South Texas Law Review

35 S. Tex. L. Rev. 727 (October, 1994)

Client Confidences and the Rules of Professional Responsibility: Too Little Consensus and Too Much Confusion

by Harris Weinstein*

* Mr. Weinstein, a partner in the Washington, D.C. firm of Covington & Burling, served as Chief Counsel of the Office of Thrift Supervision, U.S. Department of Treasury, from May 1990 through December 1992. This Article is based on a paper presented at the South Texas Law Review Symposium.

Text retrieved from LEXIS database; re-formatted for readability.

SUMMARY:

... The organized bar is now well into a fourth decade of controversy over the rules governing a lawyer's responsibility upon learning that a client has used the lawyer's services in the perpetration of a civil fraud or financial crime. ... (1) to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in ... substantial injury to the financial interests or property of another; [or] (2) to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services had been used. ... Thus, the information is neither privileged nor entitled to confidential treatment as a client “confidence” or “secret.” ... One can now find among the 50 states at least 10 different versions of rules governing whether a lawyer may, must, or may not disclose that a client has committed or is intending to commit a fraud or a financial crime having a serious financial impact on a third party. The rules range from the absolute bar on disclosure found in California to the New Jersey rule requiring a lawyer to disclose information “to the proper authorities, as soon as, and to the extent the lawyer reasonably believes necessary, to prevent the client ... from committing [an] ... illegal or fraudulent act that the lawyer reasonably believes is likely to result in ... substantial injury to the financial interest ... of another.” ...

TEXT:

[*727]

I. Introduction

The organized bar is now well into a fourth decade of controversy over the rules governing a lawyer's responsibility upon learning that a client has used the lawyer's services in the perpetration of a civil fraud or financial crime. This controversy has included extensive arguments concerning the lawyer's duty to retain in confidence information about a client's intended or already completed fraudulent activity. n1 A subject that in 1908 was the **[*728]** topic of a seemingly straightforward Canon has given rise to a host of different rules among the states, vigorous debate within the organized bar, and, at times, confrontations between the Bar and government regulatory agencies.

This paper will first summarize the development of the current rules. Next, the diverse rules now in force in the 50 states will be reviewed. Finally, this Article suggests the questions that should be considered in seeking to develop a broader consensus.

Several points emerge from this brief discussion. First, ABA Model Rule 1.6(b), n2 which addresses the disclosure of client confidences, should be analyzed as one of a group of rules defining the expected response of an attorney who has learned that a client has engaged the lawyer's services in furtherance of a fraudulent scheme. Second, when viewed in their entirety, the ABA Model Rules permit broader disclosure of intended client fraud than the ABA's current Model Rule 1.6(b) appears to tolerate. Finally, a disciplined review of the general issues - undertaken in a time free of emotions generated by specific cases - may advance efforts to establish a more useful consensus.

II. The Historical Development of the Rules on Disclosure of Confidential Information

The Canons of Professional Ethics, adopted by the American Bar As **[*729]** sociation in 1908, explicitly took the position that a client's announced intention to commit a crime “is not included within the confidences” that the lawyer “is bound to respect.” n3 Thus, the Canons excluded from the category of protected secrets a client's stated intent to proceed criminally. Crimes threatening personal injury or death were not singled out. Any client communications in furtherance of criminal fraud and other financial crimes were included among those that were denied confidential treatment. n4

Canon 41 went further and placed on the attorney an obligation to disclose a client's completed fraud or deception to the victim unless the client rectified the wrong:

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. n5

The language of Canon 41 was unmistakable in its meaning. According to Professors Hazard and Koniak, "canon 41 imposed a mandatory duty to disclose both past and ongoing fraud, whether or not the lawyer's services had been used to perpetrate the fraud." n6

The ABA's continued adherence to the disclosure principles of Canons 37 and 41 became doubtful as the result of two formal opinions of the Standing Committee on Ethics and Professional Responsibility (the Committee) issued some 40 years after the Canons were written. To be sure, these opinions did not deal with disclosure of client fraud to the victim. Instead, they dealt with client perjury. **[*730]**

In 1948, the Committee issued an opinion holding that a lawyer who resigned upon learning that a client intended to commit perjury may not communicate that knowledge to the client's next counsel - such disclosure was said to violate the duty to maintain client confidences. n7 This theory directly contravened Canon 37, which would have denied confidential treatment to the client's stated intent to commit the crime of perjury. n8

A few years later, in 1953, the Committee held that a lawyer may not disclose a client's perjury if the lawyer learns of the false testimony after the conclusion of, rather than during the pendency of, the proceeding in which the perjury occurred. n9 Both the 1948 opinion and the 1953 opinion directly contradicted Canon 41, which expressly required a lawyer to disclose a client's "fraud or deception" if the attorney could not convince the client "to forego the advantage unjustly gained." n10

Thus, by the time the ABA began drafting the Model Code, an informed observer would have assumed that the Canon's treatment of client fraud and crime was a dead letter. The Model Code, however, as initially adopted in 1969, rehabilitated part of the position taken in Canons 37 and 41. Disciplinary Rule 4-101(C)(3) permitted - but did not require - a lawyer to "reveal . . . the intention of his client to commit a crime and the information necessary to prevent the crime." n11 Information that a client intended to commit a criminal act was not excepted from the definition of protected client confidences, but the lawyer was nonetheless allowed to reveal client confidences as needed to prevent the crime. n12

The Model Code also appeared to continue, at least in clear cases, the **[*731]** requirement of Canon 41 that a victim be informed of a completed client fraud when the client declined to forego the fruits of the fraud. Disciplinary Rule 7-102(B)(1) originally provided:

A lawyer who receives information clearly establishing that ... [a] client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal. n13

The only significant departure from the language of Canon 41 is in the statement that the information the lawyer receives must "clearly establish" the client fraud. n14 That phrase may have stated a more specific and more demanding standard than the reference in Canon 41 to the lawyer's discovery "that some fraud or deception has been practiced." n15 Once the standard of proof has been satisfied, the disclosure obligation imposed by the Model Code is substantively indistinguishable from the requirement of Canon 41.

Before long, however, the ABA once again retreated from the disclosure rule that was then of more than a half century standing. In 1974, the ABA amended Disciplinary Rule 7-102(B)(1) to preclude disclosure of a client's fraud "when the information is protected as a privileged communication." n16 The next year, Formal Opinion 341 made clear that this amendment was designed to negate the lawyer's disclosure obligation. n17 The opinion interpreted the disclosure obligation of amended Disciplinary Rule 7-102(B) as applying only when the lawyer learns of the client's fraud "from a third-party" but "not in connection with [the] professional relationship [between the lawyer and] the client." n18

Neither the 1974 amendment to the Model Code nor the 1975 opinion resolved the argument within the ABA regarding a lawyer's disclosure obli **[*732]** gation. Instead, the controversy further intensified when the Kutak Commission, which was appointed to rewrite the ABA's rules on professional responsibility, proposed a new rule:

A lawyer may reveal [confidential] information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in ... substantial injury to the financial interests or property of another; [or] (2) to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services had been used. n19

The subsequent history is well known. Intense warfare broke out within the organized bar. The trial bar vigorously opposed, while the counselling bar generally supported, the Kutak proposal. The trial lawyers prevailed before the ABA House of Delegates in 1983. Rule 1.6 as finally written permitted a lawyer to reveal "information relating to representation of a client" without the client's consent only:

... 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. n20

The official commentary to Model Rule 1.6 never acknowledged the different position that the Bar had taken for two-thirds of a century before 1974. The commentary did, however, recognize "that no privilege attaches to communications from the client in furtherance of criminal or fraudulent conduct because the client has not sought advice from a lawyer acting in his or her professional capacity." n21 The commentators adopted the rationale of an Oregon court of appeals' decision, which in turn rested on a century old British case:

In order that the [privilege] may apply there must be both professional confidence and professional employment, but if the client has a criminal object in view ... one of these elements must necessarily be absent. The client must either conspire with his [counsel] or deceive him. If his criminal object is avowed, the client does not consult his adviser professionally, because it cannot be the [lawyer's] business to **[*733]** further any criminal object. If the client does not avow his object, he reposes no confidence.... The [lawyer's] advice is obtained by a fraud. n22

The rationale of the Phelps and Cox decisions is that any information a lawyer receives from a client bent on fraud is not confidential because the client's failure to acknowledge his fraudulent purpose constitutes a fraud upon the lawyer. n23 Thus, the information is neither privileged nor entitled to confidential treatment as a client "confidence" or "secret." The roots of Canon 37 in Queen v. Cox are not difficult to identify.

This commentary to the Model Rules - which is generally overlooked - is hard to square with the language of Model Rule 1.6(b). If, as the Phelps and Cox cases say, a client who seeks a lawyer's assistance to perpetrate fraud "reposes no confidence" in the lawyer, then it is at least an open question whether the lawyer has an obligation under any principle of professional responsibility to refrain from unconsented disclosures of the information to third parties. n24

Perhaps the commentators to the Model Rules never thought through the implications of the language from Phelps and Cox. There is considerable evidence that the Model Rules were never in fact intended to authorize any disclosure of information secured from a client who, the attorney later discovers, was embarked on a fraudulent course. n25 To be precise, despite the commentary, Rule 1.6(b) seeks to impose an obligationof confidentiality on all "information relating to representation of a client," whether or not the information is imparted to a lawyer in circumstances evoking a legal obligation of confidentiality. n26 In this respect, Model Rule 1.6(b) represents a radical departure from a century old Anglo-American legal principle.

III. State Rules on Disclosure of Confidential Client Information

Although more than one-half of the states have adopted the ABA's 1983 Model Rules, Rule 1.6(b) in its original form has been rejected more frequently than not. n27 Only six states n28 and the District of Columbia n29 have **[*734]** followed Model Rule 1.6(b) in the form adopted by the ABA's House of Delegates, while a far larger number have rules that permit lawyers wider latitude to disclose client confidences. n30 By this measure, it appears this **[*735]** **[*736]** one model rule has been a substantive and political failure.

One can now find among the 50 states at least 10 different versions of rules governing whether a lawyer may, must, or may not disclose that a client has committed or is intending to commit a fraud or a financial crime having a serious financial impact on a third party. The rules range from the absolute bar on disclosure found in California n31 to the New Jersey rule requiring a lawyer to disclose information "to the proper authorities, as soon as, and to the extent the lawyer reasonably believes necessary, to prevent the client ... from committing [an] ... illegal or fraudulent act that the lawyer reasonably believes is likely to result in ... substantial injury to the financial interest ... of another." n32

Altogether four states require disclosure of confidential client information to prevent a client's criminal fraud; seven jurisdictions forbid disclosure of a client's intent to commit a crime that threatens financial harm only; n33 and the remaining states permit, but do not require, disclosure in these circumstances. In some states, the lawyer's authority to disclose client confidences depends on whether substantial financial injury is threatened or has occurred, or on whether the lawyer's services have been used in furtherance of a crime or fraud. n34 When the fraud is not criminal, only two states require disclosure while forty-two plus the District of Columbia forbid it. A lawyer practicing in the Middle Atlantic region of the United States will find different rules in each of New York, Pennsylvania, New Jersey, Delaware, and Virginia. n35 The Maryland rules on this subject **[*737]** are the same as in Pennsylvania. n36 The District of Columbia rules are identical to Delaware's. n37

The lack of consensus and resulting confusion regarding the lawyer's professional responsibility is unfortunate. The presence of very different rules in adjoining states creates serious issues of professional responsibility and potential liability for many lawyers whose practices cross state boundaries.

The profession and the public deserve to have greater uniformity in the rules defining the lawyer's disclosure obligation. The multiplicity of rules defeats one of the most fundamental obligations of a legal system: to provide clear standards that permit a reasonable assessment of the potential legal consequences of contemplated conduct.

IV. Indirect Disclosure of a Client's Fraud Under the ModelRules

The development of a more uniform rule on attorney disclosure of past or prospective client fraud or financial crime should begin with an assessment of Model Rule 1.6(b). The rule ought to be examined in the context of all of the Model Rules in order to gain a full understanding of its effect. Although Rule 1.6(b) by itself precludes disclosure of client confidences unrelated to crimes that threaten serious bodily harm, other rules permit, and in some circumstances may require, a lawyer to take action that gives a past or intended victim of fraud or financial crime meaningful notice of the possibility of fraud.

For example, Model Rule 1.2(d) precludes a lawyer from knowingly assisting a client in fraudulent or criminal conduct. n38 Even where the disclosure of confidential information to prevent financial harm is forbidden under ABA Model Rule 1.6, the lawyer should still consider the possibility of making a "noisy withdrawal" from a professional engagement after learning that the client intends to use the attorney's work product in furtherance of a fraud.

Formal Opinion 366, issued by the Committee in 1992, discussed this **[*738]** problem at great length. n39 The majority ruled that a lawyer may make a "noisy withdrawal" when she "with reason believes that her services or work product are being used or are intended to be used by a client to perpetrate a fraud." n40 The opinion implies, but does not explicitly hold, that a noisy withdrawal is required when a lawyer discovers a client is providing the attorney's work product to intended victims of a prospective or continuing fraud. n41

What is the noisy withdrawal? It is limited to "disaffirming documents" - such as legal opinions that the lawyer prepared for the client - "that are being, or will be, used in furtherance of the fraud, even though such a "noisy' withdrawal may have the collateral effect of inferentially revealing client confidences." n42 It is important to recognize, however, that a noisy withdrawal does not include or permit explicit revelation of client confidences.

Although Formal Opinion 366 acknowledges and accepts the fact that disaffirming a prior opinion can lead to an inferential disclosure of client confidences, it places great stress on a lawyer's duty not to assist in a fraud even if client confidences are inferentially compromised. n43 As the Committee's dissenting members emphasized, the practical distinction between direct and inferential disclosure of confidences may often be of little practical consequence. The majority, however, relied on the principle that the lawyer is obligated to deny professional assistance to fraud but does not have a duty to "blow the whistle" on the client. n44

While it is true that no part of the Model Rules would permit an explicit disclosure of client confidences when a lawyer discovers a client is using the lawyer's work product to further a fraud or financial crime, all but the most unsophisticated victims would understand the implications of a noisy withdrawal. And, while the result may be subject to criticism and ridicule because of the indirection with which the Model Rules achieve notice to victims of a client's financial wrongdoing, the plain fact is that a lawyer who strictly adheres to the Model Rules has the ability to provide the defrauded victim with a meaningful opportunity to identify and rectify the wrong. **[*739]**

V. The Desirability of a Revised Rule

Under the Committee's ruling in Formal Opinion 366, Model Rule 1.6(b), within its context of the entire Model Rules, does not preclude a lawyer from inferentially revealing client confidences to protect victims of a client's continuing or planned fraud. On the other hand, there is a potentially strong argument that the profession would be better served by relying less on a collateral rule to modify and limit inferentially the specific language of the very rule that is designed to address the disclosure question. For this reason - and because of the broad rejection of Model Rule 1.6(b) across the country - the profession might well give serious consideration to the development of a revised rule that says what it means, means what it says, and carries a realistic prospect of widespread adoption.

There is, moreover, an additional reason to consider the possibility of a revised rule at this time: The profession does not currently face a crisis related to the disclosure dilemma. Over the past twenty years, the Bar's practice has been to address the disclosure issue only in reaction to efforts by plaintiffs or government agencies to impose liability on lawyers for alleged complicity in a client's failure to make a disclosure that the law requires. This was evident in the securities cases during the 1970s and it was seen a few years ago at the height of the savings and loan and banking failures of the late 1980s and early 1990s. Although many malpractice cases derived from the thrift and banking failures remain pending, we may now have reached a moment of calm, or at least the threshold of calm. As those cases are in the process of being resolved, efforts made to work through a revised rule may be undertaken without any realistic threat of enhancing the risks to any current lawyer defendant.

VI. Factors in the Redesign of Rule 1.6(b)

What factors should be considered in the redesign of Rule 1.6(b)? A fair and workable rule must account for at least the following points:

1. There are strong public policy reasons to accord client communications the strongest protection. The comments to Rule 1.6 rightly observe that "to hold inviolate confidential information of the client not only facilitates the full development of the facts essential to proper representation of a client but also encourages people to seek early legal assistance. n45

2. A client abuses the attorney-client relationship in consciously seeking legal assistance to further a fraud or a crime. The caselaw deprives a client who intends to deceive both his lawyer and another party to a transaction of a legiti **[*740]** mate claim to confidentiality. The lawyer, however, should always presume a client's communications are confidential and should have in hand clear and convincing reasons before concluding that the Phelps and Cox doctrine overcomes the presumption of confidentiality.

3. The lawyer can readily be among the victims of a client's fraud. Our recent history has ample examples of clients who were able to hide their fraudulent purpose from even the most highly skilled attorneys.

4. A lawyer should not be held liable for the client's fraud so long as the lawyer had reason to believe that the client's purposes were lawful. The lawyer should not be exposed to liability for a client's fraud in the absence of clear proof that the lawyer acted knowingly or recklessly in providing legal services used to implement the fraud.

5. When, however, the evidence shows a lawyer knowingly or recklessly aided a client's civil fraud or financial crime, neither the profession nor the public should find reason to protect the lawyer through a rule that restricts disclosure of client information.

6. A person who has become a potential or actual defendant after completing a fraud has an important and legitimate claim to a confidential relationship with the attorney retained to assist in defending against any criminal charges or civil claims. On the other hand, no such claim to confidential treatment needs to be recognized in a client who knowingly misuses a lawyer's services in designing or implementing fraud.

These factors, of course, are to some extent in tension with one another. Nevertheless, they should and can be balanced in developing a rule that provides full protection to the confidences of clients seeking a lawyer's assistance in order to conform their conduct to the laws, while still recognizing the illegitimacy of any claim to protected communications by a client whose objective is to use the lawyer's work product to commit fraud.

FOOTNOTES:

n1. See, e.g., Maria H. Bainor & Nancy Batterman, Report on the Debate Over Whether There Should Be an Exception to Confidentiality for Rectifying a Crime or Fraud, *20 Fordham Urb. L.J. 857 (1993);* Naomi R. Cahn, Critical Theories and Legal Ethics: Inconsistent Stories, *81 Geo. L.J. 2475 (1993);* David L. Beckman, Jr., Sixth Amendment - Effective Assistance of Counsel: A Defense Attorney's Right to Refuse Cooperation in Defendant's Perjured Testimony, *77 J. Crim. L. & Criminology 692 (1986);* Monroe H. Freedman, Client Confidences and Client Perjury: Some Unanswered Questions, *136 U. Pa. L. Rev. 1939 (1988);* David J. Fried, Too High a Price for Truth: The Exception to the Attorney-Client Privilege for Contemplated Crimes and Frauds, *64 N.C. L. Rev. 443 (1986);* Geoffrey C. Hazard, Jr., The Future of Legal Ethics, *100 Yale L.J. 1239 (1991);* Gerard E. Lynch, The Lawyer as Informer, *1986 Duke L.J. 491 (1986);* Terence F. MacCarthy & Kathy M. Mejia, Criminal Law - The Perjurious Client Question: Putting Criminal Defense Lawyers Between a Rock and a Hard Place, *75 J. Crim. L. & Criminology 1197 (1984);* Michael K. McChrystal, Lawyers and Loyalty, *33 Wm. & Mary L. Rev. 367 (1992);* Lee A. Pizzimenti, The Lawyer's Duty to Warn Clients About Limits on Confidentiality, *39 Cath. U. L. Rev. 441 (1990);* Carol T. Rieger, Client Perjury: A Proposed Resolution of the Constitutional and Ethical Issues, *70 Minn. L. Rev. 121 (1985);* Kevin R. Reitz, Clients, Lawyers and the Fifth Amendment: The Need for a Projected Privilege, *41 Duke L.J. 572 (1991);* Ted Schneyer, The ALI's Restatement and the ABA's Model Rules: Rivals or Complements?, *46 Okla. L. Rev. 25 (1993);* Jay S. Silver, Truth, Justice, and the American Way: The Case Against the Client Perjury Rules, *47 Vand. L. Rev. 339 (1994);* William H. Simon, Ethical Discretion in Lawyering, *101 Harv. L. Rev. 1083 (1988);* Serena Stier, Legal Ethics: The Integrity Thesis, *52 Ohio St. L.J. 551 (1991);* Harry I. Subin, The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm, *70 Iowa L. Rev. 1091 (1985);* Elizabeth G. Thornburg, Sanctifying Secrecy: The Mythology of the Corporate Attorney-Client Privilege, *69 Notre Dame L. Rev. 157 (1993);* Fred C. Zacharias, Rethinking Confidentiality II: Is Confidentiality Constitutional?, *75 Iowa L. Rev. 601 (1990);* Kenneth F. Krach, Comment, The Client - Fraud Dilemma: A Need for Consensus, *46 Md. L. Rev. 436 (1987);* Timothy J. Miller, Note, The Attorney's Duty to Reveal a Client's Intended Future Criminal Conduct, *1984 Duke L.J. 582 (1984);* Jocelyn N. Sands & Roy Conn, III, Comment, Confidentiality and the Lawyer's Conflicting Duty, *27 How. L.J. 329 (1984);* Robert N. Treiman, Comment, Inter-Lawyer Communication and the Prevention of Client Fraud: A Look Back at the O.P.M., *34 UCLA L. Rev. 925 (1987).*

n2. Model Rules of Professional Conduct Rule 1.6(b) (1993). Rule 1.6(b) provides:

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.

Id. Cf. Model Code of Professional Responsibility DR 4-101(c)(3)(4) (1980) (providing that a lawyer may reveal a client's intention to commit a crime, the information necessary to prevent the crime, and the confidences related to any defenses against a client's accusation of wrongful conduct on the part of the attorney); Model Code of Professional Responsibility EC 4-4 (1980) (stating that the attorney-client privilege is more limited than the lawyer's ethical obligation to guard a client's confidences); Model Code of Professional Responsibility Canon 37 (1983) (providing for the disclosure of a client's intention to commit a crime in order to prevent such act or protect those threatened).

n3. Model Code of Professional Responsibility Canon 37 (1908). The text of Canon 37 now provides:

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 his new client.

If a lawyer is accused by his client, he is not precluded from disclosing the truth in respect to the accusation. The announced intention of a client to commit a crime is not included within the confidences which he is bound to respect. He may properly make such disclosures as may be necessary to

prevent the act or protect those against whom it is threatened.

Model Code of Professional Responsibility Canon 37 (1983).

n4. Id.

n5. Model Code of Professional Responsibility Canon 41 (1983) (emphasis added).

n6. Geoffrey C. Hazard, Jr. & Susan P. Koniak, The Law and Ethics of Lawyering 282 (1990).

n7. ABA Comm. on Professional Ethics and Grievances, Formal Op. 268 (1945).

n8. See Model Code of Professional Responsibility Canon 37 (1908).

n9. ABA Comm. on Professional Ethics, Formal Op. 287 (1953); cf. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 353 (1987) (stating that if a lawyer learns prior to the conclusion of the proceedings that the client committed perjury, the attorney must disclose this to the tribunal if he cannot persuade the client to rectify the perjury).

n10. Model Code of Professional Responsibility Canon 41 (1908).

n11. Model Code of Professional Responsibility DR 4-101(C)(3) (1969). This rule states in pertinent part:

(C) A lawyer may reveal:

....

(3) The intention of his clientto commit a crime and the information necessary to prevent the crime.

Id; see also, ABA Comm. on Professional Ethics, Formal Op. 314 (1965) (stating that lawyers must disclose the confidences of their clients if “the facts in the attorney's possession indicate beyond reasonable doubt that a crime will be committed”); cf. Model Rules of Professional Conduct Rule 1.6(b)(1) (1993) (permitting a lawyer to reveal information relating to the representation of a client likely to result in death or substantial injury); Model Rules of Professional Conduct Rule 1.9(c)(2) (1993) (providing that a lawyer who had formerly represented a client shall not disclose information relating to that representation except where rules 1.6 and 3.3 permit).

n12. Model Code of Professional Conduct DR 4-101(C)(3) (1969).

n13. Model Code of Professional Responsibility DR 7-102(B)(1) (1969) (emphasis added); see Note, Securities Regulation - Attorneys' Liability - Advising, Abetting, and the SEC's National Student Marketing Offensive, *50 Tex. L. Rev. 1265, 127071 (1972)* (criticizing DR 7-102(B)(1) prior to its amendment); cf. Model Rules of Professional Conduct Rule 1.6(b) (1993) (allowing disclosure of client intent to commit a crime resulting in death or substantial injury); Model Rules of Professional Conduct Rule 3.3(a)(4) (1993) (prohibiting a lawyer from knowingly offering false evidence and allowing the lawyer to take reasonable remedial measures for false evidence already offered); Model Rules of Professional Conduct Rule 3.3(b) (1993) (providing for disclosure of information in order to be in compliance with 3.3(a) duties unless otherwise under Rule 1.6 protection); Model Rules of Professional Conduct Rule 4.1(b) (1993) (prohibiting a lawyer from knowingly failing to disclose a material fact to a third person where necessary to avoid assisting in a criminal or fraudulent act, unless Rule 1.6 prohibits such disclosure).

n14. Model Code of Professional Responsibility DR 7-102(B)(1) (1969).

n15. Model Code of Professional Responsibility Canon 41 (1908).

n16. Model Code of Professional Responsibility DR 7-102 (B)(1) (1974).

n17. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 341 (1975).

n18. Id.

n19. Model Rules of Professional Conduct Rule 1.6 (Proposed Discussion Draft 1982).

n20. Model Rules of Professional Conduct Rule 1.6 (1993). From the days of the Canons to the adoption of the Model Rules, a lawyer has also been permitted to reveal confidential client information “in a controversy between the lawyer and the client” or to defend the lawyer against “a criminal charge or a civil claim ... 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.” Model Rules of Professional Conduct Rule 1.6(b)(2) (1993); cf. Model Code of Professional Responsibility DR 4-101(C)(4) (1983) (providing that a lawyer may reveal a client's confidences in order to defend against that client's accusation of wrongful conduct).

n21. Annotated Model Rules of Professional Conduct (2d ed. 1992).

n22. *State v. Phelps, 545 P.2d 901, 904 (Or. Ct. App. 1976)* (quoting

The Queen v. Cox, 14 Q.B.D. 153, 168 (1884)).

n23. Id.

n24. Id.

n25. See, e.g., Stephen Gillers & Roy D. Simon, Jr., Regulation of Lawyers: Statutes and Standards 6263 (1994) (discussing the legislative history of Rule 1.6) [hereinafter Gillers & Simon].

n26. Model Rules of Professional Conduct Rule 1.6(a) (1993).

n27. Compare Ariz. Rev. Stat. Ann. ER 1.6(c) (1988) (“A lawyer may reveal the intention of his client to commit a crime and the information necessary to prevent the crime.”); Ark. Code Ann. Court Rule 1.6(b)(1) (Michie 1994) (“A lawyer may reveal such information to the extent the lawyer reasonably believes necessary ... to prevent the client from committing a criminal act;”); Idaho Rule 1.6(b)(1), reprinted in 2 National Reporter on Legal Ethics and Professional Responsibility 1994, at 3 (“A lawyer may reveal such information to the extent the lawyer reasonably believes necessary ... to prevent the client from committing a crime, including disclosure of the intention of his client to commit a crime;”); Ind. Code Ann. Rules of Professional Conduct Rule 1.6(b)(1) (West 1987) (“A lawyer may reveal such information to the extent the lawyer reasonably believes necessary ... to prevent the client from committing any criminal act;”); Kansas Rule 1.6(b)(1), reprinted in 2 National Reporter on Legal Ethics and Professional Responsibility 1994, at 18 (“A lawyer may reveal such information to the extent the lawyer reasonably believes necessary ... to prevent the client from committing a crime;”); Mich. Rules of Court Rules of Professional Conduct Rule 1.6(c)(4) (West 1994) (“A lawyer may reveal: ... the intention of a client to commit a crime and the information necessary to prevent the crime;”); Minn. Rules of Court Rules of Professional Conduct Rule 1.6(b)(3) (West 1994) (“A lawyer may reveal: ... the intention of a client to commit a crime and the information necessary to prevent a crime;”); Miss. Code Ann. 73-30-17 (1989) (“No licensed professional counselor may disclose any information acquired during professional consultation with clients except: ... When a communication reveals the contemplation of a crime. ...”); N.C. Gen. Stat. Rules of Professional Conduct Rule 4(C)(4) (1994) (“A lawyer may reveal: ... Confidential information concerning the intention of his client to commit a crime, and the information necessary to prevent the crime.”); Wash. Court Rules Rules of General Application 1.6(b)(1) (West 1994) (“A lawyer may reveal such confidences or secrets to the extent the lawyer reasonably believes necessary ... to prevent the client from committing a crime;”); Wy. Court Rules Ann. Rules of Professional Conduct Rule 1.6(b)(1) (Michie 1991) (“A lawyer may reveal such information to the extent the lawyer reasonably believes necessary: ... to prevent the client from committing a criminal act;”); see also Gillers & Simon, supra note 25, at 64. Arizona, Connecticut, Illinois, Nevada, North Dakota, and Texas mandate that attorneys disclose information to prevent their clients from committing violent crimes. Id.

n28. See Del. Code Ann. Rules of Professional Conduct Rule 1.6 (Michie 1987); Ky. Rules of Court SCR 3.130 - Professional Conduct Rule 1.6 (West 1994); La. Rules of Court State Bar Association - Rules of Professional Conduct Rule 1.6 (West 1994); Mo. Rules of Court Bar and Judiciary - Rule 4, Professional Conduct Rule 1.6 (West 1994); Mont. Rules of Court ClientLawyer Relationship Rule 1.6 (West 1994); R.I. Court Rules Ann. Supreme Court Rules Rule 1.6 (Michie 1994).

n29. D.C. Court Rules Ann. D.C. Bar Rule 1.6 (Michie 1994).

n30. Each of the following states has in general adopted the ABA's Model Rules while modifying Rule 1.6(b) to permit or require a lawyer to reveal information necessary to prevent a client from committing a financial crime in furtherance of which the lawyer's services were used: Ariz. Rev. Stat. Ann. ER 1.6(c) (1988) (“A lawyer may reveal the intention of his client to commit a crime and the information necessary to prevent the crime.”); Ark. Code Ann. Court Rule 1.6(b)(1) (Michie 1994) (“A lawyer may reveal such information to the extent the lawyer reasonably believes necessary: ... to prevent the client from committing a criminal act;”); Conn. Rules of Court, Rules of Professional Conduct Rule 1.6(c)(1) (West 1993) (“A lawyer may reveal such information to the extent the lawyer reasonably believes necessary to ... prevent the client from committing a criminal act that the lawyer believes is likely to result in substantial injury to the financial interest or property of another;”); Fla. Stat. Ann. Rules Regulating the Florida Bar Rule 4 - 1.6(b)(1) (West 1993) (“A lawyer shall reveal such information to the extent the lawyer believes necessary: ... to prevent a client from committing a crime;”); Haw. Rev. Stat. Court Rules Ann. Rules of Professional Conduct Rule 1.6(b) (Michie Supp. 1994) (“A lawyer shall reveal information which clearly establishes a criminal or fraudulent act of the client in the furtherance of which the lawyer's services had been used, to the extent reasonably necessary to rectify the consequences of such act, where the act has resulted in substantial injury to the financial interests or property of another.”); Idaho Rule 1.6(b)(1), reprinted in 2 National Reporter on Legal Ethics and Professional Responsibility 1994, at 3 (“A lawyer may reveal such informa-

tion to the extent the lawyer reasonably believes necessary: ... to prevent the client from committing a crime, ..."); Ill. Ann. Stat. Supreme Court Rules Professional Conduct Rule 1.6(c)(2) (West's Smith-Hurd 1994) ("A lawyer may use or reveal: ... the intention of a client to commit a crime in circumstances other than those enumerated in Rule 1.6(b);"); Ind. Code Ann. Rules of Professional Conduct Rule 1.6(b)(1) (West 1987) ("A lawyer may reveal such information to the extent the lawyer reasonably believes necessary: ... to prevent the client from committing any criminal act;"); Kansas Rule 1.6(b)(1), reprinted in 2 National Reporter on Legal Ethics and Professional Responsibility 1994, at 18 ("A lawyer may reveal such information to the extent the lawyer reasonably believes necessary: ... to prevent the client from committing a crime;"); Md. Code Ann. App.: Rules of Professional Conduct Rule 1.6(b)(1) (1994) ("A lawyer may reveal such information to the extent the lawyer reasonably believes necessary: ... to prevent the client from committing a criminal or fraudulent act that the lawyer believes is likely to result ... in substantial injury to the financial interests or property of another;"); Mich. Rules of Court, Rules of Professional Conduct Rule 1.6(c)(3)(4) (West 1994) ("A lawyer may reveal: ... (3) confidences and secrets to the extent reasonably necessary to rectify the consequences of a client's illegal or fraudulent act in the furtherance of which the lawyer's services have been used; (4) the intention of a client to commit a crime and the information necessary to prevent the crime;"); Nev. Rev. Stat. Ann. Court Rules Rule 156(3)(a) (Michie 1994) ("A lawyer may reveal such information to the extent the lawyer reasonably believes necessary: ... to prevent or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services have been used ...."); New Hampshire Rule 1.6(b)(1), reprinted in 2 National Reporter on Legal Ethics and Professional Responsibility 1994, at 18 ("A lawyer may reveal such information to the extent the lawyer reasonably believes necessary: ... to prevent the client from committing a criminal act that the lawyer believes is likely to result in ... substantial injury to the financial interest or property of another;"); N.J. Rules of Court, Rules of Professional Conduct Rule 1.6(b)(1) (West 1993) ("A lawyer shall reveal such information to the proper authorities, as soon as, and to the extent the lawyer reasonably believes necessary, to prevent the client: ... from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to result in ... substantial injury to the financial interest or property of another;"); N.M. S. Ct. Rules, Rules of Professional Conduct Rule 16-106(C) (Michie 1994) ("To prevent the client from committing a criminal act that the lawyer believes is likely to result in substantial injury to the financial interest or property of another, a lawyer may reveal such information to the extent the lawyer reasonably believes necessary."); N.D. Court Rules Ann., Rules of Professional Conduct Rule 1.6(d) (Michie 1994) ("Such revelation or use is: ... permitted to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in ... substantial injury or harm to the financial interests or property of another;"); 42 Pa. Cons. Stat. Ann., Professional Conduct Rule 1.6(c)(1) (West Supp. 1994) ("A lawyer may reveal such information to the extent that the lawyer reasonably believes necessary: ... to prevent the client from committing a criminal act that the lawyer believes is likely to result in ... substantial injury to the financial interests or property of another;"); S.D. Codified Laws Ann. Rules of Professional Conduct Rule 1.6(b)(3) (Michie Supp. 1994) ("A lawyer may reveal such information to the extent the lawyer reasonably believes necessary: ... to the extent that revelation appears to be necessary to rectify the consequences of a client's criminal or fraudulent act in which the lawyer's services had been used."); Tex. Disciplinary R. Prof. Conduct 1.05(c)(7)(8)(1994), reprinted in Tex. Gov't Code Ann., tit. 2, subtit. G app. A (Vernon 1993) (State Bar Rules art. X, 9) ("A lawyer may reveal confidential information: ... (7) When the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act. (8) To the extent revelation reasonably appears necessary to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used."); Wash. Court Rules, Rules of General Application Rule 1.6(b)(1) (West 1994) ("A lawyer may reveal such confidences or secrets to the extent the lawyer reasonably believes necessary: ... To prevent the client from committing a crime;"); W. Va. Code Ann., Rules of Professional Conduct Rule 1.6(b)(1) (Michie 1994) ("A lawyer may reveal such information to the extent the lawyer reasonably believes necessary: ... to prevent the client from committing a criminal act;"); Wis. Court Rules and Procedure Supreme Court Rules, Professional Conduct Rule 20:1.6(b) (West 1993) ("A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result ... in substantial injury to the financial interest or property of another.").

n31. See Cal. Business and Professions Code 6068(e).

n32. N.J. Rules of Court, Rules of Professional Conduct Rule 1.6(b) (West 1994).

n33. See supra notes 2830 for a discussion of the various state rules.

n34. Among the state variations are whether to: 1) continue the Code's authority to reveal any prospective crime; 2) extend the authority to conduct other than criminal activity; 3) keep the authority permissive or to mandate revelation of prospective criminal or harmful conduct; 4) distinguish the obligations depending upon whether the attorney-client privilege or only the jurisdiction's ethical document protects the attorney's information. Gillers & Simon, supra note 25, at 64.

n35. See Gillers & Simon, supra note 25, at 6667 (discussing New York's adoption of the ABA Model Code in the same or substantially the same form and discussing the provisions of Virginia's DR 4-101(D)(1)); Del. Code Ann. Rules of Professional Conduct Rule 1.6 (1987); N.J. Rules of Court, Rules of Professional Conduct Rule 1.6(b) (West 1994); 42 Pa. Cons. Stat. Ann. Professional Conduct Rule 1.6 (West Supp. 1994).

n36. See Md. Code Ann. Appendix: Rules of Professional Conduct Rule 1.6(b)(1) (1994).

n37. Compare D.C. Court Rules Ann. D.C. Bar Rule 1.6 (Michie 1994) with Del. Code Ann. Rules of Professional Conduct Rule 1.6 (1987).

n38. Model Rules of Professional Conduct Rule 1.2(d) (1993). Rule 1.2(d) provides:

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

n39. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 366 (1992).

n40. Id.

n41. Id.

n42. Id. (emphasis added).

n43. Id.

n44. Id. The committee specifically stated that the lawyer must not go further than necessary to disaffirm the work product that the client is using in furtherance of the scheme and specifically said the lawyer may not divulge publicly the reasons for disaffirmance. Id.

n45. Model Rules of Professional Conduct Rule 1.6 cmt. 2 (1993).