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A CASE FOR INCREASED DISCLOSURE

Deborah Abramovsky*

I. Introduction

An experienced criminal defense attorney may, on occasion, be informed by a client that the client has committed, or will commit, homicide, rape or other savage crimes. When a client confides such information, the attorney faces a choice: should he remain silent about this information which the client has revealed in confidence, or should he report it to law enforcement authorities? An even greater dilemma arises when a client turns over to his attorney fruits or instrumentalities of a crime for safekeeping. May an attorney conceal evidence of a crime? What happens when an attorney learns from his corporate client of an ongoing fraud by the corporation? Should he be required to disclose information that would aid in rectifying the fraud?

To resolve these dilemmas, an attorney must weigh his obligations to his client against his obligations to the profession and to society.¹ Although the client would want the attorney to keep the information confidential, there are countervailing societal interests that warrant disclosure of such information and evidence.² It is often difficult to determine where the rights of clients end and those of society begin.

Each time the legal profession amends the ethical codes and rules by which it governs itself,³ as it did recently during the debates over adoption of the Model Rules of Professional Conduct (Rules),⁴

* B.F.A., State University of New York (Buffalo); M.A., New York University; J.D., Pace University School of Law.

1. The responsibilities of a lawyer are set forth in the Preamble to the Model Rules of Professional Conduct, which states in pertinent part: "A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice." MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1983) [hereinafter cited as RULES].

2. See *infra* notes 11-30 and accompanying text.

3. Lawyer conduct in the United States was originally governed by the Canons of Professional Ethics (Canons), which were adopted by the American Bar Association (ABA) in 1908. ABA Comm. on Professional Ethics and Grievances, Formal Ops., Foreword, at ix (1947). In 1969, a Model Code of Professional Responsibility was drafted and adopted by the ABA. ABA/BNA LAW. MANUAL ON PROF. CONDUCT (BNA) 01:301 (1984) [hereinafter cited as LAWYER'S MANUAL]. In August, 1983, the ABA House of Delegates adopted the Rules, which replaced the entire Code. LAWYER'S MANUAL, *supra*, at 01:101 and 01:301.

4. See *infra* notes 41-53 and accompanying text, which discuss the controversy over adoption of the RULES.

difficult choices must be made. The final version of Model Rule 1.6 (Rule 1.6), which governs disclosure of client confidences, allows permissive disclosure in certain situations but does not mandate disclosure under all circumstances.⁵

This Article examines situations where the client reveals information about a future violent crime,⁶ entrusts fruits and instrumentalities of a crime to his attorney,⁷ or reveals an ongoing course of corporate fraud.⁸ It concludes that the American Bar Association's (ABA) final version of Rule 1.6 places unwarranted emphasis on client confidentiality to the detriment of societal interests. The ultimate goals of truth and the preservation of human life should far outweigh concern for maintaining the confidentiality of information imparted by the client. Therefore, certain limited exceptions to the confidentiality provisions of Rule 1.6⁹ should be recognized.

II. The Duties of a Lawyer

A lawyer must represent his client zealously within the bounds of the law.¹⁰ However, a lawyer as an officer of the court owes a duty

5. RULES, *supra* note 1, Rule 1.6 (1983). The final version of Rule 1.6, entitled "Confidentiality of Information," provides:

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(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.

Id.

6. *See infra* Section III.

7. *See infra* Section IV.

8. *See infra* Section V.

9. *See infra* notes 186-88 and accompanying text.

10. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1979) [hereinafter cited as CODE]. Canon 7 includes Ethical Consideration (EC) 7-1, which states:

The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law, which includes Disciplinary Rules and enforceable professional regulations. The professional responsibility of a lawyer derives from his membership in a profession which has the duty of assisting members of the public to secure and protect available legal rights and benefits

Id. EC 7-1; *see also id.* DR 7-101 and 7-102.

to society to protect its members from imminent physical injury or death.¹¹ The attorney-client relationship is governed by these two legal and ethical principles. These principles are not as antithetical as they appear to be. Although Canon 7 of the Model Code of Professional Responsibility (Code)¹² requires zealous representation, it also makes clear that the representation must be *within* the bounds of the law.¹³ Thus, while the attorney's primary obligation is to his client, he also is obliged to both society and to his profession.

A. Officer of the Court

As an officer of the court, an attorney must seek justice and equity.¹⁴ The practice of law is more than an occupation, and lawyers are not mere profit seekers.¹⁵ The lawyer owes allegiance to the courts in which he appears and to the criminal justice system.¹⁶ Both moral and ethical principles dictate that attorneys not hinder the

11. P.M. BROWN, *The Decline of Lawyers' Professional Independence*, in THE LAWYER'S PROFESSIONAL INDEPENDENCE, PRESENT THREATS/FUTURE CHALLENGES 34 n.10, quoting trial lawyer W. Sidney Davis of New York who asserted:

When an American lawyer raises his or her right hand to take the oath for admission to the bar he or she takes on as a first responsibility the commitment to serve the public interest and our system of justice: to be foremost an officer of the court. Within that context, an attorney takes on the responsibility of a solicitor-advisor to his clients; and finally, when disputes regarding his or her clients' rights and obligations cannot otherwise be reasonably resolved, an attorney assumes the responsibility of a barrister-advocate—but only an advocate who serves his client within the letter and the *spirit* of his responsibilities as an officer of the court.

Id.

12. CODE, *supra* note 10, Canon 7.

13. *Id.*

14. See *Thornton v. United States*, 357 A.2d 429 (D.C.), *cert. denied*, 429 U.S. 1024 (1976). In *Thornton*, the court stated that defense counsel must use "all honorable means to see that justice is done," rather than going to any lengths to see that the defendant is acquitted. *Id.* at 438.

15. Harrell, *Preserving Professionalism*, 69 A.B.A.J. 864 (1983); Brown, *supra* note 11, at 31. *But see Lawyers for Hire for Anything?*, N.Y. Times, Feb. 11, 1983, at A26, col. 1. The author asserts that confidentiality may be sacrificed where the attorney's financial interests are threatened.

16. *Thornton*, 357 A.2d at 437; see also CODE, *supra* note 10, DR 7-103(B), which imposes a duty of fairness on public prosecutors, to "make timely disclosure to counsel for the defendant . . . of the existence of evidence, known to the prosecutor . . . that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment." *Id.* This provision is discussed in *United States v. Agurs*, 427 U.S. 97, 108 (1976) and *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The prosecutor's duty has been described as a dual obligation to prosecute vigorously those who prey upon members of society and to secure justice. See NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13.

judicial process but, rather, that they encourage and facilitate conformity with the law.¹⁷

The fact-finding process is fundamental to the administration of justice.¹⁸ In support of this principle, an attorney is prohibited from knowingly engaging in certain types of conduct such as using perjured testimony or false evidence,¹⁹ assisting his client in fraudulent or unlawful conduct,²⁰ engaging in unlawful conduct or violating a disciplinary rule.²¹ Moreover, an attorney should not knowingly file a suit designed solely to harass or injure a defendant,²² or knowingly make a false statement of law or fact.²³ In addition to these ethical proscriptions which protect the administration of justice, an affirmative duty arises when, in the course of representation, a lawyer learns that his client has defrauded a person or tribunal. This duty requires the lawyer to advise his client to rectify the fraud.²⁴ If the client cannot or will not do so, the lawyer should reveal the fraud to the affected person or tribunal provided that the information does not qualify as a confidence or secret, in which case it may be protected by the confidentiality rule.²⁵

An attorney is not a passive observer of the judicial system. The attorney is an integral part of the judicial system²⁶ as a participant

17. See *Committee on Professional Ethics v. Crary*, 245 N.W.2d 298 (Sup. Ct. Iowa 1976) (en banc).

18. See ABA STANDARDS FOR CRIMINAL JUSTICE ch. 4, at 4.6, 4.7, 4.88 (2d ed. 1980) [hereinafter cited as ABA STANDARDS].

19. CODE, *supra* note 10, DR 7-102(A)(4).

20. *Id.* DR 7-102(A)(7).

21. *Id.* DR 7-102(A)(8).

22. *Id.* DR 7-102(A)(1).

23. *Id.* DR 7-102(A)(5).

24. *Id.* DR 7-102(B)(1). An attorney must not knowingly permit a witness to lie. *In re Hardenbrook*, 135 A.D. 634, 121 N.Y.S. 250 (1st Dep't 1909), *aff'd*, 199 N.Y. 539, 92 N.E. 1086, *app. den.*, 144 A.D. 928, 129 N.Y.S. 1126 (1st Dep't 1911) (disbarment after attorney knowingly recalled perjuring witness); *In re Crary*, 223 A.D. 277, 228 N.Y.S. 340 (3d Dep't 1928) (one year suspension for unprofessional and reprehensible conduct in connection with perjury by witness); *In re Barach*, 279 Pa. 89, 123 A. 727 (1924) (disbarment where attorney permitted witnesses to testify falsely); *Committee on Professional Ethics v. Crary*, 245 N.W.2d 298 (Iowa 1976) (en banc) (disbarment where attorney knowingly permitted perjury at deposition).

25. RULES, *supra* note 1, Rule 1.6. Before the emergence of the Code, the Canons provided:

Nothing operates more certainly to create or to foster popular prejudice against lawyers as a class, and to deprive the profession of that full measure of public esteem and confidence which belongs to the proper discharge of its duties than does the false claim, often set up by the unscrupulous in defense of questionable transactions. . . .

CANONS OF PROFESSIONAL ETHICS Canon 15 (ABA 1957) [hereinafter cited as CANONS].

26. CODE, *supra* note 10, EC 8-7.

in the fact-finding process at the trial as well as in pre- and post-trial proceedings. Therefore, he is obliged to preserve and promote the integrity of the judicial system.²⁷ An attorney fulfills this obligation by conforming to the principles embodied in the Code.²⁸

B. Duty to Society

A lawyer has moral obligations to members of society other than his client, including those who are likely to become victims of his client's crimes.²⁹ When a client informs his lawyer that he plans some act of murder or mayhem, decency and humanity dictate that the attorney warn the potential victim, reveal the intended crime to the authorities or otherwise prevent the harm.³⁰

C. Ethical Duties Governing Lawyers

As members of a self-regulated profession, lawyers undertake a grave responsibility.³¹ Public confidence in the profession can be maintained only if attorneys scrupulously obey ethical principles.³² Therefore, the lawyer must never forget his moral obligations to society.³³ The rules of confidentiality should not be used to facilitate criminal activity, nor should they supersede the protection of human life.³⁴ Contrary to one view,³⁵ public confidence in lawyers is not dependent upon whether lawyers keep client secrets regardless of the consequences to innocent victims.³⁶ Describing the negative aspects of confidentiality, one colleague aptly stated that it:

27. *Id.* EC 8-7 and 8-9.

28. *See* CODE, *supra* note 10, Preamble.

29. *See generally* F.R. MARKS, K. LESWING, B.A. FORTINSKY, *THE LAWYER, THE PUBLIC, AND PROFESSIONAL RESPONSIBILITY* (1972). The authors assert that: "the development of standards of professional conduct . . . implicit[ly] . . . recogni[z]es that both higher principle and the interest of the public may serve to limit the extent of action on behalf of a client." *Id.* at 9 n.4.

30. *See* 1 ABA DEFENSE STANDARDS, *supra* note 18, ¶ 4-3.7 at 4-50; A.H. GOLDMAN, *THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS* 128 (1980) [hereinafter cited as GOLDMAN].

31. *See* Brown, *supra* note 11, at 65.

32. *Id.*

33. *See supra* notes 29-30 and accompanying text.

34. GOLDMAN, *supra* note 30, at 134-35.

35. *See, e.g., In re Ryder*, 263 F. Supp. 360, 367 (E.D. Va.), *aff'd*, 381 F.2d 713 (4th Cir. 1967), *quoting* SEC v. Harrison, 80 F. Supp. 226, 230 (D.D.C. 1948), *aff'd*, 87 U.S. App. D.C. 232, 184 F.2d 691 (1950), *judgment order vacated as moot*, 340 U.S. 908 (1951).

36. *See Lawyers for Hire for Anything?*, N.Y. Times, Feb. 11, 1983, at A26, col. 1 (editorial); Reeves, *The Trouble With Lawyers*, New York Magazine, July 29, 1974, at 27; *see also* The Gallup Poll Public Opinion 1196 (1977); Gallup Poll:

frees the lawyer from the risk of having to bite the hand that feeds him - he can usually hide behind the excuse of confidentiality while his client loots, steals and defrauds. This confidentiality on the part of the lawyer lends solace to the client wrongdoer because he has a professional assistant whose loyalty is absolute.³⁷

1. *The Existing Code of Professional Responsibility*

Under the present Code, a lawyer is directed not to reveal client confidences except under limited circumstances. Disciplinary Rule (DR) 4-101(C)(3)³⁸ provides that a lawyer *may* reveal "[t]he intention of his client to commit a crime and the information necessary to prevent the crime."³⁹ Essentially, this provision means that a lawyer may reveal a client's secret. Under no circumstances is disclosure mandatory. Instead, the attorney is given discretion to determine whether disclosure is appropriate.⁴⁰

2. *The Model Rules*

a. Mandatory Disclosure Proposed

An early draft of Rule 1.7 of the Rules, reflecting a different philosophy, provided that "a lawyer *shall* disclose information about a client to the extent it appears necessary to prevent the client from committing an act that would result in death, serious bodily harm or substantial injury to the financial interest or property of another."⁴¹ Had this provision been adopted, it would have altered substantially the attorney's obligation to his client. For the first time, a viable standard of mandatory disclosure, applicable in enumerated circumstances, would have been established. While some members of the legal community welcomed the advent of mandatory disclosure,⁴² many groups and individuals strongly opposed this ex-

Public Opinion 209-10 (1981). These polls indicate that a large segment of the public rates the moral and ethical standards of the legal profession as average to low or very low.

37. Clark, *Fear and Loathing in New Orleans: The Sorry Fate of the Kutak Commission's Rules*, 17 SUFFOLK U.L. REV. 79, 81 (1983).

38. CODE, *supra* note 10, DR 4-101(C)(3).

39. *Id.*

40. RULES, *supra* note 1, Comment to Rule 1.6. The comment states that a "lawyer's decision not to take preventive action permitted by paragraph (b)(1) does not violate this Rule." *Id.*

41. RULES, *supra* note 1, Rule 1.6 (Discussion Draft 1982).

42. For example, only recently a committee of the New Jersey State Bar As-

ception to the requirement of confidentiality.⁴³ Notably, both the New York City and New York State Bar Associations rejected the principle of mandatory disclosure.⁴⁴ Declaring the existing provisions of DR 4-101 "far superior" to proposed Rule 1.7, the Committee of Professional and Judicial Ethics of the New York City Bar Association joined other critics in attacking mandatory disclosure.⁴⁵

b. The ABA Votes

Criticism by bar associations and law professors⁴⁶ among others resulted in modification of the proposed rule. Two votes were taken by the ABA House of Delegates in February and August, 1983.⁴⁷ In August, a final version of the Rules was adopted.⁴⁸ Rule 1.6,

sociation, headed by United States District Court Judge Dickinson R. Debevoise, recommended mandatory disclosure of intended serious crimes. Flaherty, *The Model Rules Face Rocky Road*, Nat'l. L.J., Jan. 16, 1984, at 9, col. 1; see Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975); Winter, *Muting the Whistle*, 69 A.B.A. J. 421 (1983); Schanberg, *To Tell the Truth, We Can't*, N.Y. Times, Feb. 12, 1983, at A23, col. 4 (letter to editor).

43. The American College of Trial Lawyers, as well as the New York State Bar Association, devised amendments to replace the mandatory disclosure provision. Additionally, the New York State Bar Association adamantly opposed much of the proposed Code. See New York State Bar Association, Report of the Special Committee to Review ABA Draft Model Rules of Professional Conduct (1980). The results of a poll of convention delegates can be found in *Lawyers Vote for Disclosure If Needed to Correct Perjury*, N.Y. Times, Feb. 9, 1983, at A24, col. 1; see also Wermeil, *ABA Rejects Proposed Ethics Guideline Designed to Encourage Whistle Blowing*, Wall St. J., Feb. 8, 1983, at 6, col. 2, 3.

44. The Committee of Professional and Judicial Ethics of the Bar Association of the City of New York concluded that "the current rule DR 4-101 which permits disclosure where a client intends to commit a crime, reflects a sufficient balance of the competing societal interests [so] that any broadening of the permissible disclosure of confidences or secrets is unwarranted." New York City Bar Association Committee Reports on the Model Rules of Professional Conduct 18 (July 1980) (based on discussions held on January 30, 1980).

The Committee further determined that DR 7-102(B), which mandates disclosure to rectify a fraud unless a confidence or secret is involved, also represents an appropriate balance of the competing interests. *Id.* Moreover, the Committee opined that on the whole "except with regard to the need for *permissive* disclosure to protect against death or serious bodily harm the provisions of the current Code dealing with confidentiality are far superior to Rule 1.7 [of the proposed Code, dealing with the same subject matter]." *Id.* at 19.

45. *Id.* at 19.

46. See Taylor, *Of Lawyers, Ethics and Business*, N.Y. Times, Feb. 6, 1983, at F4, col. 4 [hereinafter cited as Taylor].

47. See Wermeil, *ABA Rejects Proposed Ethics Guideline Designed to Encourage Whistle Blowing*, Wall St. J., Feb. 8, 1983, at 6, col. 2. See generally Flaherty, *supra* note 42.

48. Flaherty, *supra* note 42, at 1, col. 1.

formerly Rule 1.7, in its final form, increased and strengthened the existing guarantee of confidentiality. The mandatory disclosure provision was deleted from Rule 1.6, and in its place permissive disclosure was inserted.⁴⁹ Moreover, disclosure was limited to a few specific situations, and even under these circumstances, the attorney was vested with discretion as to when and how to reveal his client's secrets.⁵⁰ A substantial change was made in section (b)(2). Originally, this section provided for discretionary disclosure of a client's intention to commit criminal acts likely to result in death, substantial bodily harm, or substantial injury to the financial interest or property of another.⁵¹ The final draft of Rule 1.6, however, deleted the discretionary disclosure option in cases of financial and property crimes.⁵² Moreover, when an attorney is aware that his client is defrauding others in a business context, he is obligated to maintain the secret and may not divulge client secrets in order to rectify the fraud.⁵³

III. Future Crimes

When a client declares or even hints to his attorney that he intends to commit a crime, the attorney is placed in a precarious position. Numerous options are available. At the very least, the attorney may counsel against engaging in criminal activity.⁵⁴ The attorney may withdraw from representation.⁵⁵ If the client has provided specific information regarding the intended crime, the lawyer may seek to prevent the crime by warning the intended victim or his family.⁵⁶ In certain situations, the attorney may elect to inform the police or other authorities. However, any attempt to warn an individual of the client's intention involves revealing client secrets.⁵⁷ Prior to taking such a step, an attorney should weigh his competing moral, ethical

49. *Id.* at 9, col. 1.

50. *See supra* note 5.

51. *See Taylor, supra* note 46, at F4, col. 5.

52. *See supra* note 5.

53. *See Taylor, Lawyers Vote for Disclosure if Needed to Correct Perjury*, N.Y. Times, Feb. 9, 1983, at A24, col. 1.

54. *See Panel Discussion*, 35 U. MIAMI L. REV. 639, 641 (1981) (confidentiality privilege allows lawyer to dissuade client from improper course of conduct).

55. *See CODE, supra* note 10, DR 2-110(C)(1)(b) (1983) (lawyer may withdraw if client "[p]ersonally seeks to pursue an illegal course of conduct").

56. *See supra* notes 77-83 and accompanying text for discussion of the need for disclosure of imminent serious crime.

57. *See N.Y. State Bar Ass'n Comm. on Professional Ethics*, Op. 405 (1975) (revelation of ongoing larceny by attorney would constitute disclosure of client secrets).

and legal duties.⁵⁸ As the late Robert Kutak⁵⁹ pointed out, an attorney contemplating disclosure of client confidences with regard to future crimes must weigh three questions under the permissive standard of Rule 1.6.⁶⁰ First, the lawyer must determine the nature of the client's conduct; that is, whether the client's conduct is criminal. Second, is it likely that tangible property will be destroyed, funds embezzled, or a human life taken? Third, to what extent is disclosure necessary to prevent the consequences?⁶¹ After weighing these factors, the attorney is vested with discretion to disclose client confidences.⁶² A responsible attorney may endeavor to analyze these considerations and make a proper determination. A less responsible lawyer may not bother since he is not obligated to engage in such a weighing process. Mandatory disclosure would obviate the need for this lengthy analysis.

Under the Code and the Rules, when a client intimates that he is arranging to "torch"⁶³ real property to collect insurance proceeds or to bribe a public official, the attorney may properly guard the secret.⁶⁴ Even more anomalously, if a client informs his attorney that key witnesses will not be able to testify against him because they will have "accidents," the lawyer has no duty to alert either the intended victims or the police.⁶⁵

Although an attorney's role is to advise and defend, he should never become a knowing accomplice in his client's criminal activity.⁶⁶ When the lawyer knows that a crime will be committed in the future

58. See RULES, *supra* note 1, Preamble ("[W]ithin the framework of these Rules many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.").

59. Former Chairman, American Bar Association Commission on Evaluation of Professional Standards, commonly known as the "Kutak Commission." See Kutak, *The Law of Lawyering*, 22 WASHBURN L. REV. 413 (1983) [hereinafter cited as Kutak].

60. Kutak, *supra* note 59, at 427.

61. *Id.*

62. *Id.* at 426.

63. This term is used by lawyers in its colloquial sense, meaning "to set fire to." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2412 (3d ed. 1976).

64. See Crystal, *Confidentiality Under the Model Rules of Professional Conduct*, 30 U. KAN. L. REV. 215, 232 (1982) (disclosure not required where "client's conduct does not involve death, substantial bodily harm, or substantial injury to the financial interest or property of another person").

65. *Id.* ("The Model Rule gives lawyers discretion to reveal confidential information in order to prevent conduct that involves serious harm to others rather than imposing a duty on lawyers to do so.").

66. See RULES, *supra* note 1, Rule 1.2(d); CODE, *supra* note 10, EC 7-5 (1983).

but sits back to wait for its completion, arguably, he is an accomplice.⁶⁷ Withdrawing from representation is a feeble response which serves only to assuage the attorney's conscience. A lawyer should not be a passive observer of his client's criminal activity. When a lawyer seeks to prevent a crime, not only is the putative victim saved from harm, but society is spared the direct and indirect costs of making the victim whole.

Comments to Rule 1.6 indicate that criminal defendants are likely to make boastful and idle threats, and it is, therefore, unlikely that the danger to the threatened party is real.⁶⁸ However, a lawyer is not trained to evaluate a client's psychological make-up and should not be placed in a position where he must determine the reality of a threat of criminal conduct before deciding whether to alert the intended victim.⁶⁹ Mandatory disclosure is preferable to a standard that requires lawyers to exercise discretion in areas in which they are inadequately trained to properly exercise that discretion. Furthermore, when gambling with human life, the stakes are simply too high to justify a lawyer's inaction.

It also has been suggested that mandatory disclosure will stem the flow of information from clients to their attorneys.⁷⁰ However, there is no empirical evidence that broader disclosure rules would hinder or even affect the attorney-client relationship.⁷¹ Clients will always have to confide in their attorneys to insure informed advice. Existing socio-economic barriers already preclude complete honesty between a client and his lawyer,⁷² and permissive disclosure provisions regarding future crimes will in no way encourage further candor. The integrity of the legal profession and that of the individual attorney can best be protected by requiring mandatory disclosure of future crimes.

67. Kutak, *supra* note 59, at 426.

68. See, e.g., RULES, *supra* note 1, Rule 1.6 comment.

69. See generally Diamond, *The Psychiatric Prediction of Dangerousness*, 123 U. PA. L. REV. 439 (1975), which discusses difficulties encountered by psychiatrists in predicting present dangerousness of those who have committed criminal acts in the past.

70. See RULES, *supra* note 1, Rule 1.6 comment.

71. See Comment, *Proposed Model Rule 1.6: Its Effect on a Lawyer's Moral and Ethical Decisions With Regard to Attorney-Client Confidentiality*, 35 BAYLOR L. REV. 561, 572 (1983) [hereinafter cited as Comment]; Burt, *Conflict and Trust Between Attorney and Client*, 69 GEO. L.J. 1015, 1028 (1980-1981).

72. See Comment, *supra* note 71, at 572 n.77; Crystal, *supra* note 64, at 224 (racial and socio-economic barriers prevent totally honest communications from clients to attorneys, and client may not have known attorney long enough to entrust him with harmful facts).

A. Recommendations—Adoption of Proposed Model Rule 1.7

Despite the trend toward greater confidentiality,⁷³ the concept of mandatory disclosure, as embodied in proposed Rule 1.7, is necessary to our criminal justice system. Presiding Justice Francis T. Murphy of the New York State Supreme Court, Appellate Division, First Department, asserted that the final proposed version of Rule 1.6 “protects a regiment of criminals.”⁷⁴ Judge Murphy aptly described Rule 1.6 when he wrote: “A rule that allows a lawyer discretion to disclose a client’s intention to murder or inflict serious bodily injury, but requires him to keep silent about that client’s intention to commit other grave crimes, is indefensible.”⁷⁵

In response, the commentary to the Rules equivocates, stating that it is arguable that a lawyer should have a professional obligation to “make a disclosure in order to prevent homicide or serious bodily injury which the lawyer”⁷⁶ knows is “intended by a client.”⁷⁷ However, “[i]t is very difficult for a lawyer to ‘know’ when such a heinous purpose will actually be carried out for the client may have a change of mind.”⁷⁸ To require disclosure when a client intends such an act, at risk of disciplinary liability if the assessment of the client’s purpose turns out to be wrong, would be to impose a penal risk that might interfere with the lawyer’s resolution of an inherently difficult moral dilemma.

Contrary to these assertions in the commentary to the Rules, proposed Rule 1.7 would not place the attorney in an impossible situation. It does not seek to destroy the confidentiality between attorney and client, nor would it deprive a defendant of his constitutional rights. However, it would ensure that under the unique circumstances where bodily harm or death may be imminent, as when a lawyer knows the location of a kidnapping victim, the lawyer’s duty would mandate disclosure.⁷⁹

IV. Fruits and Instrumentalities of a Crime

Another dilemma is created when an attorney receives tangible evidence of a client’s offense in the form of either fruits or instrumentalities of the crime. Should these articles be protected by

73. See *supra* notes 41-53 and accompanying text.

74. Flaherty, *supra* note 42, at 11, col. 1.

75. *Id.*

76. See RULES, *supra* note 1, Rule 1.6 comment.

77. *Id.*

78. *Id.*

79. See *supra* note 41 and accompanying text.

legal and ethical principles? As an officer of the court, should the attorney disclose their existence and turn them over to either the prosecuting authorities or the court? There is a paucity of law on the subject.⁸⁰ Nevertheless, the better-reasoned view of the majority is that an attorney may not conceal tangible evidence of a crime.⁸¹

In *In re Ryder*,⁸² the defendant, while being questioned by the Federal Bureau of Investigation (FBI) about a bank robbery,⁸³ telephoned his attorney, Ryder. While speaking with his lawyer, the client denied that he had committed the robbery, maintaining that the money the FBI seized from him had been won in a "crap" game.⁸⁴ Pursuant to this conversation, Ryder went to his client's safe deposit box and extracted a large sum of cash and a sawed-off shotgun. He placed these articles in another safe deposit box in his own name.⁸⁵

During his ensuing disciplinary hearing, Ryder claimed that the attorney-client privilege protected the articles.⁸⁶ He asserted that he intended to reimburse the money to the victimized bank following his client's trial.⁸⁷ The district court rejected both of these contentions and suspended Ryder for eighteen months pursuant to the then-existing Canons of Ethics.⁸⁸ The court concluded that Ryder intended "to assist [the defendant] by keeping the stolen money and the shotgun concealed in his lockbox until after the trial."⁸⁹ Relying on *United States v. United Shoe Machinery Corp.*,⁹⁰ and *Wigmore on Evidence*,⁹¹ the court concluded that the attorney's conduct "went far beyond the receipt and retention of a confidential communication from his client."⁹² The court held that under the circumstances, Ryder was not privileged to take possession of and retain the fruits and instrumentalities of the crime.⁹³

As *Ryder* demonstrates, an important factor in determining a

80. *Morrell v. State*, 575 P.2d 1200, 1207 (Alaska 1978).

81. See *infra* notes 93, 102, & 105 and accompanying text.

82. 263 F. Supp. 360 (E.D. Va.), *aff'd*, 381 F.2d 713 (4th Cir. 1967). For a complete discussion of *Ryder*, see Comment, *Professional Responsibility and In Re Ryder; Can An Attorney Serve Two Masters?*, 54 VA. L. REV. 145 (1968).

83. 263 F. Supp. at 362.

84. *Id.*

85. *Id.* at 363.

86. *Id.*

87. *Id.* at 363.

88. *Id.* at 364.

89. *Id.* at 365.

90. 89 F. Supp. 357 (D. Mass. 1950).

91. 8 WIGMORE, EVIDENCE § 2292 (McNaughton Rev. 1961).

92. 263 F. Supp. at 365.

93. *Id.*

lawyer's duty with regard to tangible evidence is the existence of criminal statutes prohibiting secreting or tampering with evidence of a crime.⁹⁴ Thus, in *Ryder*, the court found that the attorney knowingly concealed stolen property in contravention of the statute prohibiting such conduct.⁹⁵ In *People v. Lee*,⁹⁶ the client's wife delivered blood-stained shoes to the public defender.⁹⁷ He, in turn, delivered them to the judge pursuant to an agreement with the prosecutor.⁹⁸ During the client's trial, these events were revealed.⁹⁹

The defendant sought unsuccessfully to prevent admission of the shoes into evidence.¹⁰⁰ The California court held that it was proper to seize the shoes by warrant and that the attorney-client privilege did not give an attorney the right to withhold evidence.¹⁰¹ The court stated that it would be an abuse of the attorney's duty of professional responsibility to knowingly take possession of and secrete instrumentalities of a crime.¹⁰² The court further held that it had been proper for the attorney to testify.¹⁰³ Also, in *Morrell v. State*,¹⁰⁴ the Supreme Court of Alaska held that an attorney has an ethical duty to deliver fruits and instrumentalities of crime to the prosecuting authorities.¹⁰⁵ As these cases show, neither the ethical nor the evidentiary rules of confidentiality cover all situations. The California and Alaska courts placed the lawyer's duty as an officer of the

94. *Id.* at 369. The court quoted from the Code of Virginia, § 18.1-107, which provided: "If any person buys or receives from another person, or aid [sic] in concealing, any stolen goods or other thing, knowing the same to have been stolen, he shall be deemed guilty of larceny thereof, and may be proceeded against, although the principal offender be not convicted." VA. CODE § 18.1-107 (1950) (repealed 1975); see also N.Y. PENAL LAW § 215.40 (McKinney 1975) (forbidding suppression of evidence).

95. 263 F. Supp. at 369.

96. 3 Cal. App. 3d 514, 83 Cal. Rptr. 715 (1970).

97. *Id.* at 524, 83 Cal. Rptr. at 721.

98. *Id.* at 524-25, 83 Cal. Rptr. at 721.

99. *Id.*

100. *Id.* at 525, 83 Cal. Rptr. at 722.

101. *Id.* at 526, 83 Cal. Rptr. at 722.

102. *Id.* (quoting *In re Ryder*, 381 F.2d 713, 714).

103. 3 Cal. App. 3d 527, 83 Cal. Rptr. 723. In *Anderson v. State*, 297 So. 2d 871 (Fla. Dist. Ct. App. 1974), the court held that an attorney who delivers stolen property to the police need not divulge his client's identity or the manner in which he gained possession of the items. Furthermore, the court prohibited the prosecutor from informing the jury that the property was obtained from the defendant's attorney. *Id.* at 875.

104. 575 P.2d 1200 (Alaska 1978). In *Morrell*, a handwritten plan to carry out a kidnapping scheme was received from the defendant's house guest. The court held that the attorney properly delivered this evidence to the prosecutor. *Id.* at 1212.

105. 575 P.2d at 1207.

court ahead of the duty to defend his client, thereby carving out exceptions to the rule of confidentiality.¹⁰⁶

There is, however, law to the contrary. In one of the leading cases, *State v. Olwell*,¹⁰⁷ the defendant's attorney refused to comply with a subpoena duces tecum¹⁰⁸ which sought production of a knife allegedly used by his client in the commission of a homicide.¹⁰⁹ Olwell asserted the attorney-client privilege and was cited for contempt by a Washington state court.¹¹⁰ However, the Supreme Court of Washington reversed, finding that the knife was protected by the attorney-client privilege.¹¹¹ Relying on a Florida case,¹¹² the court concluded that communication with a client encompassed delivery of instrumentalities by the client to the attorney.¹¹³ However, the court cautioned that after a reasonable period of time, the attorney must deliver the evidence to the authorities.¹¹⁴

However, *Olwell* represents an aberration rather than the rule. The court improperly balanced society's interest in a truthful criminal justice system against the client's interest in a confidential attorney-client relationship.¹¹⁵ The norm should be the well-reasoned conclusion of *Ryder*,¹¹⁶ that fruits and instrumentalities are not, nor should they be, protected by the attorney-client privilege.¹¹⁷

Another issue relating to tangible objects is whether the attorney should testify about the articles and how he came to possess them. Although language in *Morrell*¹¹⁸ and *Lee*¹¹⁹ indicates that it was proper for the attorneys to testify about the evidence in their pos-

106. *Lee*, 3 Cal. App. 3d at 526, 83 Cal. Rptr. at 722; *Morrell*, 575 P.2d at 1211.

107. 64 Wash. 2d 828, 394 P.2d 681 (1964).

108. Subpoena duces tecum is defined as "[a] process by which the court, at the instance of a party, commands a witness who has in his possession or control some document or page that is pertinent to the issue of a pending controversy, to produce it at the trial." BLACK'S LAW DICTIONARY 1279 (5th ed. 1979).

109. 394 P.2d at 682.

110. *Id.* at 683.

111. *Id.* at 684.

112. *Dupree v. Better Way, Inc.*, 80 Fla. 500, 86 So. 2d 425 (1956) (privileged communication encompasses information as well as objects which clients deliver to attorney).

113. 64 Wash. 2d at 830, 394 P.2d at 683-84; *cf.* *Dyas v. State*, 539 S.W.2d 251 (Ark. 1976) (property not protected as client confidence because lawyer obtained it from third person rather than from client; *Olwell* thus distinguished).

114. 64 Wash. 2d at 831, 394 P.2d at 684-85.

115. *Id.* at 830, 394 P.2d at 684.

116. 263 F. Supp. 360.

117. *See supra* notes 92-95 and accompanying text.

118. 575 P.2d 1200, 1207.

119. 3 Cal. App. 3d 527, 83 Cal. Rptr. 723.

session, a landmark New York case holds otherwise. In *People v. Belge*,¹²⁰ attorney Belge and his partner were appointed to represent a defendant accused of murder. Upon interviewing his client, Belge learned not only that the client had committed three other murders but also the location of one corpse.¹²¹ Belge drove to the area his client had described and confirmed that a body was there.¹²²

This sequence of events was revealed during the course of the trial. Consequently, Belge was indicted for violation of the New York Health Laws.¹²³ He sought dismissal of the charge on the ground that the discovery of the corpse was attributable to statements obtained through the lawyer-client relationship and thus was privileged.¹²⁴ The court dismissed the indictment and quoted with approval from the amicus curiae brief submitted by the National Association of Criminal Defense Lawyers, which asserted that Belge was "constitutionally exempt from any statutory requirement to disclose the location of the body," and in fact was "under a positive stricture precluding such disclosure."¹²⁵

Belge is distinguishable from *Ryder, Lee, Olwell* and *Morrell* to the extent that it involved an indictment against an attorney under state health laws and dealt only peripherally with the criminal prosecution of the client. However, it is important to consider *Belge* since it later served as the foundation for an important limitation on the confidentiality rule.

In *People v. Meredith*,¹²⁶ the California Supreme Court generally upheld the principle of confidentiality but cautioned that, once a client informs his attorney of the location of the physical evidence, confidentiality will be lost if the evidence is either moved or altered.¹²⁷ The court reasoned that tampering with evidence dissolves the confidential relationship because

[w]hen defense counsel alters or removes physical evidence, he necessarily deprives the prosecution of the opportunity to observe

120. 83 Misc. 2d 186, 372 N.Y.S.2d 798 (Onondaga County Ct. 1975), *aff'd*, 50 A.D.2d 1088, 376 N.Y.S.2d 771 (4th Dep't 1975), *aff'd*, 41 N.Y.2d 60, 359 N.E.2d 377, 390 N.Y.S.2d 867 (1976).

121. 83 Misc. 2d at 187, 372 N.Y.S.2d at 799.

122. *Id.*

123. *Id.*

124. *Id.* at 187, 372 N.Y.S.2d at 799-800.

125. *Id.* at 190, 372 N.Y.S.2d at 802.

126. 29 Cal. 3d 682, 631 P.2d 46, 175 Cal. Rptr. 612 (1981); see Martin, *The Razor's Edge of Conflicting Duties*, 4 CAL. LAWYER 15 (1984); Note, *People v. Meredith: The Attorney-Client Privilege and the Criminal Defendant's Constitutional Rights*, 70 CAL. L. REV. 1048 (1982).

127. 29 Cal. 3d 694, 631 P.2d at 53, 175 Cal. Rptr. at 619.

that evidence in its original condition or location [T]o bar admission of testimony concerning the original condition and location of the evidence in such a case permits the defense in effect to "destroy" critical information¹²⁸

Thus, *Meredith* suggests that courts should create exceptions to the protection of the attorney-client privilege in situations where counsel has removed or altered evidence.¹²⁹ However, the court specifically stated that when the defense attorney leaves the evidence as he finds it, those observations derived from privileged communications are insulated from disclosure.¹³⁰

A helpful method of analyzing cases involving fruits and instrumentalities was set forth in a recent opinion of the New York City Bar Association.¹³¹ An attorney wrote to the New York City Bar Association Ethics Committee for guidance regarding the following matter: a new client met with his attorney, showed him a gun, and stated that the gun had just been fired at someone. The attorney believed that this firing of the gun constituted a crime. To protect the people in his office, the attorney took the weapon and placed it in his office safe. He then referred the client to a lawyer specializing in criminal matters. Later, the lawyer learned that the client had been charged with a felony. Believing that the gun was unregistered, the lawyer inquired as to his ethical obligations with respect to the evidence in his safe.¹³²

Prefacing its decision by commenting that the lawyer's duties are coextensive with the legal obligations of any other citizen,¹³³ the committee concluded that the lawyer might be obligated by law to turn over the gun to the authorities but could not voluntarily reveal the circumstances under which the weapon came into his possession.¹³⁴ Citing Canon 4,¹³⁵ the committee outlined and applied a two-part analysis. First, the lawyer must decide whether and to what extent the instrumentality and/or the circumstances of its receipt constitute confidences or secrets under the Code.¹³⁶ Second, the lawyer must

128. *Id.*

129. *Id.*

130. *Id.* at 695, 631 P.2d at 54, 175 Cal. Rptr. at 620.

131. New York City Bar Association Ethics Committee, Op. 81-99 (1981).

132. *Id.*

133. *Id.*

134. *Id.*

135. CODE, *supra* note 10, CANON 4.

136. New York City Bar Ass'n Ethics Comm., Op. 81-99. DR 4-101(A) of the Code distinguishes between confidences and secrets as follows: "'Confidence' refers to information protected by the attorney-client privilege under applicable law, and

determine whether, and to what extent, he is required by law to reveal any confidences or secrets involving the client's visit and delivery of the instrumentality of the crime.¹³⁷ In the situation presented, the committee concluded that the information was a secret and thus fell within the ambit of Canon 4.¹³⁸ The committee then inquired as to whether relevant law required that the attorney reveal client confidences. The committee noted state statutes forbidding suppression of evidence and outlawing possession of guns by unlicensed persons.¹³⁹ It concluded that since the Code subjects to disciplinary sanctions lawyers whose conduct is "prejudicial to the administration of justice,"¹⁴⁰ if the applicable law forbids retention of the gun as unlawful suppression of evidence, the Code similarly proscribes such retention as a violation of the Disciplinary Rules even though turning over the gun may involve revealing a client secret.¹⁴¹ The committee further asserted that the lawyer had a corresponding duty to limit any disclosure of information to items that he was required by law to reveal.¹⁴² Consequently, if a lawyer decides that he must turn over certain physical evidence, he must do so in a manner that does not jeopardize protected information. After surrendering the evidence, the lawyer must endeavor to preserve any remaining client confidences unless the court directs otherwise.¹⁴³

The committee emphasized the importance of the manner in which a lawyer representing a criminal defendant delivers the fruits or instrumentalities to the court. By simply informing the court that he possesses physical evidence, a lawyer may prejudice his client.¹⁴⁴ Since the Code permits disclosure only to the extent required by law,¹⁴⁵ an attorney must determine the minimum required by law, and he may not divulge information beyond those requirements which would reveal confidences or secrets. Moreover, if a lawyer is asked

'secret' refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client." CODE, *supra* note 10, DR 4-101(A).

137. New York City Bar Ass'n Ethics Committee, Op. 81-99.

138. *Id.*; see *supra* note 136, which sets forth the Code's definition of secrets.

139. The committee cited N.Y. PENAL LAW § 215.40 (McKinney 1975) (forbidding suppression of evidence) and N.Y. PENAL LAW §§ 265.01-265.05 (McKinney 1980 & Supp. 1984) (outlawing possession of guns by unlicensed persons). New York City Bar Ass'n Ethics Committee, Op. 81-99.

140. CODE, *supra* note 1, DR 1-102(A)(5).

141. New York City Bar Ass'n Ethics Committee, Op. 81-99.

142. *Id.*

143. *Id.*

144. *Id.*

145. CODE, *supra* note 10, DR 4-101(C)(2).

by the court to explain the circumstances under which he came to possess evidence, he is ethically bound to assert the attorney-client privilege and refuse to answer. The lawyer must not divulge his client's secrets unless he is subject to a court order.¹⁴⁶ The committee, therefore, opined that if the law allows the attorney to deliver the evidence anonymously to the prosecuting authorities, he must follow that course and must refrain from further action which might prejudice the client's interests.¹⁴⁷

A. Recommendations

It is unthinkable that an attorney's office might become a storehouse for contraband. It is equally outrageous for a lawyer to become an aider and abettor of criminal activity. As the cases discussed above¹⁴⁸ clearly show, these actions substantially impair the criminal justice system.¹⁴⁹ Furthering the proper goals of justice must take precedence over the duty of confidentiality which a lawyer owes to his client. Therefore, the interests of society mandate that an attorney deliver to the authorities the fruits and instrumentalities of a crime which come into his possession.

Unfortunately, once he has released the evidence, the attorney has not totally resolved his dilemma. He must decide whether to explain his possession of the incriminating evidence or to remain silent.¹⁵⁰ Although speaking out could eviscerate his client's right under the sixth amendment to effective assistance of counsel and a fair trial,¹⁵¹ the attorney's silence could also be detrimental to his client.

Depositing the physical evidence with the administrative judge of the court rather than the prosecuting authorities is a more practical solution than anonymous delivery.¹⁵² The administrative judge is able to determine what may be disclosed and what must remain confidential, and furthermore, as an impartial and detached party, he may serve as a buffer between the prosecuting authorities and the

146. *Id.*; New York City Bar Ass'n Ethics Committee, Op. 81-99.

147. New York City Bar Ass'n Ethics Committee, Op. 81-99.

148. *See supra* notes 82-106 and accompanying text.

149. *See supra* note 102 and accompanying text.

150. *See supra* notes 108, 118, 119, 132, 136, 145, 146 and accompanying text.

151. *See CODE, supra* note 10, EC 4-1.

152. The position of chief administrator, or administrative judge of the New York court system, is described in the New York Judiciary Law. N.Y. JUD. LAW §§ 210-217 (McKinney 1983 & Supp. 1984). The chief administrative judge is vested with authority to designate administrative judges for the lower state courts, *id.* § 212(1)(d), and to adopt rules and orders regulating practice in the courts. *Id.* § 212(2)(d).

client.¹⁵³ By revealing the evidence to the administrative judge rather than the prosecuting authorities, it is less likely to be used to the client's disadvantage.¹⁵⁴

Establishing a uniform method to handle the attorney's predicament is just as important as preserving the client's sixth amendment rights. By consistently resorting to the administrative judge, defense attorneys would not make these decisions alone. The efficient functioning of the criminal justice system would be enhanced by procedural consistency. Public esteem for lawyers would probably increase.¹⁵⁵ Therefore, an exception should be carved out of the doctrine of confidentiality to allow lawyers to turn over fruits and instrumentalities evidence to a neutral administrative judge.¹⁵⁶

V. Corporate Fraud

Any discussion of Rule 1.6 would be incomplete without consideration of another issue: when a lawyer or law firm becomes the unwitting participant in a client's fraud, should confidentiality be sacrificed to permit the lawyer to rectify the fraud? Ironically, at the time when the ABA House of Delegates voted to delete the client fraud exception from Rule 1.6,¹⁵⁷ a large-scale corporate fraud implicating several attorneys became public.¹⁵⁸ On September 23, 1981, the law firm retained by O.P.M. Leasing Services, Inc. (O.P.M.)

153. Although the administrative judge is not specifically vested with authority to perform these functions under the New York Judiciary Law, it could be argued that such duties are encompassed within the administrative judge's general supervisory duties. N.Y. JUD. LAW § 211 (McKinney 1983). Furthermore, the law could be amended to provide a specific grant of authority to administrative judges in cases involving confidentiality claims.

154. The client is protected because information about his identity and the circumstances under which the evidence was recovered would not be revealed to the trial judge. See Bender, *Incriminating Evidence: What to Do With a Hot Potato*, 11 COLO. LAWYER 881, 892 (1982).

155. See Brown, *supra* note 11, at 34, quoting trial lawyer W. Sidney Davis of New York. Davis asserted:

The decline of the American lawyer's professional independence leads to growing disrespect for the whole legal process. Since the public's perception of attorneys is that they are too often advocates for hire to the highest bidder, guided by low personal scruples and encouraged by a system that rewards results without concern for the sanctity of the system of justice itself, can the disrepute of the rule of law be far behind?

Id.

156. See *supra* notes 150-53 and accompanying text.

157. See Wermeil, *supra* note 47, at 6, col. 2.

158. See Blustein and Penn, *Advice or Consent: O.P.M. Fraud Raises Questions About Role of a Criminal's Lawyer*, Wall St. J., Dec. 31, 1982, at 1, col. 6. [hereinafter cited as Blustein and Penn].

announced that it would no longer represent O.P.M.¹⁵⁹ The circumstances leading up to that resignation highlight the need for a commercial fraud exception to the confidentiality rule.

O.P.M. had engaged in the business of matching customers who wished to lease computers with financial institutions who purchased computers and leased them to customers.¹⁶⁰ To secure multimillion dollar loans from financial institutions, O.P.M.'s owners, Myron Goodman and Mordecai Weissman, often used a single computer as collateral for several different loans.¹⁶¹ Later, when larger funds were required, Goodman created false documents showing numerous leasing agreements to lure investors.¹⁶²

From its inception in 1970, O.P.M. retained a law firm to close the loans and issue opinion letters confirming the legality of leasing agreements¹⁶³ which were relied on by investors.¹⁶⁴ In June, 1980, Goodman hinted to a senior partner of the law firm that he had done something wrong involving millions of dollars but would not elaborate further. Goodman gave the lawyer a sealed envelope containing a letter from O.P.M.'s chief in-house accountant which purportedly revealed the accountant's knowledge of the fraud.¹⁶⁵ Although there were conflicting accounts as to the firm's later dealings with the in-house accountant, and it appears that the members of the firm did not open the envelope or read the letter, it is clear that the law firm had reason to suspect fraud.¹⁶⁶

The law firm consulted an attorney specializing in legal ethics and was advised not to disclose any past fraud and not to aid ongoing or new frauds.¹⁶⁷ As to future transactions, the firm was advised to verify that lease agreements collateralizing computer purchases were genuine;¹⁶⁸ but it was also told that if it believed the client's representations, independent verification and investigation were not necessary.¹⁶⁹ Therefore, prior to each loan closing, the law firm

159. *Id.* at 6, col. 3.

160. *Id.* at 1, col. 6.

161. *Id.*; Taylor, *Ethics and the Law: A Case History*, N.Y. Times, Jan. 9, 1983, (Magazine), at 31, col. 2 [hereinafter cited as *Ethics and the Law*].

162. *Id.* at 33, col. 1.

163. *Id.* at 33, col. 1.

164. *Id.*

165. *Id.*

166. The attorney for John A. Clifton, the chief in-house accountant, recounted that Singer Hutner tried to persuade Clifton to remain silent. Hutner, however, stated that he neither asked Clifton to withdraw the letter nor refused to listen to Clifton's information. *Id.* at col. 2.

167. *Id.* at 33, col. 3.

168. *Id.* at 46, col. 2.

169. *Id.*; see also ABA Comm. on Ethics and Professional Responsibility, Formal

required Goodman to certify in writing that each lease agreement was legitimate.¹⁷⁰ Nevertheless, the frauds continued, amounting to over \$70 million during the summer of 1980.¹⁷¹ In September, 1980, Goodman confessed a portion of his fraudulent activities to the firm, but he did not reveal that the frauds were ongoing.¹⁷² The firm then attempted, unsuccessfully, to independently verify the lease agreements.¹⁷³

On September 23, 1980, the firm informed Goodman that it had decided to withdraw as O.P.M.'s legal counsel in a gradual process designed to minimize injury to the client.¹⁷⁴ The firm was advised by its ethics counsel that under the Code, it was barred from revealing any details of the fraud.¹⁷⁵ Therefore, when O.P.M. retained another law firm, the second firm was not warned of the fraud.¹⁷⁶

That the ongoing fraud was not rectified in the O.P.M. situation, where the lawyers appeared to have complied with the dictates of the Code,¹⁷⁷ highlights the Code's inadequacies. The Kutak Commission¹⁷⁸ sought to remedy this inadequacy by permitting disclosure of a secret to rectify a fraud.¹⁷⁹

However, this "whistle blowing"¹⁸⁰ provision was rejected by the House of Delegates.¹⁸¹ Instead, under the Code, the only feasible course of action for an attorney who discovers his client's fraud outside of the courtroom milieu is to withdraw from representation.¹⁸² He cannot warn the lawyers who succeed him. Thus, the fraud may remain undiscovered and may continue.

Despite the incompatibility of this result with the interests of

Op. 335 (1974) (lawyer must inquire into facts relevant to opinion letter written for sales of unregistered securities; further inquiry needed only where client's answer is incomplete, suspect, inconsistent or open to question).

170. *Ethics and the Law*, *supra* note 161, at 46.

171. Blustein and Penn, *supra* note 158, at 1, col. 6.

172. *Id.* at 6, col. 3.

173. *Id.*

174. *Id.* During the period of withdrawal, Singer Hutner independently verified lease agreements and demanded that O.P.M. cease new tax shelter financing. *Ethics and the Law*, *supra* note 161, at 48, col. 5.

175. *Id.* at 49, col. 1; *see also* CODE, *supra* note 10, EC 4-6 (1979) ("obligation of lawyer to preserve the confidences and secrets of his client continues after the termination of his employment").

176. *Ethics and the Law*, *supra* note 161, at 49, col. 2.

177. *Id.* at 52, col. 2.

178. *See* Kutak, *supra* note 59.

179. *Id.* at 424.

180. For an example of the usage of this colloquialism which refers to those who inform on others, *see* Werneil, *supra* note 47, at 6, col. 2.

181. *See id.* at 6, col. 2.

182. *See supra* note 55.

society, the principles behind it continue to receive support. For example, a policy statement of the ABA Section of Corporation, Banking, and Business Law¹⁸³ provides that the vital confidentiality involved in lawyer-client consultation and advice would be seriously impaired if lawyers were required to disclose confidential information to the Securities Exchange Commission (SEC) or other agencies.¹⁸⁴ According to the statement, "any such compelled disclosure would seriously and adversely affect the lawyer's function as counselor, and may seriously and adversely affect the ability of lawyers as advocates to represent and defend their clients' interests."¹⁸⁵ Thus, in this sphere, there is a distinct trend toward greater confidentiality, regardless of whether the contemplated fraud involves the SEC, the Internal Revenue Service, or innocent third parties.¹⁸⁶

A. Recommendations

Some critics resist permitting lawyers to become aiders and abettors of fraud by active, though unknowing, participation or by knowingly remaining silent. For example, in February, 1983, Senator Arlen Specter introduced a bill which made it a crime for an attorney to mail documents that enable a client to commit, or assist a client in committing a crime.¹⁸⁷ Under this bill, an attorney would be subject to a fine or imprisonment, or both for failure to timely disclose a crime or fraud to federal law enforcement officials.¹⁸⁸

That Congress would consider passing a criminal law to be enforced

183. See ABA Section of Corporation, Banking and Business Law, *Recommendation Regarding Responsibilities and Liabilities of Lawyers in Advising With Respect to the Compliance by Clients with Laws Administered by the Securities and Exchange Commission*, reprinted in N. REDLICH, *PROFESSIONAL RESPONSIBILITY: A PROBLEM APPROACH* 222 (1976) [hereinafter cited as *Recommendation*].

184. *Id.*

185. *Id.* at 223.

186. See generally Marsan, *Tax Shelter Opinions: Ethical Responsibilities of the Tax Attorney*, 9 OHIO N.U.L. REV. 237 (1982); Myers, *The Attorney-Client Relationship and the Code of Professional Responsibility: Suggested Attorney Liability for Breach of Duty to Disclose Fraud to Securities and Exchange Commission*, 44 FORDHAM L. REV. 1113 (1976); Robins, *Policeman, Conscience or Confidant: Thoughts on the Appropriate Response of a Securities Attorney Who Suspects Client Violations of the Federal Securities Laws*, 15 J. MAR. L. REV. 373 (1982); Wilczek, *Corporate Confidentiality: Problems and Dilemmas of Corporate Counsel*, 7 DEL. J. CORP. L. 221 (1982); Note, *The Need for Attorney-Client Confidentiality in Securities Regulation: S.E.C. v. Gulf & Western Industries, Inc.*, 46 ALB. L. REV. 1354 (1982).

187. S. Res. 485, 98th Cong., 1st Sess., 129 CONG. REC. S.1198-99 (daily ed. Feb. 16, 1983).

188. *Id.* at 1199.

exclusively against lawyers reflects poorly on the legal profession. Traditionally, law has been a self-regulated profession governed by the Code of Ethics.¹⁸⁹ Federal laws should not be necessary. To avoid outside regulation, the profession should prohibit its members from becoming involved in client fraud. When the states adopt the Model Rules, they should include a provision allowing disclosure of client confidences when necessary to prevent or rectify that client's fraud.

VI. Conclusion

Although the confidentiality rule is a cornerstone of criminal defense, it is not absolute. The rights of individual clients must be balanced against society's interests.¹⁹⁰ Generally, confidentiality should be preserved. While an attorney's suspicion of potential danger should not require mandatory disclosure, reasonable certainty of the existence of such danger should create a duty to reveal client secrets.¹⁹¹ Therefore, when an attorney learns from his client of an imminent threat of death or serious bodily harm to a third party, disclosure should be mandatory.

As a matter of public policy, safeguarding and preserving human life far outweigh the considerations underlying the confidentiality rule. Over forty years ago, the American Bar Association declared:

There are some circumstances under which . . . a communication is not privileged for reasons founded on sound principles of public policy. In such cases the attorney may not remain silent. When the communications of the client to the attorney are made with respect to commission of an unlawful act or to a continuing wrong, the communication is not privileged.¹⁹²

Ascertainment of truth is a fundamental goal of the adversarial system.¹⁹³ A limited exception to the confidentiality rule would not interfere with a client's constitutional rights or with the orderly administration of justice. Such an exception could prevent serious injury to potential witnesses, members of the judiciary and others

189. See RULES, *supra* note 1, Preamble § 11 ("legal profession's relative autonomy carries with it special responsibilities of self-government. . . . Every lawyer is responsible for observance of the Rules of Professional Conduct.").

190. See *supra* notes 29-30 and accompanying text.

191. Cf. ABA Comm. on Professional Ethics, Formal Op. 314 (1965) (requiring attorney to be fair and candid when practicing before Internal Revenue Service).

192. Cf. ABA Comm. on Professional Ethics, Formal Op. 250 (1943).

193. See *United States v. Havens*, 446 U.S. 620 (1980); *Oregon v. Hass*, 420 U.S. 714 (1975); *Harris v. New York*, 401 U.S. 222 (1971).

who, but for the lawyer's timely disclosure, might be irreparably harmed. Furthermore, it would enhance the system by increasing the esteem which the public holds for lawyers as a group.¹⁹⁴ High moral character is required of candidates to the Bar.¹⁹⁵ This same degree of morality must be required of practicing attorneys as well. If the mandatory disclosure rule were adopted by the profession, lawyers no longer would be viewed as unscrupulous technocrats. Instead, the legal profession would be perceived as one dedicated to the paramount goal of any society—the safeguarding of human life.

194. See *supra* note 154 and accompanying text.

195. CODE, *supra* note 10, EC 1-3, DR 1-101(B).