In understanding the principle of confidentiality, it is important to distinguish among three related but distinct concepts: the ethical duty of confidentiality, the evidentiary attorney-client privilege, and the work product doctrine. Model Rule 1.6 expresses the ethical duty of confidentiality. Subject to certain exceptions that we will discuss later, the rule requires lawyers to maintain the confidentiality of information “relating to the representation,” under all circumstances, whether in connection with court proceedings or otherwise.

By contrast, the attorney-client privilege is a rule of evidence that deals with the question when a lawyer may be compelled in court or other official proceedings or investigations to reveal information received in confidence from a client. Although the scope of the attorney-client privilege depends on the rules of evidence applicable in each jurisdiction, a frequently cited formulation is the one offered by Professor Wigmore:

(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.1

1. 8 Wigmore on Evidence §2292, at 554 (McNaughton ed. 1961). Comment 3 to Model Rule 1.6 summarizes the distinction between the evidentiary privilege and the ethical duty of confidentiality. See generally Geoffrey C. Hazard, Jr., An Historical Perspective on the Attorney-Client Privilege, 66 Cal. L. Rev. 1061 (1978).
The work product doctrine, a discovery rule recognized by the Supreme Court in the leading case of Hickman v. Taylor,\(^2\) prevents discovery of materials prepared “in anticipation of litigation” unless the party seeking discovery makes a special showing that the party has “substantial need” for the materials and cannot obtain equivalent materials without “undue hardship.”\(^3\) Although client confidences may be embodied in attorney work product, the work product doctrine is designed to preserve the proper functioning of the adversarial system—to allow attorneys to prepare their cases without fear that material prepared in anticipation of litigation will be available to the opposing side.\(^4\) In criminal cases, where discovery is limited, the work product doctrine has little application.\(^5\)

The duty of confidentiality, the attorney client privilege, and the work product doctrine are all subject to exceptions that we will discuss in these materials.

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**A. The Ethical Duty and Its Exceptions**

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**Problem 3-1**

**Information About Unsolved or Contemplated Crimes**

You are an attorney with the office of the public defender. You have been appointed to represent Albert Simmons, who has been accused of a series of burglaries in the community.

For several months the police have been investigating the disappearance of a teenager. The family and friends of the teenager have organized a massive public campaign in an effort to obtain information about their daughter, but with no success. According to the local newspaper, the investigation is at a dead end, without any leads. Television reports have described the emotional suffering of the teenager’s family. In fact, the teenager’s father has been hospitalized because of stress.

During the course of one of your interviews with Simmons, he begins crying uncontrollably and tells you that he has a terrible secret that he can’t keep to himself any longer: He killed the girl that the police have been looking for. Simmons also tells you that he left her body in an abandoned mine several miles from the city. What would you do with this information?

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5. See 1 McCormick on Evidence §97.
Simmons goes on to tell you that he is sure the police will find her body and that they’ll trace it to him because he left “some other stuff there.” Simmons says he’s got to get out of jail to get the stuff and to hide the body. Simmons wants you to seek his release on bail. Assume that Simmons has a reasonable chance of being released on bail. Be prepared to analyze your ethical obligations and to explain how you would proceed.

Suppose you tell Simmons that he doesn’t qualify for bail. He tells you, “I’m dead if they find the body. I am going to bust out of here if I have to. I can get a gun.” What would you do? Why?

Suppose you have not revealed any of the information that Simmons has given to you. Three years have passed. One year ago the police arrested a man named Christopher Connors. Connors had in his possession a backpack that belonged to the missing teenager. Connors told the police that he had found the backpack in an abandoned mine where he had slept one night. Connors showed them where the mine was located. When police investigated the mine, they found the remains of the missing teenager. Connors denied knowing anything about the teenager’s death, but he was prosecuted and convicted of second-degree murder and has been sentenced to 30 years in prison. What if anything would you do with the information Simmons gave to you?

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Read Model Rules 1.2, 1.6, 1.16, and comments.

Exceptions to the duty of confidentiality: consent, prevention of harm, and past wrongful conduct

As we have seen, the ethical duty of confidentiality is very broad. Any information “relating to the representation” regardless of form (electronic, documentary, or oral) and regardless of source (client, third party, independent investigation by lawyer) is subject to the ethical duty. What about public information—for example, information that is in pleadings filed in court or that is in depositions taken in cases? The language of the Model Rules does not support an exception for “public information,” and the comments do not refer to this possibility. In Sealed Party v. Sealed Party the federal District Court in Texas held that the Texas Rules of Professional Conduct do not provide an exception to the duty of confidentiality to reveal either “public” information or “generally known” information. On the other hand, the

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6. Sealed Party v. Sealed Party, 2006 U.S. Dist. LEXIS 28392, at 39-65 (S.D. Tex. 2006). In the case of a former client, a lawyer may ethically “use” confidential information so long as the use is not detrimental to the former client, but may not “reveal” such information unless the information has become generally known. See id. at 62-65 and Model Rule 1.9(c)(2).
Restatement takes the view that “generally known” information is not subject to the duty of confidentiality. Under the Restatement view, information that has been revealed to others remains subject to the duty of confidentiality unless it is generally known. Information about the law, legal institutions, and similar matters is not subject to the duty of confidentiality even though the lawyer may acquire such information while working on a client matter, as long as the lawyer does not otherwise disclose client confidences. The rules of some jurisdictions, such as New York, provide exceptions for widely known public information.

Rule 1.6(a) provides that a lawyer may reveal confidential information if the “client gives informed consent.” For the definition of “informed consent” see Rule 1.0(e).

A dramatic example of the application of the consent exception is McClure v. Thompson. Attorney Christopher Mecca represented Robert McClure, who was accused of the murder of Carol Jones. When McClure was arrested, two of Jones’s children were missing. Mecca and McClure had several discussions about the children, but McClure did not tell Mecca whether they were dead or alive. However, McClure drew a map indicating where the children might be. Mecca had his secretary place an anonymous phone call to the authorities to inform them where the children might be found. Based on this information, the sheriff’s office located the bodies of the children. Mecca then withdrew from representing McClure, who was subsequently convicted of all three murders and sentenced to life in prison. McClure filed a petition for habeas corpus relief claiming that Mecca rendered ineffective assistance of counsel. He argued that Mecca failed to obtain his informed consent before disclosing confidential information, did not make a sufficient inquiry before disclosing confidences, and suffered from a conflict of interest. While McClure did not expressly consent to Mecca’s disclosure to the authorities, the court accepted the state court’s finding of fact that Mecca had “inferred” that McClure had consented to disclosure, but the court ruled that the fact of consent was insufficient because Mecca had not advised his client of the potentially harmful consequences of disclosure. Although the court found that Mecca was not authorized to disclose McClure’s confidences under the consent exception, it still denied relief. In a

8. Id. §59, cmt. d.
9. Id. §59, cmt. e.
10. New York Rule of Prof. Cond. 1.6(a) provides:

“Confidential information” does not ordinarily include (i) a lawyer’s legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

The rules of the District of Columbia do not contain such an exception, but these rules define the scope of the duty of confidentiality more narrowly than the broad definition contained in the Model Rules. See D.C. R. Prof. Cond. 1.6(a).
11. 323 F.3d 1233 (9th Cir. 2003).
12. Id. at 1244-1245.
2-1 decision, the court found that Mecca was authorized to disclose the information to prevent imminent death because he had a reasonable belief that the children were still alive. The majority was not completely comfortable with its decision, stating that the case was a close one. A strongly worded dissent argued that a lawyer must have a firm factual basis before disclosing a client’s confidences; the information Mecca had did not meet that standard and he failed to investigate further to determine whether the children were alive.

One of the most hotly debated issues in the profession over the past 40 years has been the extent to which the duty of confidentiality should be limited when disclosure would either prevent the client from committing a wrongful act or would rectify the consequences of a wrongful act that the client has committed. Model Rule 1.6 as originally adopted in 1983 contained a very narrow exception to the duty of confidentiality to prevent harm. Rule 1.6(b)(1) allowed a lawyer to reveal information relating to the representation of a client to prevent a client from engaging in criminal conduct that was likely to cause “imminent death or substantial bodily harm.” The 2002 amendments to the Model Rules broadened the harm-prevention exception to read as follows: “to prevent reasonably certain death or substantial bodily harm.” The revision to Rule 1.6 widens the exception to confidentiality by eliminating the requirement of a criminal act by the client. Thus, under the revised rule a lawyer would have discretion to reveal confidential information to prevent the execution of an innocent person. The rule would not, however, allow a lawyer to reveal confidential information regarding past crimes unless the revelation could prevent reasonably certain death or substantial bodily harm. In 2003 the ABA made further amendments to Rule 1.6 dealing with revelation of confidential information to prevent or rectify financial crimes or frauds when the lawyer’s services were involved. We will consider this issue in Problem 3-4 when we examine lawyers’ ethical and legal obligations regarding fraud by clients in business transactions.

13. Id. at 1246-1247.
14. Id. at 1247.
15. Id. at 1252-1256.
17. Symposium, Executing the Wrong Person: The Professionals’ Ethical Dilemmas, 28 Loy. L.A. L. Rev. 1543 (1996). Of course, even if a lawyer could ethically reveal confidential information to prevent an unjust conviction or incarceration, the attorney-client privilege might prevent the attorney from testifying about such communications. See Purcell v. District Attorney for the Suffolk Dist., 676 N.E.2d 436 (Mass. 1997) (holding that attorney could ethically reveal his client’s threats to commit arson, but attorney-client privilege prevented attorney from being called as a witness in prosecution for attempted arson; court holds that crime-fraud exception to the privilege does not apply).
Tort or criminal liability for failure to disclose confidential information to prevent or rectify wrongful conduct

The rules of professional conduct are not the only guidelines for determining whether a lawyer is authorized or required to disclose confidential information to prevent or rectify wrongful conduct. The Model Rules recognize and incorporate a requirement that lawyers comply with “other law.” Model Rule 1.6(b)(6) states that a lawyer may disclose confidential information to the extent the lawyer reasonably believes necessary “to comply with other law or a court order.” See also comment 12. What does “other law” require? In particular, does either tort or statutory law require disclosure of what would otherwise be confidential information?

In Tarasoff v. Regents of the University of California,18 a patient confided to a psychotherapist employed by the University of California his intention to kill a young woman who had rejected his advances. The doctor concluded that his patient should be committed and notified the police, who arrested the patient but released him when he appeared to be rational. The doctor did not notify the young woman or her family of the threat to her life. The patient subsequently carried out his threat and killed the young woman. The California Supreme Court held that her parents stated a cause of action against the defendants for negligent failure to warn the young woman of the threat to her life. The court held that the special relationship between doctor and patient was sufficient to create a duty of care to third parties foreseeably injured by the patient.19 Defendants argued that liability should not be imposed because psychotherapists cannot accurately predict dangerousness. The court rejected this blanket argument, noting that doctors were required only to exercise reasonable care, and in any event the argument did not apply to the case before the court since the doctor had accurately concluded that the patient was dangerous but had failed to warn the potential victim.20 Defendants also argued that the imposition of liability interfered with “free and open communication . . . essential to psychotherapy.” While recognizing that there was a public policy in favor of confidentiality between psychotherapist and patient, the court concluded that this policy must yield to the public policy in favor of preventing harm to others: “The protective privilege ends where the public peril begins.”21

Subsequent California cases, however, have limited Tarasoff to situations in which the patient threatens an “identifiable” victim rather than simply posing a danger to the community as a whole.22 Failure-to-warn

19. Id. at 344.
20. Id. at 345.
21. Id. at 346-347.
22. See, e.g., Thompson v. County of Alameda, 614 P.2d 728 (Cal. 1980). But see Reisner v. Regents of the University of California, 37 Cal. Rptr. 2d 518 (Ct. App.), review denied (1995) (doctor who learned that patient was HIV-infected during operation had duty to
claims have also been brought in other jurisdictions, but recovery has been rare.\textsuperscript{23}

Could attorneys be held liable in tort for failure to warn third parties of threats by their clients?\textsuperscript{24} Hawkins v. King County\textsuperscript{25} appears to be the only case that has dealt directly with the issue. In \textit{Hawkins} the court appointed an attorney to represent Hawkins, who was accused of possession of marijuana. The attorney learned from another lawyer employed by his client’s mother that his client was mentally ill and dangerous. A psychiatrist advised the attorney that his client was dangerous to himself and to others and should not be released from custody. The attorney represented the client at a bail hearing and obtained his release on a personal surety bond. The attorney did not inform the court of the information about his client’s dangerousness. Neither the judge nor the prosecutor raised any questions about the client’s dangerousness. Eight days after his release, Hawkins assaulted his mother and attempted suicide. The Hawkinses then brought suit naming the attorney as one of the defendants. They alleged two theories: First, that the attorney violated a duty imposed by rules of ethics and court rules to disclose to the court information about his client’s dangerousness. Second, based on Tarasoff, the attorney should be held liable for failure to warn of his client’s dangerousness. The court rejected the first theory. It found no specific provision in either the rules of ethics or court rules that required a lawyer to reveal adverse information about a client:

We believe that the duty of counsel to be loyal to his client and to represent zealously his client’s interest overrides the nebulous and unsupported theory that our rules and ethical code mandate disclosure of information which counsel considers detrimental to his client’s stated interest. Because disclosure is not “required by law,” appellants’ theory of liability on the basis of ethical or court rule violations fails for lack of substance.\textsuperscript{26}

As to the Tarasoff theory, the court appeared to hold that on appropriate facts a cause of action could be stated against an attorney for failure to warn, but that the case before it was distinguishable from Tarasoff:

\textsuperscript{23} Cases are collected in John C. Williams, Annotation, Liability of One Treating Mentally Afflicted Patient for Failure to Warn or Protect Third Persons Threatened by Patient, 83 A.L.R.3d 1201 (1978). \textit{See also} Ronen Avraham & Joachim Meyer, The Optimal Scope of Physicians’ Duty to Protect Patients’ Privacy, 100 Minn. L. Rev. Headnotes 30 (2016).

\textsuperscript{24} \textit{See generally} Davalene Cooper, The Ethical Rules Lack Ethics: Tort Liability When a Lawyer Fails to Warn a Third Party of a Client’s Threat to Cause Serious Physical Harm or Death, 36 Idaho L. Rev. 479 (2000); Vanessa Merton, Confidentiality and the “Dangerous” Patient: Implications of Tarasoff for Psychiatrists and Lawyers, 31 Emory L.J. 263 (1982).


\textsuperscript{26} \textit{Id.} at 365.
In the instant case Michael Hawkins’ potential victims, his mother and sister, knew he might be dangerous and that he had been released from confinement, contrary to Tatiana Tarasoff’s ignorance of any risk of harm. Thus, no duty befell Sanders to warn Frances Hawkins of a risk of which she was already fully cognizant. Further, it must not be overlooked that Sanders received no information that Hawkins planned to assault anyone, only that he was mentally ill and likely to be dangerous to himself and others. That Sanders received no information directly from Michael Hawkins is the final distinction between the two cases.

The common law duty to volunteer information about a client to a court considering pretrial release must be limited to situations where information gained convinces counsel that his client intends to commit a crime or inflict injury upon unknowing third persons. Such a duty cannot be extended to the facts before us.27

In addition to tort law, statutes may impose an obligation on lawyers to disclose confidential information to prevent or rectify harm. For example, in a few states statutes may require attorneys to reveal confidential information to prevent child abuse.28

If a statute expressly requires a lawyer to disclose information, the lawyer must comply with the statute, unless compliance would violate the client’s constitutional rights, a point discussed below. The situations in which a statute expressly imposes a disclosure obligation on an attorney are rare. Far more common are statutes that apply broadly to “any person” and do not include a specific exemption for attorneys.29 A famous example is the Lake Pleasant Bodies case, People v. Belge.30 Two lawyers, Armani and Belge, were representing a defendant accused of murder when the defendant informed them that he had committed three unsolved murders. The defendant told his lawyers of the location of one victim’s body. Belge went to the location and inspected the body to verify the client’s story. The lawyers did not reveal the information, but their knowledge later became public during the defendant’s trial as part of their insanity defense. Because of public outrage against the lawyers’ conduct, the district attorney presented the matter to a grand jury, which returned an

27. Id. at 365-366. Cf. State v. Hansen, 862 P.2d 117 (Wash. 1993) (en banc) (attorney has duty to warn judge of client’s intention to attack judge; Hawkins distinguished because mother and sister were aware of danger while judge was not).


29. See Rebecca Aviel, When the State Demands Disclosure, 33 Cardozo L. Rev. 675 (2011) (arguing that legislatures have broad authority to require disclosure by lawyers, but courts should require a clear statement of legislative intent before concluding that legislation does impose such an obligation).

indictment against Belge, but not against Armani, for violation of two provisions of the New York Public Health Law, one requiring that the dead be given a decent burial, the other directing any person knowing of the death of a person without medical assistance to report the matter to the authorities. Neither statute expressly referred to attorneys. While the trial court dismissed the indictment and the appellate division affirmed, the victory for the duty of confidentiality was far from clear-cut. The trial court did not decide that the attorneys’ conduct was clearly proper. Instead, it concluded that it must balance the rights of the defendant against the interests of society. The court seemed particularly influenced by the fact that the grand jury had returned an indictment against Belge but not against Armani, characterizing the grand jury as “grasping at straws.” The court went on to state that Belge’s conduct amounted to obstruction of justice and that the decision of the court would have been much more difficult if he had been indicted on that ground.

The appellate court was equally lukewarm in its support of Belge. While finding that the attorney-client privilege protected Belge from responsibility under the public health law, the court stated:

In view of the fact that the claim of absolute privilege was proffered, we note that the privilege is not all-encompassing and that in a given case there may be conflicting considerations. We believe that an attorney must protect his client’s interests, but also must observe basic human standards of decency, having due regard to the need that the legal system accord justice to the interests of society and its individual members.

We write to emphasize our serious concern regarding the consequences that emanate from a claim of an absolute attorney-client privilege. Because the only question presented, briefed and argued on this appeal was a legal one with respect to the sufficiency of the indictments, we limit our determination to that issue and do not reach the ethical questions underlying this case.31

What should be the scope of the duty of confidentiality?

Advocates of a strict view of confidentiality have typically made two arguments in support of their position. One argument rests on the “rights” of clients, either legal rights or more broadly defined moral rights. The other argument rests on the social utility of client confidentiality.

Proponents of a strong view of confidentiality have argued that clients have constitutional rights to confidentiality based on the Fifth Amendment privilege against self-incrimination and the Sixth Amendment right to counsel.32 In Fisher v. United States33 the Supreme Court held that the

31. 376 N.Y.S.2d at 772.
32. See Rebecca Aviel, When the State Demands Disclosure, 33 Cardozo L. Rev. 675, 701-722 (2011) (analyzing the Fifth and Sixth Amendment issues raised by disclosure statutes and concluding that in most cases disclosure statutes will not violate these constitutional rights).
privilege against self-incrimination protected information that a client had
given to a lawyer (1) if the attorney-client privilege applied to the conveyance
of the information from the client to the lawyer, and (2) if the information
could not have been obtained directly from the client because of the privilege
against self-incrimination. (We will consider Fisher in more detail in connec-
tion with Problems 3-2 and 3-3.) Under Fisher it is unlikely that a rule requir-
ing or allowing a lawyer to reveal confidential information to prevent a
criminal or wrongful act would violate the client’s privilege against self-
incrimination. First, the attorney-client privilege may not apply to the infor-
mation. If the client does not convey the information for the purpose of
seeking legal advice, the privilege does not apply. Thus, if the client simply
makes threats to harm others, the privilege may not apply. Even if the client
is seeking legal advice about his plans, then the privilege may still not apply
because one of the well-recognized exceptions to the attorney-client privilege
is the “crime-fraud exception.” Under this exception a client’s communica-
tions are not privileged when the client consults with the lawyer for the
purpose of obtaining assistance to engage in a crime or fraud or uses the
lawyer’s services to commit a crime or fraud. Second, the privilege against
self-incrimination applies only if the information is incriminating. To the
extent that the attorney’s disclosure prevents a crime (or the attempt to
commit a crime), there is no incrimination. Third, disclosure of informa-
tion to prevent noncriminal conduct would not implicate the privilege against
self-incrimination. Finally, disclosure would not violate the privilege against
self-incrimination if the client received “use immunity” against being pros-
ecuted based on the disclosed information. The attorney could request such
immunity from the authorities before revealing the client’s intention to com-
mit a crime.

Similarly, the Sixth Amendment right to counsel should not prevent
disclosure of information to prevent harm. First, the right to counsel does
not attach in criminal cases until the initiation of adversary judicial

34. Restatement (Third) of the Law Governing Lawyers §72.
35. See United States v. Alexander, 287 F.3d 811 (9th Cir. 2002).
36. Restatement (Third) of the Law Governing Lawyers §82.
37. But see Purcell v. District Attorney for the Suffolk Dist., 676 N.E.2d 436 (Mass. 1997). In Purcell an attorney reported to the authorities his client’s intention to burn down an apartment building where he had previously worked. While the lawyer’s disclosure prevented the crime of arson, the client was charged with attempted arson. The prosecution called the attorney as a witness in this case. However, the court found that the attorney-client privilege continued to apply even though the attorney had revealed the client’s threat, rejecting arguments that the client was not seeking legal advice when he made the threat and that the crime-fraud exception applied. Other courts may not agree with Purcell. See United States v. Alexander, 287 F.3d 811 (9th Cir. 2002) (attorney’s testimony regarding threats by client to harm attorney and others was not subject to the attorney-client privilege because the client was not seeking legal advice).
proceedings.\textsuperscript{39} A rule that required disclosure of information prior to that
time would not implicate the Sixth Amendment. Even if the disclosure obli-
gation attached after initiation of formal proceedings, the Sixth Amendment
requires that counsel conform to reasonable professional standards. A lawyer
who has a reasonable belief that another person faces imminent death or
substantial bodily harm and who discloses confidential information to pre-
vent this harm in accordance with the rules of professional conduct does not
violate the defendant’s Sixth Amendment right to effective assistance of
counsel.\textsuperscript{40} Finally, the Sixth Amendment does not guarantee a right to a
particular counsel, only a right to effective representation. Any Sixth Amend-
ment problem with a rule requiring lawyers to disclose information to prevent
serious harm could be resolved, therefore, by appointing another lawyer to
represent the client.\textsuperscript{41}

A broader statement of the clients’ rights argument focuses on moral
rather than legal rights.\textsuperscript{42} Under this view the client’s moral rights to privacy
and autonomy justify an obligation of confidentiality.\textsuperscript{43} But moral philosophy
recognizes that rights such as privacy and autonomy may be limited in various
situations, in particular when a person intends to harm others.\textsuperscript{44} Thus,
neither constitutional nor moral rights justify a strict rule of confidentiality.

The social utility argument for confidentiality claims that if clients are
couraged to reveal confidential information, including information about
wrongdoing, lawyers will be in a position to dissuade them from wrongful
conduct. Thus, a rule of confidentiality is more likely to prevent harm than a
rule of disclosure. The social utility argument is based on assumptions that
are both unproven and of doubtful validity.\textsuperscript{45} First, the argument assumes
that clients will be deterred from seeking legal advice about wrongful conduct
if lawyers have an obligation to disclose the intention of their clients to com-
mit wrongs. In many cases, clients have no choice about seeking represen-
tation. In addition, law-abiding clients have an incentive to seek legal advice

\textsuperscript{39} Rothgery v. Gillespie Cnty., 554 U.S. 191, 194 (2008) (“the right to counsel guar-
anteed by the Sixth Amendment applies at the first appearance before a judicial officer at
which a defendant is told of the formal accusation against him and restrictions are imposed on
his liberty”).

\textsuperscript{40} McClure v. Thompson, 323 F.3d 1233 (9th Cir. 2003).

\textsuperscript{41} See Subin, The Lawyer as Superego, 70 Iowa L. Rev. at 1127-1132; see also Crystal,

\textsuperscript{42} See generally Susan R. Martyn, In Defense of Client-Lawyer Confidentiality . . . And
Its Exceptions . . ., 81 Neb. L. Rev. 1320 (2003); Nancy J. Moore, Limits to Attorney-Client
Confidentiality: A “Philosophically Informed” and Comparative Approach to Legal and Medical

\textsuperscript{43} Id. at 188-191.

\textsuperscript{44} Id. at 194.

(confidentiality rules benefit lawyers but are of dubious value to clients and society as a whole).
See also Dru Stevenson, Against Confidentiality, 48 U.C. Davis L. Rev. 337 (2014) (discussing
passim empirical evidence of the lack of benefit of confidentiality).
regardless of the disclosure rule in order to conform their conduct to the law. Second, the argument assumes that lawyers can be effective in dissuading clients from engaging in wrongful conduct. In many cases, however, the wrongful nature of the conduct and the possible consequences are clear. Rather, the client intends to commit the act regardless of the consequences.46 Further, limited empirical studies of attorney-client confidentiality lend little support to the need for strict confidentiality.47

Even if one accepts the conclusion that a rule of strict confidentiality is not justified by either clients’ rights or social utility, a more difficult question remains: What should be the scope of the duty of confidentiality? In particular, how far should the “harm prevention” principle be taken? Professor Harry Subin argues that lawyers should have a duty to reveal confidential information to prevent clients from committing a felony.48 Other scholars have argued for even broader rules of disclosure.49

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**Problem 3-2**

**Dealing with Instrumentalities, Fruits, and Evidence of Crimes**

a. You and co-counsel represent Richard Wemark, who is being prosecuted by the state for murder of his wife, Melissa. The state is seeking the death penalty. The state contends that Wemark stabbed

46. See Crystal, Confidentiality Under the Model Rules of Professional Conduct, 30 Kan. L. Rev. at 225-226 (using a hypothetical analysis of types of clients that lawyers represent to conclude that a disclosure rule is more likely to reduce harm than a rule of confidentiality); Subin, The Lawyer as Superego, 70 Iowa L. Rev. at 1166-1172 (instrumental defense less persuasive than rights-based argument for confidentiality). See also Steven Shavell, Legal Advice About Contemplated Acts: The Decision to Obtain Advice, Its Social Desirability, and Protection of Confidentiality, 17 J. Legal Stud. 123 (1988) (developing model dealing with effect of advice and confidentiality on rational decisionmaking).

47. See Fred C. Zacharias, Rethinking Confidentiality, 74 Iowa L. Rev. 351 (1989). But see Leslie C. Levin, Testing the Radical Experiment: A Study of Lawyer Response to Clients Who Intend to Harm Others, 47 Rutgers L. Rev. 81 (1994) (survey of lawyer responses under New Jersey rule requiring lawyers to reveal confidential information to prevent clients from committing criminal, fraudulent, or illegal acts that would seriously harm others, casting doubt on wisdom of mandatory disclosure rule). See also Dru Stevenson, Against Confidentiality, 48 U.C. Davis L. Rev. 337 (2014) (discussing passim empirical evidence of the lack of benefit of confidentiality).

48. Subin, The Lawyer as Superego, 70 Iowa L. Rev. at 1172-1176.

his wife to death at their home. Her body had 15 stab wounds. Wemark
has told you that his wife attacked him with a knife and wounded him
several times. He says that he was finally able to wrest the knife from
her, stabbed her a couple of times in self-defense, and then ran from the
home and drove across the state before he was apprehended a day later.
Wemark says that he only stabbed his wife a couple of times, not 15, and
that he was sure she was alive when he fled. According to Wemark, his
wife was having an affair, but she and her lover, Sam Larson, had just
broken up angrily. Wemark claims that Larson must have come to the
house after Wemark left and killed Melissa. The police have thoroughly
searched the home and grounds but have been unable to find the murder
weapon. They also interviewed Larson. You don’t know the results of
those interviews, but the state has charged Wemark, not Larson.
Wemark has told you several times that he has no idea what happened
to the knife. You and your cocounsel have doubts about Wemark’s
truthfulness because a number of statements he has made to you
have turned out to be false. Trial is scheduled in 60 days. Today at a
meeting with Wemark he told you that he actually does know where the
knife with which he stabbed Melissa is located. Consider the following
questions about this situation:

(1) Should you ask Wemark where the knife is located?

(2) Assume you ask him where the knife is located, and he tells
you that he put the knife at the bottom of a box of tools in the
basement of his home. Would you go to his home to look for
the knife?

(3) Assume that you go to the home and find the box of tools that
Wemark mentioned. Assume you do not see the knife when
looking at the box of tools. Would you move the tools at the
top of the box to see if you can find the knife?

(4) Assume that you do move the tools at the top of the box and
you observe the knife, which appears to have some dried red
stains. Would you take possession of the knife?

(5) Assume that you decide to have the knife examined by a pri-
vately retained forensic expert. The examination reveals that
the bloodstains on the knife match the blood of Melissa and
there is no evidence of Wemark’s blood. The examination
also reveals that the knife has only Wemark’s fingerprints.
What would you do with the knife?

(6) If you keep the knife in a safety deposit box at a bank or in a
safe at your office, have you committed the crime of obstruc-
tion of justice?

b. You represent Robert Williams, a young man accused of
armed robbery of a local convenience store. Your client was identified
by the store clerk as the robber, but you think the identification is weak,
and you may well be able to obtain an acquittal or at least negotiate a favorable plea bargain. Your client denies that he was involved in the robbery. Today, Williams’ former girlfriend, Sasha Johnson, left a bag at your office with the following note: “This is Robert’s. He hid it in my apartment. I don’t want anything to do with this. Sasha Johnson.” What would you do with the bag?

c. You are meeting with a potential client, Norbert Ponderson. Ponderson is employed by an Internet security company, Internet Protection, LLC. The company has just told Ponderson that he is being laid off at the end of the month. The company requires Ponderson to return the laptop that the company has provided him. Ponderson is very worried and wants your advice about what to do about his laptop. He tells you that he has used the laptop at home and that it contains pictures of minors engaged in sexual activity. Possession of child pornography is a federal crime. 18 U.S.C. §2256. Ponderson has the laptop with him. What legal and ethical factors should you consider? What options can you identify? What would you do?

d. You represent Beverly Clingle, the CEO of Weddington Enterprises, a large real estate developer. Clingle is under investigation for commercial bribery. As part of your investigation, you have reviewed Clingle’s files, computers, cell phone, and email accounts. Your investigation has revealed a number of potentially incriminating documents and emails, which you have copied for your defense files. Do you have any obligation to turn this material over to the authorities?

Read Model Rules 1.2(d), 2.1, 3.4, 4.3, 8.4, and comments.

The obligations of lawyers regarding tangible criminal material in their possession

We saw in Problem 3-1 that under the Model Rules of Professional Conduct, lawyers have discretion to reveal confidential information to prevent reasonably certain death or serious bodily harm, but lawyers have an ethical obligation to maintain confidentiality of information regarding past crimes. Suppose, however, a lawyer has more than information about a past crime. Instead, the lawyer obtains possession of tangible property related to a crime. Lawyers can come into possession of instrumentalities of crimes (such as weapons), fruits of criminal conduct (stolen money, for example), contraband (material the possession of which is illegal, such as narcotics), or tangible evidence of crimes (for example, incriminating documents or tape recordings). The discussion that follows uses the term “tangible criminal material” to refer to these items collectively. Lawyers can obtain possession of tangible criminal material in a variety of ways: from clients, from third
parties, or as a result of their own investigation. What are a lawyer’s legal and ethical obligations if the lawyer comes into possession of tangible criminal material?

Lawyers may not assist their clients by actively concealing tangible criminal material. The leading case establishing this proposition is In re Ryder.50 Ryder represented an individual accused of bank robbery with a sawed-off shotgun. The FBI told Ryder that his client had bills taken in the bank robbery in his possession when he was arrested. Ryder’s client told him that a man whom he would not identify had paid him $500 to put a package in a safety deposit box, a story Ryder did not believe. Ryder had his client sign a power of attorney so that he could obtain possession of the client’s safety deposit box. When Ryder opened his client’s box, he found a sawed-off shotgun and a bag of money, among other items. Ryder transferred the contents of his client’s box to a new box that he had opened in his name. The FBI later discovered Ryder’s box containing the money and gun. Ryder testified that he intended to return the money to the true owner. He claimed that his purpose in transferring the money and gun to his own box was to support an argument that the money and gun were inadmissible in a prosecution against his client because of the attorney-client privilege. The court removed Ryder from the case, and later the United States attorney instituted disciplinary proceedings against him. The district court suspended Ryder from practice for 18 months. The court ruled that Ryder had gone far beyond the receipt of confidential information to become an active participant in concealment of a crime. On appeal the Fourth Circuit approved the district court’s order:

It is an abuse of a lawyer’s professional responsibility knowingly to take possession of and secrete the fruits and instrumentalities of a crime. Ryder’s acts bear no reasonable relation to the privilege and duty to refuse to divulge a client’s confidential communication. Ryder made himself an active participant in a criminal act, ostensibly wearing the mantle of the loyal advocate, but in reality serving as accessory after the fact.51

A number of courts have gone beyond the decision in Ryder and have held that attorneys who come into possession of tangible criminal material have an obligation to turn the material over to the authorities. In State ex rel. Sowers v. Olwell,52 Olwell, an attorney representing a suspect in a murder, came into possession of a knife. It was unclear from the case whether Olwell obtained the knife from his client or from another source. A few days before a coroner’s inquest into the death, Olwell received a subpoena duces tecum,

50. 263 F. Supp. 360 (E.D. Va.), aff’d, 381 F.2d 713 (4th Cir. 1967).
51. 381 F.2d at 714. Accord State ex rel. Oklahoma Bar Assn. v. Harlton, 669 P.2d 774, 777 (Okla. 1983) (attorney received five-year suspension after pleading guilty to charge of hindering prosecution by concealing shotgun; attorney “embraced the role of an accessory to a crime as a personal accommodation to its perpetrator”).
52. 394 P.2d 681 (Wash. 1964).
directing him to produce “all knives in your possession” that related to the
death. Olwell refused to comply with the subpoena, claiming a confidential
relationship of attorney and client. The Washington Supreme Court held that
Olwell must produce the knife.\(^53\) Although Olwell was under subpoena, the
court stated that he had an obligation “on his own motion” to turn the
material over to the authorities after a reasonable period of time for
examination.\(^54\)

Several courts have applied the *Olwell* approach to other types of tan-
gible criminal material and in a variety of other settings. In Morrell v. State\(^55\)
the defendant Morrell was charged with kidnapping and rape. A public
defender was appointed to represent Morrell. About a month later, the lawyer
received a telephone call from a friend of Morrell’s who had been living in
Morrell’s home with his consent while Morrell was awaiting trial. The friend
told the lawyer that he had found a legal pad that appeared to have a kidnap-
ning plan written on it. The lawyer took possession of the pad and asked his
client about it. Morrell denied that the plan implicated him; he said that he
had written the plan in response to a television report about an earlier kid-
napping. Unsure how to proceed, the lawyer sought the advice of the Ethics
Advisory Committee of the Alaska Bar Association. The committee advised
the lawyer to return the plan to the friend, to advise the friend about the law
on concealment of evidence, and to withdraw from the case if it became
obvious that a violation of rules of ethics would occur. The lawyer basically
followed this advice. The friend decided to turn the pad over to the police,
and it was introduced into evidence at Morrell’s trial, at which he was con-
victed. Morrell argued on appeal that his former attorney’s conduct had
denied him effective assistance of counsel. The Alaska Supreme Court
rejected this argument, relying on *Olwell*, *Ryder*, and other cases:

From the foregoing cases emerges the rule that a criminal defense attor-
ney must turn over to the prosecution real evidence that the attorney obtains
from his client. Further, if the evidence is obtained from a non-client third party
who is not acting for the client, then the privilege to refuse to testify concerning
the manner in which the evidence was obtained is inapplicable.\(^56\)

In dictum, the court stated that the attorney’s obligation would have been the
same even if he had received the evidence directly from his client rather than
from a third party.\(^57\) Similarly, in State v. Carlin\(^58\) the defendant was pros-
ecuted for making terroristic threats. The defendant had made tape

\(^{53}\) *Id.* at 684-685.
\(^{54}\) *Id.* at 686. *See also* Quinones v. State, 766 So. 2d 1165 (Fla. Dist Ct. App. 2000)
(defense attorney violated ethical obligations under Rules 3.4(a) and (c) by failing to disclose
possession of knife; court indicates that the attorney’s conduct may also be a crime).
\(^{56}\) *Id.* at 1210.
\(^{57}\) *Id.* at 1211.
recordings of his conversations, which he had turned over to his attorney. The court ordered the attorney to produce the tapes for the prosecution, but the attorney objected, claiming that he had obtained the tapes in a privileged communication. The court of appeals affirmed: “Since the appellant’s attorney had a duty to turn over the evidence under the line of cases mentioned above, there was no error in the court ordering him to do so.”

The Restatement of the Law Governing Lawyers incorporates the line of cases discussed above:

§119. Physical Evidence of Client Crime

With respect to physical evidence of a client crime, a lawyer:

(1) may, when reasonably necessary for purposes of the representation, take possession of the evidence and retain it for the time reasonably necessary to examine it and subject it to tests that do not alter or destroy material characteristics of the evidence; but

(2) following possession under Subsection (1), the lawyer must notify prosecuting authorities of the lawyer’s possession of the evidence or turn the evidence over to them.

The Model Rules provide that “applicable law” determines a lawyer’s ethical obligations with regard to possession of tangible criminal property. See Comment 2 to Rule 3.4.

While most of the cases have involved situations in which lawyers have been subject to subpoena or in which defendants have made claims of ineffective assistance of counsel, lawyers who keep possession of tangible criminal material run the risk of disciplinary action or criminal prosecution.

59. Id. at 328. See also In re Original Grand Jury Investigation, 733 N.E.2d 1135 (Ohio 2000) (attorney who received possession of threatening letter written by client must relinquish the letter to law enforcement and comply with any subpoena); Henderson v. State, 962 S.W.2d 544 (Tex. Ct. Crim. App. 1997) (en banc), cert. denied, 525 U.S. 978 (1998) (trial court properly required production of maps in lawyers’ possession showing where baby was buried because privilege must yield when possible to prevent death or serious injury).

60. The comments to the Restatement broadly define the types of material subject to the attorney’s duty to produce:

This Section applies to evidence of a client crime, contraband, weapons, and similar implements used in an offense. It also includes such material as documents and material in electronically retrievable form used by the client to plan the offense, documents used in the course of a mail-fraud violation, or transaction documents evidencing a crime.

Witness statements, photographs of the scene of a crime, trial exhibits, and the like prepared by a lawyer or the lawyer’s assistants constitute work product and thus are not subject to the Section, even if such material could constitute evidence of a client crime for some purposes, such as if waived. . . .

Restatement (Third) of the Law Governing Lawyers §119, cmt. a.

61. See In re Olson, 222 P.3d 632 (Mont. 2009). In Olson a defense lawyer was subject to a disciplinary proceeding for failing to turn over to the prosecution 13 sexually provocative photographs of underage girls found in his client’s home when the client was being prosecuted for child sex abuse. The lawyer was able to avoid discipline mainly because he had obtained an ex parte protective order allowing him to keep possession of the photographs.
for violation of statutes dealing with obstruction of justice, concealment of evidence, and similar crimes. In Morrell the court discussed the application of criminal statutes as follows:

While statutes which address the concealing of evidence are generally construed to require an affirmative act of concealment in addition to the failure to disclose information to the authorities, taking possession of evidence from a non-client third party and holding the evidence in a place not accessible to investigating authorities would seem to fall within the statute’s ambit.62

In Commonwealth v. Stenhach63 two public defenders were prosecuted for hindering prosecution and tampering with evidence because they kept possession of a rifle stock used in a homicide committed by their client. The lawyers had learned of the existence and location of the weapon in a confidential communication from their client. The jury found the defendants guilty. The appellate court first joined the “overwhelming majority of states which hold that physical evidence of crime in the possession of a criminal defense attorney is not subject to a privilege but must be delivered to the prosecution.”64 The court, however, then went on to reverse the defendants’ convictions on the ground that the statutes as applied to them were vague and overbroad.

Attorneys facing the question of how to deal with tangible criminal material, however, can take little comfort from Stenhach. First, the attorneys were convicted at trial and only obtained a reversal on appeal. The emotional and financial costs to them were undoubtedly great. Second, given the body of law now on the books requiring lawyers to turn over tangible criminal material to the authorities, other courts are much less likely to be sympathetic to due process claims.

The federal obstruction of justice statute may also apply to a lawyer’s possession of tangible criminal material. In general, the statute prohibits any person (including lawyers) from knowingly altering or destroying material with the intent to hinder court or agency proceedings.65 The statute does not require that a proceeding be pending, but it must at least be foreseeable.66 Whether a proceeding is foreseeable is likely to be a question of fact, which means that a motion to dismiss an indictment for obstruction of justice will typically be dismissed. In United States v. Russell,67 the defendant was

62. 575 P.2d at 1212. See also State ex rel. Oklahoma Bar Assn. v. Harlton, 669 P.2d 774 (Okla. 1983) (disciplinary proceeding based on attorney’s pleading guilty to charge of hindering prosecution by concealing shotgun).
64. Id. at 119.
representing a church that had learned that its long-time choirmaster had child pornography on his computer. The church, which had decided to dismiss the choirmaster but not to report his conduct to the authorities, had custody of the computer. The lawyer knew that possession of child pornography was a crime. He did not think that there was any proceeding or investigation involving the choirmaster, so he decided that the best course of action was to destroy the computer, eliminating the risk of criminal action against the church or its officials based on continued possession of the computer. The lawyer also thought that his conduct was justified because the computer contained contraband, and he did not believe that he was committing a crime because he did not think any proceeding or investigation existed. However, he was wrong. The FBI was currently investigating the choirmaster, an extremely bad actor who had possessed child pornography for years and had sexually exploited children. The FBI contacted the attorney, who fully cooperated and informed them of his destruction of the computer. However, the US Attorney decided to indict the attorney for obstruction of justice. The district court denied the attorney’s motion to dismiss the indictment because the court concluded that the allegations of the indictment were, if proved, legally sufficient to constitute a crime. The attorney later pled guilty to misprision of a felony. He was suspended from the practice of law for six months. His saga does end at least somewhat happily; he has been reinstated and resumed his successful practice.68

Despite the widespread acceptance by the courts of the attorney’s duty to turn over tangible physical evidence as articulated by Olwell (scholars have been quite critical of this line of authority as discussed below), lawyers confronted with actual or potential possession of tangible criminal material may face a number of questions regarding the application of the doctrine.

Application of the attorney-client privilege after tangible criminal material is turned over to the authorities

The line of cases discussed in the preceding section establishes the principle that lawyers have a duty on their own motion even in the absence of a subpoena to turn over to the authorities tangible criminal material that comes into their possession. After the material is turned over to the authorities, does the attorney-client evidentiary privilege have any relevance? In particular, can the prosecution introduce evidence of the source of the incriminating material? The prosecution may claim a need to prove the source of the material to establish a foundation for admission of the evidence. On the other hand, the defense will obviously be severely prejudiced if the trier of fact

68. For discussion of the case, see Sisk, The Legal Ethics of Real Evidence, 89 Wash. L. Rev. 819.
learns that defense counsel turned over incriminating material to the authorities.69

In People v. Meredith70 one of two codefendants was accused of conspiracy to murder. A crucial fact in the case was the location of the victim’s wallet. The defendant had told his lawyer that the wallet was in a trash can behind his residence. The lawyer’s investigator retrieved the wallet and the attorney then turned it over to authorities. At trial the defense and prosecution agreed that the prosecution could introduce the wallet into evidence and that the conversations between the defendant and his lawyer were privileged. The issue in the case was whether the prosecution could call the investigator to testify regarding his observation of the location of the wallet. The court first held that the attorney-client privilege applied not just to communications between attorney and client but also to observations made as a consequence of protected communications. The court also held, however, that an observation by a lawyer or his agent would lose its privileged character if “the defense by altering or removing physical evidence has precluded the prosecution from making that same observation.”71

The Court in State ex rel. Sowers v. Olwell (discussed above), however, struck a balance between the state’s need for evidence and preservation of the attorney-client privilege:

We think the attorney-client privilege should and can be preserved even though the attorney surrenders the evidence he has in his possession. The prosecution, upon receipt of such evidence from an attorney, where charge against the attorney’s client is contemplated (presently or in the future), should be well aware of the existence of the attorney-client privilege. Therefore, the state, when attempting to introduce such evidence at the trial, should take extreme precautions to make certain that the source of the evidence is not disclosed in the presence of the jury and prejudicial error is not committed. By thus allowing the prosecution to recover such evidence, the public interest is served, and by refusing the prosecution an opportunity to disclose the source of the evidence, the client’s privilege is preserved and a balance is reached between these conflicting interests.72

The Restatement expands on the balancing approach used in Olwell:

The prosecution and defense should make appropriate arrangements for introduction and authentication of the evidence at trial. Because of the risk of prejudice to the client, that should be done without improperly revealing the source of the evidence to the finder of fact. The parties may also agree that the tribunal may instruct the jury, without revealing the lawyer’s involvement, that an appropriate chain of possession links the evidence to the place where it

71. Id. at 48.
72. 394 P.2d at 685.
was located before coming into the lawyer’s possession. In the absence of agreement to such an instruction by the defense, the prosecutor may offer evidence of the lawyer’s possession if necessary to establish the chain of possession.\textsuperscript{73}

However, if the lawyer obtains the physical evidence from a third party, not the client, the attorney-client privilege does not apply and the lawyer or the lawyer’s agent, such as an investigator, may be compelled to testify as to the source of the evidence.\textsuperscript{74}

**Application of the Fifth Amendment privilege against self-incrimination**

Does the obligation imposed on lawyers to turn over to the authorities tangible criminal material that is in their possession violate the client’s Fifth and Fourteenth Amendment privilege against self-incrimination? Analysis of this issue begins with the Supreme Court’s decision in Fisher v. United States.\textsuperscript{75}

In *Fisher* the Supreme Court established Fifth Amendment principles applicable to this situation. *Fisher* involved an investigation of possible civil and criminal violations of the federal income tax laws. The taxpayers obtained their accountants’ work papers relating to the preparation of their tax returns and turned the documents over to their attorneys for assistance in the investigation. The Internal Revenue Service subsequently issued subpoenas to the attorneys seeking production of these documents. When the attorneys refused to comply, the government brought enforcement actions against them.

*Fisher* considered two major issues: Does the privilege against self-incrimination apply to documents voluntarily prepared by the defendant or third parties? Can the privilege continue to apply when a client transfers documents to his attorney? On the first issue, the Court held that the privilege protects a criminal defendant from being compelled to give incriminating testimony against himself; it does not bar the use of incriminating evidence against a person. Because the accountants’ work papers did not involve any testimony by the taxpayers, they were not subject to the privilege against self-incrimination.\textsuperscript{76} In its discussion the Court confirmed that “purely evidentiary (but ‘nontestimonial’) materials, as well as contraband and fruits and

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\textsuperscript{73} Restatement (Third) of the Law Governing Lawyers §119, cmt. c. \textit{See also} Hitch v. Pima County Superior Court, 708 P.2d 72 (Ariz. 1985) (en banc) (defendant forced to choose between having lawyer testify or stipulation regarding original location of material).

\textsuperscript{74} \textit{See} State v. Abdullah, 348 P.3d 1, 104 (Idaho 2015) (when the location of real evidence is revealed to defense counsel by a non-client third party, then the attorney-client privilege does not prevent the state from proving, even through testimony from the attorney or the attorney’s agent, where and how the evidence was located).

\textsuperscript{75} 425 U.S. 391 (1976).

\textsuperscript{76} \textit{Id.} at 409–410.
instrumentalities of crime, may now be searched for and seized under proper circumstances."\(^{77}\)

The Court qualified the proposition that nontestimonial materials may be searched and seized by recognizing the "act of production" doctrine. The Court noted that the act of production of documents voluntarily prepared (as opposed to their substantive content) could have testimonial aspects, depending on the circumstances. In some cases, production of documents or other evidence could establish their existence, possession or control by the taxpayer, or authentication.\(^{78}\) In a subsequent case, United States v. Doe,\(^{79}\) the Court applied the act of production doctrine and held that the government could not enforce a subpoena directed to the owner of sole proprietorships seeking the production of voluntarily prepared business records unless it granted the defendant "use immunity" from any incrimination resulting from the production of the material.\(^{80}\)

On the second issue, because the Court had defined the privilege as protecting a person from being compelled to give incriminating testimony, it ruled that the privilege did not prevent enforcement of the subpoenas against the attorneys; the subpoenas did not compel the taxpayers to do anything.\(^{81}\) While the privilege against self-incrimination no longer applied directly, it still continued to apply indirectly:

> Where the transfer is made for the purpose of obtaining legal advice, the purposes of the attorney-client privilege would be defeated unless the privilege is applicable. "It follows, then, that when the client himself would be privileged from production of the document, because of self-incrimination, the attorney having possession of the document is not bound to produce."\(^{82}\)

Thus, under *Fisher* an attorney is not bound to produce information if (1) the attorney received the information from a client in a communication that is subject to the attorney-client privilege and (2) the compulsion, if directed toward the client rather than the attorney, would violate the Fifth Amendment because the client would be compelled to give incriminating testimony against himself.

It is unclear the extent to which *Fisher* and *Doe* apply to the duty of lawyers to deliver to the authorities tangible criminal material in their possession. In many cases it would appear that an attorney’s production of the

\(^{77}\) *Id.* at 407.

\(^{78}\) *Id.* at 410.


\(^{80}\) *Id.* at 616-617. In United States v. Hubbell, 530 U.S. 27 (2000), the Court held that the grant of use immunity must be coextensive with the scope of the privilege against self-incrimination. Therefore, the grant of use immunity prohibited the prosecution from making both direct and derivative use of the material produced under the grant of immunity. The prosecution must show that evidence arises from a legitimate source wholly independent of produced testimony. *Id.* at 39-40.

\(^{81}\) 425 U.S. at 397.

\(^{82}\) *Id.* at 404 (emphasis in original).
material would not violate the client’s privilege against self-incrimination. Under Fisher, the privilege against self-incrimination does not apply unless the attorney received the material in a communication that was subject to the attorney-client privilege. Thus, if the attorney received the material from a third party, not the client, the privilege would not generally apply. Similarly if the attorney received the material for the purpose of hiding it from authorities, as in Ryder, subsequent production by the attorney, either voluntarily or pursuant to subpoena, would not violate the client’s privilege against self-incrimination because the conveyance to the attorney would almost certainly be subject to the crime-fraud exception to the attorney-client privilege. However, if the attorney received the material from the client in a communication that was subject to the attorney-client privilege, and the attorney’s production of the material established the existence of the material, the defendant’s possession or control of the material, or the material’s authenticity, then under the act of production doctrine, the defendant’s privilege against self-incrimination could be infringed. The state could respond by granting the defendant use immunity, but this would prevent the state from making any direct or derivative use of the produced material. The state would need to prove the tangible criminal material through a legitimate source wholly independent of the defendant and his attorney. This is likely to be very difficult to do, but not necessarily impossible. For example, in Ryder the authorities learned about the attorney’s safety deposit box from other sources. Similarly, in Olwell, the authorities learned that the attorney might be in possession of a knife presumably from sources other than the attorney or the defendant.

Criticism of the current state of the law

Scholars have been quite critical of the duty to turn over tangible criminal material. Writing in 1991, Professor Kevin Reitz argued that the duty was fundamentally inconsistent with the privilege against self-incrimination as recognized by Fisher and Doe. Reitz contended that the Olwell line of cases effectively transformed lawyers into government agents. To avoid this problem, Reitz recommended recognition of a new “protected privilege” in which defense counsel would be allowed to assert the client’s privilege against self-incrimination. If recognized, this privilege would prevent clients

83. See People v. Sanchez, 30 Cal. Rptr. 2d 111 (Ct. App., review denied (1994)) (no violation of privilege against self-incrimination when defense counsel turned over incriminating diaries that he received from defendant’s sisters to court).

84. For a recent case finding a Fifth Amendment violation when a judge issued a subpoena compelling a law firm to produce a telephone that it had received from the client, see In the Matter of a Grand Jury Investigation, 22 N.E.3d 927 (Mass. 2015).


87. Id. at 573.
from being disadvantaged when they transferred tangible criminal material to their lawyers. At the same time, Reitz realized that possession by lawyers could interfere with government investigations. To protect the government’s legitimate investigative interest and to level the playing field for defendants and the government, Reitz called for a new investigative procedure involving a “hybrid order,” a combination of a subpoena and a search warrant that the government could use to obtain tangible criminal material in the possession of a client’s lawyer. Of course, the lawyer would be able to raise whatever defenses might be available to the hybrid order, including the new protected privilege.88

More recently, Professor Stephen Gillers has expanded on Reitz’s analysis.89 Gillers begins his analysis with three principles. First, a client should not be worse off because his lawyer has received an item with evidentiary value or has learned its location. Second, the state should also not be worse off because a lawyer has received or knows of such property. Third, if the two premises are in conflict, the client’s interests should prevail but only if the lawyer’s possession serves a legitimate goal of legal representation or public policy.90

Gillers argues that there are often legitimate reasons why a lawyer would want to take possession of tangible criminal material. Sometimes these reasons are based on the interests of clients, but not always. For example, a lawyer may take possession so as to be able to return stolen property to its rightful owner, to protect the property from loss or destruction, to protect the safety of the public, or because the lawyer may have possession against her will. Gillers would allow lawyers to take possession of tangible criminal material without imposing an affirmative duty to turn the material over to the authorities if the attorney has a legitimate reason for taking possession of the material. Gillers, like Reitz, recognizes that the government has a legitimate interest in preventing lawyers from interfering with their investigations. He argues that in those cases where the government knows that a client is represented by a lawyer with regard to a criminal matter, the government may proceed to obtain tangible criminal material from the lawyer either by subpoena or search warrant. To deal with those cases in which the government may not know that a particular individual associated with a crime may be represented by counsel, Gillers proposes the creation of a registry where attorneys would be required to list their representation so that the state could direct its investigative efforts against the lawyer as well as the client, recognizing, of course, that the lawyer could raise various defenses against a government search or subpoena.

88. Id. at 660.
90. Id. at 821-822.
In particular, Gillers argues for the following rules:

1. A lawyer should not take possession of tangible criminal material unless the lawyer has a good reason for doing so. If the lawyer takes possession, the state may require the lawyer to testify about chain of custody even if the testimony is damaging to the client.

2. A lawyer has no duty to take possession of tangible criminal material even if the lawyer has a good reason for doing so.

3. A lawyer may take possession of such material temporarily to test or inspect the property or otherwise competently represent the client, but must return the material to its source unless the lawyer is allowed to keep the property indefinitely.

4. A lawyer may take possession of tangible criminal material indefinitely if the lawyer has good reason for doing so, which includes danger to others, when the property belongs to a third person but immediate return would incriminate the client, the item has exculpatory value, or return would be impossible.

5. When a lawyer is allowed to retain an item either temporarily or indefinitely, the state’s investigative interest can be protected by allowing the new investigative procedure (i.e. search warrant or subpoena directed at lawyer), like the one recommended by Reitz, coupled with a registry in which lawyers who represent clients in criminal matters identify the client. Thus, if the client becomes a person of interest or an accused in a criminal matter, the state may determine that the lawyer represents the client and direct a subpoena or search warrant at the lawyer, who can raise any applicable defenses.91

6. Gillers would also require lawyers who have possession of tangible criminal material to deliver it anonymously to the authorities or the true owner if delivery can be done without harm to the client.92

Gillers argues that if lawyers handle tangible criminal material in accordance with the rules he provides, they should not be subject to criminal prosecution or disciplinary action.93

Professor Gregory Sisk bemoans the lack of clarity in the law, resulting in a chilling effect on lawyer representation of criminal defendants. He provides a very useful analysis of the cases and law in this area that should be helpful to lawyers seeking guidance in this difficult area.94

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91. Id. at 850-864.
92. Id. at 863.
93. Id. at 829-836.
How should attorneys comply with an obligation to turn tangible criminal material over to the authorities?

Assuming lawyers have an obligation to turn tangible criminal material in their possession over to the authorities, usually it will not make sense for lawyers voluntarily to take possession of such material. Possession of the material places lawyers in an ethical quandary in which they are required to act contrary to their clients’ interests and exposes them to legal risks, including in extreme cases, criminal prosecution.

One reason for doing so would be if the material could be exculpatory. Another possible reason for a lawyer to take possession of tangible criminal material is to attempt to assert a claim to prevent the prosecution from using the material based on the client’s privilege against self-incrimination. If the attorney believes the authorities are likely to locate the material in the normal course of investigation, the attorney could take possession of the material, either directly from the client or based on information received from the client, inform the authorities that the attorney has possession of certain tangible criminal material, and request use immunity for the client in connection with the delivery of the material. If the prosecution rejected the request, the attorney could either file a motion in limine seeking to prevent the prosecution from using the material based on the client’s privilege against self-incrimination or hold the material awaiting a subpoena and then move to quash the subpoena based on the client’s privilege against self-incrimination.

In some cases, however, the attorney may not have a choice about obtaining or keeping possession of tangible criminal material. The material may be delivered anonymously to the lawyer or the party making the delivery may refuse to keep it.

What should a lawyer do if the lawyer has received possession of such material, either voluntarily or involuntarily? One possibility would be to return the material to its original location rather than to the authorities. The ABA Standards for the Defense Function and some court decisions recognize return of the property to its original location as an option. In other jurisdictions, however, return of the material to the original source may not be ethically permissible. Even if case law in the jurisdiction does

95. For a discussion of various options available to lawyers in dealing with the problem of possession of evidence of a client’s crime, see Evan A. Jenness, Ethics and Advocacy Dilemmas—Possessing Evidence of a Client’s Crime, 34-Dec Champion 16 (2010).
96. ABA Standards for Criminal Justice, Defense Function Standard 4-4.6(b) (4th ed. 2015); Hitch v. Pima County Superior Court, 708 P.2d 72 (Ariz. 1985) (en banc).
97. In California the approach of returning the property to its original location finds support in the Meredith case (discussed above), which held that the privilege is lost if the attorney prevents the authorities from being able to obtain the material through an independent investigation. A subsequent California appellate decision, however, states that if a lawyer takes possession of physical evidence, the lawyer must immediately notify the court so that the prosecution can have access to the evidence. See People v. Superior Court (In re Fairbank), 237 Cal. Rptr. 158 (Ct. App., review denied (1987)).
not absolutely foreclose the return option, the circumstances of the case may make return impossible. The Restatement states:

Some decisions have alluded to an additional option—returning the evidence to the site from which it was taken, when that can be accomplished without destroying or altering material characteristics of the evidence. That will often be impossible. The option would also be unavailable when the lawyer reasonably should know that the client or another person will intentionally alter or destroy the evidence.\textsuperscript{98}

The ABA Standards agree with this limitation.\textsuperscript{99}

If counsel receives possession of “contraband,” an item the possession of which is itself a crime, such as various controlled substances like heroin or cocaine, counsel could suggest that the client destroy the material if there is no pending case or proceeding and one is not reasonably foreseeable (see the discussion of obstruction of justice above). If destruction would be illegal, counsel may be required to either turn the material over to the authorities or inform them of its location.\textsuperscript{100}

Another option would be to turn the material over to the authorities anonymously to protect client confidentiality to the maximum extent possible. Defense counsel could hire another attorney for the purpose of delivering the materials to the authorities.\textsuperscript{101} Normally, the identity of a client is not subject to the attorney-client privilege, but at least one court has held that the identity of a client from whom an attorney received stolen property was privileged.\textsuperscript{102} On the other hand, an anonymous return may effectively deprive the prosecution of evidence of a crime: What is a prosecutor to do with a gun returned anonymously without any identification of the crime to which the gun is related?\textsuperscript{103}

Finally, as discussed above, the attorney could inform the authorities that the attorney has possession of tangible criminal material and will turn the material over to the authorities if the client receives use immunity. Such a tactic is ethically troubling, however, in those cases where the attorney is taking possession of the material to prevent the prosecution from finding

\textsuperscript{98} Restatement (Third) of the Law Governing Lawyers §119, cmt. c.

\textsuperscript{99} ABA Standards for Criminal Justice, Defense Function Standard 4-4.6(c) (4th ed. 2015) (stating that after testing or examining evidence, defense counsel should return the item to its original location unless counsel has reason to believe that the evidence might be altered, destroyed, or used to harm another person or the return would be impossible).

\textsuperscript{100} See Id. Standard 4-4.6(d).

\textsuperscript{101} For many years, the District of Columbia Bar has provided a mechanism for lawyers in possession of tangible criminal property to deliver the property to bar counsel to be turned over to the police. See Mark Hansen, Hand it Over, 91-DEC A.B.A. J. 30 (2005).


the material in the normal course of the investigation. In addition, the prosecution could argue that the privilege against self-incrimination does not apply in this situation because the client’s primary purpose in turning over the material to the lawyer was to interfere with the investigation, not to seek legal advice.

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**Problem 3-3**

**False Testimony in Criminal and Civil Cases**

a. Melinda Lee represents Neil Denny in a prosecution for carjacking, which occurred at around 11:00 P.M. At the initial interview, Denny told Lee that he was innocent and was nowhere near the place where the carjacking occurred. When Lee asked Denny where he was, Denny seemed a little hesitant, but finally said that he was with his girlfriend, Robin Gayle, at her apartment all evening.

Lee interviewed Gayle, who said that she and Denny were together the entire evening from about 7:30 until 1:00 A.M. watching television. She doesn’t remember, however, what they watched, and her recall of the evening is sketchy. Lee is skeptical about whether Gayle will be a good witness for Denny, and Lee believes that she may even be lying to protect Denny.

While Lee was preparing the case for trial, a person named Thomas Frank contacted Lee. Frank told Lee that he knows Denny because he has seen him at a local sports bar often. Frank says that an investigator for the prosecution had interviewed him. Frank told the investigator that he saw Denny at the sports bar on the evening of the carjacking. Frank said he saw Denny leave the bar; he thinks Denny left around 10:30. Frank remembers that Denny was furious because his team, the Seahawks, were losing badly. Denny said he had a big bet on the game and was going to lose a lot of money. Frank told Lee that he has received a subpoena to testify as a witness at Denny’s trial. Frank also said that he thinks there may be some other people who will testify that they saw Denny at the bar. Frank told Lee that he likes Denny and wanted Lee to know about this testimony, hoping that it might help Denny.

Lee met with Denny to inform him of Frank’s testimony and possibly the testimony of other patrons of the sports bar. Denny said, “Ok, well, yeah, I was at the bar like he says, but then I left and went to

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104. This problem and the relevant rules generally use the term “false testimony” rather than “perjury,” which is a crime. Ethical duties attach even if no crime has been committed, for example, if a client mistakenly testifies falsely. *See* Restatement (Third) of the Law Governing Lawyers §120, cmt. d.
Gayle’s. I got to her apartment maybe 10:45. I’ll talk with her and we’ll get our stories straight. Don’t worry.”

(1) If you were in Lee’s position, what would you say to Denny?
(2) Would it be ethically proper for Lee to move to withdraw? If so, what should Lee say in the motion? Would you move to withdraw? Why?
(3) Would it be ethically proper for Denny to inform the court that Denny is planning to testify falsely at trial?
(4) Suppose Lee informs the court that Denny is insisting on testifying falsely. If you were the judge, what would you do?
(5) Rather than withdrawing or disclosing that Denny plans to testify falsely, would it be proper for Lee to refuse to call Denny as a witness?
(6) Under the Model Rules, would it be proper to use the narrative approach in Denny’s case? If you used the narrative approach, how would you proceed?
(7) Would it be ethically proper for Lee to refuse to call Gayle as a witness? Would it be ethically proper for Lee to call Gayle as a witness?
(8) Suppose Lee counsels Denny that he must testify truthfully, that false testimony has a number of adverse consequences, and that Lee will inform the court if Denny insists on offering false testimony. As a result, Denny does not take the stand and does not present Gayle as an alibi witness. The jury convicts Denny of carjacking. Denny then files a petition seeking postconviction relief on the ground that Lee’s actions violated Denny’s Sixth and Fourteenth Amendment right to effective assistance of counsel. Be prepared to present an oral argument on behalf of the state or Denny as assigned by your instructor on the issue of whether Denny’s constitutional right to effective assistance of counsel has been violated.
(9) Based on your analysis of the situations above, how would you as defense counsel handle an initial client interview? What, if anything, would you say about confidentiality when you first meet with the defendant? What would you say if the defendant said to you: “Everything I tell you is confidential, right?”
(10) What is the approach to the problem of false testimony by a criminal defendant in the state where you plan to practice?

b. You represent the plaintiff in a products liability action in which the plaintiff suffered severe injuries. The plaintiff’s wife has joined in the action seeking loss of consortium. The plaintiff was asked the following questions during his deposition.
Q: Were you having marital problems during the one-year period before the accident?
A: Well, like any couple we would argue, but nothing serious.
Q: Have you had an affair during the five-year period prior to the accident?
A: No.

A few days after the deposition, the plaintiff called and said that he has had a few sleepless nights about the deposition. He says that in fact he had an affair about two years before the accident, but he broke off the affair. He says that his wife never knew about the situation. What are your ethical obligations? How would you proceed?

Read Model Rules 1.2, 1.16, 2.1, 3.3, and comments.

**Approaches to the problem of false testimony by the criminal defendant**

What should defense counsel do when the defendant insists on taking the stand and testifying falsely (contemplated false testimony) or when defense counsel learns that the defendant has testified falsely (completed false testimony)?

Put aside for the moment the question of when a lawyer “knows” that a client will testify falsely. We will consider that point later in the discussion. Assume that, by whatever standard of knowledge is applicable, the lawyer does know that the client will testify or has testified falsely. Five approaches have been suggested for how defense counsel should respond either to contemplated or completed false testimony by a criminal defendant.

1. **Full representation.** In a famous 1966 article Professor Monroe Freedman argued that if a criminal defendant insists on taking the stand and testifying falsely, defense counsel should not move to withdraw from the case and should not inform the court of the false testimony. Instead, defense counsel should allow the defendant to take the stand and to testify; defense counsel should not do anything that would either explicitly or implicitly disclose the attorney’s knowledge to the judge or jury. More specifically, Freedman’s approach meant that the attorney would examine the defendant in the normal fashion, even if the defendant’s answers were false, and that the attorney would make normal closing arguments to the finder of fact, including arguments based on false testimony.

105. For an historical survey of some of the most important cases involving perjured testimony, see Richard H. Underwood, Perjury: An Anthology, 13 Ariz. J. Intl. & Comp. L. 307 (1996).

Freedman explained the basis for his position. At its deepest level, his view of the obligations of defense counsel is founded on the value of the dignity of the individual in a free society.\textsuperscript{107} Constitutional rights, such as due process of law, right to counsel, and the privilege against self-incrimination, express this basic value.\textsuperscript{108} Confidentiality of communications between lawyer and client is central to all of these rights, since without client trust and complete information, lawyers cannot adequately defend their clients’ rights.\textsuperscript{109} In addition, Professor Freedman has criticized the practicality and constitutionality of the alternatives that others have proposed for dealing with the issue of false testimony by criminal defendants.\textsuperscript{110}

2. Disclosure to the court. Professor Freedman’s position met with immediate criticism from then United States Circuit Judge (later Chief Justice of the United States Supreme Court) Warren Burger. Justice Burger claimed that a lawyer could never under any circumstances participate in a fraud on the court, and that for a lawyer to ask questions of a client that would elicit false testimony was clearly improper.\textsuperscript{111} Logically, the opposite position to Freedman’s position of full representation would be full disclosure by defense counsel to the court of the defendant’s contemplated or completed false testimony. Although Justice Burger did not go that far in his 1966 article, he later came to endorse that position in his opinion in Nix v. Whiteside,\textsuperscript{112} discussed in detail below.

Professor Freedman’s and Justice Burger’s views on the issue of false testimony by the criminal defendant represent the polar positions for dealing with the problem. Each has the advantage of being clear in its direction to counsel, but each can be criticized for ignoring an important competing value: the integrity of the adversarial system in Freedman’s case and the importance of client confidentiality to individual liberty in Justice Burger’s case. Not surprisingly, other courts and scholars have attempted to find a middle ground that balances or accommodates in some fashion these competing values. Three alternatives to the full representation position of Professor Freedman and the disclosure position of Justice Burger are the

\textsuperscript{107} Freedman & Smith, Understanding Lawyers’ Ethics §6.10. See also Jay S. Silver, Truth, Justice, and the American Way: The Case Against the Client Perjury Rules, 47 Vand. L. Rev. 339 (1994) (criticizing the disclosure obligations of the Model Rules because they impede the discovery of truth, subvert the rights of the accused, and undermine the adversarial process).

\textsuperscript{108} Freedman & Smith, Understanding Lawyers’ Ethics §1.06.

\textsuperscript{109} Id. at 128.


\textsuperscript{112} 475 U.S. 157 (1986).
following: withdrawal without disclosure, narrative testimony, and avoidance of knowledge.

3. Withdrawal without disclosure. An attorney confronted with a client who plans to take the stand and testify falsely or who has already testified falsely could move to withdraw from the case and still protect the confidentiality of client communications. The lawyer could, for example, move to withdraw because of “ethical reasons” or because of a “conflict of interest” or because of “privileged reasons.” Professor Freedman has criticized the withdrawal solution on a number of grounds, including the following: First, if the court grants the motion, the problem is simply passed on to successor counsel who will either face the same dilemma or who will not learn of the false testimony because the client has now been educated about what can and cannot be told to a lawyer. If the latter occurs, the withdrawal solution is no solution at all since it allows false testimony to take place, but adds cost to the operation of the judicial system. Second, if the matter occurs on the eve of or during the trial, the judge will almost certainly deny the motion. The “withdrawal approach” does not guide the attorney about how to act in that event. Third, if the attorney moves to withdraw, the court may order the lawyer to reveal the reason, so it may be impossible to maintain confidentiality. In addition, if the lawyer does reveal the reason for moving to withdraw, and the client takes the stand, the judge may take the client’s false testimony into account in sentencing.

4. Narrative testimony. In 1971 the American Bar Association adopted Defense Function Standard 7.7 to guide defense lawyers in dealing with perjury by the criminal defendant. In 1979 the ABA Committee on Standards for Criminal Justice proposed a revised version of 7.7, but then withdrew this proposal from consideration by the ABA on the understanding that the issue of perjury by the criminal defendant would be considered by the ABA committee working on the Model Rules of Professional Conduct. Revised Defense Function Standard 7.7, however, did provide a detailed statement of the narrative approach to perjury by the criminal defendant.

113. See Manfredi & Levine v. Superior Court (Barles), 78 Cal. Rptr. 2d 494 (Ct. App. 1998) (decision to grant motion to withdraw within discretion of trial court; court should ordinarily accept representations of counsel that confidentiality precludes disclosure of specific reasons for motion when court concludes counsel is acting in good faith). See also Lawyer Disciplinary Board v. Farber, 488 S.E.2d 460 (W. Va. 1997) (lawyer received four-month suspension for disclosure of confidential information in connection with motion to withdraw in criminal case because disclosure went beyond what was necessary and was accompanied by threats to client).

114. Freedman & Smith, Understanding Lawyers’ Ethics §6.06.

Revised Standard 7.7 granted lawyers discretion to move to withdraw if the issue of client perjury arose before trial. If withdrawal was not feasible or was denied by the court, the standard allowed lawyers to continue the representation when a defendant in a criminal case insisted on testifying falsely by using what is called the “narrative solution.” The narrative solution involves the following aspects:

- The lawyer cannot assist or use perjured testimony.
- Before the defendant takes the stand, the lawyer should make a private record, not revealed to the court, that the defendant is testifying against the advice of counsel.
- When the defendant takes the stand, the lawyer may ask questions about matters to which the defendant will testify truthfully.
- As to matters for which the defendant will be testifying falsely, the lawyer may not engage in the normal direct examination. Instead, the lawyer should ask the defendant if he wishes to make any additional statements to the trier of fact regarding the case.
- The lawyer may not make arguments to the trier of fact based on the defendant’s known false testimony.

Standard 7.7 represents an effort to walk a tightrope between the full representation and the disclosure approaches to perjury by the criminal defendant. Under the narrative approach defense counsel should not reveal client perjury, but at the same time defense counsel must strictly avoid any involvement in client perjury.

The principal objection to the narrative testimony approach is that it sacrifices both of the principles it seeks to protect: The solution does not prevent perjury from taking place, and it infringes confidentiality because both the judge and jury are almost certain to know that defendant’s lawyer does not trust his own client’s testimony.116 Moreover, the narrative solution does not address the question of what the lawyer should do when the lawyer learns that the client has already testified perjuriously. Nevertheless, several courts have adopted the narrative solution as an ethically proper way for defense counsel to deal with the problem117 and it has been incorporated in the District of Columbia Rules of Professional Conduct.118 Some commentators also support the narrative approach.119

117. People v. Guzman, 755 P.2d 917 (Cal. 1988) (en banc); People v. DePallo, 754 N.E.2d 751 (NY 2001). In DePallo, the Court of Appeals held that defense counsel did not render ineffective assistance of counsel when he presented the defendant’s testimony in narrative form. The court did not specifically hold that attorneys were required to follow the narrative approach. Id. at 754.
118. D.C. R. Prof. Conduct 3.3(b).
119. The most extensive defense of the narrative approach can be found in Norman Lefstein, Client Perjury in Criminal Cases: Still in Search of an Answer, 1 Geo. J. Legal Ethics
5. Avoidance of knowledge. Some commentators have suggested that the most practical way for a lawyer to deal with the problem of false testimony by a criminal defendant is to make sure that the lawyer avoids knowing that the client intends to testify falsely. For example, if defense lawyers ask their clients to inform them about “what the prosecution is likely to say” and “your memory of what happened,” rather than “what happened,” then defense counsel can obtain all the facts without committing their clients to a particular version of what occurred. Professor Freedman characterizes this as “sophistry” and a “disingenuous evasion” designed to achieve the same result that he advocates openly and defends on the basis of fundamental values. Further, this solution does not address the issue of the lawyer’s obligation if the lawyer learns of false testimony despite efforts to avoid knowledge.

The approach of the Model Rules of Professional Conduct and the Restatement of the Law Governing Lawyers

The philosophy of the Model Rules and the Restatement of the Law Governing Lawyers is that a lawyer should not knowingly participate in the introduction of false testimony. A lawyer must refuse to present such testimony if the lawyer knows of its falsity before it is offered and a lawyer must take reasonable remedial measures to correct false testimony that has been offered, including, if necessary, disclosure of the falsity of the testimony to the tribunal. Under the Model Rules and the Restatement, the integrity of the tribunal is superior to any interest the client may have in loyalty and confidentiality regarding false testimony. Model Rule 3.3(a)(3) and cmt. 2.

While the general approach of the Model Rules and the Restatement is clear, the implementation of this philosophy in the 2002 revision of the Model Rules raises a number of interpretative issues, leading to some possibly surprising conclusions. Analytically, it is useful to consider various steps that a lawyer can consider when confronted with false testimony by a criminal defendant: (1) remonstration, (2) withdrawal, (3) disclosure to prevent false testimony, (4) refusing to call the criminal defendant as a witness, (5) narrative testimony, and (6) remedial measures after false testimony has been offered.

Remonstration. The first step for the lawyer representing a criminal defendant who intends to testify falsely is to remonstrate with the client in

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521 (1988). See also Crystal, Confidentiality Under the Model Rules of Professional Conduct, 30 Kan. L. Rev. at 236-244.
120. Freedman & Smith, Understanding Lawyers’ Ethics §6.18.
121. See Restatement (Third) of the Law Governing Lawyers §120.
an effort to dissuade the client from the testimony. While the text of Rule 3.3 does not mention remonstration, comment 6 states that lawyers should attempt to persuade clients from offering false testimony. Even if a lawyer does not know that the client intends to testify falsely, a lawyer who believes that the defendant’s testimony lacks credibility has an obligation to counsel the client regarding the possible ramifications of the testimony. See Model Rule 2.1. In remonstrating with a client, the lawyer could emphasize factors such as the following: 123 The client has a legal obligation to testify truthfully. False testimony by the client may be unsuccessful either because of vigorous cross-examination by the prosecutor or because the jury rejects the testimony. If the judge believes the defendant testified perjuriously, the judge may take the perjury into account in sentencing. The defendant may be prosecuted for perjury. The lawyer ethically may move to withdraw.

Withdrawal. If the lawyer has a reasonable belief (as opposed to knowledge) that the defendant intends to testify falsely, the lawyer has discretion but is not ethically required to move to withdraw. Model Rule 1.16(b)(2). 124 If a lawyer has actual knowledge that a defendant intends to testify falsely, some commentators have argued that the lawyer must move to withdraw. 125 Rule 3.3, however, appears to reject the proposition that lawyers have an ethical obligation to move to withdraw when they know that a criminal defendant intends to testify falsely unless the confrontation with the client has produced an extreme deterioration of the relationship so that the lawyer can no longer competently represent the client. Model Rule 3.3, cmt. 15.

Disclosure to prevent false testimony from being offered. The 2002 revision of the Model Rules adds a new section 3.3(b) which imposes additional disclosure obligations on lawyers. Under that rule if a lawyer who represents a client in an adjudicative proceeding knows that any person is engaging or has engaged in a crime or fraud related to the proceeding the lawyer shall take reasonable remedial action “including, if necessary, disclosure to the tribunal.” The new rule clearly requires a lawyer to disclose information to prevent conduct such as bribery, intimidation, or unlawful destruction of documents, whether the conduct is by the client or a third person. See comment 12. Does the rule require a lawyer to disclose the

124. If a lawyer moves to withdraw, he should minimize the disclosure of confidential information. For example, the lawyer can move to withdraw because of “ethical considerations.” Courts should generally honor representations made by counsel without inquiring into the factual basis for the motion. See State v. Chambers, 994 A.2d 1248 (Conn. 2010).
125. 2 Hazard, Hodes & Jarvis, The Law of Lawyering §32.17.1. For a criticism of this view, see Crystal, False Testimony by Criminal Defendants, 2003 Ill. L. Rev. at 1539-1540. See also Freedman & Smith, Understanding Lawyers’ Ethics §6.06. (withdrawal should never be viewed as a solution to the perjury problem).
client’s intention to testify falsely? The rule could certainly be read to require disclosure, treating false testimony by the criminal defendant as one type of criminal conduct. On the other hand, several reasons can be given to interpret the rule not to require disclosure to prevent false testimony by a criminal defendant. First, the rule only requires disclosure as a “remedial” measure. The common meaning of remedial is to correct or cure a problem rather than prevent one from occurring. Second, the rule only requires disclosure when “necessary.” A lawyer could reason that disclosure is only necessary when the false testimony has occurred; a client who is threatening false testimony may always change his mind. Third, the comments do not mention disclosure before the false testimony occurs. Comments 10 and 11, which deal with remedial measures, including disclosure, do not mention disclosure before the client testifies, only after the fact. In particular, comment 6 indicates that rather than disclosing planned false testimony the lawyer should refrain from asking questions that would elicit false testimony. Finally, neither the text of Rule 3.3(b) nor the comment to the rule specifically mention false testimony by a criminal defendant.126

Refusing to call the criminal defendant as a witness. Revised Rule 3.3(a)(3) adds the following new sentence: “A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false” (emphasis added). The sentence seems intended to protect criminal defendants against a mistaken belief by defense counsel that a defendant intends to testify falsely. Comment 9 reaffirms this point, but it also indicates that the rule imposes a duty that many defense counsel may find startling—a duty not to offer the testimony of a criminal defendant when defense counsel knows the testimony will be false: “Unless the lawyer knows the testimony will be false, the lawyer must honor the client’s decision to testify. See also Comment [7].” (Emphasis added.)

An ethical obligation to refuse to call a criminal defendant to testify even if the lawyer knows the testimony will be false raises significant constitutional questions. In Rock v. Arkansas,127 the Supreme Court held that defendants enjoy a fundamental constitutional right to testify in their own behalf. Almost all courts of appeals have held that the right to testify is personal to the defendant and not waivable by defense counsel.128 Addressing this precise issue, the Seventh Circuit has stated that defense counsel may not prevent the defendant from testifying, even if counsel knows the testimony will be false:

What Rock holds is that the accused may not be prohibited from testifying—not by a judge, not by a lawyer. So if a defendant’s theory were that he told his

126. Crystal, False Testimony by Criminal Defendants, 2003 Ill. L. Rev. at 1541-1542. On the issue of whether disclosure should be discretionary, see id. at 1542-1543.
128. See, e.g., Brown v. Artuz, 124 F.3d 73, 77 (2d Cir. 1997) (citing cases from the First, Third, Fourth, Fifth, Seventh, Eighth, Ninth, and Eleventh circuits).
lawyer that he wanted to testify, but that his lawyer refused to allow this (for example, flatly refused to call his client to the stand without suggesting the possibility, if he thought that his client’s testimony would be perjury, that he could withdraw and allow the accused to represent himself, see Nix v. Whiteside, 475 U.S. 157 (1985)), this would be a sound constitutional claim.129

How should lawyers proceed in light of the questionable constitutionality of the “duty” set forth in Rule 3.3(a)(3) and comment 9 to refuse to honor the defendant’s decision to testify if the lawyer knows the testimony will be false? One way to proceed is for the lawyer to conclude that the defendant has a constitutional right to testify in his own behalf and that this right trumps the lawyer’s duty to refuse to offer testimony that the lawyer knows is false. This approach is reasonable, but it means that the lawyer is ignoring an ethical obligation based on a constitutional right that is unclear under the current state of the law.

A better approach is for the lawyer to attempt to honor both the ethical obligation and the defendant’s constitutional right to testify. How can a lawyer harmonize the ethical duty and the defendant’s right to testify? Reconciliation can be achieved if the attorney refrains from calling the defendant as a witness but makes it possible for the defendant to call himself. When the time comes for the defendant to testify, the attorney would not formally call the defendant as a witness but would instead make a statement like the following: “Your honor, the defendant would now like to exercise his constitutional right to testify in his own behalf.” During the examination of the defendant, the attorney would not ask questions that would elicit false testimony. See Model Rule 3.3, cmt. 6.130

Narrative testimony. The 1983 version of the Model Rules specifically rejected the narrative approach to false testimony by a criminal defendant. Comment 9 to the 1983 version criticized the narrative solution because it compromised both the lawyer’s obligation to the client and to the tribunal. The narrative solution left the client to testify without the guidance of the lawyer. In addition, the lawyer’s “noninvolvement” amounted to an implicit disclosure that the client’s testimony was not worthy of belief. At the same time it exempted the lawyer from the obligation to disclose false testimony to the tribunal.

Revised rule 3.3, however, is much more tolerant of the narrative solution. Comment 7 provides the narrative solution is permissible in those jurisdictions where it is specifically authorized. A growing number of

129. Taylor v. United States, 287 F.3d 658, 661-662 (7th Cir. 2002). On the facts of Taylor the court found that the defendant’s constitutional rights had not been violated. The court held that defense counsel was not constitutionally required to give the defendant a Miranda-type warning that the decision of whether to testify was the defendant’s alone. Id. at 661-663.

130. Crystal, False Testimony by Criminal Defendants, 2003 Ill. L. Rev. at 1546-1547.
jurisdictions have adopted the narrative solution, including California and New York through court decision and the District of Columbia by rule.\textsuperscript{131}

While comment 7 to revised Rule 3.3 explicitly authorizes the use of the narrative solution in those jurisdictions that have directed lawyers to follow this approach, it could be read as implicitly rejecting the use of the narrative solution in those jurisdictions that have not specifically approved of this approach. However, comment 6 appears to approve the use of what is in essence the narrative solution in other situations.

Under comment 6 if the lawyer fails to persuade the client to testify truthfully, the lawyer must refuse to present false testimony. If only part of the client’s testimony will be false, the lawyer may offer the truthful testimony, “but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.”

Thus, under revised rule 3.3 it appears that lawyers should use the narrative solution in two situations: first, if the jurisdiction in which they practice requires use of the narrative solution and second, in all other jurisdictions when the lawyer remains in the case and a portion of the defendant’s testimony will be false. These two situations cover almost all cases the lawyer will face. The result is that comments 6 and 7 taken together move a long way toward adoption of the narrative solution.\textsuperscript{132}

\textit{Remedial measures after false testimony has been offered.} If false testimony has been presented to the tribunal, whether by the lawyer, the lawyer’s client, or a witness called by the lawyer, the lawyer must take reasonable remedial measures, including disclosure to the tribunal if necessary. Rule 3.3(a)(3). Withdrawal will normally not be a reasonable remedial measure because it will not undo the false testimony. Model Rule 3.3, cmt. 10. However, the lawyer may be able to take remedial measures that do not involve disclosure of confidential information. The lawyer could attempt to persuade the client to take the stand and correct the client’s false testimony. In some instances the lawyer may be able to move to strike or withdraw the evidence.\textsuperscript{133}

If the testimony has been presented in narrative form, must the lawyer take any further action? The answer is unclear. Arguably not, because the duty to disclose only attaches under Rule 3.3(a)(3) when the lawyer “comes to know” that false testimony has been offered. The language of section appears to contemplate a duty to disclose when the lawyer is surprised by false testimony. It may not apply if defense counsel knows that a defendant will testify falsely but continues the representation in narrative form under comment 6. In addition, it can be argued that if the defendant testifies in narrative form no disclosure is necessary because the tribunal has been

\textsuperscript{131} See notes 117-118, above.

\textsuperscript{132} Crystal, False Testimony by Criminal Defendants, 2003 Ill. L. Rev. at 1548.

\textsuperscript{133} See also Restatement (Third) of the Law Governing Lawyers §120, cmt. h.
implicitly informed of the matter and may make such inquiry as it deems appropriate.\textsuperscript{134}

If a lawyer informs the court that a defendant either intends to or has testified falsely, what should the court do about the matter? Comment 10 to Model Rule 3.3 provides that it is up to the tribunal to decide what action to take. The comment identifies three possibilities: statement to the trier of fact, mistrial, or nothing. In United States v. Scott,\textsuperscript{135} defendant’s public defender moved to withdraw for unspecified ethical reasons. The trial judge informed the defendant that he had the choice of either proceeding pro se or with the assistance of counsel who would make the decision about whether to allow the defendant to testify. The defendant chose to continue the case pro se. The Eleventh Circuit reversed the defendant’s conviction, holding that the trial judge had put the defendant to an unconstitutional choice between the constitutional rights to testify and to effective assistance of counsel. The court stated that the trial judge should have simply decided the issue of whether to grant counsel’s motion to withdraw. The court also held that without more information the trial court should have denied the motion to withdraw.\textsuperscript{136} The court conceded, however, that “a much more difficult case would have resulted had it been established on the record that defendant intended to commit perjury.”\textsuperscript{137}

\begin{center}
\textbf{Nix v. Whiteside}
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United States Supreme Court
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475 U.S. 157 (1986)
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Chief Justice BURGER delivered the opinion of the Court. . . .

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Whiteside was convicted of second-degree murder by a jury verdict which was affirmed by the Iowa courts. The killing took place on February 8, 1977, in Cedar Rapids, Iowa. Whiteside and two others went to one Calvin Love’s apartment late that night, seeking marihuana. Love was in bed when Whiteside and his companions arrived; an argument between Whiteside and Love over the marihuana ensued. At one point, Love directed his girlfriend to get his “piece,” and at another point got up, then returned to his bed. According to Whiteside’s testimony, Love then started to reach under his pillow and moved toward Whiteside. Whiteside stabbed Love in the chest, inflicting a fatal wound.
\end{quote}

\begin{footnotes}
134. Crystal, False Testimony by Criminal Defendants, 2003 Ill. L. Rev. at 1549.
135. 909 F.2d 488 (11th Cir. 1990).
136. \textit{Id.} at 493.
137. \textit{Id.} at 493-494.
\end{footnotes}
Whiteside was charged with murder, and when counsel was appointed he objected to the lawyer initially appointed, claiming that he felt uncomfortable with a lawyer who had formerly been a prosecutor. Gary L. Robinson was then appointed and immediately began an investigation. Whiteside gave him a statement that he had stabbed Love as the latter “was pulling a pistol from underneath the pillow on the bed.” Upon questioning by Robinson, however, Whiteside indicated that he had not actually seen a gun, but that he was convinced that Love had a gun. No pistol was found on the premises; shortly after the police search following the stabbing, which had revealed no weapon, the victim’s family had removed all of the victim’s possessions from the apartment. Robinson interviewed Whiteside’s companions who were present during the stabbing, and none had seen a gun during the incident. Robinson advised Whiteside that the existence of a gun was not necessary to establish the claim of self-defense, and that only a reasonable belief that the victim had a gun nearby was necessary even though no gun was actually present.

Until shortly before trial, Whiteside consistently stated to Robinson that he had not actually seen a gun, but that he was convinced that Love had a gun in his hand. About a week before trial, during preparation for direct examination, Whiteside for the first time told Robinson and his associate Donna Paulsen that he had seen something “metallic” in Love’s hand. When asked about this, Whiteside responded: “[I]n Howard Cook’s case there was a gun. If I don’t say I saw a gun, I’m dead.” Robinson told Whiteside that such testimony would be perjury and repeated that it was not necessary to prove that a gun was available but only that Whiteside reasonably believed that he was in danger. On Whiteside’s insisting that he would testify that he saw “something metallic” Robinson told him, according to Robinson’s testimony:

[W]e could not allow him to [testify falsely] because that would be perjury, and as officers of the court we would be suborning perjury if we allowed him to do it; . . . I advised him that if he did do that it would be my duty to advise the Court of what he was doing and that I felt he was committing perjury; also, that I probably would be allowed to attempt to impeach that particular testimony. App. to Pet. for Cert. A-85.

Robinson also indicated he would seek to withdraw from the representation if Whiteside insisted on committing perjury.2

2. Whiteside’s version of the events at this pretrial meeting is considerably more cryptic:

Q. And as you went over the questions, did the two of you come into conflict with regard to whether or not there was a weapon?
A. I couldn’t—I couldn’t say a conflict. But I got the impression at one time that maybe if I didn’t go along with—with what was happening, that it was no gun being involved, maybe that he will pull out of my trial.

Whiteside testified in his own defense at trial and stated that he “knew” that Love had a gun and that he believed Love was reaching for a gun and he had acted swiftly in self-defense. On cross-examination, he admitted that he had not actually seen a gun in Love’s hand. Robinson presented evidence that Love had been seen with a sawed-off shotgun on other occasions, that the police search of the apartment may have been careless, and that the victim’s family had removed everything from the apartment shortly after the crime. Robinson presented this evidence to show a basis for Whiteside's asserted fear that Love had a gun.

The jury returned a verdict of second-degree murder. [The trial court denied Whiteside’s motion for a new trial and the Iowa Supreme Court affirmed. Whiteside then petitioned for habeas corpus relief in the federal courts, claiming a violation of his Sixth and Fourteenth Amendment rights to effective assistance of counsel. The Eight Circuit directed that the petition be granted, finding that Robinson’s threat to inform the trial court of Whiteside’s proposed testimony violated his duty of confidentiality and breached the standard of effective representation.]

II

A

The right of an accused to testify in his defense is of relatively recent origin. Until the latter part of the preceding century, criminal defendants in this country, as at common law, were considered to be disqualified from giving sworn testimony at their own trial by reason of their interest as a party to the case. . . .

By the end of the 19th century, however, the disqualification was finally abolished by statute in most states and in the federal courts. . . . Although this Court has never explicitly held that a criminal defendant has a due process right to testify in his own behalf, cases in several Circuits have so held, and the right has long been assumed. . . . We have also suggested that such a right exists as a corollary to the Fifth Amendment privilege against compelled testimony. . . .

B

In Strickland v. Washington [466 U.S. 668 (1984)], we held that to obtain relief by way of federal habeas corpus on a claim of a deprivation of effective assistance of counsel under the Sixth Amendment, the movant must establish both serious attorney error and prejudice. . . . To counteract the natural tendency to fault an unsuccessful defense, a court reviewing a claim of ineffective assistance must “indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” [466 U.S.] at 689. In giving shape to the perimeters of this range of reasonable professional assistance, Strickland mandates that “[p]revailing norms of practice as reflected
We turn next to the question presented: the definition of the range of “reasonable professional” responses to a criminal defendant client who informs counsel that he will perjure himself on the stand. We must determine whether, in this setting, Robinson’s conduct fell within the wide range of professional responses to threatened client perjury acceptable under the Sixth Amendment.

Although counsel must take all reasonable lawful means to attain the objectives of the client, counsel is precluded from taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law. This principle has consistently been recognized in most unequivocal terms by expositors of the norms of professional conduct since the first Canons of Professional Ethics were adopted by the American Bar Association in 1908. [The Court cites DR 7-102(A)(4), (7) and Model Rule 1.2(d).] Both the Model Code of Professional Responsibility and the Model Rules of Professional Conduct also adopt the specific exception from the attorney-client privilege for disclosure of perjury that his client intends to commit or has committed. DR 4-101(C)(3) (intention of client to commit a crime); Rule 3.3 (lawyer has duty to disclose falsity of evidence even if disclosure compromises client confidences). Indeed, both the Model Code and the Model Rules do not merely authorize disclosure by counsel of client perjury; they require such disclosure. See Rule 3.3(a)(4); DR 7-102(B)(1). . . .

These standards confirm that the legal profession has accepted that an attorney’s ethical duty to advance the interests of his client is limited by an equally solemn duty to comply with the law and standards of professional conduct; it specifically ensures that the client may not use false evidence. This special duty of an attorney to prevent and disclose frauds upon the court derives from the recognition that perjury is as much a crime as tampering with witnesses or jurors by way of promises and threats, and undermines the administration of justice. . . .

It is universally agreed that at a minimum the attorney’s first duty when confronted with a proposal for perjurious testimony is to attempt to dissuade the client from the unlawful course of conduct. Model Rules of Professional Conduct, Rule 3.3, Comment. [See Model Rule 3.3 comment 6.] The commentary thus also suggests that an attorney’s revelation of his client’s perjury to the court is a professionally responsible and acceptable response to the conduct of a client who has actually given perjured testimony. Similarly, the Model Rules and the commentary, as well as the Code of Professional Responsibility adopted in Iowa, expressly permit withdrawal from representation as an appropriate response of an attorney when the client threatens to
commit perjury. Model Rules of Professional Conduct, Rule 1.16(a)(1), Rule 1.6, Comment (1983); Code of Professional Responsibility, DR 2-110(B), (C) (1980). Withdrawal of counsel when this situation arises at trial gives rise to many difficult questions including possible mistrial and claims of double jeopardy. . . .

D

Considering Robinson’s representation of respondent in light of these accepted norms of professional conduct, we discern no failure to adhere to reasonable professional standards that would in any sense make out a deprivation of the Sixth Amendment right to counsel. Whether Robinson’s conduct is seen as a successful attempt to dissuade his client from committing the crime of perjury, or whether seen as a “threat” to withdraw from representation and disclose the illegal scheme, Robinson’s representation of Whiteside falls well within accepted standards of professional conduct and the range of reasonable professional conduct acceptable under Strickland.

The Court of Appeals [held]:

... Counsel’s actions prevented [Whiteside] from testifying falsely. We hold that counsel’s action deprived appellant of due process and effective assistance of counsel. ... Counsel’s actions also impermissibly compromised appellant’s right to testify in his own defense by conditioning continued representation by counsel and confidentiality upon appellant’s restricted testimony. 750 F.2d, at 714-715. . . .

The Court of Appeals’ holding that Robinson’s “action deprived [Whiteside] of due process and effective assistance of counsel” is not supported by the record since Robinson’s action, at most, deprived Whiteside of his contemplated perjury. Nothing counsel did in any way undermined Whiteside’s claim that he believed the victim was reaching for a gun. Similarly, the record gives no support for holding that Robinson’s action “also impermissibly compromised [Whiteside’s] right to testify in his own defense by conditioning continued representation ... and confidentiality upon [Whiteside’s ]restricted testimony.” The record in fact shows the contrary: (a) that Whiteside did testify, and (b) he was “restricted” or restrained only from testifying falsely and was aided by Robinson in developing the basis for the fear that Love was reaching for a gun. Robinson divulged no client communications until he was compelled to do so in response to Whiteside’s post-trial challenge to the quality of his performance. We see this as a case in which the attorney successfully dissuaded the client from committing the crime of perjury.

Paradoxically, even while accepting the conclusion of the Iowa trial court that Whiteside’s proposed testimony would have been a criminal act, the Court of Appeals held that Robinson’s efforts to persuade Whiteside not
to commit that crime were improper, \textit{first}, as forcing an impermissible choice between the right to counsel and the right to testify; and, \textit{second}, as compromising client confidences because of Robinson’s threat to disclose the contemplated perjury.\textsuperscript{7}

Whatever the scope of a constitutional right to testify, it is elementary that such a right does not extend to testifying \textit{falsely}. In \textit{Harris v. New York}, we assumed the right of an accused to testify “in his own defense, or to refuse to do so” and went on to hold: “[T]hat privilege cannot be construed to include the right to commit perjury.” . . . In \textit{Harris} we held the defendant could be impeached by prior contrary statements which had been ruled inadmissible under \textit{Miranda v. Arizona}, 384 U.S. 436 (1966). \textit{Harris} and other cases make it crystal clear that there is no right whatever—constitutional or otherwise—for a defendant to use false evidence. . . .

The paucity of authority on the subject of any such “right” may be explained by the fact that such a notion has never been responsibly advanced; the right to counsel includes no right to have a lawyer who will cooperate with planned perjury. A lawyer who would so cooperate would be at risk of prosecution for suborning perjury, and disciplinary proceedings, including suspension or disbarment.

Robinson’s admonitions to his client can in no sense be said to have forced respondent into an \textit{impermissible} choice between his right to counsel and his right to testify as he proposed for there was no \textit{permissible} choice to testify falsely. For defense counsel to take steps to persuade a criminal defendant to testify truthfully, or to withdraw, deprives the defendant of neither his right to counsel nor the right to testify truthfully. In \textit{United States v. Havens}, [446 U.S. 620 (1980)], we made clear that “when defendants testify, they must testify truthfully or suffer the consequences.”\textsuperscript{[446 U.S.]} at 626. When an accused proposes to resort to perjury or to produce false evidence, one consequence is the risk of withdrawal of counsel.

On this record, the accused enjoyed continued representation within the bounds of reasonable professional conduct and did in fact exercise his right to testify; at most he was denied the right to have the assistance of counsel in the presentation of false testimony. Similarly, we can discern no breach of professional duty in Robinson’s admonition to respondent that he would disclose respondent’s perjury to the court. The crime of perjury in this setting is indistinguishable in substance from the crime of threatening or tampering with a witness or a juror. A defendant who informed his counsel that he was arranging to bribe or threaten witnesses or members of the jury would have no

\textsuperscript{7} The Court of Appeals also determined that Robinson’s efforts to persuade Whiteside to testify truthfully constituted an impermissible threat to testify against his own client. We find no support for a threat to testify against Whiteside while he was acting as counsel. The record reflects testimony by Robinson that he had admonished Whiteside that if he withdrew he “probably would be allowed to attempt to impeach that particular testimony,” if Whiteside testified falsely. The trial court accepted this version of the conversation as true.
“right” to insist on counsel’s assistance or silence. Counsel would not be limited to advising against that conduct. An attorney’s duty of confidentiality, which totally covers the client’s admission of guilt, does not extend to a client’s announced plans to engage in future criminal conduct. See Clark v. United States, 289 U.S. 1, 15 (1933). In short, the responsibility of an ethical lawyer, as an officer of the court and a key component of a system of justice, dedicated to a search for truth, is essentially the same whether the client announces an intention to bribe or threaten witnesses or jurors or to commit or procure perjury. No system of justice worthy of the name can tolerate a lesser standard.

We hold that, as a matter of law, counsel’s conduct complained of here cannot establish the prejudice required for relief under the second strand of the Strickland inquiry. Although a defendant need not establish that the attorney’s deficient performance more likely than not altered the outcome in order to establish prejudice under Strickland, a defendant must show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” 466 U.S., at 694. According to Strickland, “[a] reasonable probability is a probability sufficient to undermine confidence in the outcome.” Ibid. The Strickland Court noted that the “benchmark” of an ineffective-assistance claim is the fairness of the adversary proceeding, and that in judging prejudice and the likelihood of a different outcome, “[a] defendant has no entitlement to the luck of a lawless decision-maker.” Id., at 695.

Whether he was persuaded or compelled to desist from perjury, Whiteside has no valid claim that confidence in the result of his trial has been diminished by his desisting from the contemplated perjury. Even if we were to assume that the jury might have believed his perjury, it does not follow that Whiteside was prejudiced.

In his attempt to evade the prejudice requirement of Strickland, Whiteside relies on cases involving conflicting loyalties of counsel. In Cuyler v. Sullivan, 446 U.S. 335 (1980), we held that a defendant could obtain relief without pointing to a specific prejudicial default on the part of his counsel, provided it is established that the attorney was “actively represent[ing] conflicting interests.” Id., at 350.

Here, there was indeed a “conflict,” but of a quite different kind; it was one imposed on the attorney by the client’s proposal to commit the crime of fabricating testimony without which, as he put it, “I’m dead.” This is not remotely the kind of conflict of interests dealt with in Cuyler v. Sullivan. Even in that case we did not suggest that all multiple representations necessarily resulted in an active conflict rendering the representation constitutionally infirm. If a “conflict” between a client’s proposal and counsel’s ethical obligation gives rise to a presumption that counsel’s assistance was prejudicially ineffective, every guilty criminal’s conviction would be suspect if the
defendant had sought to obtain an acquittal by illegal means. Can anyone doubt what practices and problems would be spawned by such a rule and what volumes of litigation it would generate?

Whiteside’s attorney treated Whiteside’s proposed perjury in accord with professional standards, and since Whiteside’s truthful testimony could not have prejudiced the result of his trial, the Court of Appeals was in error to direct the issuance of a writ of habeas corpus and must be reversed.

[In a concurring opinion written by Justice Blackmun and joined by Justices Brennan, Marshall, and Stevens, these justices agreed that Whiteside had failed to show any prejudice but they criticized the majority opinion for implicitly defining as a matter of constitutional law the appropriate standard of conduct for lawyers in dealing with perjury by criminal defendants. Justice Blackmun argued that states should be free to adopt “differing approaches” to a complex ethical problem: “The signal merit of asking first whether a defendant has shown any adverse prejudicial effect before inquiring into his attorney’s performance is that it avoids unnecessary federal interference in a State’s regulation of its bar.” 475 U.S. at 190.]

**Notes and Questions**

1. In an article dealing with Nix v. Whiteside, I characterized the decision as a “Constitutional outlier” because it presents a very weak case for a Sixth Amendment violation: First, attorney Robinson knew beyond any doubt that Whiteside planned to testify falsely. Robinson’s knowledge was based on (1) Whiteside’s admissions to him (2) supported by uncontradicted independent evidence. Second, in *Nix*, Robinson’s response to Whiteside’s planned intention to offer false evidence was to attempt to dissuade him from doing so. Thus, *Nix* only dealt with attorney remonstration as a response to contemplated perjury, a response on which there was “universal[] agreement.” 475 U.S. at 169. The Court did not consider the constitutional implications of any of the other possible responses to false testimony by a criminal defendant. Third, Whiteside’s claim of prejudice was tenuous. Because Robinson’s efforts to persuade Whiteside to testify truthfully were successful, he did not have to take any of the actions that he threatened. In particular, Robinson did not inform the court that Whiteside planned to testify falsely nor did he move to withdraw. In addition, Robinson’s efforts did not prevent Whiteside from testifying. He took the stand and presented the substance of his claim for self-defense. Robinson supported this defense with the testimony of other witnesses. The judge instructed the jury on self-defense. See Crystal, False Testimony by Criminal Defendants, 2003 Ill. L. Rev. at 1551-1565.

Defendants may be able to establish Sixth Amendment violations on facts stronger than those presented to the Supreme Court in *Nix*. Suppose Robinson had acted based on his belief that his client was committing perjury rather than his client’s admission, and suppose the substance of the client’s claim of self-defense had not been presented to the jury. In such a case the defendant might
be able to establish both prongs of the Strickland test for ineffective assistance of counsel. See State v. Jones, 923 P.2d 560 (Mont. 1996) (defendant’s Sixth Amendment right violated when lawyer moved to withdraw on unsubstantiated belief that defendant intended to commit perjury).

2. Nix was a Sixth Amendment case. The Supreme Court has yet to address the question of the relationship between the Fifth Amendment privilege against self-incrimination and client perjury. When state ethics rules require lawyers to reveal client confidences that are then used to establish the client’s guilt or to enhance punishment, serious self-incrimination issues arise. See Crystal, False Testimony by Criminal Defendants, 2003 Ill. L. Rev. at 1567-1571; Monroe H. Freedman, Getting Honest About Client Perjury, 21 Geo. J. Legal Ethics 133 (2008); Freedman & Smith §§6.17-6.19.

3. Nix also did not deal with possible due process issues. If an attorney’s actions in response to false testimony by the criminal defendant undermine the ability of the trier of fact to decide the case impartially, the defendant’s right to due process has been infringed. Such a situation could occur in bench trials. See Lowery v. Cardwell, 575 F.2d 727 (9th Cir. 1978); State v. Jefferson, 615 P.2d 638 (Ariz. 1980) (en banc). If disclosure of the false testimony is necessary, defense counsel could inform a judge other than the trial judge, such as the chief administrative judge of the court in which the case is being heard. The Restatement suggests that disclosure to the prosecutor rather than the judge may be an appropriate remedial measure. Restatement (Third) of the Law Governing Lawyers §120, cmt. i. In jury trials the conduct of defense counsel may demonstrate to the jury that the defendant’s testimony is false, in which case a due process violation may be found. See State v. Robinson, 224 S.E.2d 174 (N.C. 1976). It has sometimes been claimed, without success, that the use of the narrative solution violates the defendant’s right to due process because it informs the trier of fact that defense counsel does not believe the defendant’s testimony. See Commonwealth v. Mitchell, 2000 WL 33119695, at *26 (Mass. Super. Dec. 18, 2000), aff’d, 781 N.E. 2d 1237 (Mass. 2003).

When does a lawyer “know” that a defendant intends to or has testified falsely?

Almost all of the duties set forth in Rule 3.3 depend on whether the lawyer has knowledge that the defendant intends to or has testified falsely. The definition contained in Rule 1.0(k) states two propositions. First, knowledge means “actual knowledge.” Second, knowledge may be inferred from the circumstances. Quite clearly “actual knowledge” is not the same as “personal knowledge,” but what does it mean to say that a lawyer has actual knowledge that a criminal defendant will testify falsely? Some courts and
commentators have suggested that attorney must be convinced beyond a reasonable doubt that the testimony will be false. Most courts, however, have held that a lawyer must have a “firm factual basis” before taking action to interdict false testimony. The Restatement adopts this test.

Assuming the firm factual basis test applies, when does a lawyer have a firm factual basis to know of false testimony? I have proposed the following refinement of the firm factual basis test:

A lawyer has actual knowledge that a criminal defendant intends to testify falsely if the defendant’s testimony will be inconsistent with facts that defendant has admitted (the factual admission test) or with facts known to the lawyer through independent investigation (the factual inconsistency test). If the defendant retracts an admission of facts, a lawyer still has actual knowledge if the retraction is so lacking in credibility that no reasonable person would accept it.

The Restatement proposes a very similar test:

A lawyer should not conclude that testimony is or will be false unless there is a firm factual basis for doing so. Such a basis exists when facts known to the lawyer or the client’s own statements indicate to the lawyer that the testimony or other evidence is false.

It may be necessary for a court to hold a hearing to determine whether the lawyer has a firm factual basis for action.

False testimony by witnesses other than criminal defendants

Suppose the defendant wishes to call a witness that defense counsel reasonably believes will be testifying falsely. What should the lawyer do? While criminal defendants have the right to decide whether to testify in their own

142. Restatement (Third) of the Law Governing Lawyers §120, cmt. c.
143. Crystal, False Testimony by Criminal Defendants, 2003 Ill. L. Rev. at 1537.
144. Restatement (Third) of the Law Governing Lawyers §120, cmt. c.
behalf, lawyers have the authority to determine which witnesses to call. See Model Rule 1.2(a). ABA Defense Function Standard 4-5.2(b) is similar.

Further, Model Rule 3.3(a)(3) states that with regard to the testimony of witnesses other than the criminal defendant, a lawyer may refuse to present evidence that the lawyer “reasonably believes is false.” Thus, if a lawyer knows that a witness will testify falsely, the lawyer has the authority and duty simply to refuse to call the witness. As stated in Model Rule 1.2(a) and Defense Function Standard 4-5.2(b), the lawyer should take this step only after consultation with the client. If a lawyer learns that a witness has already testified falsely, the lawyer would have a duty to take reasonable remedial measures, including disclosure of the false testimony to the tribunal if necessary. See Model Rule 3.3(a)(3).

The lawyer’s refusal to call a witness could prompt a confrontation between lawyer and client that could in turn lead to the client’s demand that the lawyer withdraw. The matter would then be brought to the attention of the court, which could take such action as it thought appropriate, including granting counsel permission to withdraw, directing counsel to call the defense witness, or allowing counsel to proceed without calling the witness. See Model Rule 1.2, cmt. 2.

The ethics of the lawyer’s “lecture”

In cases like Nix v. Whiteside, the lawyer responded to a client’s decision to testify falsely. In other cases, however, lawyers face decisions about how active they can be in coaching clients about their testimony. In the novel and movie *Anatomy of a Murder*, attorney Paul Biegler has been asked to represent Lieutenant Frederic Manion, who is accused of murdering Barney Quill. Quill raped Manion’s wife, Laura. After considering the facts published in the newspapers, Biegler concludes that the only defense available to Manion is insanity at the time of the homicide. Before asking Manion to tell him about Quill’s death, Biegler lectures Manion on the various legal defenses to homicide, leading Manion to shape his testimony to establish the defense of insanity.

Professor Monroe Freedman has argued that the ethical propriety of using the lecture depends on the circumstances. In many cases, he contends, the lawyer should inform the client of the legal significance of facts because it is necessary for the lawyer to do so to overcome various psychological barriers to a person’s accurate recollection of events. The lawyer in these cases is not trying to create false testimony, but rather is simply seeking to obtain from the client accurate information necessary to represent the client competently. He

146. See also Restatement (Third) of the Law Governing Lawyers §120(3).
148. See also Restatement (Third) of the Law Governing Lawyers §120(2).
discusses three potential psychological barriers to clients (or witnesses) giving accurate information:

First, memory is affected by various factors such as temperament, biases, expectations, and experience. As a result, people reconstruct past events, often without being aware that they are doing so. Because of this “imaginative reconstruction,” a person’s memory may be “subjectively accurate but objectively false.” Second, people tend to remember in ways that are consistent with their own interests. Freedman notes that this often amounts to “wishful thinking” rather than deliberate dishonesty. Third, people tend to respond confidently to questions about what they remember even when the actual circumstances should make them cautious about the accuracy of their recollections. Freedman concludes his discussion of the psychology of memory as follows:

In sum, remembering is not like playing back a videotape. Rather, it is a process of active, creative reconstruction, which begins at the moment of perception. Moreover, this reconstructive process is significantly affected by the form of the questions asked and by what we understand to be in our own interest—even though, on a conscious level, we are responding as honestly as we can.

Was the use of the lecture in *Anatomy of a Murder* improper? The answer is far from clear. If Biegler was attempting to shape Manion’s testimony falsely, then the lecture was clearly improper. For example, if Manion was fully aware of what he was doing from the time he learned of the rape to the time he shot Quill, then Biegler would be attempting to get Manion to testify falsely that he did not actually have a memory of the events. On the other hand, it is possible that Manion did not have any memory of the events, but was unwilling to tell Biegler of his lack of memory because he believed, incorrectly, that a husband was legally justified in shooting a man who raped his wife. In fact, Manion mentions the “unwritten law” in his meeting with Biegler. If this was the situation, then Biegler would be acting properly in giving the lecture because he would be overcoming a barrier to Manion’s telling him the truth.

**False testimony in civil cases**

The ethical obligations of lawyers regarding false testimony in civil cases are the same as in criminal cases, except that the constitutional issues that arise in criminal cases do not apply. In a civil case counsel may not offer evidence that

149. Freedman & Smith, Understanding Lawyers’ Ethics §7.06.
150. Id.
151. Id.
152. Id.
153. Id.
the lawyer knows to be false, including the testimony of his client. If the lawyer, the lawyer’s client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of the falsity, the lawyer must take reasonable remedial measures. Model Rule 3.3(a)(3). These rules apply not only to trials but also to ancillary proceedings, such as depositions. See comment 1. Comment 10 discusses possible remedial measures. The ultimate remedial measure would be disclosure to the tribunal; but a lawyer should consider a number of actions of lesser gravity, such as the following: (a) If the false testimony occurred during a deposition, the witness could correct the testimony in the errata sheet that the witness receives before signing the deposition (if signature has not been waived). (b) The lawyer could inform opposing counsel or the court that certain testimony or evidence is withdrawn or should not be relied on. (c) The lawyer could recall the witness and ask questions to correct the false testimony.

Probably the most famous example of a lawyer complying with his obligations under Rule 3.3 was the letter from Robert S. Bennett, counsel for President Bill Clinton, to Judge Susan Webber Wright, informing her that President Clinton had testified falsely at his deposition in the case of Jones v. Clinton that he had not had a sexual relationship with Monica Lewinsky. At the deposition, Mr. Bennett had introduced an affidavit from Ms. Lewinsky stating that she had not had a sexual relationship with President Clinton. She later testified before a grand jury that the affidavit was false. Complying with his professional responsibility, Mr. Bennett wrote to Judge Wright on September 30, 1998, that portions of Ms. Lewinsky’s affidavit were untrue; he informed the court that it should not rely on her affidavit or the characterizations of it by counsel.154

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**Problem 3-4**

**Fraud by Clients in Business Transactions**

*a. Your firm represents National Computer, Inc., a large manufacturer of computer equipment. Ellen Lee is National’s vice president for procurement. Recently, Lee called you about negotiating a renewal of a supply contact between National and Microchip International. Your firm prepared the original contract three years ago. Lee has told you that the contract expires in six months and that National wishes to renew the contract for as long as possible. Lee also has informed you that microchips have been in short supply and that renewal of the contract is essential to National’s business. During the conversation Lee mentions that it was difficult...*
to obtain the first contract and that she found it necessary to give Microchip’s vice president of sales “something on the side” to finalize the contract. How would you proceed under the Model Rules?

In particular, analyze the following questions:

(1) Who do you represent in this matter? See Model Rule 1.13(a). Do you have a duty to ask Lee about any payments to Microchip?

(2) Do you have a duty to issue a “Miranda-type warning” to Lee before asking her about what she gave to Microchip’s VP? Consider Model Rules 1.13(f) and 4.3.

(3) Supposing you think you have a duty to issue some type of warning to Lee, would the following be sufficient? “Ellen, could you tell me about what you gave to Microchip’s Vice President? I think it is important for me to have this information to properly represent my client, National.”

(4) Suppose Lee refuses to give you information about her dealings or payments with Microchip’s VP or significantly downplays the issues, saying, “Don’t worry. It was nothing significant. I can handle it. You don’t need to be involved.” Put yourself in the position of an outside ethics adviser to the lawyer dealing with Ms. Lee. In your opinion as outside ethics adviser, do you think that the lawyer has an obligation to report the matter higher in the organization? If so, to whom should the lawyer report? If so, should the lawyer tell Lee of the lawyer’s intention to report before doing so? Suppose Lee asks an opportunity to self-report. How should the lawyer respond?

(5) Suppose Lee admits that she did bribe Microchip’s VP, but she says that it has only happened once, that she regrets having done so, and assures the lawyer that she will not engage in such conduct in the future. What should the lawyer do?

(6) Suppose you take the matter to the CEO of National and ultimately its board. The chair of the board tells you that the board has resolved the matter, but does not give you more details. The chair directs you to proceed with the renewal contract and to keep Lee’s conduct confidential. May you proceed with drafting the contract? Would it matter if you feel reasonably confident that Lee has not engaged in bribery in connection with the current contract?

(7) Suppose National’s board does not take any action against Lee, other than perhaps an internal reprimand. Do you have the obligation or the discretion to report Lee’s conduct outside the organization to Microchip?

b. In the situation described above, how would you proceed if National Computer was a publicly held company that was required to
file reports with the SEC? Would it matter if you had significant involvement in preparing those reports?

c. Suppose you learn that Ellen Lee did in fact pay substantial bribes to Microchip’s vice president of sales. Assume further that the bribery has been brought to the attention of National’s board of directors, but the board has taken no action on the matter. Your firm is defending a breach of warranty action brought by one of National’s customers. There does not appear to be any relationship between this proceeding and the contract with Microchip, but it is a little hard to tell at this point in the litigation because the firm has just submitted an answer on National’s behalf. Discovery has not begun. Should you withdraw from this action in light of Lee’s bribery?

d. Suppose as in part (c) that Lee did engage in bribery and the board has not taken any action on the matter. National has a line of credit with Interstate Bank, which it continues to use. In connection with this line of credit, your firm issued an opinion that stated the firm was “unaware of any litigation or other circumstance that could have a material effect on National’s business.” What action if any should the firm take with regard to this opinion in light of its knowledge of Lee’s bribery? Should the firm have issued such an opinion in connection with the line of credit?

e. You have been appointed by the president of your state bar to a committee formed to study and make recommendations for revisions of your state’s rules of professional conduct. To what extent does your state’s current rule on confidentiality permit or require disclosure of confidential information to prevent or rectify a client’s fraud in a business transaction? What changes would you recommend making in your state’s rule? Why? If you believe the current rule should not be changed, be prepared to explain why the current rule is sound as a matter of policy.

Read Model Rules 1.2(d), 1.6, 1.13, 1.16, 4.3, and comments.

Controversy over lawyers’ ethical and legal obligations when they encounter criminal or fraudulent conduct by their clients

For many years the issue of how a lawyer should respond if the lawyer learns that a client plans to or has engaged in a financial crime or fraud has been the topic of heated debate within the legal profession and the subject of lawsuits, administrative proceedings, and Congressional action. The issue involves

tension between two values: client confidentiality and prevention or rectification of harm resulting from client wrongdoing. Where to draw the line accommodating these two values, however, has been very controversial. The legal profession has generally favored broader protection of confidentiality while courts, administrative agencies, and Congress have tended to give greater weight to harm prevention or rectification. The materials that follow discuss the following topics: (1) the ethical prohibition against lawyers counseling or assisting clients in criminal or fraudulent conduct, (2) the scope of the ethical duty of confidentiality with regard to criminal or fraudulent conduct by clients under the Model Rules, (3) the scope of the duty of confidentiality under regulations adopted by the SEC pursuant to the Sarbanes-Oxley Act, (4) legal liability of lawyers with regard to crimes or frauds committed by their clients, and (5) professional standards for lawyers in issuing opinion letters.

The ethical obligation not to counsel or assist clients in criminal or fraudulent conduct

Ethically, lawyers have an obligation not to counsel or assist their clients in business transactions that they know are criminal or fraudulent. See Model Rule 1.2(d). Note that this obligation parallels the duty of criminal defense lawyers not to assist their clients in criminal or fraudulent activity. Recall Problem 3-2 and in particular In re Ryder.

Although the principle that lawyers may not counsel or assist clients in illegal or fraudulent conduct is well established, the scope of this obligation is imprecise. First, it should be clear that a lawyer does not counsel or assist a client in committing a crime or fraud if the lawyer does nothing more than advise a client that the client’s planned course of action would be illegal or fraudulent. Model Rule 1.2(d) states that a lawyer “may discuss the legal consequences of any proposed course of conduct with a client.” See also Comment 9.

Second, a lawyer may not counsel or assist a client in conduct that the lawyer knows is illegal or fraudulent, but when does the lawyer know of a crime or fraud? We encountered this issue in Problem 3-3, which addressed the lawyer’s ethical obligations when a client commits perjury in a criminal

156. Susan P. Koniak, When the Hurlyburly’s Done: The Bar’s Struggle with the SEC, 103 Colum. L. Rev. 1236 (2003) (reviewing the history of lawyer involvement in major corporate scandals and the tension between the bar’s ethics rules and the SEC’s enforcement of the securities laws).

157. See Florida Bar v. Calvo, 630 So. 2d 548 (Fla. 1993), cert. denied , 513 U.S. 809 (1994) (lawyer disbarred for participation in fraudulent securities offering); Iowa Supreme Court Bd. of Professional Ethics & Conduct v. Vinyard, 656 N.W.2d 127 (Iowa 2003) (lawyer disbarred after criminal convictions for money laundering and mail fraud).

158. 263 F. Supp. 360 (E.D. Va.), aff’d , 381 F.2d 713 (4th Cir. 1967).

case. As we saw, courts and commentators have suggested several possible
standards for knowledge, including a “firm factual basis” or “beyond a rea-
sonable doubt.” Other commentators have argued that “willful blindness” or
“conscious avoidance” should be treated as the equivalent of knowledge.160

Third, what are the consequences of the duty not to counsel or assist a
client in criminal or fraudulent conduct with regard to the lawyer’s ability to
continue to represent the client? The lawyer obviously cannot continue to
handle the legal work directly involved in the illegal or fraudulent transactions
(such as preparing opinions or other documents or participating in closings)
since such conduct would amount to direct assistance of the client’s wrong-
doing. Must the lawyer formally resign from representation in connection
with any wrongful transactions? For example, the client might retain other
counsel, who is unaware of the wrongdoing, to handle the transaction, but
might ask the first lawyer to refrain from formally resigning to avoid raising a
“red flag.” If the purpose of withholding the lawyer’s resignation is to mislead
new counsel into believing that the lawyer is still associated with the client and
that the client is not engaged in misconduct, isn’t the lawyer providing indir-
ect assistance of fraud?

Is a lawyer who knows that a client is engaged in an illegal or fraudulent
transaction prohibited from having any involvement whatsoever with the
transaction? Suppose, for example, that a lawyer knows that a client is engag-
ing in a fraudulent financial transaction, but the lawyer is not representing the
client in the transaction. May the lawyer respond to a letter from the client’s
accountant asking the lawyer to state the amount of outstanding legal fees
that the client owes the lawyer, or does even providing factual information
constitute assistance of the fraud? In civil cases involving claims of aider and
abetter liability against attorneys (discussed later in this problem), the courts
have held that lawyers were liable only if they provided “substantial” assis-
tance to client fraud.161

A related aspect of the question as to how far the prohibition on
counseling or assisting a crime or fraud extends deals with representation
in unrelated matters. Does the obligation mean that the lawyer can have
no involvement in transactions that are unrelated to the crime or fraud? For
example, suppose a law firm knows that a client is engaging in a fraud-
ulent securities transaction. Must the firm refuse to represent the client in
unrelated civil litigation? Must it refuse to represent the client in unrelated
business matters? In essence, must the firm resign from all employment by
the client?

In Formal Opinion 92-366, the ABA Committee on Ethics and
Professional Responsibility examined the ethical aspects of a lawyer’s

160. Cf. John P. Freeman & Nathan M. Crystal, Scien
ter in Professional Liability
Cases, 42 S.C. L. Rev. 783, 833-838 (1991); Rebecc
Roiphe, The Ethics of Willful Ignor

(D.D.C. 1978); see also Restatement (Second) of Torts §876(b).
continued representation of a client who was engaged in fraud in matters that were both related and unrelated to the fraud. The committee opined that a lawyer was ethically required to withdraw from representation in matters directly involving fraud. As to unrelated matters, the committee concluded that withdrawal was more likely to be permissive under Model Rule 1.16. The committee also advised, however, that “complete severance” might be the best way to avoid any possible association with the client’s fraud.162

Lawyer advice with regard to corporate document retention programs can raise issues of counseling or assisting clients in criminal or fraudulent conduct. Corporations may legally establish policies and procedures for retention and destruction of physical and electronic documents, and lawyers may ethically and legally advise their clients about the creation and implementation of such programs.163 However, federal law, and the law of almost all states, makes obstruction of justice a crime.164 Destruction of documents or electronic information relevant to a pending court proceeding, administrative investigation, or legislative hearing can amount to obstruction of justice.165 It is important for lawyers to understand that obstruction of justice can occur even though a subpoena has not been issued and even before a proceeding is filed if a proceeding is likely.166 Accordingly, a corporation’s lawyer should advise the company to suspend document destruction activities as soon as a company receives notice that a proceeding or investigation is likely.167 In 2002, the Arthur Andersen accounting firm was convicted of obstruction of justice for destroying documents relating to its representation of the Enron corporation. In an infamous e-mail, Andersen’s in-house counsel suggested that Andersen employees continue to implement the firm’s document destruction policy even though Andersen knew about an SEC investigation into the Enron scandal.168 While the Supreme Court reversed the conviction on appeal,169 the victory was hollow because the conviction itself led to the firm’s demise.

162. ABA Formal Op. 92-366, at 6. See also Geoffrey C. Hazard, Jr., Lawyers and Client Fraud: They Still Don’t Get It, 6 Geo. J. Legal Ethics 701, 728-729 (1993) (arguing that duty not to counsel or assist in fraud does not preclude defense of litigation arising from fraud or representation in unrelated matters).
164. Id. at 729-745.
165. Id.
166. Id. at 734-735, 737-738. Cf. United States v. Perlstein, 126 F.2d 789 (3d Cir.), cert. denied, 316 U.S. 678 (1942) (two lawyers convicted of conspiracy to obstruct future judicial proceeding based on their advice to a client to destroy documents if a judicial proceeding was initiated).
167. See Chase, supra note 163, at 757-758. See also Nathan M. Crystal, Ethical Responsibility and Legal Liability of Lawyers for Failure to Institute or Monitor Litigation Holds, 43 Akron L. Rev. 715 (2010).
168. Chase, supra note 163, at 757-758.
169. Arthur Andersen LLP v. U.S., 544 U.S. 696 (2005). The Court recognized that a person can be guilty of obstruction of justice even if an official proceeding is not pending.
The scope of the duty of confidentiality with regard to criminal or fraudulent client conduct under the Model Rules: “Reporting Up” and “Reporting Out”

The duty not to counsel or assist a client in a crime or fraud is not the only obligation applicable to lawyers when they confront such conduct. Under the Model Rules, a lawyer may also have the obligation or discretion to disclose the crime or fraud. In considering the issue of disclosure of a client crime or fraud, a distinction is drawn between “reporting up” and “reporting out,” although those terms are not used in the rules. Reporting up refers to the lawyer informing higher authority within the organization of the crime or fraud. Model Rule 1.13 governs reporting up. Reporting out involves disclosure by the lawyer outside the organization. Reporting out is sometimes appropriate to prevent harm to people other than the client. Model Rule 1.6 deals with this form of reporting out. In addition, Rule 1.13(c) provides for a different form of reporting out, to prevent substantial injury to the organization. The ABA adopted major amendments to Rules 1.6 and 1.13 in August 2003 based on the report of its Task Force on Corporate Responsibility. These changes occurred in response to corporate scandals involving Enron and WorldCom and Congressional enactment of the Sarbanes-Oxley Act as a result of these scandals.

Model Rule 1.13(a) adopts an “entity representation” principle, providing that a lawyer retained by an organization represents the entity rather than any of its “constituents.” For a corporation, the term constituents means officers, directors, employees, and shareholders. For other entities, the equivalent categories are treated as constituents. Model Rule 1.13, cmt. 1. The principle means that a lawyer does not have a client-lawyer relationship with any of the constituents of an entity merely because the lawyer represents the entity. Even though a lawyer does not represent a constituent of an

However, a person is not guilty of a crime if he “persuades others to shred documents under a document retention policy when he does not have in contemplation any particular official proceeding in which those documents might be material.” Id. at 707-708.

170. The discussion that follows assumes that there is no proceeding pending before a tribunal. If so, Model Rule 3.3 would impose additional, more demanding disclosure obligations.


172. It is, of course, possible for a lawyer who represents an entity to also have a client-lawyer relationship with one of the entity’s constituents. Such a relationship, however, arises expressly rather than by virtue of the lawyer’s representation of the entity. For example, if the lawyer for a corporation performs estate planning or real estate services for an officer of the corporation, the lawyer has a client-lawyer relationship with both the corporation and the officer. In some cases, it is permissible for a lawyer to represent both the corporation and its constituents in litigation. See Model Rule 1.13(g). In other situations, multiple representation of the corporation and its constituents may be improper. See Model Rule 1.13, cmts. 13
entity, information received from any constituent of the entity may still be subject to the attorney-client evidentiary privilege, depending on how broadly a court interprets the privilege.\textsuperscript{173}

The entity representation principle has important implications if a lawyer learns about wrongdoing by a constituent or other person associated with the organization. The lawyer cannot follow the directions or seek to protect the interests of the person who is involved in wrongdoing because the lawyer represents the entity, not that person. How should the lawyer proceed? Model Rule 1.13(b) provides that a lawyer must take action to protect the entity when the lawyer knows that a constituent or other person associated with the organization\textsuperscript{174} acts or fails to act “in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization.” The section apparently envisions two types of cases. In the first, the person is engaged in some type of breach of fiduciary duty, such as misappropriation of the entity’s funds. In the second, the person is involved in illegal conduct as to third parties, such as securities fraud.

The application of Rule 1.13(b) raises a number of issues and uncertainties. First, under the rule the lawyer must “know” of the misconduct before the duty to act applies. We have already encountered this issue in the context of false testimony by criminal defendants. Recall Problem 3-3. In some cases, the lawyer’s knowledge may be clear; for example, if the lawyer has direct evidence that an officer has converted corporate funds. In many cases, particularly complex corporate transactions, the lawyer may have incomplete factual information and may be unclear about the legal consequences of the constituent’s conduct. How should a lawyer proceed when the lawyer has strong suspicions of misconduct but the factual and legal basis of that assessment is uncertain? Comment 3 indicates that in such cases of

\textsuperscript{173.} Compare Upjohn Co. v. United States, 449 U.S. 383 (1981) (under federal law attorney-client privilege extends to communications between lawyers and lower-level employees and is not limited to corporate officials in “control group”), with Consolidation Coal Co. v. Bucyrus-Erie Co., 432 N.E.2d 250 (Ill. 1982) (control group test applies under Illinois law). See also the discussion in connection with Problem 3-6. See also Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970), cert. denied, 401 U.S. 974 (1971) (in shareholder derivative litigation corporate attorney-client privilege does not apply if shareholders establish good cause); Wal-Mart Stores, Inc. v. Ind. Elec. Workers Pension Trust Fund Ibew, 95 A.3d 1264 (Del. 2014) (recognizing the Garner fiduciary exception to the attorney-client privilege in Delaware, but holding that it did not apply to work-product material).

\textsuperscript{174.} The duty to protect the organization from substantial harm under Rule 1.13(b) is not limited to harm caused by constituents but includes any “person associated with the organization.” Thus, if an independent contractor hired by the organization was engaged in such misconduct the lawyer would have the duty to act under Rule 1.13(b) even though the independent contractor is not a constituent.
uncertainty the lawyer does not have an obligation to act, but lawyers should be cautious about relying on comment 3. While the comment may be helpful in defending a lawyer who decided not to report possible misconduct, prudent lawyers will err on the side of reporting up when they have strong suspicion of serious wrongdoing. A lawyer who does not report has deprived duly authorized corporate officials of the information and the ability to make decisions about possible wrongdoing that is likely to seriously harm the organization. The determination of whether wrongdoing has occurred and the nature of the response if it has happened is more properly made by those officials than by the lawyer. In addition, in the post-Enron climate, it seems more appropriate for a lawyer to act rather than to remain silent when the lawyer has strong suspicion of serious wrongdoing.

Second, the misconduct must be “in a matter related to the representation.” Suppose a coworker tells a corporate lawyer of serious wrongdoing in her department that is unrelated to any work the lawyer does. If the coworker has decided not to take any action with regard to the matter, does the lawyer have a duty to act?175 Third, the conduct must involve a substantial injury to the organization. Minor violations of the law do not require the lawyer to act.176 The line between minor and substantial, however, may be difficult to draw. Suppose a lawyer learns that a corporate officer has sought reimbursements for a relatively small amount of personal expenses. In itself the misconduct may be minor but the failure to stop the misappropriation now could lead to more serious violations. It should also be noted that comment 4 provides that a lawyer may report up matters that the lawyer reasonably believes to be of sufficient importance in the best interest of the organization even if the lawyer is not required to do so under Rule 1.13(b).

Assuming the lawyer has a duty to act under Rule 1.13(b), what must the lawyer do? In most instances the lawyer should discuss the matter with the person whose conduct is in question, particularly if the lawyer may be mistaken about whether wrongdoing has occurred. Rule 1.13 does not specifically mention discussion with the person, but in most cases common courtesy, respect for the person’s role in the organization, and minimization of reports based on mistake all justify discussion of the matter with the person before the lawyer takes any further action. In addition, discussion with the person might lead that person to self-report the matter to higher authority. Would the lawyer nonetheless have a duty to report, even if the person self-reported? Comment 4 implies that such a discussion is ordinarily appropriate while indicating that discussion with the person may not be necessary when “the matter is of sufficient seriousness and importance or urgency to the organization.” The lawyer must exercise care in any discussions with the person the lawyer believes is involved in wrongdoing. Under Rule 1.13(f) the lawyer must “explain the identity of the client” when the lawyer should know that the interests of the organization and the person may be adverse.

175. See 1 Hazard, Hodes & Jarvis, The Law of Lawyering illus. 18-5.
176. Id. illus. 18-6.
The purpose of Rule 1.13(f) is similar to Rule 4.3: protection of an unrepresented person from being misled about the lawyer’s role. Several issues exist with regard to application of Rule 1.13(f): When does the duty to warn attach? Must the lawyer warn at the first moment the lawyer believes adversity exists, in which case the lawyer may be unable to obtain information from the person about harm to the corporation? Or can the lawyer wait to warn until the adversity is clear, seeking to obtain information from the person before warning? How extensive must the warning be? The text of the rule states that the lawyer must only inform the person that the lawyer represents the entity, but comment 10 indicates that a much more extensive warning is necessary.177

What should the lawyer do after discussing the matter with the constituent or other person, or after deciding that the matter is of sufficient importance for the lawyer to act without a meeting? Rule 1.13(b) and the comments state that the lawyer normally should report the matter to higher authority in the organization; including, if necessary, to the “highest authority that can act on behalf of the organization.” Comment 4 indicates that in some instances the best interests of the organization may not require reporting up, for example, in the case of a “constituent’s innocent misunderstanding of law and subsequent acceptance of the lawyer’s advice.” Here again lawyers should be cautious about relying on this qualification to reporting up. The strongest case for not reporting up would involve prospective conduct by a constituent who is acting in good faith and who accepts the lawyer’s advice to refrain from such conduct. The case for reporting up becomes much stronger if any of these elements is missing. For example, if the conduct has already occurred but can be rectified in whole or in part, reporting up still may be necessary. The constituent’s mistake in judgment is a piece of information that higher authority may consider important in evaluating the constituent’s performance in the company. In addition, if the mistake has already occurred, there may be various methods of rectification. Higher officials are likely to prefer to make their own decisions about how to correct a problem that has arisen rather than allow the wrongdoer and a lawyer to make the decision.

If reporting up is required under paragraph (b), the lawyer should choose the appropriate authority to whom to make the report depending on a variety of circumstances, including the entity’s structure, the lawyer’s role in the organization, the person’s position in the organization, and the seriousness of the matter. For example, if the misconduct involves a subordinate corporate officer, reporting to the officer’s immediate superior or perhaps the CEO would probably be appropriate. Whether the lawyer is required to make further reports after the initial one depends on the response to the initial report, the seriousness of the matter, and the lawyer’s evaluation of whether further reporting is necessary in the best interests of the organization. As section (b) indicates, in very serious cases, the lawyer should

177. Id. §17.13. For a discussion of the necessity, content, and timing of the warning, see Restatement (Third) of the Law Governing Lawyers §103, cmt. e.
report the matter to the highest authority that can act on behalf of the organization under applicable law. Comment 5 indicates that this will ordinarily be the board of directors or similar governing body. This comment is somewhat strange because for business corporations the shareholders in a duty constituted meeting, not the board of directors, are the highest authority that can act on behalf of the organization. (For nonprofit corporations which do not have shareholders, the board of directors may be the highest authority that can act for the organization.) Shareholders are, of course, not an ongoing body like the board, but shareholders do meet on an annual basis and can be convened for special meetings. It may be difficult, however, for a lawyer to report to a shareholders’ meeting either because of the timing of the meeting or because of problems in placing the matter on the agenda. Another possibility would be to report to a shareholder or group of shareholders holding a majority interest or controlling interest in the corporation, if such a group is readily identifiable.178

Suppose the lawyer has reported the matter to the highest authority that can act on behalf of the organization, but that authority has refused to act or has taken action that the lawyer reasonably believes is not in the best interest of the organization. As comment 6 states, the lawyer may be required to withdraw from the representation if the matter involves criminal or fraudulent conduct. See Rule 1.2(d) (prohibiting lawyers from engaging in criminal or fraudulent conduct) and Rule 1.16(a)(1) (requiring withdrawal when continued representation would violate the rules). If the lawyer has issued an opinion or other document, it may be necessary for the lawyer to disaffirm or withdraw the document to prevent continued reliance by third parties on the document. Model Rule 4.1, cmt. 3 authorizes this “noisy notice” of withdrawal. If the lawyer is required to withdraw, or if the lawyer is discharged, the lawyer nonetheless has continuing duties to act under Rule 1.13. See Model Rule 1.13(e).

In addition to withdrawal, a lawyer may have the discretion to report the misconduct outside the corporation. Reporting out is permissible in three situations: self-defense, to prevent or rectify harm under Rule 1.6, and to prevent harm to the corporation under Rule 1.13(c). The first situation in which a lawyer may report out is in self-defense under Model Rule 1.6(b)(5). The leading decision dealing with the “self-defense” exception to the duty of confidentiality is Meyerhofer v. Empire Fire & Marine Insurance Co.179 While the case was decided under the Code of Professional Responsibility,

178. See Restatement (Third) of the Law Governing Lawyers §96, cmt. f (suggesting the possibility of reporting to the owner of a majority of the stock in the corporation). Hazard, Hodes & Jarvis, however, treat reporting to shareholders, at least in the absence of a shareholders’ meeting, as reporting outside the corporation rather than reporting to the highest authority within the corporation. See 1 Hazard, Hodes & Jarvis, The Law of Lawyering §18.20. Even if reporting to shareholders is treated as reporting out, under revised Model Rule 1.13(c), a lawyer would have discretion to do so in serious cases of substantial harm to the corporation when the board fails to act.

it remains applicable under the Model Rules. The case involved a securities fraud action alleging that Empire had marketed securities using a registration statement and prospectus that were materially false and misleading. The complaint named Empire’s law firm and several of its partners as defendants. In addition, the complaint included as a defendant Stuart Goldberg, an attorney who had worked on the Empire matter but who had resigned from the firm in a dispute with the firm over the adequacy of disclosures being made in the Empire offering. On the same day that he resigned from the firm, Goldberg informed the SEC of his concerns about the offering; he subsequently filed an affidavit with the SEC about the matter. When Goldberg was named as a defendant in the securities fraud litigation, he contacted plaintiffs’ counsel, informed them of his noninvolvement in the offering, and supplied them with a copy of the affidavit he filed with the SEC. As a result the plaintiffs dismissed Goldberg from the suit. Defendants then moved to disqualify plaintiffs’ counsel from continuing in the case on the ground that they had received confidential information from Goldberg. The district court granted the disqualification motion but the Second Circuit Court of Appeals reversed:

DR 4-101(C) recognizes that a lawyer may reveal confidences or secrets necessary to defend himself against “an accusation of wrongful conduct.” This is exactly what Goldberg had to face when, in their original complaint, plaintiffs named him as a defendant who wilfully violated the securities laws. The charge, of knowing participation in the filing of a false and misleading registration statement, was a serious one. The complaint alleged violation of criminal statutes and civil liability computable at over four million dollars. The cost in money of simply defending such an action might be very substantial. The damage to his professional reputation which might be occasioned by the mere pendency of such a charge was an even greater cause for concern. Under these circumstances Goldberg had the right to make an appropriate disclosure with respect to his role in the public offering. Concomitantly, he had the right to support his version of the facts with suitable evidence.180

Although the court expressed some concern with Goldberg’s method of disclosure—turning over to plaintiffs’ counsel a 30-page affidavit with 16 attached exhibits—the court concluded that his action was the “most effective way for him to substantiate his story.”181

While Goldberg acted properly in revealing information to the plaintiffs’ counsel in an effort to obtain dismissal of the suit filed against him, his earlier actions are questionable. Goldberg apparently informed the SEC and filed an affidavit with the agency before any allegations were made against him. While the self-defense exception does not require lawyers to wait until formal proceedings are instituted against them, it does require an assertion of complicity be made against the lawyer. See Model Rule 1.6, cmt. 10. Goldberg may have

180. Id. at 1194-1195.
181. Id. at 1195.
acted improperly by making a preemptive disclosure before any allegations were made against him.\textsuperscript{182}

Reporting out under the self-defense exception protects the interests of the lawyer over the interests of the client. Model Rule 1.6 also authorizes reporting out to protect third parties from serious harm caused by their clients. We have already considered Model Rule 1.6(b)(1), which gives lawyers discretion to reveal confidential information to prevent reasonably certain death or substantial bodily harm. In the business context, most criminal or fraudulent conduct involves financial harm to which Rule 1.6(b)(1) would not apply. However, if a client planned on continuing to market a product that was defective and dangerous to consumers in violation of applicable law, the lawyer would be authorized to reveal the information under Rule 1.6(b)(1).

Model Rules 1.6(b)(2) and (b)(3), which were added by the ABA in 2003, expand the scope of reporting out. These rules authorize lawyers to disclose confidential information to prevent or to rectify substantial financial harm resulting from a crime or fraud that the client is planning or has committed, but only if the lawyer’s services are being or have been used in the commission of the crime or fraud. Thus, under Rule 1.6 a lawyer could not reveal confidential information to prevent or to rectify a financial fraud when the lawyer knows about the fraud but the lawyer’s services are not involved in the fraud. While Rule 1.6(b)(1) is based completely on the policy of preventing serious harm to others, Rules 1.6(b)(2) and (3) reflect this policy only in part because of the requirement that the lawyer’s services be used in the commission of the crime or fraud. Comment 7 indicates that the rationale for these exceptions is that the client has forfeited the protections of confidentiality by a serious abuse of the client-attorney relationship.

Reporting out is also permissible under Model Rule 1.13(c), added by the ABA in 2003. This section applies when the lawyer has reported up to the highest authority that can act on behalf of the organization, that authority has refused to act, and the lawyer reasonably believes that the matter involves a clear violation of law that is reasonably certain to result in substantial injury to the organization. Reporting out is permitted in this situation but only to the extent reasonably necessary to prevent substantial injury to the organization. Comment 6 discusses the relationship between Rule 1.13(c) and the exceptions to confidentiality under Rule 1.6. The comment states that Rule 1.13(c) supplements Rule 1.6(b) providing an additional ground for disclosure. Rules 1.6(b) and 1.13(c) differ in two significant ways. Under Rule 1.13(c) a lawyer may report out even though the lawyer’s services were not used in the crime or fraud. See comment 6. In this sense Rule 1.13(c) expands on Rule 1.6(b). However, Rule 1.13(c) is narrower in that disclosure under this rule is only allowed to prevent reasonably certain substantial injury to the organization not to prevent or rectify harm to others. When would Rule

\textsuperscript{182} See 1 Hazard, Hodes & Jarvis, The Law of Lawyering §10.37 (discussing whether preemptive disclosure is permissible under the Model Rules).
1.13(c) apply? The clearest example is a case in which the lawyer has informed the board of criminal or fraudulent conduct by a constituent of the organization, but the board refuses to act because of self-interest or personal involvement of board members. To whom should the lawyer report if Rule 1.13(c) applies? The rule and comments give no guidance, but the natural answer is to some group of shareholders who are being harmed by the wrongdoing and who are not disabled from acting because of personal involvement in the misconduct or loyalty to the wrongdoer. If the entity were a nonprofit organization without shareholders, the lawyer could report to some authority authorized to regulate the entity. Rule 1.13(c) indicates that the disclosure should be limited to the extent the lawyer reasonably believes necessary to prevent substantial harm to the organization. This limitation implies that in most instances, unlike Rule 1.6(b), disclosure to the victims would be inappropriate. However, disclosure to the victims should not be precluded under Rule 1.13(c) if that is the best way to prevent harm to the organization by stopping the misconduct.

Rule 1.13(d) limits the authority of a lawyer to report out under Rule 1.13(c). Under Rule 1.13(d) if the lawyer has been retained either to investigate allegations of violation of the law by the organization or to defend the organization or a person associated with the organization against charges of criminal or fraudulent conduct, then Rule 1.13(c) does not apply. Comment 7 indicates that this limitation is necessary to enable the client to receive the full benefit of counsel in conducting an investigation or defending a claim. The ABA Task Force Report states that full and frank communication is essential when the lawyer is conducting an investigation or defending a claim and in this case confidentiality outweighs any interest in disclosure. Application of this new section should be reasonably clear if the corporation retains outside counsel not formerly associated with the organization to investigate the matter or to defend the organization or the wrongdoer in legal proceedings. Involvement of in-house counsel, however, can make the application of the section unclear. Suppose in-house counsel who has received information about potential criminal or fraudulent conduct is then appointed by management to conduct the investigation. Does section (d) apply? If it does not apply because of the lawyer’s preexisting information, then the goal of having full and frank communication of information during an investigation is undermined. If it does apply, then it would be possible to cut off a lawyer’s disclosure obligations simply by appointing the lawyer to conduct an investigation. Suppose outside counsel is appointed to conduct the investigation and outside counsel reports information to in-house counsel. Section (d) applies to outside counsel, but what about the information received by in-house counsel who is not conducting the investigation?

184. Id. at 46.
The preceding discussion assumes that the entity is fairly large. What if the entity is closely held? An old decision, Rosman v. Shapiro, held that in a two-person corporation, the attorney has a client-attorney relationship with both shareholders. However, the Second Circuit has rejected the reasonable expectation test of *Rosman* in favor of an objective test requiring the principals of the entity to show that they sought legal advice from the attorney and made it clear that they were doing so in their individual capacity.

If a client-attorney relationship exists with the principals of a closely held entity, two courses of action seem available to the attorney. One is to make full disclosure to all clients; disclosure would be justified on the ground that there is no expectation of confidentiality nor does the attorney-client privilege apply to joint clients. See Model Rule 1.7, cmts. 30 and 31. The other option is to withdraw from the matter, based on the principle that an irreconcilable conflict of interest exists between multiple clients. See Model Rule 1.16(a)(1).

**Reporting up and reporting out under the SEC’s attorney conduct regulations adopted pursuant to the Sarbanes-Oxley Act**

*Introduction.* Congress enacted the Sarbanes-Oxley Act of 2002 in response to widespread corporate accounting scandals involving major corporations, particularly Enron and WorldCom. The Act contains 11 titles, dealing with topics such as establishing a Public Accounting Oversight Board, improving auditor independence, enhancing financial disclosures, strengthening the powers of the SEC, and increasing criminal penalties. Only one provision focuses directly on lawyers. Section 307 of the Act (Rules of Professional Responsibility for Attorneys) states:

Not later than 180 days after the date of enactment of this Act, the Commission shall issue rules, in the public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers, including a rule—

(1) requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); and

185. See Rosman v. Shapiro, 653 F. Supp. 1441 (S.D.N.Y. 1987) (in two-person corporation, it is reasonable for each shareholder to view corporate counsel as his individual attorney).


187. For insight into the drafting of the regulations and criticism of the final product, see Susan P. Koniak, When the Hurlyburly’s Done: The Bar’s Struggle with the SEC, 103 Colum. L. Rev. 1236, 1269-1278 (2003).

(2) if the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors.

After receiving extensive comments, in January 2003, the Commission promulgated final regulations, effective August 5, 2003, implementing the statute’s mandate to impose a reporting up requirement.\(^\text{189}\)

Relationship between the Sarbanes-Oxley regulations and state rules of professional conduct. The regulations provide that they supplement standards of conduct in jurisdictions where the attorney is admitted to practice.\(^\text{190}\) Thus, if a state imposes more demanding requirements than the regulations, state rules govern. The regulations preempt state rules, however, to the extent that they conflict with the regulations and impose lesser obligations.\(^\text{191}\) Therefore, to determine their obligations, attorneys who are covered by the regulations must consult both the regulations and state rules of professional conduct.

Covered attorneys. The regulations apply to “attorneys appearing and practicing before the Commission in the representation of an issuer.”\(^\text{192}\) The definitional section broadly defines “appearing and practicing before the Commission.”\(^\text{193}\) The term includes lawyers who transact business with the Commission or who represent issuers in connection with Commission proceedings. In addition, lawyers who give advice with regard to U.S. securities issues will be covered by the definition if their advice relates to documents filed with the Commission or if they advise about exemptions from filing or other regulatory requirements. Lawyers retained by issuers to investigate reports required by the regulation are also treated as appearing and practicing before the Commission, although they have limited obligations under the regulations.\(^\text{194}\) The rule excludes “non-appearing foreign attorneys.”\(^\text{195}\)

Standard for reporting. The obligations of attorneys covered by the regulations attach when an attorney “becomes aware of evidence of a

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191. Id.
192. Id.
193. Id. §205.2(a).
194. Id. §205.3(b)(5), (6), (7).
195. Id. §§205.2(a)(2)(ii) and 205.2(j).
material violation by the issuer or by any officer, director, employee, or agent of the issuer.\(^{196}\) The regulations adopt the following definition:

*Evidence of a material violation* means credible evidence, based upon which it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that it is reasonably likely that a material violation has occurred, is ongoing, or is about to occur.\(^{197}\)

This definition represents a compromise among the differing views presented to the Commission. The final standard is objective, but it also recognizes the possibility of a range of reasonable professional behavior.\(^{198}\) The combination of negatives (“unreasonable” and “not”), however, is likely to be confusing. The easiest way to understand the definition is by focusing on the concept of “reasonably likely that a material violation has occurred.” The comments to the definition explain:

To be “reasonably likely” a material violation must be more than a mere possibility, but it need not be “more likely than not.” If a material violation is reasonably likely, an attorney must report evidence of this violation.\(^{199}\)

Several other points about the triggering standard are worth noting. It is clear that a lawyer cannot refuse to report evidence of a material violation on the ground that the lawyer does not know that a violation has occurred.\(^{200}\) Under revised ABA Model Rule 1.13(b) a lawyer must know of a crime of fraud before having a duty to report up, but as discussed above, the regulations preempt less demanding state standards. Similarly, a lawyer cannot refrain from reporting on the ground that nonfrivolous arguments can be made that a material violation has not occurred.\(^{201}\) Thus, a lawyer could properly refuse to report evidence of a material violation only if a competent and prudent lawyer, under the circumstances, would conclude based on the evidence that a finding of a material violation is not reasonably likely. How will lawyers make this determination? The commentary indicates the circumstances that lawyers should take into account:

The “circumstances” are the circumstances at the time the attorney decides whether he or she is obligated to report the information. These circumstances may include, among others, the attorney’s professional skills, background and experience, the time constraints under which the attorney is acting, the attorney’s previous experience and familiarity with the client, and

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196. *Id.* §205.3(b)(1) and §205(c)(1). The former section applies to issuers that have not established Qualified Legal Compliance Committees (QLCC); the latter to issuers that have created such committees. The triggering language is the same for both. QLCCs are discussed below.
197. *Id.* §205.2(e).
198. See SEC Release 33-8185 (Jan. 29, 2003) at n.46 (discussing comments on the proposed rule in Section-by-Section Discussion of Final Rule).
199. *Id.* at n.50.
200. *Id.* at n.48.
201. *Id.* at n.49.
the availability of other lawyers with whom the lawyer may consult. Under the revised definition, an attorney is not required (or expected) to report “gossip, hearsay, [or] innuendo.” Nor is the rule’s reporting obligation triggered by “a combination of circumstances from which the attorney, in retrospect, should have drawn an inference.” . . .

While these factors are useful, they do not provide the kind of clear guidance that attorneys facing these difficult decisions will want. How a lawyer should proceed will depend on whether the lawyer is a supervisory or subordinate attorney.

Obligations of subordinate attorneys. If the attorney is a subordinate attorney, the attorney should normally report the matter to the attorney’s supervisor. This would be the prudent course of action even if the subordinate did not believe that a material violation was reasonably likely. Under the regulations subordinate attorneys comply with their obligations if they report the matter to their supervisory attorneys:

A subordinate attorney complies with §205.3 if the subordinate attorney reports to his or her supervising attorney under §205.3(b) evidence of a material violation of which the subordinate attorney has become aware in appearing and practicing before the Commission.

It should be noted that the obligations of subordinate attorneys under the regulations are quite different from their obligations under rules of professional conduct applicable in most states. Under ABA Model Rule 5.2(b) a subordinate attorney “does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer’s reasonable resolution of an arguable question of professional duty.” Thus, under ABA rules a subordinate attorney is not relieved of responsibility simply by reporting a matter to a supervisory attorney. Under the regulations, however, subordinates enjoy greater protection. Once a subordinate reports a matter to a supervisory lawyer, the subordinate need not take any further action.

The comments to the regulations explain why subordinate attorneys should not be exempted from compliance with the regulations:

We believe that creation of such an exemption would seriously undermine Congress’ intent to provide for the reporting of evidence of material violations to issuers. Indeed, because subordinate attorneys frequently perform a significant amount of work on behalf of issuers, we believe that subordinate

202. Id. at n.47.
203. 17 C.F.R. §205.4 (responsibilities of supervisory attorneys).
204. Id. §205.5.
205. Id. §205.5(c).
206. Id. Subordinate attorneys are authorized, but not required, to take further action if they reasonably believe that their supervisors have failed to comply with the reporting obligations under the regulations. Id. §205.5(d).
attorneys are at least as likely (indeed, potentially more likely) to learn about evidence of material violations as supervisory attorneys.207

But the comments fail to explain why the regulations deviate from the ABA Model Rules and exempt subordinate attorneys from compliance with the regulations once they have reported matters to their supervisory attorneys. The comments simply state that this provision received relatively little comment and those comments typically supported allowing subordinate attorneys to satisfy their obligations by reporting to supervisory attorneys.208 One possible justification is that the determination of whether evidence of a material violation exists can often be a complex question. Many subordinate attorneys will lack the experience to make this decision. Fearful of their reputations and of personal liability, subordinates may be inclined to over-report. In addition, by shifting responsibility to the supervisory attorney, the regulations are likely to diminish difficult confrontations between supervisory and subordinate lawyers.

Obligations of supervisory attorneys. Once a matter is brought to the attention of a supervisory lawyer, either directly or by report of a subordinate attorney, the supervisory attorney must then make the decision whether the evidence is sufficient to require reporting under the regulations:

A supervisory attorney is responsible for complying with the reporting requirements in §205.3 when a subordinate attorney has reported to the supervisory attorney evidence of a material violation.209

How should a supervisory attorney make this determination? One way to proceed is to err on the side of caution and report the matter, particularly if the matter involves potentially serious wrongdoing. A supervisory attorney who is contemplating not reporting a matter should consider obtaining advice of independent counsel on the issue. If the supervisory lawyer receives an opinion stating that a material violation was reasonably likely, then the lawyer would be required to report as set forth in the regulations. An opinion from a qualified independent counsel stating that a material violation is not reasonably likely should be sufficient to justify that attorney taking no further action.

If a lawyer concludes that he or she possesses evidence of a material violation, then the lawyer is required to report the matter as set forth in the regulations. The regulations envision two ways in which the lawyer can report, depending on whether or not the client has established a Qualified Legal Compliance Committee (QLCC).210 If the client has not established a QLCC, the attorney is required to act as follows:

207. See SEC Release 33-8185 (Jan. 29, 2003) at n.120.
208. Id.
209. 17 C.F.R. §205.4(c).
210. Compare id. §205.3(b)(1), with id. §205.3(c)(1).
If an attorney, appearing and practicing before the Commission in the representation of an issuer, becomes aware of evidence of a material violation by the issuer or by any officer, director, employee, or agent of the issuer, the attorney shall report such evidence to the issuer’s chief legal officer (or the equivalent thereof) or to both the issuer’s chief legal officer and its chief executive officer (or the equivalents thereof) forthwith.\textsuperscript{211}

The chief legal officer (CLO) (or the equivalent) is then required to investigate the matter.\textsuperscript{212} As a result of the investigation, the CLO may conclude that no material violation is involved. In that case the CLO shall inform the reporting attorney and explain the basis for that determination.\textsuperscript{213} Unless the CLO reasonably believes that a material violation is not involved, the CLO “shall take all reasonable steps to cause the issuer to adopt an appropriate response, and shall advise the reporting attorney thereof.”\textsuperscript{214} What amounts to an “appropriate response” is discussed in more detail below. If the issuer has established a QLCC, the CLO, rather than conducting an investigation, may turn the matter over to the QLCC.\textsuperscript{215}

If the reporting attorney does not reasonably believe that the CLO has made an appropriate response within a reasonable period of time, the attorney must then report the evidence of a material violation to either the audit committee of the issuer, another committee of the issuer that consists solely of independent directors, or to the issuer’s board of directors.\textsuperscript{216}

An attorney who reasonably believes that he or she has received an appropriate response to a report “need do nothing more under this section.”\textsuperscript{217} On the other hand, if a reporting attorney does not reasonably believe that he or she has received an appropriate response to a report required by the regulations, then the attorney “shall explain his or her reasons therefor to the chief legal officer (or the equivalent thereof), the chief executive officer (or the equivalent thereof), and directors to whom the attorney reported the evidence of a material violation.”\textsuperscript{218}

\textit{Qualified legal compliance committees.} The regulations provide for an alternative reporting regime if the issuer has established a QLCC.\textsuperscript{219} The regulations define specifically the requirements for a QLCC in order to

\textsuperscript{211} 17 C.F.R. §205.3(b)(1).  
\textsuperscript{212} Id. §205.3(b)(2).  
\textsuperscript{213} Id.  
\textsuperscript{214} Id.  
\textsuperscript{215} Id. §205.3(b)(2).  
\textsuperscript{216} Id. §205.3(b)(3).  
\textsuperscript{217} Id. §205.3(b)(8).  
\textsuperscript{218} Id. §205.3(b)(9).  
assure its independence.\textsuperscript{220} The regulations allow reporting to a QLCC only if the committee was established before the matter arises.\textsuperscript{221} Thus, an issuer cannot create a QLCC to deal with a matter that has already arisen.

Rather than reporting evidence of a material violation to an issuer’s CLO, an attorney may report the matter to a QLCC.\textsuperscript{222} An attorney who reports a matter to a QLCC is not required to take any further action: “An attorney who reports evidence of a material violation to such a qualified legal compliance committee has satisfied his or her obligation to report such evidence and is not required to assess the issuer’s response to the reported evidence of a material violation.”\textsuperscript{223} Similarly, a CLO may turn the matter over to a QLCC, which then has full responsibility for the matter.\textsuperscript{224}

\textit{Appropriate response to a report.} Crucial to the application of the regulations is the concept of an “appropriate response.” As discussed previously reporting attorneys need not take any further action if they receive an appropriate response.\textsuperscript{225} A CLO to whom a matter is reported and who determines that a material violation is reasonably likely must take reasonable steps to cause an issuer to make an appropriate response.\textsuperscript{226} A QLCC to which a matter has been referred has the power to recommend that the issuer make an appropriate response.\textsuperscript{227} Under the regulations there are three types of appropriate responses:

- a response that the reporting attorney reasonably believes that no material violation is involved.\textsuperscript{228}
- a response that the reporting attorney reasonably believes that the issuer has adopted appropriate remedial measures, “including appropriate steps or sanctions to stop any material violations that are ongoing, to prevent any material violation that has yet to occur, and to remedy or otherwise appropriately address any material violation that has already occurred and to minimize the likelihood of its recurrence.”\textsuperscript{229}
- a response that the issuer, with the consent of the board of directors, a QLCC, or a committee to which a report could be made under the regulations,\textsuperscript{230} has retained an attorney to investigate the material

\textsuperscript{220} 17 C.F.R. §205.2(k).
\textsuperscript{221} Id. §205.3(c)(1) (“if the issuer has previously formed such a committee”). Id. §205.3(c)(2) (“previously established qualified legal compliance committee”).
\textsuperscript{222} Id. §205.3(c)(1).
\textsuperscript{223} Id.
\textsuperscript{224} Id. §205.3(c)(2).
\textsuperscript{225} Id. §205.3(b)(8).
\textsuperscript{226} Id. §205.3(b)(2).
\textsuperscript{227} Id. §205.2(k)(3)(iii).
\textsuperscript{228} Id. §205.3(b)(1).
\textsuperscript{229} Id. §205.3(b)(2).
\textsuperscript{230} Id. §205.3(b)(3).
violation and either (1) the issuer has reasonably implemented the remedial measures recommended by the attorney after a reasonable investigation or (2) the issuer has been advised by the attorney that “such attorney may, consistent with his or her professional obligations, assert a colorable defense . . . in any investigation or judicial or administrative proceeding relating to the reported evidence of a violation.”

Probably the most striking aspect of the definition of an appropriate response is the last part. Under this section, if an issuer, with the consent of either the board of directors or one of the listed independent committees, has retained an attorney to review the matter, and if the attorney “consistent with his or her professional obligations” concludes that a “colorable defense” exists, that conclusion amounts to an appropriate response. The comments explain that a “colorable defense” is essentially a defense that is not frivolous. This standard is exceedingly weak. The investigating attorney need not even be outside counsel. The comments refer to an attorney “whether employed or retained by it.” While there is an element of independence in the process through the requirement that the attorney be selected with the consent of one of the independent committees, that protection is not great. Even if counsel that is chosen is truly independent and makes an objective inquiry, it is very likely that counsel will find that a colorable defense exists.

Reporting out. As discussed previously, the Model Rules have several provisions that allow lawyers to report out if reporting up has not produced a successful resolution of the wrongdoing. The SEC’s regulations also include reporting out provisions, but they are somewhat different from the reporting out sections of the Model Rules. The regulations provide:

(d) Issuer confidences.

(1) Any report under this section (or the contemporaneous record thereof) or any response thereto (or the contemporaneous record thereof) may be used by an attorney in connection with any investigation, proceeding, or litigation in which the attorney’s compliance with this part is in issue.

(2) An attorney appearing and practicing before the Commission in the representation of an issuer may reveal to the Commission, without the issuer’s consent, confidential information related to the representation to the extent the attorney reasonably believes necessary:

(i) To prevent the issuer from committing a material violation that is likely to cause substantial injury to the financial interest or property of the issuer or investors;

(ii) To prevent the issuer, in a Commission investigation or administrative proceeding from committing perjury, proscribed in 18 U.S.C.

231. Id. §205.2(b)(3(ii).
232. See SEC Release 33-8185 (Jan. 29, 2003), cmt. to §205.2(b) (definition of “appropriate response”).
233. Id.
§1621; suborning perjury, proscribed in 18 U.S.C. §1622; or committing any act proscribed in 18 U.S.C. §1001 that is likely to perpetrate a fraud upon the Commission; or

(iii) To rectify the consequences of a material violation by the issuer that caused, or may cause, substantial injury to the financial interest or property of the issuer or investors in the furtherance of which the attorney’s services were used.\(^{234}\)

Section (d)(1) is similar to the self-defense exception of Model Rule 1.6(b)(5). Section (d)(2)(i) is similar to Model Rule 1.6(b)(2) but with significant differences. It does not require that the lawyer’s services be used; it focuses on prevention of harm to the issuer or investors, while Model Rule 1.6(b)(2) applies to financial harm to any person; it authorizes the lawyer to report to the Commission. Section (d)(2)(ii) is broadly similar to Model Rule 3.3, which imposes obligations on lawyers with regard to false testimony. Section (d)(ii) is directed at prevention rather than rectification of false testimony, but perhaps rectification is implicit in the rule. Section (d)(2)(iii) is similar to Model Rule 1.6(b)(3), but this section, unlike (d)(2)(i), includes a requirement that the lawyer’s services be used in furtherance of the material violation.

The reporting out provisions discussed above are discretionary with attorneys. In addition, the SEC proposed a mandatory noisy notice of withdrawal requirement if the reporting attorney did not receive an appropriate response to a report of a material violation. The SEC ultimately decided not to adopt the noisy withdrawal provision. Instead, it chose a provision requiring an issuer to report to the SEC when a lawyer withdraws for “professional considerations.”\(^{235}\)

Civil liability of attorneys with regard to illegal or fraudulent conduct by their clients

To what extent are lawyers legally liable for damages to third persons because of their involvement in transactions in which a client committed a crime or engaged in fraud? The question cannot be answered simply because of the wide variety of legal theories, both statutory and common law, that can form the basis of lawyer liability to third parties.\(^{236}\) This section surveys some of the most significant theories.

\(^{234}\) 17 C.F.R. §205.3(d).
Aiding and abetting liability under the federal securities laws. Beginning in the 1970s a number of courts ruled that lawyers could be held legally liable for “aiding and abetting” violations of the federal securities laws. Probably the best known of these cases is SEC v. National Student Marketing Corp.,237 in which the court found that a prominent New York law firm was liable as an aider and abetter when it participated in the closing of a merger even though it knew that management had solicited proxies based on false financial statements. After National Student Marketing, many courts held lawyers civilly liable for aiding and abetting securities law violations. Another highly publicized situation in which lawyers were accused of aiding or abetting client fraud was the OPM leasing scandal. In that matter a law firm continued to close leasing transactions even after it had learned that its client was using phony leases as collateral for loans.238

In 1994 the Supreme Court, in Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.,239 surprised many members of the securities bar. The Court overturned more than 20 years of case law and repudiated the decisions of all 11 circuit courts of appeal, holding in a 5-4 decision that “ aider and abetter” liability did not exist under the federal securities laws. Reasoning from the plain text of the statute and from the scope of the statute’s express causes of action, the Court concluded that Congress did not intend to create aider and abetter liability. The Court rejected arguments that Congress had adopted or acquiesced in judicial creation of aider and abetter liability.

While Central Bank appears to insulate lawyers and other professionals from secondary liability under the federal securities laws, this protection is not unlimited.240 The SEC has the power to bring enforcement actions against attorneys who violate the securities laws.241 In addition, attorneys may be held liable as aiders and abettors under state securities law242 or as discussed below on common law theories. Regardless of legal liability, lawyers still have an ethical obligation not to counsel or assist illegal or fraudulent conduct. Model Rule 1.2(d).

Primary liability under the federal securities laws. Central Bank recognized that if the professional’s conduct went beyond aiding or abetting to the level of a primary securities violation, the professional could still be held legally liable. Relying on this principle, in 2002 the

240. See Gary M. Bishop, A Framework for Analyzing Attorney Liability Under Section 10(b) and Rule 10b-5, 10 U.N.H. L. Rev. 193 (2012).
District Court for the Southern District of Texas held that investors stated causes of action against the firm of Vinson & Elkins for primary violations of the federal securities laws in connection with the firm’s representation of the Enron Corporation. The court stated:

[T]he complaint goes into great detail to demonstrate that Vinson & Elkins did not remain silent, but chose not once, but frequently, to make statements to the public about Enron’s business and financial situation. . . . Moreover in light of its alleged voluntary, essential, material, and deep involvement as a primary violator in the ongoing Ponzi scheme, Vinson & Elkins was not merely a drafter, but essentially a co-author of the documents it created for public consumption concealing its own and other participants’ actions. Vinson & Elkins made the alleged fraudulent misrepresentations to potential investors, credit agencies, and banks, whose support was essential to the Ponzi scheme, and Vinson & Elkins deliberately or with severe recklessness directed those public statements toward them in order to influence those investors to purchase more securities, credit agencies to keep Enron’s credit high, and banks to continue providing loans to keep the Ponzi scheme afloat. Therefore Vinson & Elkins had a duty to be accurate and truthful. Lead Plaintiff has alleged numerous inadequate disclosures by Vinson & Elkins that breached that duty.243

The Supreme Court has limited primary securities liability of vendors and customers who engage in sham transactions that inflate a corporation’s earnings because such transactions occur in the marketplace for goods and services rather than in the investment area and are therefore too remote to support primary liability.244 This limitation should not apply, however, to attorneys who engage in public statements about a company’s financial situation.245

Common law liability for fraud, negligent misrepresentation, or aiding and abetting. The traditional rule has been that lawyers are liable only to their clients and not to third parties with whom there is no privity of contract.246 In a number of jurisdictions, however, the privity barrier has been eroded.

243. In re Enron Corp. Securities, Derivative & ERISA Litigation, 235 F. Supp. 2d 549, 705 (S.D. Tex. 2002). The court dismissed allegations against another prominent law firm, Kirkland & Ellis, because it found that Kirkland & Ellis did not make public representations or prepare documents for public solicitation of funds. Id. at 706. In 2007 the plaintiffs’ voluntarily dismissed claims against Vinson & Elkins without payment. The firm did agree to pay $30 million to Enron’s bankruptcy trustee to avoid a lawsuit. See http://en.wikipedia.org/wiki/Vinson_%26_Elkins#cite_note-8 (visited August 8, 2016). For discussion of the legal and ethical responsibility of attorneys in connection with the Enron scandal, see Roger C. Cramton, Enron and the Corporate Lawyer: A Primer on Legal and Ethical Issues, 58 Bus. Law. 143 (Nov. 2002).


245. See In re DVI, Inc. Sec. Litig., 639 F.3d 623, 646-648 (3d Cir. Pa. 2011) (holding that law firm was not liable under the securities law for alleged deceptive conduct that was not publicly disclosed).

Depending on the jurisdiction, lawyers who fraudulently or negligently issue false opinions can be held liable to third parties. Opinion letters typically state that they are intended for the use of the client only and should not be relied on by third parties. Such statements, however, will not necessarily protect a law firm from liability if it is aware that its opinion letter is being used to obtain investors. Many jurisdictions recognize common law aider and abetter liability when a person knowingly provides substantial assistance or encouragement to another person’s primary wrong. As noted above, the Supreme Court in *Central Bank* held that the federal securities laws should not be interpreted to provide for aider and abetter liability.

**Liability for nondisclosure.** If a lawyer does not actively participate in a fraudulent transaction, it is unlikely that the lawyer would be held liable to a third party simply for nondisclosure of the client’s wrongdoing. For example, in *Tew v. Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A.* the district court dismissed a legal malpractice complaint against a law firm alleging that the firm had failed to disclose its knowledge of the client’s insolvency to its auditors. The firm had not issued an opinion letter or otherwise taken part in the transaction.

In 1992 the Office of Thrift Supervision (OTS) created quite a stir in the legal profession when it brought an administrative complaint against Kaye, Scholer, Fierman, Hays & Handler, a prominent New York law firm, for its representation of Lincoln Savings & Loan. The complaint contained ten


249. See Restatement (Second) of Torts §876(b) (actor liable for tort of another if actor knows that other’s conduct is breach of duty to third person and provides substantial assistance or encouragement); *Reynolds v. Schrock*, 142 P.3d 1062 (Or. 2006) (lawyers may be held liable for aiding and abetting client’s breach of fiduciary duty, but liability is limited to situations in which lawyer acts outside scope of attorney-client relationship). *See* Richard C. Mason, Civil Liability for Aiding and Abetting, 61 Bus. Law. 1135 (2006).


charges against Kaye, Scholer, a number of which alleged that the firm had failed to disclose material facts to the Federal Home Loan Bank Board. The OTS claimed that in acting as Lincoln’s agent under the governing statutory laws, Kaye, Scholer had a duty not to omit material facts. The OTS’s action was controversial in another sense because it accompanied its complaint with an “asset protection order” that limited the firm’s ability to transfer assets and required sequestration of 25 percent of the earnings of all partners with a higher percentage for certain named defendants. Under the pressure of the order, Kaye, Scholer promptly settled the case, paying $41 million in restitution—so the issue of whether the firm had a duty of disclosure as contended by the OTS was not resolved. Professor Hazard argues that the case should be understood not as a third-party liability case but rather as a case involving the scope of a law firm’s obligations to a regulatory agency that has jurisdiction over the lawyer’s client.252 Other commentators, however, see much broader implications in the case.253

Standards for issuance of third-party opinions

The Model Rules do not specifically address the standards applicable to lawyers in preparing opinions that involve third parties.254 The rules, however, do consider circumstances under which a lawyer may not undertake such an evaluation. Under Model Rule 2.3(a), a lawyer may prepare an evaluation for a third party at the request of the client provided the lawyer reasonably believes that “making the evaluation is compatible with other aspects of the lawyer’s relationship with the client.” When a lawyer is acting as an advocate for the client, it normally would be incompatible with the lawyer’s adversarial role to make an independent evaluation for others in connection with the matter. See comment 3.

If the lawyer knows or reasonably should know that providing the evaluation is likely to have a material, adverse effect on the client’s interests, the lawyer must obtain the client’s informed consent to provide the evaluation. Model Rule 2.3(b). In connection with such an evaluation, the lawyer may disclose confidential information to the extent authorized by the client. Model Rule 2.3(c).

While the Model Rules do not establish standards for issuance of third party opinions, guidelines or requirements for issuance of such opinions can

254. The Restatement also does not establish specific standards for issuance of legal opinions. See Restatement (Third) of the Law Governing Lawyers §96, cmt. g.
be found in a variety of sources. Many law firms have internal policies and procedures on the issuance of legal opinions. The Committee on Legal Opinions of the ABA Section of Business Law has established a number of guidelines for general third party opinions. Section 4.3 of the Committee’s Guidelines provides that opinion givers should not be asked to render comprehensive opinions on legal and contractual compliance. Thus, a lawyer should not be asked for the following types of opinions:

- the client has obtained all necessary licenses, permits, and filings in connection with the client’s business.
- the client is not in violation of applicable laws or regulations.
- the client is not in default under any of its contractual obligations.

Under Section 4.3 a comprehensive opinion is improper even if it contains a materiality exception or a knowledge limitation.

Instead, with regard to opinions relating to client contracts opinion givers typically limit their opinions to the following:

(1) the proposed agreement is enforceable against the client;
(2) execution, delivery, and performance of the agreement will not result in a default under any other agreements or obligations that are material to the client's business;
(3) execution, delivery, and performance of the agreement will not violate any applicable provisions of statutory law or regulations; and
(4) no actions or proceedings against the client are pending or overtly threatened in writing before any court, governmental agency, or arbitrator, which would affect the enforceability of the agreement or would be material to the client’s business.

Regardless of its form, a lawyer should not issue an opinion that would be misleading. See Section 1.5.

In particular areas of practice, legal standards and guidelines for the issuance of opinions may exist. The Internal Revenue Service, like most federal agencies, has published standards of conduct for lawyers and other practitioners admitted to practice before the agency. These standards are commonly referred to as “Treasury Circular 230” and are codified in the Code of Federal Regulations. One aspect of the IRS’s regulations establishes standards for the issuance of written tax advice. With regard to

257. Id. at 876.
258. 31 C.F.R. §10.0 et seq.
259. Id. §10.37.
securities transactions, the ABA Committee on Ethics and Professional Responsibility has issued a formal opinion to guide practitioners.\footnote{See ABA Formal Opinion 335 (1974). For real estate finance transactions, see the Real Estate Finance Opinion Report of 2012, ALI CLE Course Materials, CV008 ALI-ABA 2311 (2012) (on Lexis).}

Another form of opinion that lawyers are often asked to render involves responses to accountants’ requests for information about clients’ loss contingencies. Accountants use this information in preparing clients’ financial statements. For many years, such requests were a source of tension between lawyers and accountants. Accountants naturally wanted to receive complete information from lawyers because they were concerned about their legal liability for preparing misleading financial statements. Lawyers were wary about revealing confidential information that could generate claims that otherwise might not have been brought. In 1975, the ABA and the American Institute of Certified Public Accountants reached an accord to resolve the question how lawyers could respond to auditors’ requests for information consistently with their ethical obligations.\footnote{See ABA Statement of Policy Regarding Lawyers’ Responses to Auditors’ Requests for Information, 31 Bus. Law. 1709 (1976). See also Nathan M. Crystal, Ethical Obligations in Responding to Auditors’ Requests, 26 S.C. Law 12 (May 2015).}

In addition to these standards, lawyers who issue opinions in transactions involving third parties also face the possibility of legal liability to third parties, as discussed in the previous section.

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**Problem 3-5**

**The Duty of Confidentiality and the Use of Technology**

You are an associate in a medium-sized law firm (50 lawyers) working in products liability defense. One of the shareholders in your firm has expressed concern that the firm may not be taking adequate steps to protect the confidentiality of client information when members of the firm use the wide range of modern technology, including smartphones, wireless Internet access, and cloud computing services.

(a) Prepare an outline of some of the risks that you see and the steps or firm policies that you think the firm should consider taking to eliminate or minimize these risks. Consider the attached material and the following article: Timothy J. Toohey, Beyond Technophobia: Lawyers’ Ethical and Legal Obligations to Monitor Evolving Technology and Security Risks, 21 Rich. J.L. & Tech. 9 (2015).

(b) With regard to the risks involved in use of email, ABA Opinion 11-459 advises lawyers about the risk to confidentiality in using email systems or devices that can be accessed by third parties, including employers, friends, and family. The opinion suggests


that lawyers warn clients of this risk. Draft a warning provision for inclusion in your firm’s standard engagement agreement.

(c) Your firm is considering hiring a new case management cloud service. What factors would you consider in evaluating whether the use of the service is consistent with the ethical duty of confidentiality?

Read Model Rule 1.6 and comments.

Confidentiality and the use of technology in general

As we have seen, Model Rule 1.6(a) broadly protects client confidentiality by providing that any information “relating” to the representation is subject to the ethical duty unless various exceptions apply. The rule could be read literally to impose strict liability on attorneys for any revelation of client information unless the disclosure was expressly or impliedly authorized by the client or unless one of the exceptions set forth in section (b) applies. The rule is being interpreted, however, as having a negligence standard. Lawyers must take reasonable steps to preserve client confidentiality. If a lawyer uses a means of communication that has a reasonable expectation of privacy, the lawyer complies with the obligation of confidentiality even though client information might be revealed either inadvertently or through intentional interception by another person. Thus, the Restatement of the Law Governing Lawyers provides that confidential client information must be “acquired, stored, retrieved, and transmitted under systems and controls that are reasonably designed and managed to maintain confidentiality.”

In 2012 and 2013, the ABA adopted a number of recommendations of its Ethics 20/20 Commission. Several changes relate to the impact of technology on the practice of law. Revised comment 8 of Rule 1.1 now provides that maintaining competence requires lawyers to keep abreast “of the benefits and risks associated with relevant technology.”

With regard to the duty of confidentiality in particular, the ABA added section (c) to Rule 1.6: “A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.”

Revised comment 18 to Rule 1.6 provides that unauthorized access to client confidences is not in itself a violation of Rule 1.6 provided the lawyer has made reasonable efforts to protect such information. The comment goes


263. For the work of the 20/20 Commission, put in your browser: ABA Commission on Ethics 20/20.
on to list a number of factors for lawyers to consider in determining what is reasonable:

(i) sensitivity of the information;
(ii) likelihood of disclosure if additional precautions are not taken;
(iii) cost of additional protection;
(iv) difficulty of implementing protective measures;
(v) effect of safeguard implementation on the efficiency of client representation.

Clients may require heightened levels of security or may agree to forego protections otherwise required by the rule. Federal and state data protection laws that may require additional security protections and may impose notification in case of data breach are beyond the scope of the rules.264

The Ethics Committee of the State Bar of California has issued Opinion 2010-179 providing general guidance to lawyers with regard to their ethical obligations in using modern technology. The opinion identifies six factors for lawyers to consider in order to comply with their duties of confidentiality and competency with regard to the use of a particular method of technology:

1. “The attorney’s ability to assess the level of security afforded by the technology,” including how the technology differs from other media use; whether reasonable precautions can be taken to increase the level of security (e.g., encryption and firewalls); and limitations on who is permitted to monitor the use of the technology and on what terms (e.g., confidentiality agreements with and verification of confidentiality procedures of service providers).
2. “Legal ramifications to third parties of intercepting, accessing or exceeding authorized use of another person’s electronic information.” The fact that such a person may be subject to civil or criminal charges favors an expectation of privacy.
3. “The degree of sensitivity of the information.” Attorneys should take less technological risk with more sensitive information.
4. “Possible impact on the client of an inadvertent disclosure of privileged or confidential information or work product, including possible waiver of the privilege.” In this regard Rule 502(b) of the Federal Rules of Evidence provides some protection against inadvertent waivers.
5. “The urgency of the situation.”

6. “Client instructions and circumstances.” The committee indicated that in some circumstances lawyers should seek a client’s informed consent before using a particular technology.

In its opinion, the Committee considered three specific issues: (a) Whether a lawyer would violate his ethical duties if the firm required access to the attorney’s computer for maintenance, monitoring to assure compliance with the firm’s technology policies, and supervision of the attorney’s work. Unauthorized access or use was specifically prohibited. The Committee concluded that the lawyer would not be acting unethically because access was limited to authorized individuals to perform required tasks. However, the attorney should confirm that personnel have been instructed regarding client confidentiality. (b) Whether the attorney could use his laptop computer for client matters through a public wireless connection. The Committee concluded that this use would not be proper unless the attorney used appropriate precautions including file encryption, encryption of wireless transmissions, and a personal firewall. If the client information was particularly sensitive, the lawyer might have to forego such use entirely or obtain informed client consent. (c) Whether the attorney could ethically use his laptop for client matters on his home wireless system. With regard to home wireless computer use, the Committee concluded that such use was proper if the wireless system has appropriate security features.

E-mail use and risks

In a comprehensive opinion, the ABA Committee on Ethics and Professional Responsibility has examined the ethical propriety of lawyers’ use of e-mail.⁶⁶ All forms of e-mail have the risk of unauthorized interception. E-mail sent through on-line service providers or over the Internet is also subject to monitoring by the service provider. The committee decided that neither of these risks was sufficient to destroy the reasonable expectation of privacy.⁶⁶ Telephone conversations can be intercepted illegally, but that risk does not mean that lawyers act unethically when using the telephone to discuss client matters. Monitoring of e-mail by service providers is restricted by law and does not lessen the reasonable expectation of privacy. Therefore, the committee concluded that because lawyers have a reasonable expectation of privacy in the use of e-mail to convey client information without use of

⁶⁶. The federal wiretapping act, the Electronic Communications Privacy Act (the ECPA), 18 U.S.C. §§2510 et seq. supports this expectation of privacy in two ways. First, the act makes interception of wire communications a crime and imposes civil liability unless one of the parties to the communication consents to the interception. Id. §2511. Second, information gained from an unlawful interception is inadmissible in evidence. Id. §2515.
encryption, the use complies with a lawyer’s obligation to adopt reasonable 
means to protect the confidentiality of client information.267

Despite the blessings of the ABA Committee and almost all state com-
mittees, use of email has significant confidentiality risks.268 In Formal Opin-
ion 11-459, the ABA Committee addressed one of the risks of email: third 
party access to client-attorney email. The committee pointed out that many 
situations exist in which a client’s email could be accessed by a third party. 
For example, most employers have adopted policies providing that the 
employer has the right to review employee email when the employee has 
used the employer’s Internet service provider, employer-provided devices, 
or even employer servers. Clients may use private computers that they share 
with friends or family. The committee recommended that lawyers warn their 
clients not to use email communications that pose a risk of access by third 
parties.

**Document transmission**

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**Review and Use of Metadata**

*American Bar Association*

*Committee on Ethics and Professional Responsibility*

*Formal Opinion 06-442*

[Author’s Summary: The opinion begins by pointing out that lawyers 
often receive electronic documents, both in transactional and litigation mat-
ters. Such documents frequently contain embedded information known as “metadata.” Metadata may be easily accessible simply by a “right click” on 
the document. Metadata is not necessarily important, but in some matters the five “w’s” (who, what, when, where, why) may be significant. The opin-
ion deals with the question of whether a lawyer may review the metadata 
contained in a document. The committee concluded that such a review 
was generally proper.]

The committee first noted that no rule of professional conduct specif-
ically prohibited a receiving lawyer from reviewing metadata contained in a 
document. The closest rule to the situation was Model Rule 4.4(b), but that 
rule dealt with inadvertently sent information. Even if the sending of meta-
data was considered to be inadvertent, the rule only requires the recipient to

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267. Formal Opinion 99-413, at 11. A number of state bar ethics opinions have 
adopted an approach similar to the ABA committee’s: use of any form of e-mail is consistent 
with a lawyer’s obligations under Rule 1.6 without the need for encryption or client consent. 
Opinions in Pennsylvania and Arizona recommended that lawyers obtain client consent or use 
encryption. Opinions in Iowa and North Carolina took the position that lawyers should not 
transmit sensitive client information by e-mail. *Id.* at 11-12 n.40.

268. See Rebecca Bolin, Risky Mail: Concerns in Confidential Attorney-Client Email, 
notify the sender of the receipt of the document. It is silent on the question of whether an attorney may ethically review or use metadata.

Opinions in New York (N.Y. St. Op. 749 (2001)) and Florida (Fla. Bar Op. 06-02) had held that review of metadata was improper because the review constituted a form of dishonesty. The ABA committee rejected this view. It found that the recent inclusion in the rules of Model Rule 4.4(b) identifying the only requirement of providing notice to the sender as evidence of the intention that there were no other restrictions in the rules on the receiving lawyer’s conduct. State ethics committees are divided on whether it is ethically permissible for lawyers to access metadata in documents they receive. See American Bar Association > Metadata Ethics Opinions Around the U.S.

The committee pointed out that sending lawyers could protect against the review of metadata by (1) avoiding creation of such data to begin with, (2) using “scrubbing” programs to eliminate metadata, unless scrubbing would violate a legal or ethical prohibition on altering a document, (3) sending a different version of the document, such as hard copy, scanned, or faxed, or (4) entering into a confidentiality agreement or obtaining a protective order that would protect against the use of metadata.

Cloud computing

New York State Bar Association

Committee on Professional Ethics

Opinion #842 (2010)

QUESTION

1. May a lawyer use an online system to store a client’s confidential information without violating the duty of confidentiality or any other duty? If so, what steps should the lawyer take to ensure that the information is sufficiently secure?

OPINION

2. Various companies offer online computer data storage systems that are maintained on an array of Internet servers located around the world. (The array of Internet servers that store the data are often called the “cloud.”) A solo practitioner would like to use one of these online “cloud” computer data storage systems to store client confidential information. The lawyer’s aim is to ensure that his clients’ information will not be lost if something happens to the lawyer’s own computers. The
online data storage system is password-protected and the data stored in the online system is encrypted.

3. A discussion of confidential information implicates Rule 1.6 of the New York Rules of Professional Conduct (the “Rules”), the general rule governing confidentiality.

4. The obligation to preserve client confidential information extends beyond merely prohibiting an attorney from revealing confidential information without client consent. A lawyer must also take reasonable care to affirmatively protect a client’s confidential information.

5. In addition, Rule 1.6(c) provides that an attorney must “exercise reasonable care to prevent . . . others whose services are utilized by the lawyer from disclosing or using confidential information of a client” except to the extent disclosure is permitted by Rule 1.6(b). Accordingly, a lawyer must take reasonable affirmative steps to guard against the risk of inadvertent disclosure by others who are working under the attorney’s supervision or who have been retained by the attorney to assist in providing services to the client. We note, however, that exercising “reasonable care” under Rule 1.6 does not mean that the lawyer guarantees that the information is secure from any unauthorized access.

6. To date, no New York ethics opinion has addressed the ethics of storing confidential information online. However, in N.Y. State 709 (1998) this Committee addressed the duty to preserve a client’s confidential information when transmitting such information electronically. Opinion 709 concluded that lawyers may transmit confidential information by e-mail, but cautioned that “lawyers must always act reasonably in choosing to use e-mail for confidential communications.” The Committee also warned that the exercise of reasonable care may differ from one case to the next. Accordingly, when a lawyer is on notice that the confidential information being transmitted is “of such an extraordinarily sensitive nature that it is reasonable to use only a means of communication that is completely under the lawyer’s control, the lawyer must select a more secure means of communication than unencrypted Internet e-mail.” See also Rule 1.6, cmt. 17 (a lawyer “must take reasonable precautions” to prevent information coming into the hands of unintended recipients when transmitting information relating to the representation, but is not required to use special security measures if the means of communicating provides a reasonable expectation of privacy).

7. Ethics advisory opinions in several other states have approved the use of electronic storage of client files provided that sufficient precautions are in place.

8. Because the inquiring lawyer will use the online data storage system for the purpose of preserving client information—a purpose both related to the retention and necessary to providing legal services to the client—using the online system is consistent with conduct that this Committee has deemed ethically permissible.
9. We conclude that a lawyer may use an online “cloud” computer data backup system to store client files provided that the lawyer takes reasonable care to ensure that the system is secure and that client confidentiality will be maintained. “Reasonable care” to protect a client’s confidential information against unauthorized disclosure may include consideration of the following steps:

(1) Ensuring that the online data storage provider has an enforceable obligation to preserve confidentiality and security, and that the provider will notify the lawyer if served with process requiring the production of client information;

(2) Investigating the online data storage provider’s security measures, policies, recoverability methods, and other procedures to determine if they are adequate under the circumstances;

(3) Employing available technology to guard against reasonably foreseeable attempts to infiltrate the data that is stored; and/or

(4) Investigating the storage provider’s ability to purge and wipe any copies of the data, and to move the data to a different host, if the lawyer becomes dissatisfied with the storage provider or for other reasons changes storage providers.

10. Technology and the security of stored data are changing rapidly. Even after taking some or all of these steps (or similar steps), therefore, the lawyer should periodically reconfirm that the provider’s security measures remain effective in light of advances in technology. If the lawyer learns information suggesting that the security measures used by the online data storage provider are insufficient to adequately protect the confidentiality of client information, or if the lawyer learns of any breach of confidentiality by the online storage provider, then the lawyer must investigate whether there has been any breach of his or her own clients’ confidential information, notify any affected clients, and discontinue use of the service unless the lawyer receives assurances that any security issues have been sufficiently remediated. See Rule 1.4 (mandating communication with clients); see also N.Y. State 820 (2008) (addressing Web-based e-mail services).

11. Not only technology itself but also the law relating to technology and the protection of confidential communications is changing rapidly. Lawyers using online storage systems (and electronic means of communication generally) should monitor these legal developments, especially regarding instances when using technology may waive an otherwise applicable privilege. See, e.g., City of Ontario, Calif. v. Quon, 130 S.Ct. 2619, 177 L. Ed.2d 216 (2010) (holding that City did not violate Fourth Amendment when it reviewed transcripts of messages sent and received by police officers on police department pagers); Scott v. Beth Israel Medical Center, 17 Misc. 3d 934, 847 N.Y.S.2d 436 (N.Y. Sup. 2007) (e-mails between hospital employee and his personal attorneys were not privileged because employer’s policy regarding computer use and
e-mail monitoring stated that employees had no reasonable expectation of privacy in e-mails sent over the employer’s e-mail server). But see Stengart v. Loving Care Agency, Inc., 201 N.J. 300, 990 A.2d 650 (2010) (despite employer’s e-mail policy stating that company had right to review and disclose all information on “the company’s media systems and services” and that e-mails were “not to be considered private or personal” to any employees, company violated employee’s attorney-client privilege by reviewing e-mails sent to employee’s personal attorney on employer’s laptop through employee’s personal, password-protected e-mail account).

...  

CONCLUSION

13. A lawyer may use an online data storage system to store and back up client confidential information provided that the lawyer takes reasonable care to ensure that confidentiality is maintained in a manner consistent with the lawyer’s obligations under Rule 1.6. A lawyer using an online storage provider should take reasonable care to protect confidential information, and should exercise reasonable care to prevent others whose services are utilized by the lawyer from disclosing or using confidential information of a client. In addition, the lawyer should stay abreast of technological advances to ensure that the storage system remains sufficiently advanced to protect the client’s information, and the lawyer should monitor the changing law of privilege to ensure that storing information in the “cloud” will not waive or jeopardize any privilege protecting the information.

Storage devices

The Professional Ethics Committee has been asked by the Florida Bar Board of Governors to write an opinion addressing the ethical obligations of lawyers regarding information stored on hard drives. An increasing number of devices such as computers, printers, copiers, scanners, cellular phones, personal digital assistants (“PDA’s”), flash drives, memory sticks, facsimile machines and other electronic or digital devices (collectively, “Devices”) now contain hard drives or other data storage media (collectively “Hard Drives” or “Storage Media”) that can store information. Because many lawyers use these Devices
to assist in the practice of law and in doing so intentionally and unintentionally store their clients’ information on these Devices, it is important for lawyers to recognize that the ability of the Devices to store information may present potential ethical problems for lawyers.

For example, when a lawyer copies a document using a photocopier that contains a hard drive, the document is converted into a file that is stored on the copier’s hard drive. This document usually remains on the hard drive until it is overwritten or deleted. The lawyer may choose to later sell the photocopier or return it to a leasing company. Disposal of the device without first removing the information can result in the inadvertent disclosure of confidential information.

DUTY OF CONFIDENTIALITY

Lawyers have an ethical obligation to protect information relating to the representation of a client. Rule 4-1.6(a) of the Rules Regulating the Florida Bar addresses the duty of confidentiality. . . .

A lawyer must ensure confidentiality by taking reasonable steps to protect all confidential information under the lawyer’s control. Those reasonable steps include identifying areas where confidential information could be potentially exposed. Rule 4-1.1 addresses a lawyer’s duty of competence. . . .

The comment to the rule further elaborates:

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject. (emphasis added).

If a lawyer chooses to use these Devices that contain Storage Media, the lawyer has a duty to keep abreast of changes in technology to the extent that the lawyer can identify potential threats to maintaining confidentiality. The lawyer must learn such details as whether the Device has the ability to store confidential information, whether the information can be accessed by unauthorized parties, and who can potentially have access to the information. The lawyer must also be aware of different environments in which confidential information is exposed such as public copy centers, hotel business centers, and home offices. The lawyer should obtain enough information to know when to seek protection and what Devices must be sanitized, or cleared of all confidential information, before disposal or other disposition. Therefore, the duty of competence extends from the receipt, i.e., when the lawyer obtains control of the Device, through the Device’s life cycle, and until disposition of the Device, including after it leaves the control of the lawyer. Further, while legal matters are beyond the scope of an ethics opinion, a lawyer should be aware that depending on the nature of the information, misuse of these Devices could result in inadvertent violation of state and
federal statutes governing the disclosure of sensitive personal information such as medical records, social security numbers, criminal arrest records, etc.

**DUTY TO SUPERVISE**

The lawyer must regulate not only the lawyer’s own conduct but must take reasonable steps to ensure that all nonlawyers over whom the lawyer has supervisory responsibility adhere to the duty of confidentiality as well. See Rule 4-5.3(b) . . .

A lawyer’s supervisory responsibility extends not only to the lawyer’s own employees but over entities outside the lawyer’s firm with whom the lawyer contracts to assist in the care and maintenance of the Devices in the lawyer's control. If a nonlawyer will have access to confidential information, the lawyer must obtain adequate assurances from the nonlawyer that confidentiality of the information will be maintained.

**SANITIZATION**

A lawyer has a duty to obtain adequate assurances that the Device has been stripped of all confidential information before disposition of the Device. If a vendor or other service provider is involved in the sanitization of the Device, such as at the termination of a lease agreement or upon sale of the Device, it is not sufficient to merely obtain an agreement that the vendor will sanitize the Device upon sale or turn back of the Device. The lawyer has an affirmative obligation to ascertain that the sanitization has been accomplished, whether by some type of meaningful confirmation, by having the sanitization occur at the lawyer's office, or by other similar means.

Further, a lawyer should use care when using Devices in public places such as at copy centers, hotel business centers, and outside offices where the lawyer and those under the lawyer’s supervision have little or no control. In such situations, the lawyer should inquire and determine whether use of such Devices would preserve confidentiality under these rules.

In conclusion, when a lawyer chooses to use Devices that contain Storage Media, the lawyer must take reasonable steps to ensure that client confidentiality is maintained and that the Device is sanitized before disposition. These reasonable steps include: (1) identification of the potential threat to confidentiality along with the development and implementation of policies to address the potential threat to confidentiality; (2) inventory of the Devices that contain Hard Drives or other Storage Media; (3) supervision of nonlawyers to obtain adequate assurances that confidentiality will be maintained; and (4) responsibility for sanitization of the Device by requiring meaningful assurances from the vendor at the intake of the Device and confirmation or certification of the sanitization at the disposition of the Device.
Responding to a Former Client’s Critical Commentary on a Website

FACTS

1. The inquirer, a New York law firm, believes that a “disgruntled” former client has unfairly characterized the firm’s representation of the former client on a website that provides reviews of lawyers. A note posted by the former client said that the former client regretted the decision to retain the firm, and it asserted that the law firm provided inadequate services, communicated inadequately with the client, and did not achieve the client’s goals. The note said nothing about the merits of the underlying matter, and it did not refer to any particular communications with the law firm or any other confidential information. The former client has not filed or threatened a civil or disciplinary complaint or made any other application for civil or criminal relief.

2. The law firm disagrees with its erstwhile client’s depiction of its services and asserts that the firm achieved as good a result for the client as possible under the difficult circumstances presented. The firm wishes to respond to the former client’s criticism by telling its side of the story if it may do so consistently with its continuing duties to preserve a former client’s confidential information.

QUESTION

3. When a lawyer’s former client posts accusations about the lawyer’s services on a website, may the lawyer post a response on the website that tends to rebut the accusations by including confidential information relating to that client?

OPINION

4. The Internet and social media today provide a number of sites that ask visitors to state their views of and experiences with lawyers, presumably
to provide other visitors with information on which to base their choice of counsel. Our survey of a few of these sites did not reveal any protocols to monitor the accuracy of the commentary, except to assure that the very lawyers being reviewed are not the source.

In this respect, the sites differ from other lawyer-rating agencies—Chambers, Super Lawyers, Best Lawyers in America, Martindale-Hubbell and the like—which claim to base their ratings on a canvass of clients and other members of the bar.

5. The inquiry concerns a negative posting on such a site by a former client. The inquiring firm believes that certain information about its representation of that client would tend to rebut the posted allegations. The information in question constitutes “Confidential information” as defined by Rule 1.6(a) of the Rules of Professional Conduct (the “Rules”). Under Rule 1.9(c), a lawyer is generally prohibited from using or revealing confidential information of a former client.

6. There is, however, a “self-defense” exception to the duty of confidentiality set forth in Rule 1.6, which as to former clients is incorporated by Rule 1.9(c). Rule 1.6(b)(5)(i) says that a lawyer “may reveal or use confidential information to the extent that the lawyer reasonably believes necessary . . . to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct.” When applicable, this exception permits, but does not require, disclosure of confidential information, and only to the extent the lawyer reasonably believes necessary to serve the purpose of self-defense. See Rule 1.6, Cmts. [12] & [14].

7. The inquiry raises the question whether a lawyer may rely on this exception to disclose a former client’s confidential information in response to a negative web posting, even though there is no actual or threatened proceeding against the lawyer. We do not believe that a lawyer may do so.

8. The language of the exception suggests that it does not apply to informal complaints such as this website posting. The keyword is “accusation,” which has been defined as “[a] formal charge against a person, to the effect that he is guilty of a punishable offense,” Black’s Law Dictionary 21 (5th ed. 1979), or a “charge of wrongdoing, delinquency, or fault,” Webster’s Third International Dictionary Unabridged 22 (2002). See Roy D. Simon, Simon’s New York Rules of Professional Conduct Annotated 230 (2013 ed.) (“An accusation means something more than just casual venting.”)

9. Comment [10] to Rule 1.6 supports this conclusion. It says that “[w]here a claim or charge alleges misconduct of the lawyer related to the representation of a current or former client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense.” In the context of a set of legal standards, the words “claim” and “charge” typically suggest the beginning of a lawsuit, criminal inquiry, disciplinary complaint, or other procedure that can result in a sanction. Comment [10] continues by saying: “Such a claim may arise
in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, such as a person claiming to have been defrauded by the lawyer and client acting together or by the lawyer acting alone.” Each of these examples involves a formal proceeding in which the lawyer’s conduct has been placed in issue.

10. Case law supports our conclusion. New York cases permitting disclosure of confidential information under Rule 1.6(b)(5)(i) and its nearly identical predecessor DR 4-101 (C)(4) have invariably involved allegations of lawyer wrongdoing in formal proceedings such as legal malpractice or other civil actions, disqualification proceedings, or sanctions motions. Those cases stand in contrast to those in which lawyers have not been permitted to use a client’s confidential information to initiate actions against former clients (other than lawsuits to collect legal fees, for which Rule 1.6(b)(5)(ii) provides a different exception to confidentiality). Thus under the case law, a lawyer is not authorized to reveal confidential information whenever helpful in a dispute, but rather only when facing some kind of formal proceeding.

11. In at least one case, discipline has been imposed for the kind of conduct in question here. In re Tsamis, Joint Stipulation and Recommendation ¶4-10 & Reprimand ¶1, No. 2013PR00095 (Hearing Board, III. Att’y Reg. & Disc. Comm. 2014) (reprimanding lawyer for revealing confidential information about her former client in response to client’s negative review on AWO legal referral website). Ethics opinions from other jurisdictions have reached varying results on the question facing us, but their relevance is limited by differences in the ethical rules in force in those jurisdictions.

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3. See N.Y. City 2005-03 (noting recognition by courts that “an attorney may use client confidences or secrets to defend himself or herself from a claim or counterclaim brought by the client, or as evidence in a fee collection dispute, but may not necessarily be permitted to use that same information affirmatively in a different type of claim against a client”); Restatement (Third) of the Law Governing Lawyers §64, comment (c) (2000) (noting that a lawyer may act under the Restatement’s self-defense provision “only to defend against charges that imminently threaten the lawyer or the lawyer’s associate or agent with serious consequences, including criminal charges, claims of legal malpractice, and other civil actions such as suits to recover overpayment of fees, complaints in disciplinary proceedings, and the threat of disqualification”).

4. In California there is no ethical counterpart to New York Rule 1.6(b)(5)(i), but the Evidence Code contains a self-defense exception to attorney-client privilege. Opinions interpreting that exception have concluded that California law does not permit a lawyer “to disclose otherwise confidential information in an online attorney review forum, absent client consent or a waiver.” San Francisco Opinion 2014-1; see Los Angeles County Opinion 525 (2012)
We note a New York opinion that addressed the predecessor to Rule 1.6(b)(5)(i), though in a different context. In N.Y. County 732 (2004), a client threatened to file a disciplinary complaint against a lawyer if the lawyer did not release funds in an IOLA account, the proper disposition of which was a part of the lawyer’s inquiry to the Committee. The Committee opined that in the event of such a complaint, “the law firm would be entitled to disclose confidences or secrets necessary to defend itself against the client’s accusations.” The Committee concluded that the “rules permitting disclosure of client confidences should be read restrictively” but that the law firm may disclose protected client information “if the client files a complaint or claim against the law firm.”

We do not mean to say that a formal proceeding must be actually commenced to trigger the authorization of disclosure by Rule 1.6(b)(5)(i). There may be circumstances in which the material threat of a proceeding would give rise to that right. See N.Y. City 1986-7 (in-house lawyer may disclose confidential information to government prosecutors who have identified the lawyer as the subject of a grand jury investigation in which other witnesses have made incriminating statements about the lawyer). We do not need to reach that question here because no material threat of a proceeding has been made on the website posting that is the subject of this inquiry.

 Nor do we consider the question of whether and when a negative website posting may effect a waiver of a client’s right to confidentiality, because that question is not raised by the facts as presented in the inquiry. If there were facts raising the question of waiver, it would be necessary to consider separately the possible waivers of attorney-client privilege and of other kinds of confidentiality under Rule 1.6(a). Waiver of attorney-client privilege turns on questions of law beyond our jurisdiction. See, e.g., 1050 Tenants Corp. v. Lapidus, 12 Misc. 3d 1118, 1123-25 (Civ. Ct. N.Y.C. 2006). Given the facts as presented, we need not consider whether a negative website posting might waive other kinds of confidentiality. Rather, we assume for present purposes that confidentiality has not been waived. It suffices to say that the mere fact that a former client has posted critical commentary on a website is insufficient to permit a lawyer to respond to the commentary with disclosure of the former client’s confidential information.

(attorney may respond to former client’s internet posting if (1) “response does not disclose confidential information”; (2) response will not injure former client in matter involving the former representation; and (3) response is proportionate and restrained). An Arizona opinion concluded that the right to disclose was not limited to “a pending or imminent legal proceeding,” relying on a provision found in the Arizona rule (and in the ABA Model Rule) but not in the New York rule. Arizona Opinion 93-02 (reasoning that one category of cases within the exception, for a claim or defense “in a controversy” between the lawyer and the client, would include cases not covered by another category within the exception, for “allegations in any proceedings”).
15. This result properly respects the vital purpose of Rule 1.6(a) in preserving client confidentiality and fostering candor in the private communications between lawyers and clients, and it does not unduly restrict the self-defense exception. That exception reflects the fundamental unfairness of a current or former client—or others—being able to make consequential accusations of wrongful conduct against a lawyer, while the lawyer is disabled from revealing information to the extent reasonably necessary to defend against such accusations. Unflattering but less formal comments on the skills of lawyers, whether in hallway chatter, a newspaper account, or a website, are an inevitable incident of the practice of a public profession, and may even contribute to the body of knowledge available about lawyers for prospective clients seeking legal advice. We do not believe that Rule 1.6(b)(5)(i) should be interpreted in a manner that could chill such discussion.

**CONCLUSION**

16. A lawyer may not disclose client confidential information solely to respond to a former client’s criticism of the lawyer posted on a website that includes client reviews of lawyers.

**B. The Relationship Between the Ethical Duty, the Attorney-Client Privilege, and the Work Product Doctrine**

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**Problem 3-6**

**The Attorney-Client Privilege and the Work Product Doctrine in Civil Litigation**

The firm represents International Motors, Inc. (IM), a multinational manufacturer of automobiles. In a series of cases plaintiffs have alleged that IM produced vehicles with defective fuel tanks. Plaintiffs have sought to obtain various documents involved in the design of the fuel tank. IM has resisted these efforts, claiming that the documents are covered by the attorney-client privilege and the work product doctrine. All design decisions made by IM are the responsibility of its Design Review Committee (DRC), the chairman of which has always been an attorney. All documents presented to the DRC are marked “CONFIDENTIAL MATERIAL PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE.” IM has refused to produce any DRC documents (except for ones that it voluntarily produced in connection with filings with regulatory bodies), claiming that such documents
are privileged. What arguments would you expect plaintiffs to make in an effort to overcome claims of privilege? What responses would you make?

Read Model Rule 1.6 and comments.

**Scope and exceptions to the attorney-client privilege**

The attorney-client privilege is one of the pillars on which the legal profession rests.\(^{269}\) As the Supreme Court stated in Swidler & Berlin v. United States:\(^{270}\)

> The attorney-client privilege is one of the oldest recognized privileges for confidential communications. . . . The privilege is intended to encourage “full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.”\(^{271}\)

Courts and commentators have defined the attorney-client privilege in various ways. Problem 3-1 quoted Professor Wigmore’s widely cited version. The Restatement of the Law Governing Lawyers contains the following formulation:

> [The] attorney-client privilege may be invoked . . . with respect to:
> 
> 1. a communication
> 2. made between privileged persons
> 3. in confidence
> 4. for the purpose of obtaining or providing legal assistance for the client.\(^{272}\)

The attorney-client privilege does not apply if any of these elements is absent. Thus, if the communication is with a third person rather than with the client,\(^{273}\) or if the communication is not for the purpose of giving legal advice, the communication is not privileged. For example, in United States v. Ackert\(^{274}\) the Second Circuit held that corporate counsel’s discussions with an

\(^{269}\) See generally Edna S. Epstein, The Attorney-Client Privilege and the Work Product Doctrine (ABA 5th ed. 2007).

\(^{270}\) 524 U.S. 399 (1998) (holding that the privilege survives death of client, in this case former Deputy White House counsel Vincent Foster).

\(^{271}\) Id. at 403 (quoting from Upjohn v. United States, 449 U.S. 383, 389 (1981)).

\(^{272}\) Restatement (Third) of the Law Governing Lawyers §68.

\(^{273}\) Section 70 of the Restatement defines “privileged persons” as follows:

Privileged persons within the meaning of §68 are the client (including a prospective client), the client’s lawyer, agents of either who facilitate communications between them, and agents of the lawyer who facilitate the representation.

\(^{274}\) 169 F.3d 136 (2d Cir. 1999).
investment banker were not protected by the attorney-client privilege even though the lawyer’s goal was to obtain information to help him advise his client. The court stated “the privilege protects communications between a client and an attorney, not communications that prove important to an attorney’s legal advice to a client.”

In addition, courts have recognized several exceptions to the privilege, the two most important of which are waiver and the crime-fraud exception. The Restatement provides that the attorney-client privilege can be waived in several ways: by agreement, disclaimer, or failure to object; by voluntary disclosure in a nonprivileged communication by the client, the client’s lawyer, or another authorized agent of the client; or by raising the lawyer’s communication or assistance as an issue in the proceeding.

The Restatement provides that the attorney-client privilege does not apply to a communication occurring when a client:

(a) consults a lawyer for the purpose, later accomplished, of obtaining assistance to engage in a crime or fraud or aiding a third person to do so, or
(b) regardless of the client’s purpose at the time of consultation, uses the lawyer’s advice or other services to engage in or assist a crime or fraud.

A highly publicized application of the exception occurred in connection with tobacco litigation. In American Tobacco Co. v. State the State of Florida brought suit against various tobacco manufacturers, seeking to recover health care expenses it incurred in treating diseases of Medicaid smokers. The state subpoenaed various documents to which the tobacco companies raised claims of privilege. The state contended that the crime-fraud exception applied because the documents would show that the tobacco companies defrauded the American public about the risks of smoking. The court of appeals agreed. The opinion focused on the procedure and standard of proof necessary to establish the exception. The court held that the procedure for determining the application of the exception was an adversarial hearing in which each party could present evidence and argument, and the standard for application of the exception was the “prima facie” evidence standard:

[T]he party opposing the privilege on the crime-fraud exception has the initial burden of producing evidence which, if unexplained, would be prima facie

275. Id. at 139.
277. Id. §79.
278. Id. §80. See Frontier Refining, Inc. v. Gorman-Rupp Co., 136 F.3d 695 (10th Cir. 1998) (discussing various approaches to issue of waiver of privilege by filing lawsuit to which privileged material is relevant).
279. Restatement (Third) of the Law Governing Lawyers §82.
proof of the existence of the exception. The burden of persuasion then shifts to
the party asserting the privilege to give a reasonable explanation of the conduct
or communication. If the court accepts the explanation as sufficient to rebut the
evidence presented by the party opposing the privilege, then the privilege
remains. However, if after considering and weighing the explanation the court
does not accept it, then a prima facie case exists as to the exception, and the
privilege is lost. Thus, the trial court must consider the evidence and argument
rebuttering the existence of the crime-fraud exception and must weigh its suffi-
ciency against the case made by the proponent of the exception. 281

The court should use the standard of the preponderance of the evidence in
deciding whether the crime-fraud exception applies. 282

If a court rules that the attorney-client privilege does not apply to a
particular communication, the order is not subject to immediate appeal. 283
However, there may be other avenues of relief. The classic way to bring the
matter before an appellate court without having to reveal claimed privileged
material is for the holder of the material to defy the order to compel, be held in
contempt, and appeal the contempt order. 284

Scope and exceptions to the work product doctrine

The attorney work product doctrine has its genesis in the Supreme Court’s
decision in Hickman v. Taylor. 285 Hickman was an action for wrongful death
of a seaman against the owners of a tug that sank. Plaintiffs sought to obtain
by discovery copies of all written statements from members of the crew taken
by defendants. The Court first held that the statements were not protected by
the attorney-client privilege since they did not involve confidential commu-
nications from the client. 286 The Court went on to hold, however, that the
material sought by the plaintiff was still not subject to discovery:

Historically, a lawyer is an officer of the court and is bound to work for the
advancement of justice while faithfully protecting the rightful interests of his
clients. In performing his various duties, however, it is essential that a lawyer
work with a certain degree of privacy, free from unnecessary intrusion by
opposing parties and their counsel. Proper preparation of a client’s case
demands that he assemble information, sift what he considers to be the relevant
from the irrelevant facts, prepare his legal theories and plan his strategy without
undue and needless interference. That is the historical and the necessary way in
which lawyers act within the framework of our system of jurisprudence to
promote justice and to protect their clients’ interests. This work is reflected,

281. 697 So. 2d at 1256. See also Haines v. Liggett Group, Inc., 975 F.2d 81 (3d Cir.
282. 697 So. 2d at 1256.
284. Id. at 110-112.
286. Id. at 508.
The Court concluded that work product material was not absolutely immune from discovery: “Where relevant and non-privileged facts remain hidden in an attorney’s file and where production of those facts is essential to the preparation of one’s case, discovery may properly be had.”

The work product doctrine is embodied in Rule 26(b)(3) of the Federal Rules of Civil Procedure:

Trial Preparation: Materials.

(A) Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party’s attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) Protection Against Disclosure. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party’s attorney or other representative concerning the litigation.

Two aspects of the work product doctrine should be noted. First, for the doctrine to apply, the material must be prepared “in anticipation of litigation.” Second, a party may obtain discovery of work product material by showing “substantial need” coupled with “undue hardship.”

287. *Id.* at 510-511.
288. *Id.* at 511.
289. See U.S. v. Roxworthy, 457 F.3d 590 (6th Cir. 2006) (document was prepared “in anticipation of litigation” if (1) it was created because of party’s subjective anticipation of litigation, rather than in the ordinary course of business, and (2) subjective anticipation was objectively reasonable).
In applying the work product doctrine courts have developed a distinction between ordinary and opinion work product. The Restatement provides the following definition: “Opinion work product consists of the opinions or mental impressions of a lawyer; all other work product is ordinary work product.” Opinion work product receives greater protection than ordinary work product. While a party may obtain ordinary work product if the party can establish substantial need for the material and inability to obtain equivalent material without undue hardship, a party may obtain opinion work product only if “extraordinary circumstances justify disclosure,” unless an exception exists. The work product doctrine is subject to many of the same exceptions as the attorney-client privilege. The protections of the work product doctrine can be waived, and most courts recognize that the crime-fraud exception applies.

**Internal investigations: scope of the corporate attorney-client privilege**

When allegations of serious wrongdoing are made against corporate employees, corporations will usually investigate the charges. Are the results of such internal investigations discoverable by the opposing party, or are they protected by the attorney-client privilege or the work product doctrine? In Upjohn v. United States, the Supreme Court dealt with the issue of whether under the Federal Rules of Evidence the Internal Revenue Service could subpoena written questionnaires sent by the corporation’s general counsel to various middle managers as part of the corporation’s internal investigation into questionable foreign payments made by one of its subsidiaries. The questionnaire sought detailed factual information about the payments. The court of appeals held that the questionnaire was not privileged because the privilege applies only to members of the “control group,” not to lower-level employees. The Supreme Court reversed. It held that the control group test “overlooks the fact that the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice.” The Court did not specify a clear rule for the scope of the privilege, indicating that the privilege must be decided on a case-by-case basis, but the Court did hold that the privilege could apply to communications made by both middle- and lower-level employees.

291. *Id.* §87(2).
292. *Id.* §89.
293. *Id.* §§91 (waiver by voluntary act), 92 (waiver by use in litigation).
294. *Id.* §93.
296. *Id.* at 390.
While *Upjohn* appears to provide broad protection for communications by all corporate employees to corporate counsel in federal court, *Upjohn* has not been accepted by all states.\(^{297}\) Some courts have applied the control group test.\(^{298}\) Others follow a “subject matter test.” Under the subject matter test, the communication may be made by a lower level employee to an attorney for the entity, but the communication must be at the direction of the employee’s superior and must relate to the employee’s duties.\(^{299}\) Still others have adopted a “modified subject matter test,” which adds a “need to know” limitation for the privilege to be maintained. In Southern Bell Telephone & Telegraph Co. v. Deason,\(^{300}\) the court set forth the following five-part modified subject matter test:

1. the communication would not have been made but for the contemplation of legal services;
2. the employee making the communication did so at the direction of his or her corporate superior;
3. the superior made the request of the employee as part of the corporation’s effort to secure legal advice or services;
4. the content of the communication relates to the legal services being rendered, and the subject matter of the communication is within the scope of the employee’s duties;
5. the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.\(^{301}\)

The Restatement of the Law Governing Lawyers in section 73 adopts a further modification of the modified subject matter test. It discards the requirement that the communication relate to the duties of the employee, but it maintains the need-to-know limitation.

### Assessments

3-1  **Lawyer is attending a cocktail party at which Attorney is present. Attorney begins describing an “interesting” and significant court case that Attorney is handling. Lawyer remarks that Attorney should be careful about what he is saying because it might be unethical. Which of the following responses by Attorney is the most accurate statement of Attorney’s ethical obligations?**

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298. See, e.g., Consolidation Coal Co. v. Bucyrus-Erie Co., 432 N.E.2d 250 (Ill. 1982).
300. 632 So. 2d 1377 (Fla. 1994).
301. Id. at 1383. Accord Baisley v. Missisquoi Cemetery Assn, 708 A.2d 924, 931 (Vt. 1998).
(A) “There is no problem because the case is a matter of public record.”
(B) “There is no problem because I haven’t mentioned the names of the parties.”
(C) “There is no problem because I haven’t said anything that hasn’t already been reported on TV and in the newspapers.”
(D) “There is no problem because I haven’t said anything damaging about my client.”

3-2 Lawyer has represented the family of a teenager for a number of years. Unfortunately, the teenager has become involved in both use and distribution of cocaine. Cocaine is contraband. See 28 C.F.R. 50.21. The father of the teenager comes to Lawyer’s office with a bag that he says contains cocaine that his son uses and sells. He tells Lawyer that he has taken the drugs from his son’s bedroom. He wants advice about what to do with the drugs in order to protect his son from criminal charges. In response to a question from Lawyer, the father says that as far as he knows, his son is not under investigation by the authorities. Which of the following possible types of advice is most consistent with Lawyer’s legal and ethical obligations?

(A) Tell the father to return the bag of cocaine to its original location because his possession is a crime.
(B) Tell the father that because cocaine is contraband, he should consider destroying the drugs.
(C) Tell the father that Lawyer cannot give him any advice about ongoing criminal conduct.
(D) Tell the father than Lawyer must inform the authorities of the father’s or son’s possession of the drugs.

3-3 Lawyer represents Client in estate planning. One year earlier, Client was divorced from his wife. Another law firm represented Client in the divorce. As part of the divorce proceeding Client was required to complete a financial declaration disclosing all of Client’s assets. In reviewing Client’s assets in connection with the estate planning, Lawyer discovers that Client omitted significant assets from his financial declaration in the divorce case. Which of the following is an incorrect statement of Lawyer’s ethical obligations?

(A) Lawyer may not disclose Client’s fraud because his services were not used in the fraud.
(B) Lawyer may not disclose Client’s fraud because the divorce case is over.
(C) Lawyer must inform the law firm that handled Client’s divorce of Client’s false financial statement.
(D) Lawyer may withdraw from representing Client in estate planning if Client refuses to take action to correct his misrepresentations in his divorce case and Lawyer finds such conduct repugnant.

3-4 Lawyer represented Corporation in connection with the sale of its assets to Buyer. After the closing, Lawyer learns that Corporation’s financial statements that were submitted to Buyer in connection with the transaction were materially false. Despite advice from Lawyer, Corporation refuses to correct the false financial statements. Which of the following is not a correct statement of Lawyer’s ethical and legal obligations?

(A) Lawyer is subject to discipline if Lawyer fails to disclose to Buyer the falsity of the financial statements.
(B) If Lawyer is sued as an aider and abetter of Corporation’s fraud, Lawyer ethically could disclose confidential information to show that he was not involved in the fraud.

(C) Lawyer has discretion to reveal Corporation’s fraud because his services were used in connection with the transaction.

(D) If Corporation fails to correct its financial statements, Lawyer may withdraw from representation of Corporation because Corporation’s failure to disclose amounts to a continuing fraud.

3-5 Law Firm’s computer systems are subject to an attack by hackers and a substantial amount of client data is lost. Which of the following is an incorrect statement of the legal or ethical obligations of the firm and its members?

(A) Members of the firm have an ethical duty to notify affected clients of the data breach.

(B) The firm has a legal duty to notify affected clients of the data breach.

(C) Partners (or other lawyers with similar managerial responsibility) are subject to discipline for the data breach.

(D) The firm may be subject to an enforcement action by the Federal Trade Commission.

3-6 Lawyer represents Plaintiff in business litigation in which Plaintiff claims that Defendant engaged in fraud. Plaintiff hires a forensic accountant to examine the books and records of Defendant. Which of the following is the most accurate statement regarding the report of the forensic accountant?

(A) The report is subject to the attorney-client privilege.

(B) The report is subject to the work product doctrine.

(C) The report is not subject to either attorney-client privilege or work product protection because of the crime/fraud exception.

(D) The report is not subject to the attorney-client privilege or work product protection because the lawyer did not prepare the report.

Answers to Assessments

3-1 (C) is the correct answer. (A) is incorrect because the ethical duty of confidentiality is very broad, covering all matters relating to the representation of a client. See Model Rule 1.6(a). As discussed in the Sealed Party case, there is no exception simply because the information is a matter of public record. (B) is incorrect. While disclosure of the names of the parties would be a clear violation of the duty of confidentiality, disclosure of information about the case is also improper because it relates to the representation of the client under Model Rule 1.6(a). (C) is correct. While the Model Rules do not specifically have a “generally known” exception, that exception has been recognized by the Restatement of the Law Governing Lawyers and case law such as Sealed Party. This exception can be justified under the language of Model Rule 1.6(a) on the ground that when information is generally known, the lawyer is not “revealing” the information. (D) is incorrect because a violation of the ethical duty of confidentiality does not depend on a showing of harm or damage to the client.
3-2 (B) is the best answer. Return by the father of the drugs to their original location, option (A), is possible. That option would eliminate the father’s criminal exposure but would not do anything to protect the son, which is one of the father’s main concerns, if not his primary goal. Giving this advice, therefore, would not comply with the lawyer’s obligation as a counselor. See Model Rule 2.1. Since cocaine is contraband and there is no evidence of a pending or foreseeable proceeding, option B seems permissible as a matter of law and protective of both the father and the son. The lawyer should probably warn the father that destruction of the drugs poses some small risk that the father has engaged in obstruction of justice. See United States v. Russell. That is probably a risk that the father would be willing to take. (C) is incorrect. A lawyer cannot counsel or assist a client in criminal conduct, Model Rule 1.2(d), but the lawyer here is not doing that. He is trying to help the father avoid criminal liability for himself and his son. (D) is incorrect. While a lawyer who has possession of tangible criminal material may have an obligation to turn the material over to authorities, a lawyer does not have a duty to inform the authorities when the lawyer only has knowledge of a client crime, not possession of tangible criminal material. See Model Rule 1.6.

3-3 (C) is the correct answer because it is an incorrect statement of the lawyer’s ethical obligations. (A) is a correct statement of the lawyer’s obligations because the obligation to disclose fraud by a client on a court only applies when the lawyer has represented a client in an adjudicative proceeding. See Model Rule 3.3(b). See also Model Rule 1.6(b)(2), (3) (discretion to disclose financial fraud only when the lawyer’s services have been used). (B) is also a correct statement of the lawyer’s obligations because the duty to disclose fraud on a court under Rule 3.3 ends with the “conclusion of the proceeding.” Model Rule 3.3(c). (C) is an incorrect statement of a lawyer’s obligations because the information about the client’s fraud relates to the lawyer’s representation of the client and is therefore subject to the duty of confidentiality under Model Rule 1.6. None of the exceptions to Rule 1.6 would allow lawyer to disclose the client’s fraud to the client’s former firm, especially since the case is over. (D) is a correct statement of the lawyer’s obligations. Under Rule 1.16(b)(4) a lawyer may withdraw if the client persists in a course of conduct that the lawyer considers repugnant or with which he has a fundamental disagreement.

3-4 (A) is the correct answer because it is an incorrect statement of the lawyer’s obligations. Lawyer would not be subject to discipline for failing to disclose Corporation’s fraud. Under Model Rule 1.6(b)(3) a lawyer has discretion, but not the obligation, to reveal the Corporation’s financial fraud when the lawyer’s services were used in connection with the fraud. Note that under Rule 4.1(a) a lawyer must disclose a material fact to a third person when necessary to avoid assisting a client in a criminal or fraudulent act, unless disclosure is prohibited by Rule 1.6. Comment 3 to Rule 4.1 states that normally a lawyer can avoid assistance by withdrawing from representation. In some cases, a noisy notice of withdrawal may be necessary when the lawyer has issued an opinion or other document. Here it seems unlikely that disclosure is required. (B) is a correct statement and therefore an incorrect choice. Under Rule 1.6(b)(5) a lawyer may disclose confidential information to the extent the lawyer reasonably believes to be necessary “to respond to allegations in any proceeding concerning the lawyer’s representation of the client.”
(C) is a correct statement and therefore an incorrect choice. Under Rule 1.6(b)(3) a lawyer has discretion to reveal confidential information to correct or mitigate substantial injury to the financial interests of another person resulting from a client’s crime or fraud in which the lawyer’s services were used. (D) is a correct statement and therefore an incorrect choice. Under Rule 1.16(b)(2) a lawyer has discretion to withdraw when “the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent.”

3-5 **(C) is the correct answer** because it is an incorrect statement of the lawyers’ ethical obligations. (C) is incorrect because partners are not automatically subject to discipline for a data breach. Rule 1.6(c) states that a lawyer shall use “reasonable efforts” to prevent unauthorized access to client information; it does not impose strict ethical liability. *See also* Model Rule 5.1 and 5.3 dealing with the obligations of firm managers to use reasonable efforts to adopt measures giving reasonable assurance that lawyers and nonlawyers comply with the rules of professional conduct. (A) is an accurate statement of the ethical obligations of the members of the firm and therefore not the correct choice. Under Model Rule 1.4 lawyers have a duty to communicate with their clients about client matters. Comment 3 states that lawyers have an obligation to inform their clients of significant developments regarding their representation. (B) is also an accurate statement of the firm’s legal obligations and therefore not a correct choice. *See* Timothy J. Toohey, Beyond Technophobia: Lawyers’ Ethical and Legal Obligations to Monitor Evolving Technology and Security Risks, 21 Rich. J.L. & Tech. 9, 13-14 (2015) (referring to 47 states that have data breach notification statutes). (D) is also a correct statement and therefore the wrong choice. *See id.* at 14 (referring to FTC enforcement power).

3-6 **(B) is the correct answer** because the report was prepared in anticipation of litigation; in fact, it was prepared during the pendency of litigation. (A) is incorrect because the accountant’s report does not involve a communication between lawyer and client (or their agents) for the purpose of legal advice. (C) is incorrect because it shows a misunderstanding of when the crime/fraud exception applies. That exception applies when the client seeks or uses the lawyer’s services for the purpose of committing a crime or fraud. In other words, this exception applies when there has been an “abuse” of the attorney-client relationship. That is not the case here. (D) is incorrect because the work product doctrine does not require the participation of an attorney. The doctrine applies when material is prepared in anticipation of litigation. In addition, the attorney-client privilege can apply even when the lawyer does not prepare anything. For example, the privilege would apply when the client prepares a confidential letter or memorandum to a lawyer for the purpose of obtaining legal advice.