REVEALING CLIENT CONFIDENCES

BY EDWARD J. CLEARY

One of the first lessons we are taught in law school is the paramount importance of keeping information confidential that is acquired in the course of the representation of a client. Above all else, we are taught, a client must be able to trust her attorney without reservation. Consequently, if an attorney, either intentionally or negligently, reveals client confidences, a breach of trust occurs that undermines the attorney-client relationship, both now and into the future.

On the other hand, some nonlawyer members of the public view attorneys as coconspirators, willing to keep quiet for a price, thus indirectly facilitating wrongdoing. Unless and until they, or a loved one, need the services of an attorney, these critics fail to see a need for such secrecy and view arguments made in support of confidentiality as morally bankrupt.

The legal profession has attempted to balance these competing interests over the decades, by providing that an attorney may reveal client confidences under certain carefully delineated circumstances. The individual states have taken the lead by attempting to modify the absolute prohibition against revealing client confidences; meanwhile, the American Bar Association's House of Delegates has blocked, for the most part, proposals to provide for significant exceptions to this duty in the Model Rules of Professional Conduct on a number of occasions, most recently in August of 2001.

LIMITING CONFIDENTIALITY

There has always been a tension between the goal of keeping inviolate the client's confidences and the need to give the lawyer the ability to deal with situations where disclosure is necessary to protect third parties or the legal system from substantial harm.[1]

Currently, ABA Model Rule 1.6 allows permissive disclosure of confidential communications in only two instances: 1. to prevent a client from committing a criminal act that is likely to result in "imminent" death or substantial bodily harm; or, 2. to establish a claim or defense or to respond to allegations on behalf of the

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lawyer in a controversy between lawyer and client or to establish a defense to a criminal charge or civil claim against the lawyer resulting from the client's conduct. The Ethics 2000 Commission sought to amend this rule in several significant ways. The proposed 1.6 provided for permissive disclosure to prevent the "reasonably certain" death or substantial bodily harm of another; to prevent the client from committing a crime or fraud that would be reasonably certain to result in substantial injury to the financial interests or property of another (using or having used the lawyer's services in furtherance of the fraud); or to prevent, mitigate or rectify a substantial injury to the financial interests or property of another resulting from or reasonably certain to result from the crime or fraud (again, using or having used the lawyer's services). Variations on these recommended amendments were defeated in the early 1980s and early 1990s in the ABA House of Delegates.

In August of this year, the ABA approved (by a 243 to 184 vote) the first proposed change in language to 1.6, allowing lawyers to reveal client confidential communications relating to the representation of a client to prevent "reasonably certain" death or substantial bodily harm, deleting the previous condition of the commission of a criminal act and the requirement of "imminent" death. The new language is aimed at allowing "lawyers to report acts by corporate clients that pose such dangers as accidents caused by defective tires or illness caused by the dumping of toxic wastes."[2] In approving this amendment, the ABA simply fell into line, since a recent survey indicates that every jurisdiction but California[3] allows disclosure where a client intends to commit a crime likely to result in death or great bodily injury.[4] One national news magazine had a more cynical take on this amendment, suggesting that lawyers made the change "partly as a way to repair their reputation in a world less tolerant of the powerful taking advantage of the powerless . . . The new rules offer lawyers a moral opportunity to sound the alarm about clients bent on doing harm — and of course, an opportunity for good publicity."[5]

Not all good publicity. At this same meeting of the House of Delegates in August, the proposed amendment that would have allowed lawyers to disclose financial fraud by a client was defeated 255 to 151. As a result, the third and final amendment, which would have provided for permissive disclosure of confidences when needed to mitigate the injury caused by the financial fraud, was withdrawn by the supporters of such a change. Opponents of these amendments, including the American College of Trial Lawyers, argued that such amendments would "unduly restrict the confidentiality of communications between client and counsel . . . placing lawyers in an untenable dilemma between their fiduciary duty to protect client confidences and secrets and the proposed authorization to act as whistleblowers against their clients ... ."[6] Ethics 2000 Commission member Lawrence Fox, a leading opponent of the amendments, argued that the proposals constituted a "gaping hole in the confidentiality obligations of lawyers"[7] and opened up lawyers to liability for client fraud for failing to disclose such fraud.

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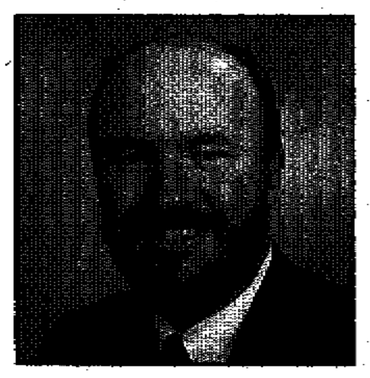

OUT OF STEP AGAIN

The same tired arguments that have been made by opponents to these recommendations over the past two decades once again carried the day at the ABA House of Delegates this past August. Contrary to the parade of horribles trotted out by opponents of these measures, such dire outcomes have not been experienced by the majority of the states that currently permit disclosure of confidences related to the substantial injury to the financial interests or property of another or, like Minnesota, that permit a lawyer to reveal the intention of a client to commit any crime. In addition, many states, again like Minnesota, allow disclosure to rectify the consequences of a client's criminal or fraudulent act. Not only isn't the sky falling, but the argument that lawyers will have increased liability due to these changes hasn't been borne out. Indeed, as one commentator has pointed out, "to say that a lawyer can't disclose these acts . . . opens him or her to major lawsuits." In one instance, a leasing company "issued $100 million in securities after securing bank loans with forged leases. After one of the firm's lawyers was told he could not disclose the information under the confidentiality rules, the law firm was sued for tens of millions of dollars by victims of the fraud."[8] The defeated proposals would have been a step in the right direction, neither threatening the attorney-client relationship nor subjecting lawyers to increased liability. All the heated rhetoric and bombastic arguments have little basis in fact. Lawyers are not whistleblowers by nature and would only use these permissive disclosure exceptions when they were forced to by their otherwise arguable complicity in the illegal and/or fraudulent conduct of their client.

CONCLUSION

The deletion from 1.6 of the requirement of "imminent" death before permissive disclosure of client confidences is a necessary change. The chair of the ABA Commission on Evaluation of the Rules of Professional Conduct (Ethics 2000 Commission) E. Norman Veasey, chief justice of the Delaware Supreme Court, called the vote against the other two proposed amendments to 1.6 "unfortunate" and a "setback."[9] He has indicated that the proposals may be resubmitted at the ABA midyear meeting in February of 2002. If Minnesota's experience with these rule provisions is any indication, the changes are not only long overdue but, if enacted,

will not have the dire consequences predicted by those whose arguments against these provisions ring hollow.
Theoretically, the ABA should lead the way for the states in formulating ethical precepts. When it comes to confidentiality and permissive disclosure, the ABA is bringing up the rear. □

NOTES

1. *Ethics 2000 Commission: Chair's Introduction and Executive Summary, p.4.*
2. *William Claiborne, "Bar Association Moves to Relax Rules Covering Client Secrecy,"* The Washington Post, *8/7/01, p. A04.*
3. See *Bob Egelko, "State Bar set to ignore new ABA rules - Client privacy remains priority in California,"* San Francisco Chronicle, *8/6/01.*
4. *Richard Zitrin, "Why Lawyers Keep Secrets About Public Harm,"* The Professional Lawyer, *Summer 2001, p. 19.*
5. *Adam Cohen, "The New Rules for Keeping Secrets,"* Time, *8/20/01, p. 66-67.*
6. *Letter of 7/23/01 to the Chair of the Ethics 2000 Commissioner Chief Justice Veasey from Earl J. Silbert on behalf of the American College of Trial Lawyers.*
7. *Proposed Amendment to Report 401 submitted to the ABA House of Delegates by Mr. Fox.*
8. *Claiborne,* The Washington Post, *8/7/01, p. A04, quoting Seth Rosner.*
9. William Claiborne, "Bar Group Rejects Bid To Change Secrecy Rule," The Washington Post, *8/8/01, p. A02.*

CORRECTION

Through an error in typesetting, a portion of the lawyer's oath discussed by Lawyers' Board Director Ed Cleary in his November "Professional Responsibility" column was omitted from his article. The quoted material, and the context in which it appeared, are given below. We regret this error and any confusion that may have resulted.
"... As lawyers we have a responsibility and a role to play.

> *'You do swear that you will support the Constitution of the United States and that of the state of Minnesota . . .'*[2]

This is the beginning of the oath each of us took upon being sworn in as a lawyer after passing the bar examination. ..."