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Professional Responsibility: Model Rule 1.6: New Limitations on the Ethical Attorney with an Unethical Client

The proposed Model Rules of Professional Conduct have stimulated much debate in the legal community regarding the changes in the area of client confidence.1 This interest has been fueled by the recent major client fraud scandal involving O.P.M. Leasing Service, Inc., of New York,2 and has focused the attention of the bar on the ethical obligations of an attorney upon discovering that a client has committed fraud during the course of the attorney's representation.

The scope of this note is limited to the ethical, as opposed to the legal, obligations of an attorney to disclose client fraud. The variety of state laws affecting privileged communication in the law of evidence is not to be addressed. Similarly, the note does not discuss the common law liability of attorneys to third parties resulting from failure to disclose client fraud,3 nor the special disclosure requirements imposed in specialized areas of practice by federal agencies.4

The note gives a synopsis of the facts of the O.P.M. scandal to provide an illustration of the dynamic ethical consequences that often arise during representation, and which have recently been scrutinized by the American Bar Association (ABA) House of Delegates.5 Second, the note traces the


Some of these writers have challenged the need for a revised set of professional standards. For a general defense to the allegations, see Kutak, The Next Step in Legal Ethics: Some Observations About the Proposed Model Rules of Professional Conduct, 30 CATH. U.L. REV. 1 (1980). Robert J. Kutak was the chairman of the American Bar Association Commission on Evaluation of Professional Standards, which has promulgated the Model Rules.

2. For a synopsis of the facts and ethical issues raised, see infra text accompanying notes 8-16.


4. For an excellent discussion on the special liability situations involving, for example, the securities practice, see Sonde, Professional Responsibility—A New Religion, or the Old Gospel, 24 EMORY L.J. 827 (1975) (extensive bibliography at n.6); Kaufman, supra note 1, at n.38.

5. The "Final Draft" version of the Model Rules relevant to disclosure and withdrawal by the attorney are reproduced here in full. Amendments to the Final Draft, which were adopted at
history of the efforts of the ABA to deal effectively with the client fraud problem as a matter of professional responsibility. The third section compares the proposed and adopted Model Rules relating to client confidence with the Disciplinary Rules and opinions under the Code of Professional

the 1983 Mid-Year Convention, are indicated in italics, with the portions deleted having a line through them. Each amendment received approval during final consideration at the Annual Convention in Atlanta. See 52 U.S.L.W. 1 (Aug. 16, 1983). Unless otherwise indicated in this note, all references to the rules refer to the Final Draft version, reproduced at 68 A.B.A.J. 1411 (1982).

RULE 1.2 Scope of Representation

. . . .

(d) A lawyer shall not counsel or assist a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, or in the preparation of a written instrument containing terms the lawyer knows are expressly prohibited by law, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client in to make a good faith effort to determine the validity, scope, meaning or application of the law.

RULE 1.6 Confidentiality of Information

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

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in imminent death or substantial bodily harm; or in substantial injury to the financial interests or property of another;

(2) to rectify the consequences of a client's or the lawyer's services had been used;

(3) to prevent a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, or to establish a defense to a criminal charge, or civil claim or disciplinary complaint against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

(4) to comply with other law.

RULE 1.16 Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, 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;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), 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;

(2) the client has utilized the representation to perpetrate a crime or fraud; or

(3) a client insists upon pursuing an objective that the lawyer considers repugnant or improper; or

(4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
Responsibility. Finally, the author critiques the 1983 Mid-Year Convention amendments to the Final Draft version of Model Rule 1.6 and suggests an alternative that both protects the historical function of the confidence rule and ensures more commitment to the integrity of the legal profession.

(5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
(6) other good cause for withdrawal exists.

Rule 1.6. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

RULE 3.3 Candor Toward the Tribunal
(a) A lawyer shall not knowingly:
(1) make a false statement of material fact or law to a tribunal;
(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;
(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
(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.

(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.

RULE 4.1 Truthfulness in Statements to Others
(a) In the course of representing a client a lawyer shall not knowingly:
(1) (a) make a false statement of material fact or law to a third person; or
(2) (b) 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.

(b) The duties stated in the Rule apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

6. The corresponding provisions are MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C) and DR 7-102(B)(1) (1979).

DR 4-101 Preservation of Confidences and Secrets of a Client.

(C) A lawyer may reveal:
(1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.
(2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.
(3) The intention of his client to commit a crime and the information necessary to prevent the crime.
(4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

DR 7-102 Representing a Client Within the Bounds of the Law.

(B) A lawyer who receives information clearly establishing that:
(1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication.
1. A Case in Point: Decisions for the Ethical Attorney with an Unethical Client

No longer may the debates in the ABA House of Delegates be considered a mere exercise in parliamentary procedure; the decisions reached in formulating Model Rule 1.6 carry widespread implications. The recent O.P.M. scandal and its effects on the New York firm of Singer, Hutner, Levine & Seeman is illustrative.7

Singer, Hutner was faced with making a number of critical decisions during its representation of O.P.M. that are at the heart of the adopted version of the Final Draft of the Model Rules of Professional Conduct. Should an attorney be allowed or required to disclose substantive information of a client's fraud committed during the course of the attorney's representation? Should withdrawal in such a situation be permitted or even required? Does the law firm have an affirmative duty to investigate the client's activity to ensure that fraud will not continue in the future? And finally, what options are available to the attorney when he learns of his client's intent to commit a future fraud? A brief discussion of the circumstances surrounding the O.P.M. scandal will provide a background against which these and other ethical questions will be addressed in an effort to formulate a more desirable set of client confidence rules.

In December 1982, Myron Goodman, chief executive officer of O.P.M., received a twelve-year prison sentence after pleading guilty to defrauding lending institutions of an estimated $200 million in what has been termed the largest financial scandal in American history.8 O.P.M. had experienced extraordinary growth in the late 1970s by serving as an intermediary in computer leasing deals. It would secure financing to purchase computers that would then be leased to its customers. However, in 1978, O.P.M. fraudulently told the lending institutions that the money was used to buy large, expensive computers for lease to Rockwell International and that the loans were secured by Rockwell's written promise to furnish the computers as collateral.

The fraud centered around Rockwell's promises, which were either forged or altered, and the fact that the computers, as collateral for the loans, were either nonexistent or much less valuable than purported by O.P.M. Despite early indications of fraud, Singer, Hutner failed to investigate O.P.M. dealings. The scheme was maintained by remitting payments to the banks under the nonexistent leases. The scheme finally failed and O.P.M. collapsed into bankruptcy in March of 1981.

The law firm of Singer, Hutner was subsequently accused by some lenders

of complicity in the O.P.M. fraud. The depositions of the O.P.M. bankruptcy trustees provide an interesting study in determining what effect the ABA's action on Model Rule 1.6 will have on the future conduct of attorneys faced with similarly difficult client fraud situations. According to his deposition, Hutner's suspicions first arose following a telephone conversation with Goodman of O.P.M. on June 11, 1980. In the meeting that followed, Goodman elicited assurances from Hutner that any disclosure of past acts would be protected by the attorney-client privilege. Despite these assurances, Hutner made no effort to force Goodman to reveal the extent of the fraudulent acts. Without disclosing any details, Goodman stated that John Clifton, O.P.M.'s chief financial officer, was resigning and that Clifton was mailing a "misleading" letter to Singer, Hutner regarding O.P.M. dealings.10

Although Hutner never received the letter, he was later informed by Clifton's attorney that O.P.M. had committed "substantial" wrongdoing and had supplied "false" documents to Singer, Hutner "that rendered some of [the firm's] legal opinions inaccurate" concerning O.P.M. leasing operations.11 Hutner was also told by Clifton's attorney that O.P.M. might not be able to continue operations without engaging in ongoing fraud.12 However, Clifton's attorney spoke in generalities and did not mention or produce the letter. Still, the firm apparently made no attempt to investigate the asserted ongoing nature of the fraud.

In mid-June of 1980, Singer, Hutner retained Joseph McLaughlin and Henry Putzel as counsel for the purpose of advising the firm concerning the difficult ethical decisions to be made.13 The two attorneys counseled that since there was no hard evidence that a fraud had been committed or was ongoing, the law firm was not required to withdraw from its representation of O.P.M.14

However, the firm was counseled to press Goodman for details of the wrongdoing. After several attempts by Hutner to elicit the information, Goodman finally began to relate the details in early September 1980.15 The firm informed Goodman on September 23, 1980, that it had formally decided

9. Id. Singer, Hutner and four other firms associated with O.P.M. have tentatively settled the litigation by agreeing to pay more than $65 million to the nineteen defrauded lenders.
10. Id. at 15, col. 4.
11. Id. By coincidence, Goodman was present when the letter arrived at Singer, Hutner. He grabbed it from an associate without allowing it to be read and subsequently concealed it from Hutner.
12. Id.
13. McLaughlin was dean of Fordham Law School at the time, and is now a federal district court judge in New York. Putzel is a former federal prosecutor, had taught legal ethics at Fordham, and was practicing law in New York at the time.
14. According to Putzel, "Everyone believed Goodman's representation that the fraud, whatever it was, had taken place in the past, and that he was in a confessional mood about it." Wall St. J., Dec. 31, 1982, at 15, col. 4.
15. Id. at 15, col. 5. At this point, however, Goodman was still reluctant to reveal the true scope of the fraud. His "estimates" of the amount involved were some $45 million short. Id.

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to resign. On September 30, Goodman submitted to the firm a list of past fraudulent transactions, some of which were dated through August. Nevertheless, Putzel still counseled not to disclose the information. According to Putzel, the mere fact that Singer, Hutner was defrauded and that it continued did not mean that the fraud was still continuing.

As a result of this advice, Hutner did not discuss the fraud with his law school classmate, a member of the Kaye, Scholer firm, which succeeded Singer, Hutner in representing O.P.M. When asked by his former classmate why Singer, Hutner had terminated the employment, Hutner only responded that he was prohibited from discussing the matter by the client confidence requirement. 16

II. ABA History and the Confidence Requirement

This unfortunate result—forced silence despite the client’s past and continuing fraud—as well as other difficulties present in the O.P.M. case, has given rise to a number of questions regarding the appropriate role of the traditional confidence requirement. Do professional ethics require such a tight-lipped position, as presumed by the Singer, Hutner firm, even if it means subsequent injury will certainly result? Should they? If not, to what extent may an attorney ethically disclose the fraudulent activity of a client?

A review of the ABA’s rather spotty history in dealing with these questions will provide some amount of guidance. One commentator suggests that the inconsistencies in earlier case law interpreting the attorney’s obligation are due to the somewhat vague scope of the term “fraud” itself. 17 Another limitation is that the ABA standards are not the “ethical law” for attorneys in this country. Unlike the rules of evidence governing the attorney-client privilege, which are statutory and judicial law, ABA rules of client confidence relating to professional ethics are the product of the legal profession. 18 The confidence rule applicable to a given attorney is the rule adopted by the highest court of the state in which the lawyer is practicing, 19 which may or may not coincide with the uniform rules promulgated by the ABA.

16. Id. at 15, col. 6. Consequently, Kaye, Scholer was likewise defrauded by Goodman in further loan agreements dating up until Feb. 11, 1981. Id.

17. See Kramer, Clients’ Fraud and Their Lawyers’ Obligations: A Study in Professional Irresponsibility, 67 Geo. L.J. 991, 996 n.29 (1979). The article cites cases varying in the interpretation of fraud under Canon 41 from tacit nondisclosure to deliberate misrepresentation: “In re Carroll, 244 S.W.2d 474, 475 (Ky. 1951) (attorney violated Canon 41 by remaining silent when his client in divorce proceeding gave testimony that attorney knew to be false); In re Stein, 1 N.J. 228, 236, 62 A.2d 801, 804-05 (1949) (attorney violated professional ethics by presenting divorce case known by him to be fraudulent).”

18. See Hazard, supra note 1, at 1064.

19. See Kramer, supra note 17, at 993, 994 n.19: “Attorneys practicing before certain federal regulatory agencies may also be required to adhere to ethical standards set by the agency.” Examples include the Internal Revenue Service, 31 C.F.R. §§ 10.21, 10.50 (1977), and the Securities and Exchange Commission, 17 C.F.R. § 201.2(e) (1977).
This diversity among the various states detracts from the principle embraced by the ABA that the disciplinary rules should be applied uniformly. Unfortunately, the inconsistency is no more prominently illustrated than in the area of client confidence and disclosure of fraud.

In 1928 the ABA adopted Canon 41, entitled "Discovery of Imposition and Deception," to its Canons of Professional Ethics. The Canon provided:

When a lawyer discovers that some fraud or deception has been practiced, which has unjustly imposed upon the court or a party, he should endeavor to rectify it; at first by advising his client, and if his client refuses to forego the advantage thus unjustly gained, he should promptly inform the injured person or his counsel, so that they may take appropriate steps.

As adopted, Canon 41 applied only to past fraud committed during the representation. It made no provision for withdrawal or disclosure of ongoing fraud.

In 1969 the ABA codified general principles of ethics in the Code of Professional Responsibility, which displaced the old canons. Under the Code, the general confidence requirement provides that "[a] lawyer shall not knowingly . . . reveal a confidence or secret of a client." An exception to this general principle allows, but does not require, a lawyer to reveal the intention of his client to commit a crime and the information needed to prevent it.

The exception allowing disclosure of the client's fraud, as allowed in Canon 41, was included in Canon 7 of the 1969 Draft, entitled "A Lawyer Should Represent a Client Zealously Within the Bounds of Law." The disclosure provision states:

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

The rule essentially corresponds to the old Canon 41. It removes past fraud

26. Id., DR 7-102(B)(1).
committed during representation from the protection of professional confidence, though apparently not the intent to commit a future fraud.\textsuperscript{27}

Following adoption of DR 7-102(B)(1) by the ABA, some commentators suggested that the new provision would subject an attorney to having to decide between violating the disclosure provision of DR 7-102(B)(1),\textsuperscript{28} or violating the rule against disclosing the client’s privileged communications.\textsuperscript{29} Consequently, the ABA amended DR 7-102(B)(1) in 1974 to prohibit disclosure “when the information is protected as a privileged communication.”\textsuperscript{30}

The ABA then attempted to clarify the amendment with an interpretation in Formal Opinion 341.\textsuperscript{31} The opinion instructed that the disclosure of fraud should not be made if it would violate the provision of DR 4-101. However, such an interpretation would virtually bankrupt the disclosure requirement because DR 4-101 prohibits the disclosure of any information “which would likely be detrimental to the client.”\textsuperscript{32} There would be nothing substantively left of DR 7-102(B)(1).\textsuperscript{33}

The opinion is made even more illogical when the exception of DR 4-101(C)(3) is considered, which allows disclosure if another disciplinary rule requires it. Thus, a reading of the two rules together under Opinion 341 results in the following circular logic: DR 4-101 prohibits disclosure unless it is permitted by another disciplinary rule. Disciplinary Rule 7-102(B)(1) mandates disclosure unless it is privileged information under DR 4-101. Disciplinary Rule 4-101 states that a communication is privileged unless disclosure is required by another rule . . . .\textsuperscript{34}

Because of the illogical reading of the two rules in light of Opinion 341, a majority of states,\textsuperscript{35} including Oklahoma,\textsuperscript{16} have not adopted the 1974

\textsuperscript{27} See Hazard, supra note 1, at 1067. See also ABA Comm. on Ethics & Professional Responsibility, Informal Op. 1210 (1972) (describes the duty of an attorney to disclose all nonprivileged information of the client’s past crime committed during the course of representation).

\textsuperscript{28} Additional requirements are imposed by DR 7-102(A)(7) (A lawyer shall not counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent), and DR 7-102(A)(8) (knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule).

\textsuperscript{29} See Model Code of Professional Responsibility DR 4-101 (1969 ed.). But see Kramer, supra note 17, at 994 n.14 ("the argument that a lawyer’s duty to disclose his client’s fraud conflicts with the attorney-client privilege is frequently exaggerated."). These disclosures were not privileged at the common law. See 5 B. Jones, Commentaries on the Law of Evidence § 2161 (2d ed. 1926); Note, Client Fraud and the Lawyer—An Ethical Analysis, 62 Minn. L. Rev. 89, 112 n.103 (1977).

\textsuperscript{30} Model Code of Professional Responsibility DR 7-102(B)(1) (1974 ed.).


\textsuperscript{32} Model Code of Professional Responsibility DR 4-101(A) (1979).


\textsuperscript{34} For an example of the difficult ethical decisions forced on the attorney by such a provision, see infra text accompanying notes 41-47.

\textsuperscript{35} See Brazil, supra note 21, at 604 n.6.

amendment to DR 7-102(B)(1). In these jurisdictions, disclosure of client fraud committed during the representation is governed by the 1969 version of the rule, which requires the attorney to persuade the client to rectify the effects of the fraud and to disclose the information if the client refuses.

In order to appreciate the magnitude of the changes that will result from adoption of the Model Rules of Professional Conduct, it is necessary to evaluate the obligations currently imposed on an attorney by the Code of Professional Conduct. The synopsis of the Singer, Hutner case will be used as an illustration to bring these obligations more clearly in focus and to aid in the comparison between the Code and the Model Rules. 37

III. Client Fraud Under the Code

As discussed above, the ethical duties of an attorney faced with client fraud vary significantly under the Code, depending on whether the state has adopted the 1974 amendment to DR 7-102(B)(1). The answers to these questions under the Code additionally depend on when the fraud is committed and whether it is continuing or terminated.

Past Fraud Committed Before the Representation

Under the Code, if an attorney learns that his client has committed past fraudulent activity before the attorney-client relationship began, he is strictly bound to maintain the confidence. Disciplinary Rule 4-101 generally provides that such confidence must be kept confidential. The narrow exceptions are when a particular law or court order compels disclosure, 38 or when disclosure is required for the attorney to collect his fees or defend against an action brought by the client. 39 The mandatory disclosure requirement of DR 7-102(B)(1) is inapplicable, as it is strictly limited to fraud committed "in the course of representation."

With regard to continued representation of the client, the mandatory withdrawal requirement of DR 2-110(B)(2) does not apply. Under this rule, withdrawal is required only when it is obvious that continued employment will result in violation of a disciplinary rule. Likewise, discretion to withdraw in this situation will generally not be available unless the client insists on conduct that is illegal or which is "likely" to result in a violation of a disciplinary rule. 40

Under these rules, the Singer, Hutner firm would not be entitled to either disclose or withdraw from representation for fraud committed by O.P.M. before the firm's representation. The situation is entirely different, however, concerning the fraud perpetrated by O.P.M. during the course of the firm's representation.

37. See supra text accompanying notes 8-16.
39. Id., DR 4-101(C)(4).
40. Id., DR 2-110(C)(2). See generally DR 2-110 for complete discussion of situations allowing for withdrawal.
Past Fraud Committed During the Representation

The primary ethical issue facing the Singer, Hutner firm was the appropriate action to take concerning the fraud committed by O.P.M. during the course of representation. According to depositions, the firm felt that the absence of concrete evidence that O.P.M. was engaged in continuing fraud obligated the maintenance of confidence. Assuming the correctness of Singer, Hutner’s assertion that it was convinced that all wrongful activity had ended, the firm was properly advised that it could not disclose the information.

Although DR 7-102(B)(1) would require disclosure in those states retaining the 1969 version of the rule, the New York version reaches a contrary result. New York has adopted the 1974 amendment to the rule that prevents disclosure of all “privileged” information, which has been interpreted by Formal Opinion 341 to include all “confidences” and “secrets” of DR 4-101.

The actions of Singer, Hutner in concealing the information are comparable to those taken by the attorney in the case of In re A, decided by the Supreme Court of Oregon, which has also adopted the 1974 amendment to DR 7-102(B)(1). In this case, the attorney allowed his client intentionally to mislead the court by failing to submit evidence that the estate in issue was being probated. The attorney was torn by the same ethical decision faced by Singer, Hutner: to violate DR 4-101 by disclosing, or to violate the mandatory disclosure provision of DR 7-102(B)(1). The court held that the attorney acted properly in concealing the information and supported its finding by referring to Formal Opinion 287:

In the case stated the lawyer should urge his client to make the disclosure, advising him that this is essential to secure for him any leniency in the event of the court’s finding out the truth. If the client will not take this advice, the lawyer should have nothing further to do with him, but despite Canons 29 and 41, should not disclose the facts to the court or to the authorities.

The consensus of states adopting the 1974 amendment supports Singer, Hutner’s action of concealing the fraud and withdrawing from the represen-

41. The attorney's obligation of disclosure when he learns of his client's intent to commit further crime will be discussed in the next section. Of primary difficulty in this regard is what evidence is required to establish the requisite "intention" of DR 4-101(C)(3). See Dike v. Dike, 75 Wash. 2d 1, 448 P.2d 490 (1968) (privilege does not attach regardless of fact attorney was unaware of client's purpose for seeking advice).

42. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B)(1) (1969). The 1969 version does not contain the exception prohibiting disclosure of "privileged" information, which has been interpreted by Formal Opinion 341, supra note 31, to include all confidences and secrets under DR 4-101.

43. 276 Or. 225, 554 P.2d 474 (1976).

The theory is that the attorney’s duty to conceal client confidences under DR 4-101 (formerly Canon 37) is paramount to the duty to report the fraud under DR 7-102(B)(1) (formerly Canons 29 and 41).

The decision of In re A illustrates the two-tier obligation of attorneys under the 1974 version of DR 7-102(B)(1). When privileged information is received clearly establishing that a fraud has been committed during the representation, the attorney must first attempt to persuade the client to rectify the fraud. Second, if the client refuses to so rectify, the attorney must resign. The failure to perform either obligation would result in a violation of DR 7-102(B)(1).

By withdrawing from its representation of O.P.M. soon after receiving what it believed to be sufficient evidence of past fraud, Singer, Hutner was not relieved of its ethical obligation under DR 7-102(B)(1). The firm must still counsel the client to rectify the past fraud, which is most effective before the firm withdraws. In theory, the peremptory advice combines with the notice of withdrawal to affected third parties to provide a substitute for substantive disclosure.46

But equally important to what the ethical obligation is for the attorney in this situation is the question of when the obligation is in fact imposed. Should a firm be allowed to sit idly by and accept its client’s word that no fraud has occurred, or do the rules impose a duty to investigate? Although Singer, Hutner maintains that it believed the O.P.M. fraud had ended,47 case law indicates that the firm had an affirmative duty to investigate, which would have triggered the ethical obligations of DR 7-102(B)(1) much earlier in the representation.

In In re Cauthen,48 the client was involved in a large check-kiting operation in which the attorney’s trust account was used. Cauthen deposited and withdrew funds from the account for his client, but claimed total ignorance of his client’s check-kiting scheme. In the subsequent disbarment proceedings, the court held that DR 7-102(B)(1) was obligatory on the attorney, despite his claim that he had no hard evidence of the fraud.

It is inconceivable that Cauthen, who had been practicing law for a period of 16 years and who had been formerly employed by a bank, would not have been aware of the purpose of this operation, yet Cauthen contends that he thought the checks given him for deposit were good . . . . We find as a fact that this Respondent in exercising ordinary prudence commensurate with his education and position in life would have known and did know that this “kiting” operation was taking place.49

45. In re Maloy, 248 N.W.2d 43 (N.D. 1976). North Dakota follows the rationale of In re A and has adopted the 1974 amendment to DR 7-102(B)(1).
46. For a critique of this theory, see infra text accompanying notes 88-90.
47. See supra note 14.
48. 267 S.C. 448, 229 S.E.2d 340 (1976). ,
49. Id. at 450-51, 229 S.E.2d at 342. See also Grand Isle Campsites, Inc. v. Cheek, 249 So.
Consequently, the court disbarred Cauthen for his violation of DR 7-102(B)(1) in failing to advise his client to rectify the fraud.

Under this analysis, Singer, Hutner would be ethically obligated to counsel O.P.M. to rectify the fraud and to withdraw from the representation if O.P.M. refused. Since New York has adopted the 1974 amendment to DR 7-102(B)(1), however, the firm was not permitted to disclose substantive information of the fraud to subsequent firms employed by O.P.M. or to affected third parties, such as Rockwell International.

However, under the majority of jurisdictions, a quite different result is reached. In those states that retain the 1969 version, an attorney in the Singer, Hutner position not only must counsel the client to rectify the wrongdoing but is also under a mandatory obligation to disclose if the client so refuses.\(^\text{50}\)

In *In re Price*,\(^\text{51}\) the attorney was suspended from practice for failure to disclose to the state’s welfare department his client’s failure to report previous settlements that would have precluded the client’s receiving further benefits: “Respondent [attorney] knowingly failed to disclose his receipt of settlement funds on behalf of [the client]. Such disclosure was required by law and was permitted under Disciplinary Rule 4-101(C). This conduct is violative of Disciplinary Rule 7-102(B) of the Code of Professional Responsibility.”\(^\text{52}\)

In the event the client refuses to rectify the past fraud committed during the representation, it is unlikely that he will consent to the attorney notifying the parties. Consequently, withdrawal in these jurisdictions would be mandatory because concealment after the attorney learns of the fraud is a violation of DR 7-102(B)(1).\(^\text{53}\) Consequently, an attorney in the O.P.M. situation would be required both to withdraw and to disclose substantive information in a jurisdiction such as Oklahoma, which retains the 1969 version of the rule.

**Client Intends to Commit a Future Fraud**

The final situation in which client fraud will trigger ethical obligations is when the attorney learns of a client’s intent to commit a fraud in the future. Information of this type is not ethically privileged under DR 4-101, and the attorney is free to disclose both the intent and the information needed to prevent such a fraud.\(^\text{54}\)


\(^{51}\) 429 N.E.2d 961 (Ind. 1982).

\(^{52}\) Id. at 965.

\(^{53}\) MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110(B)(2) mandates withdrawal if it is obvious that continued employment will result in a violation of a disciplinary rule.

\(^{54}\) MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(3) (1977). Although the rule
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Whether withdrawal is permissive or mandatory depends on the likelihood that the client will actually perpetuate the intended fraud. Withdrawal is permissive if it is "likely" that the client will do so, and becomes mandatory at the point when it is "obvious" that the fraud will be committed.

According to depositions in the O.P.M. case, this situation never arose for Singer, Hutner. Because the firm could not determine, on the basis of the evidence that it was willing to consider, that O.P.M.'s fraud was continuing, it could not inform the law firm that subsequently represented O.P.M.

It is this apparent vulnerability of the Code allowing clients to take advantage of professional confidentiality that has led to the current philosophical debates surrounding Rule 1.6. The next section of the note will compare the changes made by the Model Rules relating to confidentiality and client fraud, followed by a discussion of the 1983 amendments to the final draft, which were approved in toto at the 1983 annual convention in Atlanta.

IV. Final Draft of the Model Rules

Past Fraud Committed Before the Representation

The final draft of Proposed Rule 1.6 mirrors the provision of DR 4-101 by prohibiting disclosure of past criminal acts. Rule 1.6(b)(2) allows for disclosure to rectify the consequences of a past act only if the lawyer's services had been used. Additionally, discovery by the attorney of the client's former fraud without evidence of wrongdoing subsequent to the representation does not allow the attorney to withdraw.

Past Fraud Committed During the Representation

Although Proposed Rule 1.6(b)(2) does not appear on its face to differ much from the mandatory disclosure provision of DR 7-102(B)(1), a closer examination reveals two significant changes. First, under Rule 1.6, the attorney must not initially approach the client to counsel him to rectify the fraud; the attorney may go directly to the affected party and disclose the in-

speaks specifically to crime, courts logically extend the confidence exception to future frauds as well. See generally United States v. Aldridge, 484 F.2d 655 (7th Cir. 1973); Grummons v. Zollinger, 240 F. Supp. 63 (N.D. Ind. 1964), aff'd 391 F.2d 464 (7th Cir. 1964); Coleman v. Heidenreich, 336 N.E.2d 686 (Ind. 1977).

56. Id., DR 2-110(B)(2).
57. According to Mr. Hutner: "The advice we got is that a lawyer is supposed to assume, unless he has evidence to the contrary, that his client is telling the truth." Hutner recalls Putzel's advice: "The mere fact that Singer, Hutner was defrauded, and that it continued, doesn't mean it's continuing." Wall St. J., Dec. 31, 1982, at 1, col. 6. Yale Professor Geoffrey Hazard has criticized this aspect of the Singer, Hutner representation, and suggests that even reasonable diligence would have revealed an O.P.M. intent to further the scheme.
58. See supra note 5.
59. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(3) (Final Draft).
60. See supra note 5.
formation. Second, disclosure under the Model Rules is made completely discretionary, as opposed to the mandatory requirement of the Code.

Under the provisions of the Model Rules, Singer, Hutner, upon learning in September 1980 of O.P.M.'s past fraud committed during the representation, would have had complete discretion to notify Rockwell International and other affected parties without first having the obligation to approach and counsel O.P.M. As under the Code, if Singer, Hutner was reasonably convinced that the O.P.M. fraud had ceased, it would be under no obligation to withdraw from the representation.

Client's Intent to Commit Future Fraud

The Final Draft of the Model Rules allowed more discretion to the attorney's ability to disclose information than either the Discussion Draft Rule 1.7(c)(2) or the current Code DR 4-101(C)(3). Rule 1.7(c)(2) of the Discussion Draft allowed for disclosure for "deliberately wrongful" acts by the client. This language was believed to be too broad in that it would allow for disclosure of many less serious and nonfraudulent acts. When balanced against the interest in preserving client confidence, the overly broad discretion was amended during drafting of the Final Draft Rule 1.6.

The Final Draft version was amended to read "fraudulent act . . . likely to result in . . . substantial injury to the financial interests or property of another." This language strikes a much better compromise; though the right of a client to effective confidence should prevail over many of the less serious acts formerly included in Discussion Draft Rule 1.7, ethical rules

61. Model Rules of Professional Conduct Rule 1.6(b)(2) (Final Draft).
62. Compare the permissive language of Rule 1.6(b), supra note 5, with the mandatory language of DR 7-102(B)(1): "[H]e shall reveal the fraud to the affected person or tribunal . . . ." (Emphasis added.) See also Model Rules of Professional Conduct Rule 1.6, Notes, Code Comparison, at 10 (Final Draft).
63. See Model Rules of Professional Conduct Rules 1.16(a)(1), 1.16(b)(1), 1.16(b)(4) (Final Draft).
64. The Discussion Draft of the Model Rules provided:
   (b) A lawyer shall disclose information about a client to the extent it appears necessary to prevent the client from committing an act that would result in death or serious bodily harm to another person, and to the extent required by law or the Rules of Professional Conduct.
   (c) A lawyer may disclose information about a client only:
      (1) for the purpose of serving the client's interest, unless it is information the client has specifically requested not be disclosed;
      (2) to the extent it appears necessary to prevent or rectify the consequences of a deliberately wrongful act by the client, except when the lawyer has been employed after the commission of such an act to represent the client concerning the act or its consequences;
      (3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client, or to establish a defense to a civil or criminal claim or charge against the lawyer based upon conduct in which the client was involved; or
      (4) as otherwise permitted by law or the Rules of Professional Conduct.
65. See supra note 5.
should not interfere with an attorney's commendable desire to prevent and rectify the client's serious fraudulent acts.  

Additionally, the Final Draft permitted disclosure in order to prevent a client from committing a fraudulent act if the attorney "reasonably believes" that it will occur.  

This removes any apparent need for the concrete evidence that Singer, Hutner believed it needed before it could disclose to the other law firms and lessees. As the "substantial injury" requirement was clearly present in the O.P.M. case and therefore would have allowed disclosure, the new limitation is a desirable change from the Code's DR 4-101(C)(3) and Discussion Draft Rule 1.7(C)(2).

V. 1983 Amendments to Rules on Client Confidence

At the ABA Mid-Year Convention held February 7 and 8, 1983, in New Orleans, the House of Delegates amended every proposed rule dealing with client confidence. The action not only alleviated concerns that the Final Draft was drafted too heavily in favor of disclosure but went further and removed disclosure obligations currently in effect under the Code. Each of these amendments was approved by the House of Delegates during final adoption of the Model Rules at the Annual Convention in Atlanta in August 1983. As such, they represent the official ABA position on the appropriate standards of attorney conduct relating to client fraud. The limitations that have been imposed are unprecedented.

The most drastic change is that an attorney may no longer attempt to rectify the consequences of his client's fraud committed during the course of the representation. This amendment not only eliminates the intended effect of Proposed Model Rule 1.6(b)(2), but drastically changes the current mandatory rule under DR 7-102(B)(1). The amendment in effect reinstates the limitations of Formal Opinion 341, which has been rejected by all but a minority of states, because it effectively removes the obligation to disclose information of client fraud committed during the representation.

Rule 4.1, entitled "Truthfulness in Statements to Others," was also amended to prevent disclosure to third parties of the client's fraudulent intent. The amendment states that disclosure may not be made if such

66. Redlich, supra note 1, at 986.
67. See Rule 1.6(b)(1), supra note 5.
68. See Redlich, supra note 1, at 986 (discusses the term "deliberate wrongful act" as used in the Discussion Draft and supports limiting the disclosure provision to these more serious frauds).
69. See generally id; Kaufman, supra note 1.
70. Model Rule 1.6(b)(2) was entirely eliminated by amendment. See supra note 5. Additionally, the "fraudulent act" was removed from Rule 1.6(b)(1), leaving absolutely no permissible disclosure for fraudulent acts of the client.
71. See supra note 62.
72. See supra note 21. See also MODEL RULES OF PROFESSIONAL CONDUCT, Comments, Code Comparison (Final Draft) ("The rule further modifies DR 7-102(B)(1) by eliminating the reference to 'privilege' that was added to the Code of Professional Responsibility by amendment in 1974. That amendment has not been adopted by the majority of states.").
73. See supra note 5.
disclosure is "prohibited by Rule 1.6," and Rule 1.6 has been amended to prevent any disclosure of fraudulent activity.74

The amendment also eliminates the attorney's discretion to reveal a client's intent to commit a fraud under Final Draft Rule 1.6(b)(1).75 Such action is in direct opposition to cases holding that the attorney could exercise discretion to disclose such fraudulent intent under DR 4-101(C)(3).76

The House of Delegates did, however, preserve the attorney's obligation to inform the tribunal of the client's fraud by adopting, without amendment, Model Rule 3.3, entitled "Candor Toward the Tribunal."77 This results in a distinction being made between affected third parties and the tribunal. This result of preventing disclosure in one area and requiring it in the other has no support in the case law interpreting DR 7-102(B)(1), and though it reflects the delegates' support for the rationale of Formal Opinion 341, it stops short of applying that rationale where the courts are concerned.

Instead of allowing disclosure, as under the Final Draft Rule 1.6, the amended rules merely allow the attorney the discretion to withdraw under Rule 1.16(b)(5)78 if a client has used the relationship to commit fraud. Under the Final Draft, withdrawal was not permitted unless the attorney reasonably believed that further illegal conduct would result.79 Unchanged is the attorney's obligation to withdraw if it appears that fraudulent activity is in fact continuing.80

VI. Critique of ABA Amendments and Suggestions for Oklahoma

Past Fraud Committed Before the Representation

The Code of Professional Responsibility and both the Final Draft and amended versions of the Model Rules of Professional Conduct agree that fraud committed by the client before the representation began should not be disclosed when subsequently learned by the attorney. The profession has traditionally recognized the importance of confidence in this situation. By protecting this information, the client is encouraged to fully disclose all relevant facts to the attorney, thus enabling more effective representation. Often, it is the very fact of the former fraud for which the client seeks representation.

Allowing disclosure would substantially weaken the client's case, discourage open communication with the attorney, and thereby weaken the effectiveness of the adversary system. When balanced against the public's right to know, these benefits of confidence require that the attorney not be

74. Id.
75. Id.
76. See supra note 54.
77. See supra note 5.
78. Id.
79. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(b)(1) (Final Draft).
80. Id., Rule 1.16(a)(1) (Final Draft). See also Rule 1.2(d).
the vehicle by which the public is informed. Moreover, the professional relationship has not been used as the instrument of fraud. Thus, confidence does not impugn the integrity of the profession. This information is properly concealed and has been traditionally protected.

In the same manner, discovery of these past incidents by the attorney should not be grounds for withdrawal. It is precisely this kind of confidence that is often essential to adequate representation of the client. There should be no changes from this traditional treatment of past fraud.

_Fraud Committed During the Representation_

The major criticism of the amended version of Model Rules 1.6 and 3.3 is that it totally precludes the attorney from ever disclosing past client fraud, committed at the expense of the attorney-client relationship, no matter how serious the consequences. Such a result transforms the attorney’s _primary_ duty to his client into a _sole_ duty. Such a shift destroys the profession’s much-vaunted claim that its members are “officers of the court” and have special responsibilities to the public.81

The Discussion Draft Model Rule 1.7(c) allowed disclosure for all “deliberately wrongful” acts of the client. This would seemingly allow for disclosure of such things as refusal to file an income tax return or refusal to register for the draft.82 Consequently, the Final Draft version of Rule 1.6, which limited disclosure to the client’s “fraudulent act”83 achieved at the expense of the professional relationship, is far better terminology.

However, it is suggested that whenever the attorney-client relationship has been used to effect a fraudulent act, the attorney should be _obligated_ to disclose such fact to the affected party. The attorney has been a party, although an innocent one, to a fraud upon another person. Under the Final Draft Rule 1.6(b)(2), disclosure is merely discretionary.

Most important, under the view adopted by the majority of states, information of such acts committed during the representation is _not_ ethically privileged. DR 4-101(C)(2) instructs that information received from a client is not privileged if disclosure is permitted or required under another disciplinary rule. In the majority of states—those retaining the 1969 version of DR 7-102(B)(1)—this kind of fraud is required to be disclosed.

The drafters of the Model Rules properly adopted this overwhelming opinion that information of client fraud committed at the expense of the professional relationship is simply _not_ entitled to traditional protection. By amending Rule 1.6 to prohibit disclosure, the ABA House of Delegates has abandoned this well-reasoned position and subjected the attorney to new limitations previously rejected by the profession.

Conversely, the amended version of Rule 1.16(b)(5),84 allowing permissive

81. See Kramer, _supra_ note 17, at 1001.
82. See Redlich, _supra_ note 1, at 986.
83. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (Final Draft).
84. See _supra_ note 5.
withdrawal any time the client has utilized the representation to perpetrate a fraud, is desirable and should be adopted. Under both the Code's DR 2-110(B) and the Final Draft Rule 1.16, such withdrawal is generally not discretionary unless there is a substantial likelihood that the fraud will continue or will place the attorney in a position of violating a rule of professional ethics.85 Such a requirement need not exist when the attorney has already been the victim of an untrustworthy client. An attorney in the position of Singer, Hutner should be free to terminate the relationship when he learns that he has been defrauded by his own client in a relationship that is traditionally based on high trust and confidence.

Client's Intent to Commit a Fraud on a Person or Tribunal

Final Draft Rule 3.3, entitled "Candor Toward the Tribunal," was left unchanged by the delegates at the Mid-Year Convention. This rule requires the attorney to disclose to the court any material fraud that the client has committed on the court. The provision is consistent with case law86 and should be adopted.

The amended version of Rule 4.1, entitled "Truthfulness in Statements to Others," is less desirable. The Final Draft required an attorney to disclose facts to affected third parties to avoid assisting the client in attempted future fraud. The amendment to the rule prevents such disclosure when the information is protected under Rule 1.6, which, as amended, allows for no disclosure of fraudulent activity.

It is illogical to require withdrawal by an attorney in order to prevent him from aiding in the client's fraud and, at the same time, preclude the same attorney from seeking to prevent the fraud by disclosing relevant information to the potential victim.87 Instead, the Final Draft version of Rule 4.1, which mandates disclosure of facts necessary to prevent such fraud, should be adopted. Under that rule, an attorney in Hutner's position would not be forced to be an unwilling instrument in the furtherance of fraud by his former client.

In amending the confidence rules of the Final Draft, the ABA House of Delegates has defined the privilege in a manner never before embraced by the profession. Chairman Robert Meserve of Boston terms the amended version a rejection of the "public interest" and a "retreat" from present ethical codes in force in forty-eight states and the District of Columbia.88 Never-

85. Other grounds for permissive withdrawal are provided. An example is where the client insists on a course of conduct contrary to the judgment of the attorney in a matter not pending before a court.


87. See Model Rules of Professional Conduct Rule 1.16(a)(1) (Final Draft). Under the rule, withdrawal would be mandated under the provisions of Model Rule 1.2(d) (prohibits the attorney's employment in representation where fraud is involved).

theless, the House adopted the amendment by John Elam on behalf of the American College of Trial Lawyers, which prohibits disclosure of the client’s fraud.

Elam argues, “It’s a fallacy to make a lawyer a watchman or policeman over his client,” and that under the Final Draft the lawyer would have to give a client “Miranda warnings” before consultation. However, the position taken by the House of Delegates reflects a blindness to the fact that such disclosures are not privileged communications under the current Code. There is simply no support for the delegates’ position that the amended version protects an area of “traditional” client communication.

Defeated proponents of the Final Draft philosophically suggest that the amended version is not so drastically different from the Final Draft version. They suggest that withdrawal from representation, coupled with a withdrawal of the work product, will be implicit notice to potentially injured third parties that improprieties exist. In theory, such a result will provide some indication of fraud to third parties without actually disclosing substantive information about the fraud, thereby violating the privileged communication.

This suggestion, while attempting to rationalize the delegates’ action, is in reality an abandonment of the principles that initially led to the drafting of Model Rule 1.6. A primary factor underlying the Final Draft version was the interest that nonclients have in the integrity of the attorney-client relationship. By requiring disclosure of the most serious fraud to third parties, this nonclient interest was protected in the Final Draft.

The amended version of the rules totally ignores these nonclient interests by balancing them against the supposedly weightier interest of preserving the client’s privileged communications. This shift in values is unprecedented and unsupportable. The communications sought to be protected have never enjoyed the status of privileged communication under DR 4-101(C)(3). The amended version of the Model Rules now prohibits disclosure of a class of communication that is currently subject to discretionary disclosure in every jurisdiction, many of which require its disclosure.

Proposals for Oklahoma

The adopted version of the Final Draft of the Model Rules of Professional Conduct places new limitations on the attorney faced with an unethical client. The preceding section of this note has discussed the detrimental effect the rules will have on client fraud situations, as illustrated by the O.P.M. scandal.

The following proposals are offered to the Oklahoma bar as an alternative to the Model Rules with the hope that the truly great traditions of the profession will not now be abandoned in favor of the ABA’s latest adulteration of the attorney-client relationship.

89. Id.
90. See cases cited at supra note 86. The communications have never enjoyed the status of privileged information.
Rule 1.6 Confidentiality of Information
(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).
(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
(1) to prevent the client from committing a fraudulent act that the lawyer reasonably believes is likely to result in substantial injury to the financial interests or property of another;
(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, or to respond to the client’s allegations in any legal proceeding concerning the lawyer’s professional conduct on behalf of the client.
(c) A lawyer shall disclose such information necessary:
(1) to rectify the consequences of a client’s fraudulent act in the furtherance of which the lawyer’s professional services had been used;
(2) to comply with other law.

Rule 1.16 Declining or Terminating Representation
(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, 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;
(2) the lawyer’s physical or mental condition materially impairs the lawyer’s ability to represent the client; or
(3) the lawyer is discharged by the client.
(b) Except as stated in paragraph (c), 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;
(2) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer’s services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
(3) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client;
(4) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;
(5) the client has utilized the representation to perpetrate a crime or fraud;
(6) other good cause for withdrawal exists.
(c) When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

Rule 3.3 Candor Toward the Tribunal
(a) A lawyer shall not knowingly:
NOTES

(1) make a false statement of material fact or law to a tribunal;
(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;
(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
(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.

(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.

Rule 4.1 Truthfulness in Statements to Others

(a) In the course of representing a client a lawyer shall not knowingly:
(1) make a false statement of material fact or law to a third person; or
(2) 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.

(b) The duties stated in the Rule apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

Conclusion

An implicit theme of the Proposed Model Rules of Professional Conduct is to give the attorney guidance in his exercise of professional discretion when confronted by a situation demanding a choice between two legitimate and strongly held values. The adoption of the proposals herein for the rules on client confidence will allow for this crucial theme to be reinstated in the Model Rules.

The proposals proceed from the basic premise that a client’s right to assistance of counsel is qualified in part by the purpose he is seeking. A client has no right to legal assistance to commit a fraud. More important, the proposals reflect the writer’s belief that the Model Rules are intended not only to redefine the nature of the interests of the attorney and client but to incorporate into the rules of confidence the rights of nonclients and the integrity of the profession. One of these rights, simply put, is the right to expect that the professional relationship between attorney and client will not be adulterated by becoming an instrument for the commission of fraud, under the guise of preserving the great “traditions” of the profession.

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91. See Kutak, supra note 1, at 6.
92. Id. at 9.
93. Id. at 6. See also Redlich, supra note 1, at 982 (suggests the fate of the Model Rules may well hinge on the bar’s willingness to accept this additional value that the Model Rules envision).