Report on the Debate Over Whether There Should be an Exception to Confidentiality for Rectifying a Crime or Fraud

Maria Helen Bainor
The Committee on Professional Responsibility, Association of the Bar of the City of New York

Nancy Batterman
The Committee on Professional Responsibility, Association of the Bar of the City of New York

Follow this and additional works at: https://ir.lawnet.fordham.edu/ulj
Part of the Legal Ethics and Professional Responsibility Commons

Recommended Citation
Available at: https://ir.lawnet.fordham.edu/ulj/vol20/iss4/3

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Urban Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.
REPORT ON THE DEBATE OVER WHETHER THERE SHOULD BE AN EXCEPTION TO CONFIDENTIALITY FOR RECTIFYING A CRIME OR FRAUD

Committee on Professional Responsibility, Association of the Bar of the City of New York†

I. The Issue

In the latest round of what has proven to be a lengthy debate, the American Bar Association's House of Delegates rejected a proposal made in August 1991 by the Standing Committee on Ethics and Professional Responsibility (the "Ethics Committee") to permit lawyers to disclose confidences of clients who use their legal services in committing fraudulent or criminal acts.1 In its Report and Recommendation to the House of Delegates2 (the "Ethics Report"), the Ethics Committee had proposed amendments to Model Rule 1.6(b) of the Model Rules of Professional Conduct that would have added an additional justification permitting lawyers to reveal, without the client's consent and to the extent reasonably necessary, information that relates to the representation of a client. The proposed amendments would have authorized disclosure "[t]o rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used."3

Pursuant to Model Rule 1.6(b), lawyers already are authorized, but not mandated, to reveal such information in two situations. First, information can be revealed in order to prevent the client from committing a criminal act that the lawyer believes would likely result in imminent death or substantial bodily harm. Second, under certain enumerated circumstances, a lawyer can disclose information in order to establish a claim or defense on behalf of the lawyer.4

† February 1993. The members of the Committee at the time this report was written are listed in Appendix A.


2. STANDING COMM. ON PROFESSIONAL RESPONSIBILITY, AMERICAN BAR ASS'N, REPORT AND RECOMMENDATION TO THE HOUSE OF DELEGATES NO. 108B (1991) [hereinafter ETHICS REPORT].

3. Id. at 2.

4. Specifically, Model Rule 1.6(b) states:
A lawyer may reveal . . . information [relating to representation of a client] to the extent the lawyer reasonably believes necessary:
The Ethics Report also had recommended amendments to the Comment accompanying Model Rule 1.6(b). The most significant of these amendments would have eliminated the “noisy withdrawal” provision. The “noisy withdrawal” provision allows a lawyer who has withdrawn because his or her services were to be used by the client to further criminal or fraudulent conduct to give notice of the fact of withdrawal and to withdraw or disaffirm any opinion, document, affirmation, or the like. While the provision allowing for “noisy withdrawal” is in the Commentary rather than in the rule itself, the ABA has stated that

the Comment correctly reflects the need to interpret Rule 1.6’s requirement of confidentiality in light of what Rule 1.16(a)(1) [governing mandatory withdrawal] and Rule 1.2(d) [prohibiting a lawyer from knowingly assisting a client’s crime or fraud] require of a lawyer in a situation where continued representation of the client will entail the lawyer’s assisting in the client’s continuing or

---

(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 a proceeding concerning the lawyer’s representation of the client.

**Model Rules of Professional Conduct** Rule 1.6(b) (1989). Moreover, Model Rule 1.6(a) provides additional bases for disclosure:

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).


6. **Ethics Report**, supra note 2, at 7-8. The “noisy withdrawal” provision was added in 1983, after the ABA House of Delegates had already rejected the very same provision that was re-offered in the **Ethics Report**.

7. See the Comment to Rule 1.6(b) of the **Model Rules of Professional Conduct**, which states in relevant part:

If the lawyer’s services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1). [Rule 1.16(a)(1) states that withdrawal is mandatory if “the representation will result in violation of the rules of professional conduct or other law.”]

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

**Model Rules of Professional Conduct** Rule 1.6 cmt. (1989); see also ABA Comm. on Ethics and Professional Responsibility, Formal Op. 92-366 (1992) (describing “noisy withdrawal” and circumstances under which such a withdrawal is permitted).
future fraud and withdrawal is therefore mandatory.\footnote{8}

As noted in the Ethics Report,\footnote{9} the concept of rectification was addressed as early as 1928 in Canon 41 of the ABA Canons of Professional Ethics, which provided, \textit{inter alia}, that upon his or her discovery, a lawyer should endeavor to rectify a fraud or deception that has been unjustly imposed upon the court or a party.\footnote{10} Twenty-five years later, however, the ABA formally concluded that such a disclosure would be barred if the information leading to the lawyer's discovery was protected by the attorney-client privilege.\footnote{11}

When the Canons were replaced by the Model Code of Professional Responsibility in 1969, Disciplinary Rule 7-102(B) was adopted, and it too initially authorized a lawyer's disclosure of a fraud to the affected person or tribunal. In 1974, however, the rule was amended to bar disclosure of information that was protected as a privileged communication. This amendment was soon construed to additionally bar disclosure where the client had requested the information to be held inviolate or where disclosure would be embarrassing or detrimental to the client (\textit{i.e.,} when the information was a "secret" even though it was not protected by the evidentiary privilege).\footnote{12}

As already noted, the rectification provision, both black letter and comment, that was recommended in August 1991 was part of Model Rule 1.6 when the ABA Commission on Evaluation of Professional Standards first proposed the Model Rules of Professional Conduct in 1982.\footnote{13} As ultimately adopted, however, Model Rule 1.6(b) prohibits

\footnotesize
8. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 92-366 (1992) (refusing to ignore the noisy withdrawal provision simply because it was in the Commentary).


10. \textit{CANONS OF PROFESSIONAL ETHICS} Canon 41 (1928).


12. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 341 (1975). New York has adopted a rule that specifically bars disclosure if "the information is protected as a confidence or secret." \textit{N.Y. CODE OF PROFESSIONAL RESPONSIBILITY, N.Y. COMP. CODES R. & REGS. tit. 22, § 1200, DR 7-102(b)(1) [hereinafter N.Y. CODE OF PROFESSIONAL RESPONSIBILITY].}

The nondisclosure amendment of DR 7-102(B) was not widely adopted. Eighteen states did adopt the amended version but the majority of states provided for rectification of client fraud. See GEOFFREY C. HAZARD AND W. WILLIAM HODES, \textit{THE LAW OF LAWYERING} 598 (2d ed. 1990); see also discussion \textit{infra} text accompanying notes 40-41.

13. \textit{ETHICS REPORT, supra} note 2, at 7; see \textit{supra} note 6. The House of Delegates did approve in February 1983, the "Model Rule 3.3(b), which created additional exceptions to the lawyer's duty of confidentiality when the client commits perjury." Ronald D. Rotunda, \textit{The Notice of Withdrawal and the New Model Rules of Professional Conduct: Blowing the Whistle and Waving the Red Flag}, 63 \textit{Or. L. REV.} 455, 472-73 (1984); see also text accompanying notes 36-38 \textit{infra}, discussing Model Rule 3.3.
rectification while allowing noisy withdrawal. Where does this system leave practitioners?

The Ethics Report notes that the "noisy withdrawal" provision is not a panacea for the present limitations of black letter Model Rule 1.6(b). As an illustrative case, consider one of the Ethics Committee's own hypotheticals involving a lawyer who has settled a case on behalf of an insurance company. The lawyer later learns that his client had falsified a key piece of evidence, an office log, to eliminate any reference to the receipt of the insured's notice of claim. Although the lawyer knows that the insured discontinued his case because of the difficulty in proving timely notice, there is no pending matter from which the lawyer can withdraw. Nor would the lawyer's disaffirmance of the deposition in which the insurance company falsely testified that it had never received a notice of the claim assist the insured; since the lawyer would not be allowed to disclose the specific factual basis for the disaffirmance, the insured would receive no evidentiary basis for reinstituting the claim.

Consider also an attorney who has prepared the papers for a financial deal that has prompted a flood of investments. On the eve of the closing, the lawyer learns that she has been the unwitting tool in a plan to defraud the investors, and she is unsuccessful at persuading the client to call off the scheme. The lawyer cannot speak out to prevent the fraud; at best, she may walk away from her client's representation. Whether the parties will consider her withdrawal to be a "red flag" depends on the circumstances and is far from certain.

The case most widely cited to illustrate the limitations of the current rules governing rectification of client fraud concerns the legal representation of OPM Leasing Services, Inc. ("OPM"). In a nutshell, OPM was a financially deteriorating leasing service that resorted to wide scale illegal conduct to remain afloat. Over a nine-

14. See Ethics Report, supra note 2, at 8-13; see also ABA Comm. on Ethics and Professional Responsibility, Formal Op. 92-366 (1992) (noting that the proposed rectification provision "would have carved out a much larger exception to Rule 1.6's obligation of confidentiality" than is presented by a noisy withdrawal provision). The rectification provision would have permitted a lawyer to disclose specifically and directly, rather than merely inferentially, a client's fraud, in order to rectify its consequences, and not merely to prevent its continuation.


16. See Rotunda, supra note 13, at 474-75.

year-period, OPM was represented by Singer, Hutner, Levine & Seeman ("Singer Hutner"). That representation accounted for over 60 percent of Singer Hutner's revenues.

In 1979, Singer Hutner learned that OPM had obtained millions of dollars of loans based on fraudulent leases and that the firm had unwittingly assisted OPM by issuing opinion letters that were based on falsified documents. Singer Hutner obtained outside counsel and was advised that it could not disclose the fraud and that it could continue to represent OPM if adequately assured that all wrongdoing had ceased.

OPM nonetheless continued its fraudulent conduct, and, in the following September, Singer Hutner voted to withdraw its representation. The law firm agreed to publicly state as the rationale for its withdrawal that both parties had mutually agreed to part ways. This misinformation enabled OPM to switch law firms and thereafter obtain fifteen million dollars in additional loans based on fraudulent leases. OPM was only halted in its path when it was investigated pursuant to filing a voluntary petition for bankruptcy.

A more recent case, which also implicated the issue of a lawyer's duty when a client uses the lawyer's services to engage in fraudulent conduct, has drawn outcries from many members of the legal community. On March 2, 1992, the Office of Thrift Supervision ("OTS") filed an administrative suit against the law firm of Kaye, Scholer, Fierman, Hays & Handler ("Kaye, Scholer") relating to the firm's representation of Charles H. Keating Jr.'s Lincoln Savings and Loan Association ("Lincoln Savings"). OTS claimed that the firm, among other things, had misled regulators and remained passive while Lincoln Savings was providing false information and, on the eve of OTS's examination, was purging its files of incriminating documents. 18 Two days after commencing the administrative suit, OTS instituted a federal lawsuit against Kaye, Scholer, seeking an order to compel the firm to produce subpoenaed documents. OTS eventually settled with Kaye, Scholer for $41 million.19

Before the suit was settled, and in anticipation of testifying on behalf of Kaye, Scholer, Professor Geoffrey C. Hazard had provided an expert opinion regarding the firm's role as litigation counsel to Lincoln Savings. In his opinion, Professor Hazard concluded, inter

18. This Report takes no position on the issue of whether the Kaye, Scholer matter was or was not a rectification case.
alia, that Kaye, Scholer had no duty to disclose weaknesses in Lincoln's position and that its conduct had not violated existing standards of ethical conduct and professional responsibility.\textsuperscript{20} Professor Hazard concluded that Kaye, Scholer would have violated the Code of Professional Responsibility if it had made the disclosures to the bank regulators.\textsuperscript{21}

The editorials that flooded newspapers in the aftermath of Kaye, Scholer's settlement with OTS mirror the broad spectrum of opinion in the debate over the proposed amendments to Model Rule 1.6(b). For example, in concurrence with Professor Hazard's opinion, former Federal District Judge Marvin E. Frankel claims that OTS "appears to misstate lawyers' obligations and even to demand action violating lawyers' duties to clients."\textsuperscript{22} Another opinion, expressed by Professor Lester Brickman of Cardozo Law School, is that the ABA's Code of Ethics is responsible for creating this situation to begin with and needs to be reconsidered. In particular, Professor Brickman claims that economic considerations drive the Code and encourage lawyers' silence:

Consider that the rule in question makes lawyers' services more valuable. A lawyer who must remain silent, even as his client is using those services to commit fraud, commands a higher price than one who must disclose fraud or who is prohibited from providing services that facilitate any continuing fraud.\textsuperscript{23}

And in a recent article, Professor Hazard lamented the fact that the major issue in the Kaye, Scholer case—"a lawyer's duty concerning disclosure of facts adverse to a client, and to what third parties that duty runs"—went unresolved for future cases.\textsuperscript{24} In Professor Hazard's opinion, "[c]ontinuing uncertainty about this question subjects lawyers to jeopardy of the kind to which Kaye, Scholer was exposed."\textsuperscript{25}

\textbf{II. The Present State of the Law}

Unfortunately, the current state of the law provides very little gui-
dance to the attorney who is confronted with client fraud. The lawyer faced with such a dilemma must wend his or her way through a morass of ethical rules that are contradictory in key aspects and/or do not provide guidance on a particular issue. Moreover, those rules conflict in many ways with the attorney-client privilege, an evidentiary rule that traditionally has been narrowly construed.

The Model Rules of Professional Conduct, for instance, are confusing and unhelpful in large part. As noted above, the confidentiality of client information is addressed generally in Model Rule 1.6, but this rule makes no mention of client fraud. It prohibits, with three exceptions, disclosure of information relating to representation of a client without the client’s consent. The exceptions apply only when disclosure is: 1) “impliedly authorized” to carry out the representation; 2) aimed at preventing a crime that is likely to result in imminent death or substantial bodily harm; or 3) needed for the lawyer’s “self-defense.” The rule does not answer the question of how a lawyer may protect himself when he has unwittingly become an instrument of client fraud, nor does it tell what the lawyer may do to protect a third-party victim of such client fraud.

Of course, if a lawyer finds that his or her services have been used in perpetrating a fraud, the lawyer may withdraw. As stated above, the Comment to Model Rule 1.6 requires withdrawal if the lawyer’s services will be used in materially furthering a client fraud, and also permits a “noisy” withdrawal—i.e., giving notice of withdrawal and withdrawing or disaffirming any opinion, document, or affirmation. An ABA Formal Opinion has construed the Commentary to Rule

---

26. Curiously, Model Rule 4.1(b) states:
   In the course of representing a client a lawyer shall not knowingly fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.1 (1989). However, disclosure of client fraud is prohibited in these circumstances by Model Rule 1.6 because fraud does not fall within any of the three very circumscribed exceptions discussed in the text. Therefore, Model Rule 4.1(b) is of no help to a lawyer when faced with the dilemma of client fraud. The only remedy provided by the rules is withdrawal.

27. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b).


1.6, together with the withdrawal provisions of Rule 1.16,\textsuperscript{30} as follows:

A lawyer who knows or 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 must withdraw from further representation of the client, and may disaffirm documents prepared in the course of the representation 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.

When a lawyer's services have been used in the past by a client to perpetrate a fraud, but the fraud has ceased, the lawyer may but is not required to withdraw from further representation of the client; in these circumstances, a "noisy" withdrawal is not permitted.\textsuperscript{31}

Under the ABA Formal Opinion, therefore, the lawyer's obligations differ depending on whether the client's fraudulent scheme is ongoing or has been completed. If the fraud is ongoing, the lawyer must withdraw, even if his or her current or future work product would not be part of the fraud. "Noisy" withdrawal is optional. If the fraud is completed, withdrawal is permissive, but a noisy withdrawal is prohibited, even if the third party has suffered gravely through the client's use of the attorney's work product.

Whether mandatory or permissive, many view withdrawal as an inadequate remedy, especially when the transaction at issue has been completed.\textsuperscript{32} Recall, for example, the Ethics Committee's hypothetical, discussed supra, involving the settled insurance case in which the insurance company's lawyer later learns that his client falsified a key piece of evidence. Withdrawal is an ineffective remedy in such a situation—there is no pending matter from which the lawyer can withdraw, and even if withdrawal is viable, a "noisy" withdrawal is not

\textsuperscript{30} Model Rule 1.16 provides in pertinent part:

(a) [A] lawyer shall . . . withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law; . . .

(b) [A] lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

(1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent; [or]

(2) the client has used the lawyer's services to perpetrate a crime or fraud;


\textsuperscript{32} ETHICS REPORT, supra note 2, at 11-13; Geoffrey C. Hazard, Rectification of Client Fraud: Death and Revival of a Professional Norm, 33 EMORY L.J. 271, 300 (1984).
permitted. Thus, third parties are unlikely to understand the significance of the withdrawal and will not infer that it was based on the client's fraudulent conduct.

Where the client's wrongdoing is prospective or continuing, the Comment to Model Rule 1.6 does permit more than mere withdrawal—a lawyer may give notice of such withdrawal and also may withdraw and disavow any work product prepared in the course of the representation that is being or will be used in furtherance of the fraud. Some argue that the "signal" that is thereby given to the third person is stronger that something is amiss, and that "noisy" withdrawal is tantamount to the lawyer's rectification of the fraud.\textsuperscript{33} Disaffirmance of work product, however, is not full disclosure in any sense. Most importantly, the lawyer may not reveal the information that caused him or her to withdraw; nor may the lawyer explain that the withdrawal is due to client fraud, since that would violate the lawyer's duty of confidentiality imposed by Rule 1.6. The argument that a noisy withdrawal is sufficient can be taken both ways: if "noisy" withdrawal constitutes inferential disclosure of client fraud, why should the attorney be prohibited from making full and explicit disclosure?\textsuperscript{34} On the other hand, if "noisy" withdrawal is something significantly less than rectification of client fraud, then it cannot be considered an adequate remedy for harms suffered by third parties.\textsuperscript{35}

The Model Rules provide different rules for disclosure in the context of litigation. Model Rule 3.3 provides, in relevant part, that:

(a) A lawyer shall not knowingly:

\ldots

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;\textsuperscript{36}

\ldots

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

\textsuperscript{33} Rotunda, supra note 13, at 481, 484; Hazard, supra note 24, at 300, 304; Harry I. Subin, The Lawyer As Superego: Disclosure of Client Confidences to Prevent Harm, 70 IOWA L. REV. 1091, 1153-54 (1985).

\textsuperscript{34} Hazard, supra note 24, at 304.


\textsuperscript{36} This provision provides for disclosure only when necessary to avoid assisting a client in future criminal or fraudulent acts. See Committee on Professional Responsibility, Association of the Bar of the City of N.Y., Report on Duty to Report Misconduct and Fraud on a Tribunal, 47 REC. ASS'N B. CITY N.Y. 905 (1992); Subin, supra note 33; United States v. Zolin, 491 U.S. 554, 562-63 (1989).
(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6\(^{37}\)

This provision is baffling in its continuation of the duty to disclose only until the conclusion of the proceeding. If after the proceeding a lawyer discovers that client fraud tainted the entire proceeding he or she must keep silent. Clearly, the crime or fraud exception to the attorney-client privilege would permit a court to require the lawyer to testify about the fraud after the proceeding had ended.\(^{38}\) Thus, there seems to be no justification for Model Rule 3.3's limitation.

The disclosure provision of Model Rule 3.3 explicitly takes precedence over the confidentiality requirement of Model Rule 1.6. The drafters of the Comment to Model Rule 3.3 defend the duty to disclose client fraud on the ground that the client must be deterred from perpetrating a fraud on a tribunal. Deterrence, as a rationale, is equally sound in non-litigation settings, however. Perhaps what the drafters meant is that fraud on a tribunal, like imminent danger of death or bodily injury, is egregious enough to justify an exception to confidentiality. Yet the drafter's comment does not explain why fraud on a tribunal is inherently more egregious than large-scale frauds such as that perpetrated by Lincoln Savings.

The present Code of Professional Responsibility is as ambivalent as the Model Rules on the issue of an attorney's ethical obligations in the face of client fraud. One provision of the Code deals with client crime and another deals with client fraud, although client fraud often will be a crime.\(^{39}\) DR 4-101(C)(3) addresses client crime and provides that "a lawyer may reveal the intention of a client to commit a crime and the information necessary to prevent the crime." DR 4-101(C)(3) is permissive and its goal is prevention, not rectification. Like Model Rule 1.6, it applies to all situations, not just those where the lawyer's services have been used in furtherance of the crime.

As discussed above, the Code provision addressing client fraud, DR 7-102(B), as amended in New York, is an attempt at a rectification rule. It states,

A lawyer who receives information clearly establishing that:

\(^{37}\) MODEL RULE OF PROFESSIONAL CONDUCT Rule 3.3 (1989). Compare Rule 3.3 with the amended version of the Model Code DR 7-102(B)(1), discussed supra in Part I, which has been adopted in New York and many other states. DR 7-102(B)(1), as amended, requires the lawyer to reveal to the tribunal his client's fraud unless the information "is protected as a confidence or secret." Thus, under the amended version of DR 7-102(B), there is no required, or even permitted, disclosure in New York.

\(^{38}\) See generally Zolin, 491 U.S. 554.

\(^{39}\) MODEL RULES OF PROFESSIONAL CONDUCT DR 4-101(C)(3) (1989).
EXCEPTION TO CONFIDENTIALITY

(1) The client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon the client to rectify the same, and if the client refuses or is unable to do so, the lawyer shall reveal the fraud to the affected person or tribunal, except when the information is protected as a confidence or secret. 40

Since a "secret" is defined in DR 4-101(A) as "information gained in the professional relationship . . . the disclosure of which would be embarrassing or would be likely to be detrimental to the client" it will be the rare situation, indeed, where a lawyer may "reveal the fraud to the affected person" and yet not reveal "information [that] is protected as a confidence or secret." Thus, DR 7-102(B) is useless to accomplish rectification.

In states that have not adopted the modification to DR 7-102(B)(1), however, a lawyer's duties are as follows:

A lawyer who receives information clearly establishing that:

(1) the client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon the client to rectify the same, and if the client refuses or is unable to do so, the lawyer shall reveal the fraud to the affected person or tribunal. 41

This unamended version of DR 7-102(B)(1), unlike the amended version, standing alone, is a workable rectification rule, similar to the rule proposed by the Ethics Committee.

To add to the confusion, some states, such as New York have adopted DR 4-101(C)(5) of the Model Code. That rule provides that

[a] lawyer may reveal confidences or secrets to the extent implicit in withdrawing a written or oral opinion or representation previously given by the lawyer and believed by the lawyer still to be relied upon by a third person where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud.

Thus, if the lawyer considers the client fraud a "crime," under the Model Code, DR 4-101(C)(3), a lawyer may reveal the client's intention to commit the fraud and "any information necessary to prevent the crime." The lawyer may prevent the fraud but not rectify it. If the lawyer considers the client fraud only a "fraud" and not a "crime," under the amended version of DR 7-102(B)(1), the lawyer's

40. N.Y. Code of Professional Responsibility, supra note 12, DR 7-102(b); see also supra text accompanying note 12.

41. Model Code of Professional Responsibility DR 7-102(B)(1) (1982); see also supra note 12 and accompanying text.
duty to disclose will rarely, if ever, be triggered, because client fraud under that provision cannot be revealed if a confidence or secret will be disclosed. Under the unamended version of DR 7-102(B)(1), a lawyer’s obligation to disclose client fraud is mandatory if the lawyer was an instrument of that fraud and has warned the client beforehand. Disclosure may not be made to prevent the fraud, only to rectify it. And in states like New York that have adopted DR 4-101(C)(5), whether the client fraud is considered a fraud or a crime, the lawyer may only reveal confidences or secrets to the extent implicit in withdrawing an opinion or representation made by the lawyer if the lawyer is an instrument of an ongoing fraud.

Against this backdrop of conflicting and confusing ethical rules, which rarely permit disclosure of information relating to the representation of the client (Model Rules) or client confidences or secrets (Disciplinary Rules), is the attorney-client privilege. This rule of evidence also governs a lawyer’s conduct, but is not as broad a protection against disclosure as are the ethical rules. Thus, the ethical rules apply until a formal demand for disclosure before a tribunal is made, at which point the attorney-client privilege applies. Technically, the attorney-client privilege only applies when a formal demand for disclosure is made. In addition, the attorney-client privilege protects from disclosure only client communications made in order to seek legal advice—it does not protect all information relating to the representation of the client or all client confidences or secrets.

Moreover, the crime-fraud exception to the privilege provides for the disclosure of client communications made in order to obtain a lawyer’s advice in furtherance of an illegal goal or to achieve a legitimate goal by illegal means. Therefore, client communications made to obtain a lawyer’s advice in connection with client fraud are not privileged and must eventually be revealed, if and when a request for

42. It should be noted, however, that pursuant to Model Code of Professional Responsibility DR 4-101(C)(2), “[a] lawyer may reveal confidences or secrets when permitted under Disciplinary Rules or required by law or court order.” The same is true under the Model Rules. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. (1989).

43. 8 JOHN H. WIGMORE, EVIDENCE §§ 2292, 2296, 2298 (McNaughton rev. 1961). To the extent that an attorney’s disclosure of client communications implicates the Fifth Amendment privilege against self-incrimination, the United States Supreme Court in Fisher v. United States has ruled that an attorney may not be compelled to disclose information that he or she received from a client if the client would be privileged from compelled production of that information and if the purpose of the disclosure to the attorney was to obtain legal advice. 425 U.S. 391, 403-05 (1976).

44. Clark v. United States, 289 U.S. 1, 15-16 (1933); 8 WIGMORE, EVIDENCE § 2298 (3d ed. 1940 & Supp. 1959); Subin, supra note 33, at 1113-19.
disclosure is made before a tribunal.\footnote{45} Is it any wonder then that lawyers faced with client fraud who wish to do the right thing are completely perplexed?

Although they often turn to ethics experts and follow their advice, courts still sometimes find that they have done the wrong thing.

\section{III. Possible Solutions}

Should we return to the concept of rectification that was included in the ABA Canons of Professional Ethics in 1928 (Canon 41), discarded in 1953, and reinstituted for a short time when the Canons were replaced by the ABA Code of Professional Responsibility in 1969? This question has come up time and again and continues to spur heated debate among lawyers. If we were to return to the rectification concept, what form should it take—should disclosure be permissive or mandatory; should the rule cover prevention, rectification or both; should the attorney be able to disclose information only if the lawyer was the instrument of the fraud; should there be different sets of rules for different types of lawyers, \textit{i.e.,} litigators, advisors, criminal lawyers?\footnote{46} There are arguments, some more persuasive than others, among the right-to-counsel arguments against disclosure are that a) incriminating client communications are privileged and b) effective representation is impossible if an attorney may or must disclose such communications because the possibility of disclosure destroys the client's trust in his or her attorney and/or could make the attorney a witness against the client. \textit{Id.} at 1128. According to Professor Subin, it is not the incriminating nature of the communication that makes it privileged but rather the communication's relationship to the provision of legal advice. Moreover, these constitutional rights are not absolute and may have to give way to society's need for disclosure. \textit{See In re Grand Jury Subpoena Served Upon Doe, Esq.,} 781 F.2d 238, 250-51 (2d Cir.) (en banc), cert. denied \textit{sub nom.} Roe v. United States, 475 U.S. 1108 (1986). If so, the client must be appointed another attorney or be given the opportunity to hire another lawyer, however. Subin, \textit{supra} note 33, at 1129-32. \textit{See generally} Daniel J. Capra, \textit{Deterring the Formation of the Attorney-Client Relationship: Disclosure of Client Identity, Payment of Fees, and Communications by Fiduciaries}, \textit{4 Geo. J. Legal Ethics} 235 (1990).

\footnote{46. Indeed, the linchpin of Professor Hazard's expert opinion in the Kaye, Scholer case was Kaye, Scholer's role as litigation counsel and not as legal advisor in a non-adversarial setting. \textit{See Hazard Opinion,} \textit{supra} note 20, at 14-20.}


\footnote{45. In addition to the Fifth Amendment privilege against self-incrimination, there are two other constitutional limitations on an attorney's disclosure of client communications: the Sixth Amendment right to counsel in criminal cases, which does not attach until there is a criminal charge, \textit{see U.S. Const. amend. VI}; and the broader due process right of access to counsel, or meaningful access to the legal system. \textit{See Subin, supra note 33, at 1119 n.159, 1127-34.}}

Professor Subin believes, however, that the same standards should be applied to all
for and against each of these alternatives. A discussion of those arguments follows.

The majority of this Committee supports a rule of disclosure (although there is some disagreement as to whether it should be permissive or mandatory) of client confidences and secrets to rectify a crime or fraud when the lawyer's services have been used in the commission of that crime or fraud. The entire Committee agrees that the present state of the ethical rules governing lawyers' conduct provides little guidance to the practitioner; the rules are confusing and contradictory, and therefore, at the very least, these rules should be clarified to provide more meaningful guidance.

A. Arguments in Favor of Mandatory or Permissive Disclosure to Rectify a Crime or Fraud

The majority of this Committee believes that, whether permissive or mandatory, disclosure of client confidences and secrets to rectify a crime or fraud in the commission of which the lawyer's services have been used is necessary to protect important rights of third persons.47 The majority believes that disclosure maintains the proper balance between, on the one hand, the competing interests of client confidentiality and attorney loyalty to client interests and, on the other hand, the interests of society and third persons in avoiding harm resulting from illegal and/or fraudulent acts. Society has the right and the need to be able to rely upon the accuracy of information provided by a client through an attorney.48 For example, when a lawyer helps prepare a registration statement for a public stock offering, both the Securities and Exchange Commission and the investing public rely on that statement.49

47. The Committee notes that the trend in academic commentary is clearly in favor of a less client-centered and more public-centered view of the lawyer's role. See, e.g., Laleh Ispahani, The Soul of Discretion: The Use and Abuse of Confidential Settlements, 6 GEO. J. LEGAL ETHICS 111 (1992) (arguing that lawyers have duty to refuse to enter into confidential settlements where non-disclosure would harm public, even if confidentiality agreement would financially benefit client). See also Judge Weinstein's forthcoming comments in the Northwestern Law Review, contending that a lawyer in a mass tort litigation has the duty to preserve funds for future claimants even if that would not benefit his client.

48. See Lonnie Kocontes, Client Confidentiality and the Crooked Client: Why Silence Is Not Golden, 6 GEO. J. LEGAL ETHICS 283 (1992); Krach, supra note 17, at 450.
EXCEPTION TO CONFIDENTIALITY

ment’s accuracy. When a lawyer prepares a tax shelter opinion for a promoter, the investors also rely on the representations in such an opinion. The threat of disclosure is needed in order to deter the client from committing fraud.

Clearly, the lawyer’s duty of loyalty to the client is not absolute, as is evident in Model Rule 1.6(b)(2). As already noted, this rule permits, under certain circumstances, a lawyer to reveal information relating to representation of a client. The enumerated rule would allow disclosure to the extent the lawyer reasonably believes necessary to establish a claim. Such claims may take the form of collecting fees, defending the lawyer in a controversy between the lawyer and the client, defending the lawyer against a criminal charge or civil claim based upon conduct in which the client was involved, or responding to allegations in any proceeding concerning the lawyer’s representation of the client.49

It is hard to justify a Code that allows a lawyer to disclose confidential information when necessary to protect the lawyer or his fee, but bars disclosure when members of the public suffer substantial injury. Indeed, the self-defense exception to confidentiality allows disclosure of the confidences of any client (not just those clients who have misused the lawyer’s services) to avoid harm to the lawyer. The rationale for the self-defense exception—that the client should not be permitted to hide behind a lawyer’s duty of confidentiality to escape the consequences of his misconduct—is equally applicable when third persons have been harmed by a client’s fraud or criminal act. It is not in the best interest of the legal profession to posit a totally client-centered approach to lawyering; the interests of the public must have some relevance to the lawyer’s professional role, even where those interests conflict with those of the client.

Disclosure does not violate the time-honored duty of confidentiality, because disclosure is allowed only when the client has misused the attorney/client relationship.50 Justice Cardozo’s eloquent justification of the crime-fraud exception to the attorney-client privilege applies equally to an ethical rule in favor of disclosure to rectify a crime or fraud:

A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told . . . . The attorney may be innocent, and

49. See supra notes 26-28 and accompanying text; see also ETHICS REPORT, supra note 2, at 15-16; Subin, supra note 33, at 1134-43, 1154; Hazard, supra note 24, at 287-91.
50. ETHICS REPORT, supra note 2, at 13-14; Subin, supra note 33, at 1113-18, 1161-63.
still the guilty client must let the truth come out. . . . A privilege surviving until the relation is abused and vanishing when abuse is shown to the satisfaction of the judge has been found to be a workable technique for the protection of the confidences of client and attorney.51

The rationale for maintaining confidentiality—the need for open and free communication between a client and his attorney so that the client feels free to tell his lawyer everything—is not implicated in situations in which the rectification rule applies, i.e., situations in which the client has not told his attorney everything and has misused the lawyer's services.52 If a client tells the lawyer everything from the outset, the lawyer can withdraw, and because his services have not been misused, he will not be required to disclose confidences. In addition, when a client seeks to use a lawyer's services for illegal goals, the purpose behind maintaining confidentiality is not threatened because a lawyer's duty extends only to assist clients in pursuing goals that are within the law.

Consideration should also be given to the economic aspects involved; a lawyer whose services have been used by a client in the commission of a crime or fraud has received financial benefits from that activity. If the lawyer's work product is a material factor in the client's criminal or fraudulent scheme, it is reasonable and fair to require the lawyer to disclose information to rectify the harm of which the lawyer was an unwitting beneficiary.

I. Mandatory Disclosure

Although in August 1991 the Ethics Committee proposed a permissive rectification amendment to Model Rule 1.6(b), some believe an amendment to this rule should go even farther. Proponents of mandatory disclosure argue that a mandatory rule would provide a definite standard by which lawyers are judged, and would thereby protect lawyers who are sued or prosecuted as a result of client fraud that was committed through the use of the lawyers' services. If a lawyer has a clear duty to disclose and does disclose, he or she will be protected against such suits.

Opponents of mandatory disclosure, however, argue that this lawyer's self-interest argument is flawed.53 Model Rule 1.6(b)(2) already permits disclosure for a lawyer's self-defense. In addition, the fact that a lawyer informs the victim of a client's criminal or fraudulent

52. ETHICS REPORT, supra note 2, at 14.
act does not immunize the lawyer from any retaliatory action; he or she can still be sued, for example, for informing the victim belatedly. Opponents of mandatory disclosure also argue that lawyers are protected more by a clear non-disclosure rule, because the lawyer can then argue that the rules of ethics prevented him or her from disclosing the misconduct.\textsuperscript{54} Indeed, Kaye, Scholer's defense was based on the argument that disclosure of Lincoln's conduct was ethically prohibited.\textsuperscript{55}

Proponents of mandatory disclosure argue that the public interest is best served by the earliest possible disclosure of the fraud. Such a rule, they contend, would not only deter the client from using a lawyer's services to commit fraud, but would also limit a lawyer's response to the economic incentives to continue his or her representation—a response which could get the lawyer more and more involved in the client's scheme.

2. \textit{Permissive Disclosure}

Proponents of permissive disclosure argue that a lawyer must be permitted to exercise discretion—to take into account circumstances that may weigh in favor of or against such disclosure. Some of the oft-cited circumstances considered relevant to the question of disclosure include:

1. the extent to which disclosure of confidential client information may harm the client;
2. consideration of the extent of harm to the client from disclosure versus the extent of harm to the third party or the public from non-disclosure;
3. the probability of rectification through other sources;
4. the likelihood that disclosure will lead to rectification;
5. how the lawyer obtained the information—through the client or from another source;
6. whether the attorney was retained by the client for the transaction at issue;
7. the degree to which the lawyer's services were used by the client in the commission of the criminal or fraudulent act;
8. whether the victim is sympathetic or not;
9. the nature of the relationship between the lawyer and the client, and between the lawyer and the victim;

\textsuperscript{54} See \textit{id}. Indeed, opponents to the rectification rule, like Professor Freedman, see the real problem in the ethical rules as the inability to prevent a fraud from taking place. \textit{Id.}

\textsuperscript{55} See \textit{supra} text accompanying note 21.
10. whether the client's initial intention in seeking legal advice was to use the lawyer's services in the commission of his misconduct; and
11. how clear it is that the act is a crime or fraud.  

Advocates of permissive disclosure argue that consideration of the above factors requires a sensitive case-by-case balancing approach which is inherently discretionary and not conducive to absolute rules. On a practical level, a system of permissive disclosure is beneficial to lawyers because, if the decision to disclose is discretionary, lawyers cannot be disciplined either way. But advocates of permissive disclosure justify this result by arguing that the conflicting and sensitive interests in this area make discipline an ill-suited remedy.

B. Arguments in Favor of a Non-Disclosure Rule

Advocates of an ethical rule which would prohibit disclosure of client confidences and secrets to rectify the consequences of a crime or fraud where the attorney's services have been used argue that client confidentiality must be paramount to other considerations. Proponents of non-disclosure rely on the rationale articulated for the attorney-client privilege (which, as discussed supra, is narrower in its protection against disclosure than are the ethical rules):

- to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. . . . [S]ound legal advice or advocacy depends upon the lawyer's being fully informed by the client. . . . “[Confidentiality] rests on the need for the advocate and counsel to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out.”

Non-disclosure advocates argue that exceptions to the confidentiality requirement will, in general, chill a client's willingness to consult openly with attorneys, that a lawyer's duty of loyalty to a client is paramount, and that strict confidentiality is necessary to preserve individual rights and to foster competent legal representation. They argue that individual autonomy is preserved by protecting an individual's rights against infringement by others, and that in today's

56. See Krach, supra note 17, at 467-69.
57. See Proposed Amendments to the Lawyer's Code of Professional Responsibility, 42 Rec. Ass'n B. City N.Y. 323 (1987) (Executive Committee Statement) (stating that, in assessing the lawyer's duty to disclose a client's intent to harm a third party, “great deference” must be given “to a conscientious exercise of the lawyer's discretion in this difficult area of conflicting values”).
complex legal system, individuals can only have meaningful access to the system through skillful and fully informed lawyers. Without the assurance of strict confidentiality, the argument goes, clients might not provide their attorneys with all the facts. Advocates of non-disclosure contend that if attorneys are to guide their clients through the legal process with any skill, they must know all the necessary information in order to determine the legal problem and to recommend proper solutions. Therefore, they conclude that a client’s rights cannot be protected properly if clients are reluctant to communicate with the lawyers.\(^{59}\)

Additionally, non-disclosure proponents argue that if clients are encouraged to tell everything to their lawyers, the lawyers may be able to convince the clients to rectify the harm themselves or to cease the wrongful conduct if it is ongoing.\(^{60}\) They argue further that disclosure of client misconduct would inhibit the attorney’s well-established role in law reform, because a client might not reveal conduct that is prohibited by an unjust law.\(^{61}\)

As a practical matter, non-disclosure advocates argue, a disclosure rule, whether permissive or mandatory, raises more ethical dilemmas than it solves. Under such a rule, the practitioner is faced with questions such as: What is “reasonably necessary”? What is a “fraudulent act”? What standard should an attorney employ to determine whether a duty to disclose exists—whether the client has committed the act in question and the lawyer’s services have been used: beyond a reasonable doubt?; substantial likelihood?; or prima facie standard?\(^{62}\)

Many lawyers simply do not want to be in the position of having to make such judgments, especially if the client is a professional or personal friend. Proponents of non-disclosure therefore believe that lawyers should not police their clients and that noisy withdrawal is an adequate remedy to put third persons on notice that something is amiss.

The problem with the argument that noisy withdrawal is enough is that in many instances the noisy withdrawal provision does not apply.

---

\(^{59}\) Ethics Report, supra note 2, at 13-14; Subin, supra note 33, at 1160-66; Krach, supra note 17, at 445-46.

\(^{60}\) Subin, supra note 33, at 1166; Krach, supra note 17, at 446. This sentiment is also found in the Comment to Model Rule 1.6, which states, in relevant part:

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


\(^{61}\) Krach, supra note 17, at 446-47.

\(^{62}\) See Subin, supra note 33, at 1176.
For example, if there is no pending matter at the time the attorney becomes aware that his or her services had been used by the client in the commission of a criminal or fraudulent act, there is nothing from which to withdraw. Also, the noisy withdrawal contemplated in the Comment to Model Rule 1.6 permits a lawyer to withdraw a written representation, but it makes no provision for an oral representation.\footnote{ETHICS REPORT, supra note 2, at 11-13. By contrast, as discussed supra, New York has adopted a rule that permits withdrawal of written or oral representations given by the lawyer and believed still to be relied upon by a third person where the lawyer has discovered that the representation was based on materially inaccurate information or is being used to further a crime or fraud. See N.Y. CODE OF PROFESSIONAL RESPONSIBILITY, supra note 12, DR 4-101(C)(5).}

Finally, as discussed above, noisy withdrawal does not disclose, except at best inferentially, the reason for the withdrawal or the nature of the client's crime or fraud.

Some say that rectification of a crime or fraud, as opposed to prevention, goes too far. Such a rule as that proposed by the Ethics Committee is viewed by some as far too broad, because it applies even though the attorney learns of the fraud after it is completed, even though the lawyer no longer represents the client, even though the third person is no longer relying on anything the attorney said, and even though the lawyer did not say something instrumental to induce the third person to rely on his client's fraud.\footnote{Freedman, supra note 46, at 22, 26.}

This Committee believes, however, that the concerns expressed take too little account of the lawyer's broader duties to the public and to society. While the lawyer, of course, has a duty to the client, the lawyer's role should not be and never has been totally client-centered.\footnote{See Russell G. Pearce, Rediscovering the Republican Origins of the Legal Ethics Codes, 6 GEO. J. LEGAL ETHICS 241 (1992) (noting that historically, ethics codes viewed the lawyer's role as public-centered rather than client-centered, and advocating a return to these traditional notions of lawyering).}

Where a member (or many members) of the public suffer injury because of a client's criminal or fraudulent scheme, and where the lawyer's services were used as an instrument of that wrong, the lawyer's traditional duties to the public and to society at large cannot be ignored.

IV. Conclusion

This Committee believes that there should be a rectification rule, and recognizes that the current ethical rules, both the Model Rules and the New York Code of Professional Responsibility, provide lim-
EXCEPTION TO CONFIDENTIALITY

vided guidance to the practitioner. The current provisions are confusing and contradictory.

While this Committee cannot agree on whether the rectification rule should be mandatory or permissive, it offers the following suggestions on how existing standards can be amended, using two possible models. Under our proposal, one of the following provisions would be substituted for Model Rule 1.6(b)(1) (in a Model Rules jurisdiction) or for DR 7-102(B)(1) and DR 4-101(C)(3) and (5) (in a Code of Professional Responsibility jurisdiction): 66

Permissive Disclosure

A lawyer who believes there is a substantial likelihood that a client is engaged or has engaged in a criminal or fraudulent act in the commission of which the lawyer's services have been used shall attempt to dissuade the client from undertaking or continuing the action and to rectify the consequences of the misconduct that already has occurred. If the client refuses, the lawyer may disclose the information to the extent the lawyer reasonably believes necessary to prevent or rectify the consequences of the client's misconduct. 67

Mandatory Disclosure

A lawyer who believes there is a substantial likelihood that a client is engaged or has engaged in a criminal or fraudulent act in the commission of which the lawyer's services have been used shall attempt to dissuade the client from undertaking or continuing the action and to rectify the consequences of the misconduct that already has occurred. If the client refuses, the lawyer shall disclose the information to the extent the lawyer reasonably believes neces-

66. Because the focus of this Report is the debate over whether there should be a rectification rule when a lawyer's services have been used by her client in the commission of a crime or fraud, the Committee expresses no opinion with respect to an attorney's duty to disclose a client's intended future misconduct. Some would argue that there is a strong case for mandatory disclosure in such circumstances. See, e.g., Subin, supra note 33, at 1172-81. But see Proposed Amendments to the Lawyer's Code of Professional Responsibility, 42 REC. ASS'N B. CITY N.Y. 323 (1987) (Executive Committee Statement) (supporting the rule providing for permissive disclosure).

67. This proposal is, in substance, the same as Professor Hazard's proposed amendment to Model Rule 1.6(b) which he articulated in 1984:

A lawyer may reveal such information to the extent the lawyer reasonably believes necessary: . . . (2) 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, but the lawyer shall where practicable first make reasonable effort to persuade the client to take corrective action.

Hazard, supra note 24, at 308.
sary to prevent or rectify the consequences of the client's misconduct.

Whichever model is adopted, it will create a definite standard for a lawyer's obligations of disclosure in the face of client crime or fraud. In light of the many recently uncovered large-scale frauds in which lawyers' services have unwittingly been used, clear and workable ethical standards are crucial. But clarity is only one goal of the proposed Rules. The more important concern is to state unequivocally that the client-based approach to lawyering must have some limits, and that the lawyer's duty to the public may sometimes outweigh the admittedly important duty of confidentiality.
Appendix A
The Committee on Professional Responsibility
Daniel J. Capra, Chair
Marianne Fogarty, Secretary

<table>
<thead>
<tr>
<th>Name</th>
<th>Role</th>
</tr>
</thead>
<tbody>
<tr>
<td>Maria Helen Bainor*</td>
<td>Arthur Handler***</td>
</tr>
<tr>
<td>Nancy Batterman*</td>
<td>Gregory P.N. Joseph</td>
</tr>
<tr>
<td>Howard Benjamin</td>
<td>John Koeltl**</td>
</tr>
<tr>
<td>Lester Brickman</td>
<td>Joan B. Lobis</td>
</tr>
<tr>
<td>Timothy Brosnan</td>
<td>Barbara Brooke Manning</td>
</tr>
<tr>
<td>Susan Brotman</td>
<td>Leslie Marshall</td>
</tr>
<tr>
<td>Alice Lynn Brown</td>
<td>Sarah Diane McShea</td>
</tr>
<tr>
<td>Karen B. Burrows</td>
<td>Richard Painter</td>
</tr>
<tr>
<td>Karl Coplan</td>
<td>Diana Parker</td>
</tr>
<tr>
<td>James Cott</td>
<td>Robert L. Plotz</td>
</tr>
<tr>
<td>Anthony E. Davis</td>
<td>Sol Schreiber</td>
</tr>
<tr>
<td>Richard Friedman</td>
<td>Cora T. Walker</td>
</tr>
<tr>
<td>Thomas Gibson</td>
<td>Amy Walsh</td>
</tr>
<tr>
<td>Helen Gredd</td>
<td>Paul D. Wexler</td>
</tr>
</tbody>
</table>

*Co-authors of this Report.
** Abstains from this Report.
*** Dissents from this Report.