280 *Id*.

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.
Id.

n281 *Id*.

n282 *See* J. WIGMORE, *supra* note 79, § 2327, at 638; *id*. § 2298, at 572.

n283 CANONS OF PROFESSIONAL ETHICS Canon 29 (1908).

n284 CANONS OF PROFESSIONAL ETHICS Canon 41 (1928).

n285 *See supra* text accompanying notes 127-57.

n286 Thus, in holding that canon 37 did not bar disclosure of the whereabouts of a client who was a fugitive from justice, the Committee used language which made it clear that it was interpreting the canon in light of the rules of the attorney-client privilege:

When the communication by the client to his attorney is in respect to the future commission of an unlawful act or to a continuing wrong, the communication is not privileged. One who is actually engaged in committing a wrong can have no privileged witnesses, and public policy forbids that an attorney should assist in the commission thereof . . . .
ABA Comm. on Professional Ethics and Grievances, Op. 155 (1936).

As to the disclosure provisions in canons 29 and 41, the Committee ruled that a lawyer could not reveal the client's admitted perjury in depositions for a divorce action, but instead the lawyer was limited to advising the client to reveal the perjury to his wife. ABA Comm. on Professional Ethics and Grievances, Op. 287 (1953). If the client failed to do that, the Committee stated that the attorney should withdraw. Likewise, with respect the obligation of canon 41 to reveal fraud, the Committee ruled that an attorney representing a wife in a divorce action could not reveal that the wife had become pregnant by another man. ABA Standing Comm. on Professional Ethics, Informal Op. 869 (1965). In another divorce action, the lawyer was not permitted to reveal, either to the court or to successor counsel, that the client's claim of residence was fraudulent. ABA Comm. on Professional Ethics and Grievances, Op. 268 (1945). Qualifying the language of canon 41, the Committee said that "[w]hile ordinarily it is the duty of a lawyer, as an officer of the court, to disclose to the court any fraud that he believes is being practiced on the court, this duty does not transcend that to preserve the client's confidences." *Id*.

n287 *See* CODE OF PROFESSIONAL RESPONSIBILITY (1969). The 47 canons comprising the *Canons of Professional Ethics* were regrouped into nine canons. Each canon is a single statement. For instance, canon 4 states that "A Lawyer Should Preserve the Confidences and Secrets of a Client." Under each canon are series of ethical considerations concerning the subject of the canon, which are "aspirational in character." *See* CODE OF PROFESSIONAL RESPONSIBILITY Preliminary Statement (1969). Also under each canon are mandatory disciplinary rules, the violation of which could result in disbarment or other lesser punishments.

n288 CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(A) (1969).

n289 *Id*. DR 4-101(C)(3).

n290 *Id*. DR 4-101(C)(4).

n291 *See* ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY 178-80 (ABA 1979).

n292 CANON OF PROFESSIONAL ETHICS Canon 37 (1928).

n293 It may be recalled that disciplinary rule 4-101 was cited in *Meyerhofer* as authority for the proposition that disclosure was authorized in the face of third-party attacks, *see Meyerhofer v. Empire Fire & Marine Ins. Co., 497 F.2d 1190, 1194-95 (2d Cir. 1974)*. Whether the drafters of the *Code* actually intended to expand the self-defense provision of the *Code,* however, is debatable. One would think that so great a change, had it been intended, would have been the subject of some comment by the drafters of the *Code.* There is, however, no mention of the matter in the ethical considerations and in the footnote to disciplinary rule 4-101(C)(4), footnote 19. This note provides references to the derivation of the disciplinary rule, canon 37, which authorized defensive disclosure by an attorney in response to attack by a client, and ABA Comm. on Professional Ethics and Grievances, Op. 202 (1940), which also concerned that kind of an attack. *See* ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY, *supra* note 291, comment at 180. Commentators Mecham and Jones, who are also cited in footnote 18, also speak only to the rights of the lawyer vis-a-vis the client. *See id.* comment at 171.

n294 CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B) (1969). There really was no need for a separate rule respecting the lawyer's obligation to disclose perjury since it would always constitute a fraud on the tribunal.

n295 The amendment qualified the disclosure obligation in disciplinary rule 7-102(B)(1) by adding the concluding phrase "except when the information is protected as a privileged communication." *See* CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B)(1) (1974).

n296 ABA Comm. on Ethics and Professional Responsibility, Op. 341 (1975).

n297 Only 12 states adopted the ABA's amendment to disciplinary rule 7-102(B)(1), with a substantial majority therefore retaining the mandatory

language of the original role. *See* G. HAZARD & W. HODES, A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT 356 (1985).

n298 The privilege is limited to communications between the attorney and client. *See supra* text accompanying note 130.

n299 *See supra* text accompanying notes 123-24.

n300 *Gebhardt v. United Rys. Co., 220 S.W. 667, 679 (Mo. 1920).*

n301 *Regina v. Cox, 14 Q.B.D. 153, 167 (1884).*

n302 The theory would be that the ethical rules preclude only disclosure of *past* crimes, not continuing or future ones. *See supra* text accompanying notes 148-51.

n303 MODEL RULES OF PROFESSIONAL CONDUCT scope at 11 (1983).

n304 *Id*. Rule 1.6.

n305 The term "secret," while broadly construed, is limited to information about the client "gained in the professional relationship." *See* CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(A) (1969). Under the *Model Rules,* information gained outside of the professional relationship is also protected, so long as it relates to the relationship. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983).

n306 *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1983), discussed *infra* text accompanying notes 324-33.

n307 *Id*. Rule 1.13, which addresses the "Organization as Client," a category including corporations, contains certain disclosure language, but is not so much a disclosure rule as one which attempts to grapple with the intractable problem of identifying who the client is in a corporate setting. It concludes, whether helpfully or not, that the client is "the organization acting through its duly authorized constituents." *Id*. The rule indicates the circumstances under which an attorney can disclose wrongful acts to the board of directors of the corporation, characterizing such disclosure not as a breach of the privilege, but as a disclosure of the conduct of one constituent of the client to another. *See id.* There is no provision for disclosure outside of the corporation except, of course, for the attorney's right to disclose in self-defense. Absent that situation, the attorney may only withdraw. Withdrawal, however, can result, as I shall discuss, in at least implicit disclosure. *See infra* text accompanying notes 315-22.

n308 *Id*. Rule 1.6.

n309 Although Professor Freedman, whose influence on the *Model Rules* is manifest, has noted a concern for human life which might explain this exception, *see* M. FREEDMAN, *supra* note 8, at 1, the exception was probably adopted in response to the recent decision of the California Supreme Court in *Tarasoff,* in which a right to sue a psychiatrist for failing to warn the victim of a homicidal client was established, *see Tarasoff v. Regents of the Univ. of Cal., 17 Cal. 3d 425, 433-47, 551 P.2d 334, 342-51, 131 Cal Rptr. 14, 22-37 (1976).* As I shall discuss *infra* text accompanying notes 310-22, the *Tarasoff* principle is inapplicable to lawyers. It has caused lawyers to worry, however, and so the *Model Rules* adopted this exception -- this ounce of prevention -- while in the process of protecting their interests.

n310 MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 comment at 26 (1983).

n311 Ironically, the one situation in which the attorney can disclose under the rule is the worst of all circumstances for the victim. Did it not occur to the drafters that once potential killers learn of this, they will be "inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action," thus decreasing the public's protection when it is most needed?

n312 No explanation is offered for exempting the attorney from actions brought by those who suffer at the hands of the client. Perhaps it was considered self-evident: the purpose of the rule of confidentiality is, after all, to assure that attorneys will be able to protect the individual rights of the client. If all of the attorneys were either incarcerated or impoverished as a result of being implicated in their clients' deeds, there would be no one left to perform this role. Therefore, only attorneys must have the right to protect themselves against the client.

n313 MODEL RULES OF PROFESSIONAL CONDUCT Scope at 11 (1983).

n314 *See supra* text accompanying notes 151-52.

n315 Such assistance would be a criminal violation under aiding and abetting or conspiracy laws.

n316 *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16 (1983).

n317 *Id*. Rule 1.6 comment at 27.

n318 *See* PROPOSED MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6, at 17 (1983): "If in any such situation the lawyer is asked about the basis for withdrawal, the lawyer should state that explanation must be obtained from the client."

n319 Just as the "imminent death," or, *"Tarasoff* exception," appears to have been inspired by a case which worried lawyers, *see supra* note 156, the provision permitting the attorney to alert other lawyers to danger was simi-

larly inspired. The case is the one I have been discussing, *O.P.M. Leasing Services*, in which the inadequately warned law firm took on the tainted client. This exception should make clear that lawyers at least can breach their "inviolable" duty if the victim is a brother.

n320 MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (1983).

n321 *Meyerhofer* has been criticized for its approval of the attorney's disclosure of information, first to the SEC and then to plaintiff's attorneys, prior to the time the defense attorney was actually sued or subjected to investigation. *See* Levine, *supra* note 188, at 804-06.

n322 *But see* Alternative B of THE AMERICAN LAWYER'S CODE OF CONDUCT, *supra* note 81, Rule 1.1, which rules out the right of the attorney to defend himself against third-person attacks by disclosing a client's confidences.

n323 MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(2) (1983).

n324 *Id*. Rule 3.3(a)(4).

n325 *See supra* text accompanying notes 287-88.

n326 MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(b) (1983).

n327 *Id*. Rule 3.3 comment at 67 (1983).

n328 That is, if the proceeding had been concluded, the crime would convert from an "ongoing" to a "past" crime. That, of course, is not the law. *See supra* text accompanying notes 147-51.

n329 MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 comment at 66 (1983).

n330 *See supra* text accompanying notes 160-211 for a discussion of the constitutional dimensions of the privilege. The rules do address the constitutional question, albeit in a confused manner. The comment to rule 3.3 contains this statement:

The general rule -- that an advocate must disclose the existence of perjury with respect to a material fact, even that of a client -- applies to defense counsel in criminal cases, as well as in other instances. However, the definition of the lawyer's ethical duty in such a situation may be qualified by constitutional provisions for due process and the right to counsel in criminal cases. In some jurisdictions these provisions have been construed to require that counsel present an accused as a witness if the accused wishes to testify, even if counsel knows the testimony will be false. The obligation of the advocate under these Rules is subordinate to such a constitutional requirement.

Id. at 67.

There are serious difficulties with this analysis. In the first place, it contains no reference to the most significant constitutional issue in disclosure of client misconduct, the privilege against self-incrimination. Nor does it indicate that this constitutional problem can arise in civil as well as criminal cases. The fifth amendment, of course, protects against compulsion of testimony in any proceeding, and against the use of compelled testimony in criminal proceedings. *See* U.S. CONST. amend. V. Moreover, while due process and right to counsel questions can be raised by a disclosure provision in both civil and criminal cases, *see supra* text accompanying notes 192-93, the problems can be remedied by declaring a mistrial. In light of these constitutional requirements, the statement that some jurisdictions require that an attorney present a defendant "as a witness" is flatly wrong. The closest that any court has come to such a position is *Whiteside*, discussed *supra* at note 208, but the court, while finding a denial of the right to counsel on the basis of a disclosure threat never suggested that the attorney should, or even could, examine the perjurious witness in the ordinary manner. Similarly in *Lowery*, discussed *supra* at note 208, the court said only that the client's perjury could not be revealed to the trier of fact. *See Lowery v. Cardwell, 575 F.2d 727, 731 (9th Cir. 1978).* Indeed, the court indicated that the proper procedure was to follow section 7.7 of the ABA's Standards Relating to the Prosecution Function and the Defense Function, which advises the attorney to announce that the client wishes to make a statement, and then disassociate herself from it, asking no questions and not referring to it in summation. *Id. at 730-31; see also* ABA, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION § 7.7(c) (1971). The standard may draw an absurd distinction between the active and passive disclosure of perjury, but it certainly does not tell the attorney to examine the client "as a witness."

n331 MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 comment at 66 (1983). The drafters have attempted to avoid this inconsistency by adding that, if the lawyer were made to remain silent, the client could "in effect coerce the lawyer into being a party to fraud on the court." *Id*. That is simply double talk. If rule 3.3 did not require disclosure, fraud on the tribunal would be covered by rule 1.6. Hence it would not be the client, but the law that coerced the lawyer and that cannot result in the lawyer being party to a fraud. The real justification for the rule, it would seem, is not to avoid the lawyer's complicity, but rather, as the quoted language of the comment suggests, to put teeth into the requirement that those who use the legal process not corrupt it.

n332 Doing this would not have been without danger to the fabric of the confidentiality rules. With the only exception being an extraordinarily unlikely one, it is possible to stay atop the mountain. If perjury or other frauds on courts are added as exceptions, the resulting movement down the slope might be unstoppable.

n333 MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.1(b) (1983).

n334 *Id*.

n335 *Id*. Rule 1.6(a).

n336 *Id*. Rule 4.1 comment at 78. Substantive law, of course, only "requires" an attorney to disclose such information in a special sense. First, a formal demand must be made by a tribunal for the information, and second, the attorney must not have a valid fifth amendment claim, because if he did have such a claim, there would be no requirement to speak. Passing that question, we have seen that there are two grounds on which an attorney might be required to disclose under substantive law; first, that the communication, having been made in furtherance of the client's intention to commit a crime of fraud, *see supra* text accompanying notes 141-57, is outside the privilege; second, because the attorney has a right to self-defense which supersedes the privilege, *see supra* text accompanying notes 225-72. It is my position that the latter situation poses the most difficult disclosure problem, and requires the application of immunity rules. *See infra* text accompanying notes 375-402.

n337 The interest to which Hazard was referring was that of collecting a fee. The *Code of Professional Responsibility* permits violation of the client's confidences to do that. *See* CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (C)(4) (1969). Professor Hazard acknowledges that it may be proper to allow the attorney to do this:

But of course the secret exchanges between the client and the lawyer could also be relevant when the client refuses to pay someone other than his lawyer, or makes an accusation of wrongdoing against a third person. Suppose a person refused to pay his architect but admits to his lawyer that he ordered changes in the plans that he denies having ordered; or charges his accountant with having prepared a misleading financial statement but admits to his lawyer that he provided the misleading information on which the accountant relied. Why should the exception to the confidentiality rule not be at least so extended that a lawyer may testify to contradict a barefaced lie by his client? The lawyer now may do so when he is the target of a client's misrepresentation . . . .

G. HAZARD, *supra* note 8, at 32.

n338 For a discussion of the moral basis for confidentiality, see Landesman, *Confidentiality and the Lawyer-Client Relationship*, in THE GOOD LAWYER 191 (D. Luban ed. 1984). *See generally* S. BOK, SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION (1982).

n339 CODE OF PROFESSIONAL RESPONSIBILITY Canon 4 (1969).

n340 *Greenough v. Gaskell, 39 Eng. Rep. 618, 620-21 (Ch. 1833); see infra* note 364.

n341 *See* A. DERSHOWITZ, THE BEST DEFENSE XV (1982); *see also* M. FREEDMAN, *supra* note 8, at 5.

n342 While the adversary system has been much proclaimed by lawyers as a powerful means of determining the truth, *see* M. FREEDMAN, *supra* note 8, at 3 ("the adversary system is one of the most efficient and fair methods designed for determining" the truth), there is at least some room to doubt whether the adversary system rewards truth as much as it does a believable story. *See* Subin, *supra* note 81, at 23, col. 1. The point is made by Judge Frankel in this way:

[The cases are] numerous . . . in which we manage as counsel to avoid too much knowledge. The sharp eye of the cynical lawyer becomes at strategic moments a demurely averted and filmy gaze. It may be agreeable not to listen to the client's tape recordings of vital conversations that may contain embarrassments for the ultimate goal of vindicating the client. Unfettered by the clear prohibitions actual "knowledge" of the truth might impose, lawyers may be effective and exuberant in employing the familiar skills: techniques that make a witness look unreliable although the look stems only from counsel's artifice, cunning questions that stop short of discomfiting revelations, complaisant experts for whom some shopping may have been necessary. The credo that frees counsel for such arts is not a doctrine of truth-seeking.

Frankel, *The Search for Truth: An Umpireal View, 123 U. PA. L. REV. 1031, 1039 (1975).* Consider also the devotion to truth revealed by a highly successful New York attorney whose "personal ethics are to win. Total devotion to employment and to win, to go for the jugular, to fight as rough and as tough as I can within the bounds of ethical considerations, and within the bounds of legality." *Roy Cohn . . . on Roy Cohn*, N.Y.L.J., Dec. 1, 1980, at 46, col. 2. When asked how he handles the client who plans to lie he responded:

First of all, you never word a question to a client that would require the client to come back to you and say, "well, I'm going to lie and say such and such." You say, "Now suppose John Jones, the prosecution's main witness

against you, makes up a bunch of lies and says on the night of Dec. 5 you had a gun in your hand and you such-and-such. How would you answer that if I decide to put you on the stand?" Now, by saying "suppose the witness makes up a lie," I'm giving him an out, not to have to say to me, "Oh yes, he will say it because it did really happen."
Id. at 46, col. 3; *id.* at 47, col. 1.

I do not suggest that all attorneys have the warped perspective on the "bounds of ethical considerations" suggested in Mr. Cohn's statement, but there is an uncomfortable similarity between his view of the lawyer's function and that reflected by Lord Brougham and his progeny. I will not discuss the point at length here. It must be conceded, however, that even if lawyers may seek to avoid the truth, or at least to avoid revealing it, it is still useful to know it, if for no other reason than the fact that it is commonly disastrous for lawyers not to know the truth when their adversaries do. *See* Subin, *supra* note 81, at 23, col. 1.

n343 "Complete candor" between lawyer and client "is in the public interest because only through the counsel and advocacy of a lawyer can each individual fully exercise his or her autonomy." THE AMERICAN LAWYER'S CODE OF CONDUCT, *supra* note 81, at 104 (comment to "The Client's Trust and Confidences").

n344 *Cf.* Fried, *supra* note 8, at 1062, 1064, 1080-87 (problems posed when attorney is asked to resolve conflict with opposing party by legal but arguably immoral means).

n345 This is how, for example, Professor Freedman justifies the attorney's silence in the face of his client's perjury. *See* M. FREEDMAN, *supra* note 8, at 31.

n346 *See* discussion of fifth amendment, *supra* text accompanying notes 160-91.

n347 *See* discussion of sixth amendment and due process, *supra* text accompanying notes 192-211.

n348 *See* M. FREEDMAN, *supra* note 8, at 1-8.

n349 I have discovered one attempt to survey attitudes toward the privilege, Comment, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine, 71 YALE L.J. 1226 (1962).* The study demonstrates the difficulty in obtaining reliable data on the subject, because it is impossible to determine from the questions asked just what the respondents were answering. For example, a sample of 108 lay people were asked whether certain professionals, including lawyers, "would repeat to others matters that you had told them in confidence." *Id. at 1262.* It is not clear whether the question related to matters about which the respondents had in fact discussed with their lawyers. Likewise, it is not clear whether the questioners asked if no matter would ever be revealed to anyone, or something less than that. Passing this problem, it is of interest to note that while approximately 70% of the sample indicated that the attorney would not reveal confidential information, 60% reached the same conclusion with respect to accountants, who are generally not obligated to conceal information. *Id.* On the question most germane to the present discussion, the respondents were asked whether they would make free and complete disclosure to the attorney if they assumed that the attorney had an obligation to reveal confidential information if ordered to do so by a court. Only half of the respondents indicated that they would be less likely to disclose. *Id. at 1270.* Of course, even this response is of questionable significance, since it was to a question too abstract to be meaningful.

n350 *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 comment at 26 (1983):

To the extent a lawyer is required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. The public is better protected if full and open communication by the client is encouraged than if it is inhibited.

n351 How else can one explain the decision of so many arrested persons to make admissions to the police or to prosecutors, despite the fact that they are assured that damaging information will be used against them? *See* Younger, *Results of a Survey Conducted in the District Attorney's Office of Los Angeles County Regarding the Effect of the* Miranda *Decision Upon the Prosecution of Felony Cases, 5 AM. CRIM. L.Q. 32 (1966).* District Attorney Younger found that the percentage of cases in which confessions or admissions were made did not decrease because of the increased scope of the warnings required by the decision in *Miranda v. Arizona, 384 U.S. 436 (1966).* He opined that: "In every human being, however noble or depraved, there is a thing called conscience. . . . Large or small, that conscience usually, or at least often, drives a guilty person to confess. If an individual wants to confess, a warning from a police officer . . . is not likely to discourage him." Younger, *supra,* at 33. If the answer to that is that the arrestee simply succumbs to the "compulsion inherent" in the police precinct, *see Miranda, 384 U.S. at 458,* then why is it not just as possible that the arrestee will succumb to the coercive effect of the lawyer's admonition that there is danger in not revealing the facts?

It might be argued that nothing has changed in terms of confessions to the police because the *Miranda* warnings are insufficient to overcome the

inherent coercion of the police precinct. This conclusion, even if true, hardly undermines the point suggested here. It would seem at least equally coercive for one's attorney to advise the client to either tell the attorney everything or lose. There is no reason to believe that a client would be less moved by his lawyer's threat that he will go to jail unless he speaks, than by the police officer's threat.

n352 The extensive literature on surprise client perjury demonstrates the scope of the problem. The latest treatment is Donitz, *Surprise Client Perjury: Some Questions to Proposed Solutions to an Old Problem, 29 N.Y.L. SCH. L. REV. 407 (1984). See also* articles cited *supra* note 146.

n353 No studies have been found which deal with the kind of advice about confidentiality that attorneys in fact give to their clients. It would appear likely, however, that a general pledge of unqualified confidentiality is most commonly given. *See, e.g.,* 4 A. AMSTERDAM, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES § 80, at 1-80 (1984). The author advises counsel to assure the client that he can tell his story "in complete confidence," and suggests this statement:

Now, I am going to ask you to tell me some things about yourself and also about this charge they have against you. Before I do, I want you to know that everything you tell me is strictly private, just between you and me. Nothing you tell me goes to the police or to the District Attorney or to the judge or to anybody else. Nobody can make me tell them what you said to me, and I won't. . . . [T]he law recognizes that the lawyer's obligation is to help his client and to nobody else; that the lawyer is supposed to be one hundred percent on the client's side; and that the lawyer is only supposed to help [his] client, and never do anything -- tell anybody anything -- that might hurt the client in any way. . . . So you can trust me and tell me anything you want without worrying that I will ever pass it along to anyone else because I won't. I can't be questioned or forced to talk about what you tell me . . . because I am 100 per cent on your side. . . .

Id.

While such advice may be safe enough most of the time, it plainly does not account for the numerous qualifications which would have to be included in a full explanation of the confidentiality rule.

n354 Freedman, *Lawyers' Silence is Right,* N.Y. Times, Feb. 14, 1983, at I/A17, col. 1: "The lawyer-client *Miranda* warning is not entirely absurd, therefore, within the scheme of the defeated rules. If your lawyer is not going to be your champion against a hostile world, but a member of the enemy camp, at least you ought to know where you stand."

n355 *See* THE AMERICAN LAWYER'S CODE OF CONDUCT, *supra* note 81, at 104:

[A]s every experienced lawyer knows, a substantial part of the lawyer's time is devoted to advising clients that a particular course of conduct should not be followed on grounds of illegality or morality. Unless clients are candid with their lawyers, [that] critical function cannot be served. The client's sense of trust in the lawyer is therefore vital, and the lawyer's obligation of confidentiality is essential to establishing and maintaining that trust.

See also MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 comment at 26 (1983).

n356 MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 comment at 26 (1983).

n357 Again, disclosure in the situation in which the communication in question is privileged because it was made in good faith is only justified if it is accompanied by a prohibition against the use of the communication in a criminal prosecution against the client.

n358 Bentham, *Rationale for Judicial Evidence,* in THE WORKS OF JEREMY BENTHAN 7 (J. Bowring ed. 1842) (originally published in 1827). The context of the quotation is worth noting. Bentham was an ardent, if somewhat excessive, foe of the attorney-client privilege who did not even recognize its relation to the privilege against self-incrimination:

But if such confidence, when reposed, is permitted to be violated, and this be known . . . the consequence will be, that no such confidence will be reposed. Not reposed? -- Well: and if it be not, wherein will consist the mischief? The man by the supposition is guilty; if not, by the supposition there is nothing to betray: let the law adviser say everything he has heard, everything he can have heard from his client, the client cannot have anything to fear from it. That it will often happen that in the case supposed no such confidence will be reposed, is natural enough: the first thing the advocate or attorney will say to his client, will be, -- Remember that, whatever you say to me, I shall be obliged to tell, if asked about it. What, then, will be the consequence? That a guilty person will not in general be able to derive quite so much assistance from his law adviser, in the way of concerting a false defence, as he may do at present.

Id. at 473. I hasten to add that I do not espouse this extreme view, which suggests that the client's admission of guilt could be used to convict him. I do believe, however, that short of that, Bentham had a point.

n359 *See supra* the discussion of withdrawal in the text accompanying notes 315-19.

n360 Predictably, the American Trial Lawyers Association gives the matter a second thought. Its proposed rules on withdrawal permit, but do not

require, the attorney to withdraw (a) in a civil case which the client has induced the attorney to undertake on the basis of deliberate misrepresentation of the facts and (b) where withdrawal is necessary to avoid the commission of a disciplinary violation by the lawyer which, presumably, would include the commission of a crime. THE AMERICAN LAWYER'S CODE OF CONDUCT, *supra* note 81, § § 6.5-6.6 & comment. In the case of the fraudulently induced representation, every discretionary withdrawal would not be permitted if it would result in a "direct" disclosure of a confidence. In the case of withdrawal to avoid violation of disciplinary rules, discretionary withdrawal would not be permitted if it would result in either a "direct" or "indirect" disclosure of a confidence. *Id.* § 1.2. There can be little doubt as to what is intended by these provisions: a lawyer, for example, is expected to continue the presentation of the case of a criminal defendant who the lawyer knows to be creating through his own testimony and that of witnesses, a totally false alibi defense, because even a request to withdraw would be a signal to the court that perjury is occurring. *See id.* at 605 (illustrative case 6(a)).

n361 *See* Report, *In re* O.P.M., *supra* note 86, at 392. The trustee's report provides a graphic example of the hysterical state which was induced in the client responsible for the massive fraud upon learning that O.P.M.'s law firm was considering resignation. Indeed, at one point the client threatened to leap out of a window if the threat was carried out. *Id.*

n362 Subin, *supra* note 81, at 22, col. 1.

n363 Those who take the most extreme view of the need for confidentiality have grouped around the American Trial Lawyers Association. *See generally* THE AMERICAN LAWYER'S CODE OF CONDUCT, *supra* note 81 (setting forth an expansive view of the need for confidentiality). The flavor of the group can be gleaned from an article written by its former president and associate reporter of its proposed code of ethics. Koskoff & Lumbard, *Breach of Faith: The Kutak Rules, 3 U. BRIDGEPORT L. REV. 1 (1981).*

Koskoff and Lumbard had this to say on the subject of confidentiality: "It is no exaggeration to say that attorney-client confidentiality is thus the key that unlocks all our liberties. We call the right to counsel the most essential right, because all rights may be lost without a lawyer. . . . [T]his . . . cannot be a negotiable issue." *Id. at 46.*

The authors state that proposals for disclosure of client confidences made by the Kutak Commisssion, *see supra* note 81, were the equivalent of Chamberlain's capitulation at Munich, Koskoff & Lumbard, *supra,* at 38, and would turn the country into one large Gulag Archipelago, a fate which can only be avoided if confidences are kept inviolable. *Id.* at 45 & n.173. They appear to find support for this proposition in both the Declaration of Independence and the Federalist Papers, although without specific citation, *see id.;* to those sources the reader must rely primarily on Solzenitzsyn. In a final burst of enthusiasm for confidentiality, Koskoff and Lumbard offer this proof of the existence of an absolute rule: "The sacred, inviolable confidentiality of the counselling relationship, however, is so fundamental to the exercise of [the right to counsel] and was so obvious and self-evident to the Founders that they saw no need to articulate it." *Id.* at 45. This rather interesting theory of constitutional interpretation, like the rest of the position of these authors, would not be all that noteworthy but for the fact that the sentiment they expressed is to a significant extent now embodied in the ethical rules adopted by the ABA, and under consideration by the states.

n364 2 TRIAL OF QUEEN CAROLINE 83 (1879). Brougham launched his legal career with a successful defense of the Queen against a charge of adultery brought by King George IV, who, living in times more civilized than those of his predecessors, sought to use the law as a means of disposing of his wife. *See* VII J. CAMPBELL, LIVES OF THE LORD CHANCELLORS 303-05 (1848). It will hardly come as a surprise that one who espoused such a view of the attorney's role would advocate a broad rule of confidentiality. This Brougham did as Lord Chancellor in the leading case of *Greenough v. Gaskell, 39 Eng. Rep. 618 (Ch. 1833).* Brougham justified the privilege as necessary to the protection of individual rights, in precisely the terms used in the debate over confidentiality today. He also offered a definition of the privilege which in part conformed with the law at the time, but in an important respect expanded its coverage, by ignoring the well-established exception for communications in furtherance of unlawful activities. *See id. at 619.* He failed to cite, for example, the leading case of Annesley v. Anglesea, 17 How. St. Trials 1139 (Ex. 1743), in which the client's request to his attorney to prosecute a false charge of murder against the client's nephew was held not privileged. *Id.* at 1414-15. *See generally* Hazard, *An Historical Perspective on the Attorney-Client Privilege, 66 CALIF. L. REV. 1061 (1978).* Professor Hazard observed of Brougham's advocacy in *Greenough v. Gaskell* that, "[a]s a demonstration of manipulating precedent, Brougham's performance is unsurpassed. As a resume of existing law, it bore practically no resemblance to reality." *Id. at 1084.*

n365 Although, in the case at bar he was being literal enough; his statement was a thinly veiled threat to expose the fact that the King had previously married a Catholic, proof of which would not only have kept George his wife, but also have lost him his crown. *See* D. MELLINKOFF, *supra* note

8, at 188.

n366 Professor Freedman's reaction to Lord Brougham's speech is: "Let justice be done -- that is, for my client let justice be done -- though the heavens fall. That is the kind of advocacy that I would want as a client and that I feel bound to provide as an advocate." M. FREEDMAN, *supra* note 8, at 9.

n367 G. CHESTERTON, *The Twelve Men*, in TREMENDOUS TRIFLES 63, 67 (6th ed. 1920):

[T]he horrible thing about all legal officials, even the best, about all judges, magistrates, barristers, detectives, and policemen, is not that they are wicked (some of them are good), not that they are stupid (some of them are quite intelligent), it is simply that they have got used to it.

Strictly they do not see the prisoner in the dock; all they see is the usual man in the usual place. They do not see the awful court of judgment; they see only their own workshop.

n368 *See* Fried, *supra* note 8, at 1071; *supra* note 30.

n369 *See supra* note 30.

n370 This term was used by Professors Dauer and Leff in their response to Fried's characterization of the lawyer-client relationship. *See* Dauer & Leff, *supra* note 31, at 583.

n371 Freedman, *supra* note 146, at 1474-75.

n372 Alschuler, *The Preservation of a Client's Confidences: One Value Among Many or a Categorical Imperative?, 52 U. COLO. L. REV. 349, 355 (1981).*

n373 In approving the ABA's rejection of most of the Kutak Commission's disclosure proposals, Professor Freedman announced that the ABA "has insured that the lawyer will continue to serve as each client's only champion against a hostile world." N.Y. Times, Feb. 14, 1983, at I/A17, col. 3.

n374 Alschuler, *supra* note 372, at 352. Alschuler would extend confidentiality to all situations except situations in which there is an imminent danger of death caused by the client. *Id. at 352-55.* He includes within that exception cases in which an innocent man has been condemned to death as a result of the client's wrongs, *id. at 355,* which is most interesting because that would appear to prevent disclosure if the consequence were merely life imprisonment.

n375 *See supra* text accompanying notes 225-72.

n376 *See, e.g.,* N.Y. PENAL LAW § 265.25 (Consol. 1984).

n377 In *Tarasoff* the court held that the parents of a homicide victim had a cause of action against a psychiatrist for failure to warn the victim of the danger to her life posed by his patient. *Tarasoff v. Regents of the Univ. of Cal., 17 Cal. 3d 425, 435-45, 551 P.2d 334, 342-47, 131 Cal. Rptr. 14, 23-29 (1976).*

n378 I have noted that the *Code*'s disciplinary rule 7-102(B) imposes a duty on lawyers to disclose frauds on courts or persons, and that the provision is in force in a number of jurisdictions. *See supra* text accompanying notes 295-96. The duty is limited, however, because it must be qualified by the attorney-client privilege (if not by the ABA's broader exclusion of "secrets"), unless, of course, an immunity law or its functional equivalent is in place. No such qualification was at issue in *Tarasoff,* a case which has been cited by lawyers as potential authority for attorney liability for failure to disclose. *See* Merton, *Confidentiality and the "Dangerous" Patient: Implications of Tarasoff for Psychiatrists and Lawyers, 31 EMORY L.J. 263, 275-76 (1982).* While it is true that the *Tarasoff* court found that the doctor had a duty not only to the patient but to third parties endangered by the patient, *Tarasoff, 17 Cal. 3d 439, 551 P.2d at 345, 131 Cal. Rptr. at 25,* the analogy is not an apt one. In *Tarasoff* the pertinent legislation expressly excluded from the physician-patient privilege information regarding danger to human life. *Id. at 441, 551 P.2d at 347, 131 Cal. Rptr. at 27.* No such exception exists in the attorney-client privilege. There is discretion to disclose such information if it is not privileged, and perhaps a court which agreed with *Tarasoff* might impose a duty in that situation. But that would hardly solve the problem, since in all but the most unusual cases the information which the attorney would gain would be privileged.

It should also be noted that contrary to the assertions of many opponents of SEC actions in regulating lawyer behavior, *see generally* Lipman, *The SEC's Reluctant Police Force: A New Role for Lawyers, 49 N.Y.U. L. REV. 437, 475-77 (1974),* the SEC has never attempted to impose a duty on lawyers to report on client misconduct. It has said that, because of the substantial and active role that attorneys play in securities matters, their silence in the face of frauds can constitute evidence that they are accomplices in the execution of the fraudulent act, *see In re* Carter and Johnson, [1981 Transfer Binder] *FED SEC. L. REP. (CCH) P82,847, at 84,169-73* (Feb. 22, 1981). The "duty" to disclose the client's fraudulent representations is a duty only in the sense that persons are obligated not to participate in unlawful activities. Where agents make what turn out to be false representations, they must correct them, even if there was no wrongful intent on their part. *See* RESTATEMENT (SECOND) OF AGENCY § 275 (1958). It should also be noted that the situations in which the securities lawyer would be obligated to disclose would almost inevitably fall within the crime or fraud

exception to the privilege.

n379 *See supra* note 378.

n380 Again, I distinguish disclosure in self-defense.

n381 MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 comment at 27 (1983).

n382 *Cf*. W. LAFAVE & A. SCOTT, *supra* note 76, at 183 (generally a person is only liable for action rather than nonaction).

n383 *Id*. at 184-87.

n384 *See supra* text accompanying notes 376-77.

n385 *See* W. LAFAVE & A. SCOTT, *supra* note 76, at 26-29.

n386 ABA Comm. on Professional Ethics and Grievances, Formal Op. 314 (1965).

n387 *See Clark v. United States, 289 U.S. 1, 15 (1933).*

n388 The need for such a record is suggested in *Kastigar v. United States, 406 U.S. 441, 443-44 (1972).*

n389 This could be done by filing with the court a record of the government's existing evidence. *See In re Grand Jury Proceedings (Weir), 377 F. Supp. 919 (S.D. Cal. 1974).*

n390 *Kastigar v. United States, 406 U.S. 441, 461 (1972).* The only reason the prosecutor might not want disclosure is that it would contaminate the record. Certification would be a cure; if there were no record, then the prosecutor should have a heavy burden.

n391 *Id. at 462.*

n392 *See Apfelbaum v. United States, 445 U.S. 115, 125 (1980):*

This Court has never held . . . that the Fifth Amendment requires immunity statutes to preclude all uses of immunized testimony. Such a requirement would be inconsistent with the principle that the privilege does not extend to consequences of a noncriminal nature, such as threats of liability in civil suits, disgrace in the community, or the loss of employment.

If the issue arose in a civil case, it would probably be appropriate for a court to notify the prosecutor in order to permit the prosecutor to protect the record of any ongoing criminal investigation. A certification by the prosecutor that he had no interest in, or information pertaining to, a particular matter would provide the client whose misconduct was revealed with a strong case for derivative use.

n393 *See Sullivan v. Chase Inv. Servs., 434 F. Supp. 171, 188-89 (N.D. Cal. 1977).*

n394 *See, e.g., Grand Jury Subpoena Duces Tecum (Simels), 605 F. Supp. at 850-53.*

n395 Disciplinary rule 5-102 requires the attorney to withdraw should he become a witness against the client. CODE OF PROFESSIONAL RESPONSIBILITY DR 5-102 (1969).

n396 *See supra* text accompanying note 259.

n397 *759 F.2d 968 (2d Cir. 1985).*

n398 *See id. at 973.*

n399 *Id. at 973-75.*

n400 *Id. at 973.*

n401 *Id.*

n402 *In re Stolar, 397 F. Supp. 520, 524-25 (S.D.N.Y. 1975)* (court quashed grand jury subpoena of attorney when alternative way of determining client's whereabouts was available, stating that caution should be exercised in view of attorney-client relationship).

n403 *See* Simon, *supra* note 8, at 30.

n404 Wasserstrom, *supra* note 8, at 14-15.

n405 Frankel, *supra* note 342, at 1035-41; *see also* Griffiths, *Ideology in Criminal Procedure or A Third "Model" of the Criminal Process, 79 YALE L.J. 359, 398 (1970).*

n406 *See* Luban, *supra* note 33, at 117-18.