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Balancing Client Loyalty and the Public Good in the Twenty-First Century

Cover Page Footnote

Professor, Boston University School of Law. I am grateful to Professor Russell Pearce for organizing, and to the Louis Stein Center for supporting, this Legal Profession Colloquium on the topic of "What Does It Mean To Practice Law 'In The Interests Of Justice' In The Twenty-first Century?" Most of all, I am grateful to Deborah L. Rhode, Bacon-Kilkenny Distinguished Visiting Professor at Fordham University School of Law, for a lifetime of work on the legal profession and for writing the book that inspired this Colloquium. See *infra* note 6.

“IN THE INTERESTS OF JUSTICE”: BALANCING CLIENT LOYALTY AND THE PUBLIC GOOD IN THE TWENTY-FIRST CENTURY

Nancy J. Moore*

INTRODUCTION

Shortly after the American Bar Association (“ABA”) met to consider the Ethics 2000 Commission’s proposals (the “Ethics 2000 Proposals”) to revise the ABA Model Rules,¹ I participated in a radio program with Deborah Rhode and Sean SeLegue.² The subject of the

* Professor, Boston University School of Law. I am grateful to Professor Russell Pearce for organizing, and to the Louis Stein Center for supporting, this Legal Profession Colloquium on the topic of “What Does It Mean To Practice Law ‘In The Interests Of Justice’ In The Twenty-first Century?” Most of all, I am grateful to Deborah L. Rhode, Bacon-Kilkenny Distinguished Visiting Professor at Fordham University School of Law, for a lifetime of work on the legal profession and for writing the book that inspired this Colloquium. *See infra* note 6.

1. In 1997, the ABA created the Commission on Evaluation of the Rules of Professional Conduct, otherwise known as the Ethics 2000 Commission. Comm’n on Evaluation of Rules of Prof’l Conduct, ABA, Report with Recommendation to the House of Delegates (Aug. 2001) [hereinafter Report to the House], *available at* http://www.abanet.org/cpr/e2k-report_home.html. The Commission was charged with conducting a comprehensive review of the Model Rules. *Id.* In May 2001, the Commission issued its report, recommending numerous changes to the Model Rules. *Id.*

The ABA House of Delegates met in August 2001 and considered the changes proposed by the Commission to the Preamble and Scope of the Model Rules as well as to Rules 1.0 through 1.10. *See* ABA Ctr. for Prof’l Responsibility, ABA, Summary of House of Delegates action at the August 2001 Annual Meeting (Ethics 2000 Committee) [hereinafter Summary of House], *available at* http://www.abanet.org/cpr/e2k-summary_2001.html (last visited Dec. 11, 2001). The House is expected to consider the remainder of the Model Rules, except for Rules 5.5 and 8.5, at the ABA mid-year meeting in February 2002. Rules 5.5 and 8.5 will be considered later at the Annual Meeting in August 2002, along with the forthcoming report of the ABA Commission on Multijurisdictional Practice.

2. Deborah Rhode, the Ernest W. McFarland Professor of Law at Stanford Law School, is visiting at Fordham Law School this Fall and wrote a book that inspired this Colloquium. *See infra* note 6. radio show is called *Forum*, and this segment aired live on KQED-FM on Wednesday, August 8, 2001, from ten to eleven a.m. PCT. *Forum* (KQED-FM, Aug. 8, 2001). Sean was one of the more vocal opponents of the amendments to the confidentiality rule proposed by the Ethics 2000 Commission. *See* William Glaberson, *Lawyers Consider Easing Restriction on Client Secrecy*, N.Y. Times, July 31, 2001, at A1.

program was the ABA House of Delegates's votes on the Ethics 2000 Proposals to revise Model Rule 1.6, which governs confidentiality of client information.³ The House had voted to broaden the circumstances in which lawyers may disclose otherwise confidential information regarding clients to prevent death or substantial bodily harm, while maintaining the rule's current prohibition on disclosure to prevent or rectify substantial economic harm, even when the lawyers' services were used by their clients in furtherance of a crime or fraud.⁴ Sean opposed each of the Ethics 2000 Proposals, arguing that they undermined the duty of loyalty owed by lawyers to their clients.⁵ Deborah supported the Ethics 2000 Proposals, but argued that they did not go far enough to further the public good, particularly in their failure to *require* lawyers to disclose information when necessary to prevent death or substantial bodily harm.⁶

As Chief Reporter to the Ethics 2000 Commission, I supported the Ethics 2000 Proposals, arguing that they struck just the right balance

3. The relevant portions of the Ethics 2000 Commission's proposed amendments to current Rule 1.6(b) are as follows:

(b) A lawyer may reveal . . . information . . .

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent reasonably certain death or substantial bodily harm; or

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

....

Report to the House, *supra* note 1, R. 1.6; *see also* Glaberson, *supra* note 2, at A17.

4. *See generally* Summary of House, *supra* note 1. At the mid-year meeting in February 2002, the House of Delegates will entertain motions to amend previously considered Rules. A motion has already been filed to amend Rule 1.6(b)(1) by reinstating the requirement that the conduct be criminal and that the harm be imminent before allowing lawyers to disclose information. Motion by David J. Pasternak, Los Angeles County Bar Ass'n, Proposed Amendment to Ethics 2000 Commission Report (Nov. 2001) (on file with author).

5. *Forum*, *supra* note 2. Many of the opponents of proposed Rule 1.6(b)(2) (disclosure to prevent future economic crime or fraud) did not formally oppose, or testify against, proposed Rule 1.6(b)(1) (disclosure to prevent reasonably certain death or substantial bodily harm). Sean testified, or was prepared to testify, before the House of Delegates in opposition to both proposals. *See* ABA, 2001 Annual Meeting Ethics 2000 Commission Excerpts 39-40 (Aug. 6-7, 2001) (draft transcript on file with author) [hereinafter 2001 Annual Meeting] (testifying in favor of the Fox amendment to proposed Rule 1.6(b)(1)); *id.* at 69 (listing Sean as one of the speakers prepared to testify in favor of the Fox amendment to proposed Rule 1.6(b)(2), when the House voted to close debate).

6. *Forum*, *supra* note 2. These views are consistent with those expressed by Deborah in her recently published book that prompted this Colloquium. *See* Deborah L. Rhode, In the Interests of Justice 106-15 (2001) (criticizing the current confidentiality rules).

between preserving loyalty to clients and advancing the public good.⁷ What I would like to do in this essay is expand on this argument. In addition, I would like to address Deborah's further argument that the ABA's continuing refusal to permit any disclosure to prevent or rectify substantial economic harm, despite the Ethics 2000 Commission's suggestion to narrowly tailor an exception where the lawyers' services are used, is yet additional evidence that lawyers have failed to regulate themselves in the public interest, and that the time has therefore come for direct public regulation of lawyers.⁸

I. THE CONFIDENTIALITY PROVISIONS

A. *Dissecting the Argument That Proposed Rule 1.6(b) Does Too Much to Tip the Scale in Favor of the Public Good*

Loyalty to clients has never been an absolute obligation of lawyers. As I noted in rebuttal to Sean,⁹ the Preamble to the Model Rules states that a lawyer is not just a client representative, but also "an officer of the legal system and a public citizen having special responsibility for the quality of justice."¹⁰ Indeed, as officers of the legal system and public citizens having special responsibility for the quality of justice, lawyers have always had special obligations to make sure that their services are not used by clients to commit unlawful acts.¹¹ As for any so-called "tradition" of confidentiality,¹² prior to the adoption of the Model Rules in 1983, ABA codes permitted lawyers to disclose the intent of a client to commit *any* crime, including economic crimes.¹³ Thus, it was not so much the Ethics 2000

7. *Forum*, *supra* note 2.

8. *Id.*; see also Rhode, *supra* note 6, at 143-47, 158-65.

9. *Forum*, *supra* note 2.

10. Model Rules of Prof'l Conduct pmbll. (2000).

11. See Model Rules R. 1.2(d) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . ."); see also Model Code of Prof'l Responsibility DR 7-102(A)(7) (1981) ("In his representation of a client, a lawyer shall not . . . [c]ounsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent."); ABA Canons of Prof'l Ethics Canon 15 (1969) ("[T]he great trust of the lawyer is to be performed within and not without the bounds of the law. The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane.").

12. See, e.g., Benjamin H. Hill, III, Remarks Before the ABA House of Delegates (Aug. 7, 2001), in 2001 Annual Meeting, *supra* note 5, at 51 [hereinafter Hill, Remarks] (characterizing proposed Rule 1.6(b)(2) as "an attempt to take away from our common law tradition the attorney/client privilege as it has been applied over literally centuries"); cf. William G. Paul, Remarks Before the ABA House of Delegates (Aug. 7, 2001), in 2001 Annual Meeting, *supra* note 5, at 61 [hereinafter Paul, Remarks] ("To remain a profession with core values and fundamental guiding principles, some things should never change and are not subject to being modernized. One of those things is to preserve the confidence of a client.").

13. See ABA Canons, Canon 37 ("The announced intention of a client to commit

Commission that broke with tradition, as it was the 1983 ABA House of Delegates, when it refused to permit lawyers to disclose information necessary to prevent a client from committing crimes threatening economic, rather than physical, harm.¹⁴

Even the most adamant opponents of the amendments proposed by the Ethics 2000 Committee will readily concede that loyalty to clients is not, and never has been, an absolute obligation. At the very least, lawyers are required to withdraw when continuing the representation would cause them to assist their clients in a crime or fraud.¹⁵ In addition, lawyers are permitted to make disclosures, even over the objection of their clients, when necessary "to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm."¹⁶ The first limitation serves an obvious purpose, since lawyers cannot be required to break the law themselves by virtue of being bound to continue representing their clients no matter what their intentions under an absolute duty of loyalty.¹⁷ But, what about the second limitation? How can opponents

a crime is not included within the confidences which he is bound to respect. He may properly make such disclosures as may be necessary to prevent the act or protect those against whom it is threatened."); see also Model Code DR 4-101(C)(3) ("A lawyer may reveal . . . [t]he intention of his client to commit a crime and the information necessary to prevent the crime."). Historically, the original source of the lawyer's obligation of confidentiality has not been lawyer codes of ethics, but rather has been the common law attorney-client evidentiary privilege. See Nancy J. Moore, *Limits to Attorney-Client Confidentiality: A "Philosophically Informed" and Comparative Approach to Legal and Medical Ethics*, 36 Case W. Res. L. Rev. 177, 198-99 (1985-86) [hereinafter Moore, *Limits*]. There, too, the announced intention of a client to commit a future crime or fraud has never come within the protection of the privilege. *Id.* at 201.

14. See generally Nancy J. Moore, Remarks Before the ABA House of Delegates (Aug. 7, 2001), in 2001 Annual Meeting, *supra* note 5, at 53-54 [hereinafter Moore, Remarks].

15. See Model Rules R. 1.16(a)(1) (providing that "except [when ordered to do so by a tribunal] a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if . . . the representation will result in violation of the rules of professional conduct or other law"); see also Model Rules R. 1.2(d) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . .").

16. Model Rules R. 1.6(b)(1).

17. *But cf.* Bruce Jay Friedman, *Mr. Prinzo's Breakthrough*, in *Far from the City of Class 88* (1966). This is a black comedy short story, in which Prinzo, a psychiatric patient with a cringe, tests the doctor-patient "compact" by murdering the psychiatrist's wife. When Prinzo confesses to the murder, the psychiatrist agrees that he cannot call the police, but at the same time, he initially refuses to help Prinzo dispose of the body. Prinzo reminds the psychiatrist of his earlier statement that the purpose of the compact is to give assurance that doctors will do whatever is best for their patients. The psychiatrist reluctantly agrees to help. At the end of the story, the psychiatrist notices that Prinzo has been cured of his cringe, at which time he joyfully declares that Prinzo is no longer his patient and immediately turns Prinzo in to the police. The story is full of inaccuracies about a doctor's obligation of confidentiality, but it does illustrate the absurdity of an ethical rule that puts welfare of patients (and, analogously, clients) above all else.

like Sean justify distinguishing between permitting disclosures to prevent violent crimes and not permitting disclosures to prevent economic crimes, both of which could result in substantial harm?

The standard defense posed by those who oppose loosening the obligation of confidentiality is based on the comment to current Rule 1.6:

[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.¹⁸

In other words, loyalty to the client in keeping information confidential is not an end in itself, but rather a means of furthering the public interest. When clients are encouraged to confide in lawyers through the imposition of a nearly absolute obligation of confidentiality, lawyers are in a better position, armed with candid information regarding their clients' intent, to dissuade their clients from pursuing an unlawful course of conduct, thereby benefiting the public. Lawyers may not succeed in every instance, but in the long run (so this argument goes), promoting confidentiality to the fullest extent furthers the public interest in preventing crimes and frauds.¹⁹ As I have previously argued, however, there are serious flaws in this type of consequentialist reasoning.²⁰ First, there is simply no empirical evidence from which to predict that even in the long run more crimes and frauds will be prevented under a rule of strict confidentiality than under a rule that permits disclosure in certain cases.²¹ Indeed, there is reason to believe that a rule of strict confidentiality will actually have little effect, if any, on preventing crimes and fraud, since, even under

18. Model Rules R. 1.6 cmt.

19. A number of those who spoke in opposition to the Ethics 2000 Commission's proposed Rule 1.6(b)(2) emphasized the danger of lawyers being sued as a result of failing to disclose their clients' intended crime or fraud, even though the disclosure under the proposed rule would have been permissive, and not mandatory. *See, e.g.*, Lawrence J. Fox, Remarks Before the ABA House of Delegates (Aug. 7, 2001), in 2001 Annual Meeting, *supra* note 5, at 56-57 (stating that lawyers will be the subject of litigation if proposed Rule 1.6(b)(2) passes); Hill, Remarks, *supra* note 12, at 51 (arguing that Rule 1.6(b)(2) promotes lawyers to behave according to a standard of care which, under changes to the Preamble, may actually provide evidence of a breach of an applicable standard of conduct). Despite the fact that rules similar to proposed Rule 1.6(b)(2) exist in most states, *see infra* note 60, there is no evidence that lawyers in these states are sued more frequently than lawyers in other states; nor is there any evidence that lawyers have been sued specifically for violating a rule that permits, but does not require, disclosure of client wrongdoing. *See, e.g.*, Don Hilliker, Remarks Before the ABA House of Delegates (Aug. 7, 2001), in 2001 Annual Meeting, *supra* note 5, at 63-65 (describing personal experience in Illinois, which permits disclosure even when lawyer's services have not been used by the client in furtherance of the crime or fraud).

20. *See Moore, Limits, supra* note 13, at 223-24.

21. *Id.* at 224.

such a rule, clients would have just as strong an incentive as they would under a more lenient rule to lie to their lawyers—that is, to prevent them from withdrawing to avoid assisting the planned crime or fraud.²² Also, without at least the threat of disclosure, lawyers have little means of “persuading” otherwise recalcitrant clients to comply with the law.²³

Second, the consequentialist argument fails to explain why the current Model Rules permit lawyers to reveal crimes threatening death or substantial bodily harm, but not crimes threatening economic harm.²⁴ Presumably, the assumption about long-range protection of the public against crimes and frauds applies equally to both situations. If we assume that less economic harm to the public will occur under a rule of non-disclosure, shouldn't we also assume that more lives will be saved in the long run if lawyers are prohibited from disclosing threats of murder?²⁵

In my opinion, there are two arguments for permitting lawyers to disclose their clients' intent to commit a crime threatening death or substantial bodily harm, and both arguments apply with equal force to crimes threatening economic harm. The first argument is consequentialist: given that, in the short term, harm to the public is virtually certain if lawyers do not disclose information regarding their clients' intent to commit a crime, the burden of proof must be shouldered by those who argue that more harm to the public will be prevented in the long run under a rule of strict confidentiality. As explained above, however, given the lack of empirical evidence to support this claim, coupled with good reason to believe that rules of strict confidentiality will not, in fact, prevent more harm even in the

22. This is precisely what happened in the famous case involving O.P.M., Inc. (believe it or not, O.P.M. actually stood for “other people’s money”), in which O.P.M. officials did everything they could to hide ongoing criminal and fraudulent activities in connection with multi-million dollar bank loans to convince Singer Huttner lawyers to continue closing the loans. When Singer Huttner finally resigned in the face of mounting evidence of crime and fraud, O.P.M. hired Kaye Scholer and lied to the lawyers to acquire their services with respect to more loan transactions. See generally Stuart Taylor, Jr., *Ethics and the Law: A Case History*, N.Y. Times, Jan. 9, 1983, (Magazine), at 31.

23. Moore, *Limits*, *supra* note 13, at 224.

24. *Id.*

25. *Id.* at 225. For example, in *Tarasoff v. Regents of the University of California*, 551 P.2d 334 (Cal. 1976), the majority held that “the public interest in safety from violent assault” justified the imposition of a duty on the part of a therapist to warn a known victim of an impending assault by a patient, *id.* at 346, 348, while the dissent argued, in part, that more lives would be saved if therapists guarantee their patients confidential treatment of all information, including threats of violence, *id.* at 358 (Clark, J., dissenting) (“Overwhelming policy considerations weigh against imposing a duty on psychotherapists to warn a potential victim against harm. While offering virtually no benefit to society, such a duty will frustrate psychiatric treatment, invade fundamental patient rights and increase violence.”).

long run,²⁶ lawyers should be entitled to act to prevent the short-term harm, whether physical or economic in nature. This argument supports limited disclosure of information by lawyers with respect to their clients' intent to commit not only crimes threatening death or substantial bodily harm, but also crimes threatening economic injury.

The second argument is non-consequentialist. According to this argument, clients who threaten crimes of violence (or, presumably, crimes threatening substantial economic harm) are "unjust aggressors" who have forfeited any right to the protection of their privacy, at least with respect to such threats.²⁷ Indeed, this is precisely the type of reasoning that traditionally was used to justify the disclosure provisions of the pre-1983 codes of ethics,²⁸ as well as the crime-fraud exception to the evidentiary privilege,²⁹ neither of which is limited to crimes of violence. This argument also supports limited disclosure of information by lawyers with respect to their clients' intent to commit either type of crime.

B. *Dissecting the Argument That Proposed Rule 1.6(b) Does Not Do Enough to Tip the Scale in Favor of the Public Good*

Let me turn, then, to the argument made by Deborah Rhode. If lawyers are *permitted* to disclose otherwise confidential information to further the public good, then why should the reasoning not be extended a step further to *require* lawyers to disclose information to prevent future harm, particularly when the harm threatened is death or substantial bodily harm?³⁰ On a related note, why should disclosure with respect to future economic crimes or frauds be limited

26. See *supra* notes 20-23 and accompanying text.

27. Moore, *Limits*, *supra* note 13, at 194-95, 225. See also Report to the House, *supra* note 1, Model Rule 1.6(b)(2) Reporter's Explanation of Changes, in which it was stated:

Use of the lawyer's services for such improper ends [as the commission of a crime or fraud threatening substantial economic harm] constitutes a serious abuse of the client-lawyer relationship. The client's entitlement to the protection of the Rule must be balanced against the prevention of the injury that would otherwise be suffered and the interest of the lawyer in being able to prevent the misuse of the lawyer's services.

28. See, e.g., ABA Canons of Prof'l Ethics Canon 37 (1969) ("The announced intention of a client to commit a crime is not included within the confidences which he is bound to respect.").

29. See, e.g., *Clark v. United States*, 289 U.S. 15 (1933). Here, the Court states: There is a privilege protecting communications between attorney and client. The privilege takes flight if the relation is abused. 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.

Id. at 15.

30. See also Stephen Gillers, *A Duty to Warn*, N.Y. Times, July 26, 2001, at A25 ("But the commission's proposal does not go far enough. If physical harm is indeed 'reasonably certain' to occur, lawyers should not be merely permitted to break confidences; they should have no choice in the matter.").

to situations where the lawyer's services have been or are being used by the client in furtherance of such crimes or frauds?³¹ The answer to both questions, I believe, is that ethics codes typically do not (and should not) require lawyers to further the public good in any direct, consequentialist sense. Rather, they assume that the public interest will be furthered when lawyers are loyal to their clients within limits defined by the lawyers' simultaneous roles as officers of the legal system and public citizens having special responsibility for the quality of justice.³² Thus, the disclosure provisions in Rule 1.6 should be viewed not as evidence of an affirmative duty of lawyers to further the public good, but rather as limitations on lawyers' obligations of loyalty to their clients, thereby freeing them to act as independent moral agents.³³

So, what are, or should be, the limits on lawyers' obligations of loyalty to their clients? One clear limit is based on the concept of the client as an "unjust aggressor"—that is, one who has forfeited any right to the lawyer's loyalty.³⁴ The Ethics 2000 Proposals, however, seek to establish limits that are both broader and narrower than the "unjust aggressor" argument would suggest. They are broader in that lawyers may now disclose information to prevent any reasonably certain death or substantial bodily harm, regardless of whether their clients are perpetrating a crime or other unlawful act.³⁵ They are narrower in that disclosure of information to prevent economic crimes or frauds is limited to situations where the lawyers' services have been

31. Deborah did not raise this question during the radio program, nor do I recall that she has raised it elsewhere. But, others have. *See, e.g.*, Restatement of the Law Governing Lawyers § 117A(1)(b) & n.1 (Proposed Final Draft No. 1, Mar. 1996) (explaining that Chief Reporter Charles Wolfram and others favored deletion of the requirement that a lawyer's services were, or are being, employed by the client in furtherance of the crime or fraud as a prerequisite to permissive disclosure to prevent substantial financial loss).

32. The lawyer's duty of loyalty is a basic principle of agency theory under which many of the lawyer's duties to his or her client may be derived. We may differ about the precise scope of the limitations that should be imposed on that duty, but we should all agree that it would be meaningless to say that an agent owes a duty of loyalty to his or her principal, if the agent were simultaneously obliged to directly pursue "the public interest." *Cf.* David Luban, *Introduction to The Good Lawyer: Lawyers' Roles and Lawyers' Ethics* 8-11 (David Luban ed., 1983) [hereinafter *The Good Lawyer*] (discussing the agency theory of ethics and limitations on the "'rule of undivided loyalty,'" as applied to both lawyer and non-lawyer agents).

33. Even under the current Model Rules, lawyers have an affirmative duty to disclose client perjury when the client refuses to do so. *See* Model Rules of Prof'l Conduct R. 3.3(a)(4) (2000). This duty arises from the lawyer's unique role as an officer of the court. *See* Report to the House, *supra* note 1, R. 3.3 cmt. 2 ("This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process.") (underlining omitted); *see also* Model Rules R. 3.3(a)(3) (providing for the duty to disclose legal authority that is directly adverse to the position of the client).

34. *See supra* note 27 and accompanying text.

35. *See supra* note 3 (proposed changes to Rule 1.6(b)(1)).

or are being used by the clients in furtherance of such crimes or frauds.³⁶

Limiting disclosure of economic crimes or frauds to situations where the lawyers' services are involved is relatively easy to explain. Disclosure to prevent economic harm has been more controversial within the profession than disclosure to prevent physical harm. Indeed, for some lawyers, such disclosure is problematic precisely because of the frequency of conflicts that arise between the clients' economic interests and the economic interests of others, thus raising the specter of a rather thin obligation of client loyalty.³⁷ On the other hand, a client who has tricked the lawyer into participating in unlawful conduct (conduct in which the lawyer would never have engaged had the lawyer known the true circumstances) is an "unjust aggressor" of the worst sort—one who has abused a relationship of trust for his or her own selfish ends. Therefore, once the lawyer discovers the true circumstances, the lawyer has a strong claim in favor of freedom to disclose information, either to protect a victim to whom the lawyer may feel a special moral obligation (to the extent that such lawyer's services have or will contribute to the harm), or to protect the lawyer himself or herself, who might well be accused of having knowingly participated in the client's unlawful conduct.³⁸

But, how then could the Ethics 2000 Commission justify its expansion of the confidentiality provision to allow disclosure of information to prevent any reasonably certain death or substantial bodily harm? First, in the vast majority of cases, the threat of such harm probably will come from a client's stated intent to commit a crime of violence, in which case the client would indeed be an "unjust aggressor" who is undeserving of the lawyer's loyalty. Second, if the client's future conduct is merely tortious (but not criminal or fraudulent), and the client refuses to desist or disclose information, the client may also be characterized as an "unjust aggressor." Third,

36. See *supra* note 3 (proposed new provisions in Rules 1.6(b)(2) and (3)); see also *supra* note 31 (noting that the Chief Reporter to the Restatement of the Law Governing Lawyers favored deletion of this requirement in the Restatement).

37. See Moore, *Limits*, *supra* note 13, at 208-11 (differentiating between physicians and lawyers on the basis that there are more frequent conflicts between the interests of clients and others than there are between the interests of patients and others).

38. For example, in the infamous O.P.M. scandal, the Singer Huttner law firm ultimately paid approximately \$10 million to settle a series of lawsuits resulting from their alleged participation in their client's frauds. Some of their participation was clearly unwitting, even though it is arguable that for some time they purposefully "buried their heads in the sand" to avoid "knowing" that their client was engaged in an ongoing fraud. See Taylor, *supra* note 22, at 33 (detailing the history of the Singer Huttner law firm's involvement with O.P.M.); see also Professor Geoffrey C. Hazard, Jr., Testimony Before the House of Delegates (Aug. 7, 2001), in 2001 Annual Meeting, *supra* note 5, at 60-61 (arguing that proposed Rule 1.6(b)(2) is necessary as a "measure of self-protection" for lawyers).

even when the client is a mere bystander, non-consequentialist reasoning may still permit the client's right to loyalty to be overridden, but for a reason other than that such client is considered an "unjust aggressor." Rather, the client's right to loyalty may be deemed to be outweighed by another equal, or more basic, right or duty associated with non-clients.³⁹ True, there are no generally recognized criteria for establishing priorities among various rights and duties;⁴⁰ moreover, it is not clear that non-clients have a "right" to be protected by lawyers from harm, particularly when the harm comes from someone other than the client.⁴¹ Nevertheless, lawyers, as moral agents, have both the right and the (moral) duty to act to prevent harm to others, at least in those circumstances where the cost to the lawyer is not high.⁴² Ordinarily, this right and duty are overridden by the lawyer's duty of loyalty owed to the client.⁴³ But, when the potential harm to the client of disclosure is slight in comparison to the potential harm to others that can be prevented by disclosure, then arguably the limits of the lawyer's obligation of confidentiality have been reached.⁴⁴ And, when the harm threatened to others is a function of conduct other than an intended client crime, then it is likely that the harm (to the client) of disclosure will be far less than the harm to be prevented by disclosure (i.e., death or substantial bodily harm) of otherwise confidential information.⁴⁵

Ironically, it is possible that broadening the permissive power of lawyers to disclose client information actually runs counter to Deborah's argument in support of making disclosure mandatory. After all, there may well be circumstances when the harm suffered by the client of disclosure would be substantial, even in comparison to the harm threatening the innocent non-client. Take, for example, a client who confesses to the lawyer that he or she has committed a crime for which another person has been arrested, perhaps even convicted and sentenced to die. The client has not in any sense abused his or her relationship with the lawyer to warrant characterization as an "unjust aggressor," as, indeed, confession of

39. See Moore, *Limits*, *supra* note 13, at 194-95 (discussing the limits on a physician's obligation of confidentiality when the patient's right to privacy is overridden by some other equal or more basic right or duty).

40. *Id.*

41. For example, lawyers have no general legal duty to prevent harm to non-clients. See, e.g., Restatement of the Law Governing Lawyers § 51 (2000). Even with respect to moral duties, while there may be a duty to prevent harm to others, this duty of beneficence is often characterized as an "imperfect obligation," i.e., one that does not entail a correlative "right" on the part of any particular individual to be a recipient of this duty. See Tom L. Beauchamp, *Philosophical Ethics* 201-03, 211-12 (1982) (discussing the correlativity thesis and the duty of beneficence).

42. Cf. Beauchamp, *supra* note 41, at 211-12.

43. See *supra* note 32 and accompanying text.

44. Cf. Moore, *Limits*, *supra* note 13, at 195.

45. See *id.* at 231-33.

past crimes is the very paradigm of the proper purpose of seeking legal advice.⁴⁶ Moreover, because the crime is in the past, there is no way the client can avoid the harm of disclosure by simply renouncing the intent to commit the crime.⁴⁷ Finally, the potential harm to the client resulting from the lawyer's disclosure—arrest, conviction, and imposition of the death sentence—may be equal in magnitude to the harm currently threatening the non-client in the event of non-disclosure, with the only difference being the innocence of the non-client and the guilt of the client. Although, in this situation, that difference between innocence and guilt may suffice to tip the scale in favor of disclosure by the lawyer,⁴⁸ if there is any chance that the innocent non-client might be saved by other means, or if there are any other factors mitigating against disclosure, it would be difficult to conclude that the lawyer must sacrifice the client to the authorities for the sake of “the public good.”⁴⁹

In sum, lawyers may be officers of the legal system and public citizens having special responsibility for the quality of justice, but they are not thereby law enforcement officers akin to police or prosecutors.⁵⁰ They should be free to act as independent moral agents

46. See *id.* at 234; cf. *Text of Initial Draft of Ethics Code Rewrite Committee*, Legal Times of Washington, Aug. 27, 1979, at 28 (stating an alternative provision of the initial draft of the Model Rules requiring a lawyer to disclose information about a client to the extent necessary “[t]o prevent or rectify the consequences of a deliberately wrongful act by the client in which the lawyer’s services are or were involved, except when the lawyer has been employed after the commission of such an act to represent the client concerning the act or its consequences” (emphasis added)).

47. See Moore, *Limits*, *supra* note 13, at 234 (noting that the traditional distinction between past and future conduct is sometimes justified on the ground that the chilling effect of disclosure with regard to past misconduct is stronger than that with regard to future misconduct, because, in the former instance, clients lack the option of preventing disclosure by renouncing their intent to commit the intended misconduct).

48. See, e.g., Mass. Rules of Prof'l Conduct R. 1.6(b)(1) (2001) (stating that the lawyer may reveal information “to prevent the wrongful execution or incarceration of another”).

49. See Moore, *Limits*, *supra* note 13, at 232-33 (arguing for permissive disclosure to prevent death or substantial bodily harm on the ground that when the client's interest in privacy in a particular case is substantial, “the lawyer may be persuaded to maintain confidentiality, if that privacy interest is not clearly outweighed by the more important interests of others,” and concluding that “the final resolution of this dilemma appears to depend on the desirability of allowing individual lawyers to determine when disclosure is morally appropriate”).

50. Some opponents of the Ethics 2000 Commission's proposals to permit limited disclosure of future economic crimes or frauds argued that the effect of these proposals would be to turn lawyers into policemen. See, e.g., Paul, Remarks, *supra* note 12, at 63 (“Let us not seek to be policemen. Let us not seek to be judges of our clients . . .”). See also, e.g., Robert J. Grey, Jr., Remarks Before the House of Delegates (Aug. 7, 2001), in 2001 Annual Meeting, *supra* note 5, at 66, in which it was stated:

[T]o suggest that we should adopt a rule that turns lawyers into investigators, into prosecutors, into judges and juries, to determine whether their clients have, in fact, committed a crime or a fraud is inconsistent with the idea that we establish the relationship built on loyalty, based on trust, and based on

when the limits of client loyalty have been reached, but at the same time, they should not be obligated to perform as agents of the state in situations where private citizens have no similar obligation.⁵¹

II. CONTINUING SELF-REGULATION BY LAWYERS

While I was delighted that the House of Delegates tentatively approved the expansion of the confidentiality provision to more readily permit disclosure of otherwise confidential information to prevent death or substantial bodily harm, it was extremely disappointing to see the House soundly reject amendments that would have enabled lawyers to disclose information to prevent or rectify substantial economic harm, even in the narrow instance where the harm resulted from crimes or frauds committed through the use of a lawyer's services.⁵² Nevertheless, I do not agree with Deborah that the ABA's continuing refusal to recognize a lawyer's right to disclose information to prevent economic harm is yet further evidence that self-regulation by lawyers has failed, and that it is, therefore, time to permit non-lawyers to regulate the practice of law.⁵³

It is certainly true, as Deborah states in her book,⁵⁴ that the "public has had almost no voice in [the] formulation or enforcement"⁵⁵ of lawyer ethics codes. I am not convinced, however, that all, or even most, of the shortcomings of the present system of self-regulation⁵⁶ would be overcome by direct public regulation of lawyers, either through legislatures or through administrative agencies.⁵⁷ Deborah herself recognizes that the public lacks sufficient information to press

the willingness of our clients to tell us the truth.

I strongly disagree that *permissive* disclosure provisions in any way turn lawyers into agents of the state, but I do agree that *mandatory* disclosure rules would do so. Such rules mandating disclosure are justified in some circumstances (e.g., disclosing client perjury to a court), but they should be rare. *See supra* note 33.

51. Private citizens do not have a legal duty to prevent death or substantial bodily harm, even when it is the result of an intended criminal act. *See, e.g.,* *People v. Oliver*, 258 Cal. Rptr. 138, 142-43 (1989) (no duty under criminal law); Restatement (Second) of Torts § 314 (1965) (no duty under tort law).

52. *See supra* notes 3-4 and accompanying text.

53. *See supra* note 8 and accompanying text.

54. Rhode, *supra* note 6, at 145.

55. *Id.*

56. Deborah is unquestionably correct that there are shortcomings in the present system of self-regulation by lawyers, and that many of these shortcomings can be traced to the profession's interest in self-protection. One example I would cite from personal experience is the ABA's refusal to endorse written fee agreements. *See infra* note 67.

57. Direct public regulation of lawyers by either legislatures or administrative agencies is currently prohibited in most states by the inherent powers doctrine, under which the judicial branch of state governments is held to have the exclusive authority to regulate the legal profession. *See* Charles W. Wolfram, *Modern Legal Ethics* § 2.2.3 (1986). Of course, this doctrine can be changed by state constitutional amendment.

for fundamental change.⁵⁸ Moreover, as she further concedes, both legislators and agency officials “are subject to capture by those [whom] they seek to regulate.”⁵⁹

I would like to make three additional arguments in favor of the present system of self-regulation by lawyers. First, despite the continuing refusal of the ABA to adopt a confidentiality provision permitting lawyers to disclose information regarding future economic crimes or frauds, such a provision has been adopted by the vast majority of the states.⁶⁰ Indeed, some states have even required lawyers to make such disclosures, or at least disclosures regarding crimes threatening death or substantial bodily harm.⁶¹ Second, there is reason to fear that direct public regulation of lawyers may have negative effects in certain areas of legal ethics where there is a special risk that the public will misunderstand the unique function of lawyers. Third, if there is direct public regulation of lawyers, lawyers may cease viewing themselves as professionals with special responsibilities to further the public interest.⁶² Each of these arguments are analyzed in turn.

First, what is the significance of the fact that the vast majority of lawyers are permitted, and sometimes required, to disclose client confidences to prevent economic crimes or frauds, despite the ABA’s constant refusal to allow such disclosure? I submit that this is *prima facie* evidence that the present system is working pretty well, at least with respect to the promulgation of ethics codes.⁶³ There are a

58. Rhode, *supra* note 6, at 146.

59. *Id.*

60. See Moore, Remarks, *supra* note 14, at 58:

The vast majority of states soundly rejected [the current ABA rule on confidentiality]. Only nine states have adopted Model Rule 1.6. One state, California, has an even more restrictive rule. The other 41 jurisdictions continue to adhere to a confidentiality rule that permits lawyers to disclose to prevent economic harm in at least some circumstances. . . . Forty-one jurisdictions either permit or require disclosure to prevent a client from perpetrating a fraud that constitutes a crime. Of these 41 jurisdictions, 11 also permit or require disclosure to prevent non-criminal frauds likely to result in substantial injury to the financial interests or property of another. Of these 41 jurisdictions, 28 permit or require [disclosure] without regard to the magnitude of loss to the affected persons.

61. Nine jurisdictions require lawyers to disclose client information related to crimes threatening death or substantial bodily harm. See Ariz. Rules of Prof’l Conduct R. 1.6 (2002); Fla. Rules of Prof’l Conduct R. 4-1.6 (2001); Ill. Rules of Prof’l Conduct R. 1.6 (2001); Nev. Rules of Prof’l Conduct R. 156 (2002); N.J. Rules of Prof’l Conduct R. 1.6 (2002); N.D. Rules of Prof’l Conduct R. 1.6 (2001); Tex. Rules of Prof’l Conduct R. 1.05 (2001); Va. Rules of Prof’l Conduct R. 1.6 (2001); Wisc. Rules of Prof’l Conduct for Attorneys R. 20:1.6 (2002).

62. See *infra* notes 77-78 and accompanying text.

63. As Deborah suggests, there is also a problem with the inadequate enforcement of standards of conduct. Rhode, *supra* note 6, at 146. There is reason to believe that legislative funding for the disciplinary enforcement of lawyers would be even less generous under a system of direct regulation of lawyers than under the present system. See ABA Ctr. for Prof’l Responsibility, ABA, Lawyer Regulation for

number of reasons why the present system is working as well as it is. One factor is that there is no single organization of lawyers that decides what provisions to insert in a lawyer ethics code; the ABA may be influential, but it cannot determine the content of the state codes that actually bind the nation's lawyers.⁶⁴ Another factor is that lawyers are not entirely self-regulating. As Deborah herself acknowledges, ethics codes are promulgated and enforced by state court judges, not state bar associations.⁶⁵ I concede that judges, as former lawyers, and increasingly, as future lawyers, are often sympathetic to bar interests.⁶⁶ The most recent evidence, however, suggests that many state courts have done quite well in carrying out their responsibility to promulgate state ethics codes with provisions that reflect not merely the bar's desires and wishes, but also the public

a New Century, Report of the Commission on Evaluation of Disciplinary Enforcement, at n.4 [hereinafter *Lawyer Regulation for a New Century*] (discussing testimony that the New York lawyer disciplinary agencies, whose funds are controlled by the State Legislature, were severely under-funded, and explaining that, subsequently, the Legislature increased lawyer registration fees, but did not increase the agencies' direct funding). A recent evaluation of disciplinary enforcement concluded that there is "no persuasive evidence that legislative regulation of other professions has resulted in better protection of the public," because "legislatively created regulatory bodies suffer from the same problems as do judicially created lawyer disciplinary agencies." *Id.* (Recommendation 1).

64. See generally Wolfram, *supra* note 57, § 2.2.2 (discussing the inherent powers doctrine, under which state supreme courts typically promulgate ethics codes that are binding on lawyers admitted in a given jurisdiction). Indeed, it was the proliferation of variations of the Model Rules, as adopted by the different states, that was at least partially responsible for the decision of the ABA to create the Ethics 2000 Commission to undertake a comprehensive evaluation of the Model Rules. See Nancy J. Moore, *Lawyer Ethics Code Drafting in the 21st Century*, 30 Hofstra L. Rev. (forthcoming Spring 2002) [hereinafter Moore, *Lawyer Ethics Code Drafting*].

65. See Rhode, *supra* note 6, at 146. With respect to lawyer discipline, it is true that there are still some jurisdictions in which disciplinary functions are conducted by bar association officials rather than staff controlled and managed by the state's highest court. *Lawyer Regulation for a New Century*, *supra* note 63 (text preceding Recommendation 5). A recent report by the ABA Commission on Evaluation of Disciplinary Enforcement continued to urge that "[a]ll jurisdictions should structure their lawyer disciplinary systems so that disciplinary officials are appointed by the highest court of the jurisdiction or by other disciplinary officials who are appointed by the Court." *Id.* (Recommendation 5).

66. See *Lawyer Regulation for a New Century*, *supra* note 63 (Recommendation 5).

[L]awyers often claim that ultimate governance authority rests with state judges, who do not face the same conflicts of interests as practitioners. Yet the history of self-regulation suggests the limitations of such oversight. Most judges are by training and temperament sympathetic to bar interests. Moreover, their reputation, effectiveness, and reelection may depend heavily on support from lawyers. Seldom has the judiciary attempted to impose regulation that might seriously compromise lawyers' status, income, or power.

Rhode, *supra* note 6, at 146. While I agree that judges are often sympathetic to bar interests, I believe that their status as judges has a very real impact on their willingness to support regulation that is more onerous than that favored by the bar.

interest.⁶⁷ Moreover, I believe it is also the case that state bar associations deserve much of the credit for initiating or supporting potentially far-reaching proposals, such as those requiring lawyers to put fee agreements or conflicts waivers in writing.⁶⁸ State code variations may present problems for cross-border practice, but they also have the significant benefit of permitting and encouraging a level of experimentation that would never go forward at the national level.⁶⁹

Second, the lack of public understanding of legal institutions and the legal profession creates a significant risk that direct public regulation of lawyers may lead to substantial adverse effects in some areas of particular sensitivity. The most obvious concern is with respect to the representation of criminal defendants, particularly those who have admitted to their lawyers that they did, in fact, commit the crime for which they are charged. The public consistently fails to understand the importance of the lawyer's role in forcing the state to meet the burden of proving guilt beyond a reasonable doubt through methods that are consistent with the law.⁷⁰ Thus, direct public regulation of lawyer conduct may not provide sufficient accommodation to the unique role of the criminal defense lawyer.

Another example of the public misunderstanding of certain areas of legal ethics concerns the allocation of decision-making between lawyer and client. The only proposal that the Ethics 2000 Commission received from a consumer organization contained a mistaken statement that Model Rule 1.2(a) currently requires lawyers to abide by their clients' instructions with respect to the means to be used to accomplish the clients' objectives.⁷¹ In addition to arguing that this

67. As previously noted, most states have determined that lawyers ought to be permitted (and sometimes even required) to disclose client information to protect third parties. *See supra* note 60 and accompanying text. Similarly, although the ABA has refused to endorse written fee agreements, seven states have done so. *See Moore, Lawyer Ethics Code Drafting, supra* note 64. Moreover, three states require that conflicts waivers either be in writing or be confirmed in writing, which led the ABA Ethics Commission to propose (and the ABA House of Delegates to adopt) a provision in the Model Rules requiring that such waivers be confirmed in writing. *Id.*

68. *See supra* note 67.

69. *See Moore, Lawyer Ethics Code Drafting, supra* note 64.

70. *Cf. David Luban, The Adversary System Excuse, in The Good Lawyer, supra* note 32, at 83, 91-93 (arguing that the public preoccupation with crime and criminals leads to a perception that the "paradigm of the morally dubious representation is the defense of the guilty criminal," whereas lawyers generally know that "[t]he good criminal defense lawyer puts the state to its proof in the most stringent and uncompromising way possible").

71. *See James C. Turner & Theresa Meehan Rudy, Statement Before the ABA Commission on Evaluation of the Rules of Professional Conduct (Aug. 11, 2000)* ("[W]hile [current Model] Rule 1.2 implicitly acknowledges that a lawyer has an ethical obligation to respect a client's decisions and requires obedience in a criminal case, it fails to make it clear that the client's decisions in a civil case too must be obeyed."), available at <http://www.halt.org/LAP/Ethics2000.html>; *see also infra* note 72. This statement is clearly mistaken. While Rule 1.2(a) requires a lawyer to "abide

requirement be retained,⁷² the organization further suggested that the comment to that rule

should include clear instruction that even if honest disagreement between the lawyer and client about the best way to proceed exists, so long as a lawyer is retained by a client, the client's instructions should be followed, unless doing so would constitute a criminal act or violate the Model Rules of Professional Conduct.⁷³

While there is some merit to this proposal,⁷⁴ the issues involved are, nevertheless, complex and arguably beyond the comprehension of those who lack adequate knowledge of the legal profession. Courts have not endorsed the proposition that clients retain complete control over the means of their representation, for example, when their instruction concerns matters of strategy or tactics.⁷⁵ Moreover, if lawyers are to continue viewing themselves as professionals, and not merely hired guns, then surely they must be afforded a fair measure of autonomy in performing their work. Therefore, in my view, accommodating the legitimate interests of both clients and lawyers in allocating decision-making authority is a task better suited for lawyers (and courts) than for non-lawyers who might be empowered to regulate the conduct of lawyers.⁷⁶

by a client's decisions concerning the *objectives* of representation," it requires only that a lawyer "shall consult with the client as to the *means* by which they are to be pursued." Model Rules of Professional Conduct Rule 1.2(a) (2000) (emphasis added). See also 1 Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering* § 5.5, at 5-12 (3d ed. 2001), in which it was stated:

The first sentence of Model Rule 1.2(a) draws a distinction between the "objectives" (or ends) of legal representation and the "means" used to achieve them. The same sentence also allocates responsibility for decisionmaking in these two arenas. The rule provides that generally "objectives" are for the client, while "means" are for the lawyer.

72. See Turner & Rudy, *supra* note 71 ("If Model Rule 1.2(a) is to carry weight, however, it must retain the language that requires lawyers to abide by a client's instructions with respect to the means to be used to accomplish the client's objectives.").

73. *Id.*

74. See Restatement of the Law Governing Lawyers § 21(2) (2000) (taking the same position).

75. See 1 Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* § 8.9, at 825 (2000).

76. See Report to the House, *supra* note 1, Model Rule 1.2(a) Reporter's Explanation of Changes, which states:

Other than acknowledging the power of the client to revoke a lawyer's implied authority, the Commission has not attempted to specify the lawyer's duties when the lawyer and client disagree about the means to be used to accomplish the client's objectives. As explained in Comment [2], the Commission believes that disagreements between a lawyer and client about means must be worked out by the lawyer and client within a framework defined by the law of agency, the right of the client to discharge the lawyer and the right of the lawyer to withdraw from the representation if the lawyer has a fundamental disagreement with the client.

See also *Id.*, Model Rule 1.16(b)(4) Reporter's Explanation of Changes (stating that a

Third, although the concept of lawyer professionalism has been both misunderstood and overused,⁷⁷ I believe that ultimately it is in the public interest for lawyers to continue viewing themselves as professionals, with obligations not only as client representatives, but also as officers of the court and public citizens having special responsibility for the quality of justice.⁷⁸ Unless and until it can be convincingly demonstrated that there is an alternative framework for regulating lawyers that would prove more beneficial to the public as a whole,⁷⁹ and continue to be effective in protecting individual rights, I believe that we should work within our present system of self-regulation, constantly striving to improve both the content and the enforcement of lawyer ethics codes.⁸⁰

lawyer may withdraw from representing a client, if the "client . . . [insists] that the lawyer take action that the lawyer finds repugnant or, in some instances, when the lawyer has a fundamental disagreement").

77. See generally Nancy J. Moore, *Professionalism Reconsidered*, 1987 Am. Bar Found. Res. J. 773 [hereinafter Moore, *Professionalism Reconsidered*].

78. Under one account of professionalism, a profession's code of ethics is the product of a contract between the profession and the larger society of which it is a part; the contract results when society agrees to give the profession a legal monopoly in return for a promise that professional practice will be performed in the public interest. See Nancy J. Moore, *The Usefulness of Ethical Codes*, 1989 Ann. Surv. of Am. Law 7, 12-14 [hereinafter Moore, *Usefulness*]; Moore, *Professionalism Reconsidered*, *supra* note 77, at 784-85. The code then establishes standards by which the profession can be held to public account; in other words, society has delegated responsibility to professionals, but it can relieve them of this responsibility, if they do not live up to their public pronouncements. Moore, *Usefulness*, *supra*, at 13. Similarly, Ted Schneyer argues that the ABA, which has "aspired to be the voice of the bar at the national level," maintains its visibility and authority by formulating ethics rules for the entire legal profession that are taken seriously by legal decision-makers, such as the state supreme courts. Ted Schneyer, *The ALI's Restatement and the ABA's Model Rules: Rivals or Complements?*, 46 Okla. L. Rev. 25, 28 (1993) (emphasis omitted).

79. Thus, Deborah arguably commits what Ted Schneyer has characterized as "the sin of drawing conclusions about the proper allocation of regulatory authority on the basis of a single-institutional analysis rather than the more appropriate comparative analysis." Ted Schneyer, *Legal Process Scholarship and the Regulation of Lawyers*, 65 Fordham L. Rev. 33, 67 (1996) (discussing an article that criticized an ABA ethics opinion regarding contingent fees on the ground that lawyer self-interest prevailed over the public interest). For an excellent discussion of the new "legal process scholarship," which focuses on the comparative competence of various institutions, see generally Schneyer, *supra*; see also David B. Wilkins, *Who Should Regulate Lawyers?*, 105 Harv. L. Rev. 799 (1992).

80. Chapter 6 of Deborah's book is full of excellent proposals to improve regulation of the legal profession. Some of her suggestions have already been adopted, or are currently being studied, by various bar or bar-related entities. For example, she recommends improving the bar admission process by eliminating overly intrusive character and fitness inquiries, particularly in sensitive areas, such as psychological counseling. Rhode, *supra* note 6, at 155. The recently revised standard questionnaire of the National Conference of Bar Examiners asks only three questions regarding mental health and addiction: (1) whether the applicant has been diagnosed with or treated for bi-polar disorder, schizophrenia, or other psychotic disorder, within the last five years; (2) whether the applicant currently has any conditions or impairments that currently affect, or if left untreated, could affect, the ability of the

CONCLUSION

Getting a legal ethics code's confidentiality provisions just right is not an easy task. There are a number of factors that must be taken into account, including the different interests of clients, the public, and the lawyers themselves. On the one hand, I argue that Sean SeLegue is wrong when he criticizes the Ethics 2000 Proposals as doing too much to tip the scale in favor of the public good. On the other hand, I argue that Deborah Rhode's assessment that the Ethics 2000 Proposals do not go far enough is also inaccurate. I believe that the arguments I make are warranted by careful consideration of the historical limits of lawyers' obligations to clients, as well as the proper role of lawyers as independent moral agents, and not agents of the state. Although I was disappointed that the House of Delegates did not adopt all of the Ethics 2000 Commission's proposals regarding confidentiality, I also disagree with Deborah's view that this failure constitutes evidence that the public would be better served by rejecting the present system of self-regulation in favor of direct control by legislatures or administrative agencies. Rather, my experience in reviewing the myriad of individual state variations to the ABA's Model Rules has been a heartening one, leading me to conclude the contrary: that the present system is functioning pretty well, that direct public regulation could pose too great a risk in areas of particular sensitivity, and that it is in the public interest for lawyers to continue to consider themselves as professionals with special, but limited, responsibilities to further the public good.

applicant to practice law competently and professionally; and (3) whether in the past five years the applicant has raised the issue of mental health or addiction as a defense, mitigation, or explanation, in the course of an administrative or judicial proceeding, or investigation. Nat'l Conference of Bar Exam'rs, Request for Preparation of Character Report, Questions 25-27, *available at* <http://www.ncbex.org/character/Standard01.pdf> (last visited Jan. 8, 2002). Deborah further proposes that "states should move either to a national system of admission or to a more effective means of accommodating interstate practice." Rhode, *supra* note 6, at 155. The recently appointed ABA Commission on Multijurisdictional Practice has been meeting for over a year, and recently issued an interim report recommending substantial changes to professional regulation, with the purpose of accommodating interstate practice. See ABA, Interim Report of the Commission on Multijurisdictional Practice (Nov. 2001), *available at* <http://www.bostonbar.org/gr/adhoc/mjpininterim.PDF>. Finally, the ABA has recommended a number of substantial changes to improve the enforcement of disciplinary rules. See Lawyer Regulation for a New Century, *supra* note 63.