

## CHAPTER V

### CONFIDENTIALITY AND ZEAL

#### I. INTRODUCTION

Both preserving a client's confidences and representing a client zealously are viewed as fundamental duties of an attorney. What is the source of these duties? What is there about the role an attorney plays which requires these obligations?

While there is no serious dispute that confidentiality and zeal are desirable attributes of an attorney in representing a client, at some point, preserving a client's confidences or secrets may inhibit the truthfinding function of the adversary system or may prevent the just resolution of a dispute between parties. And at some point, zeal on the part of a client may infringe upon the rights of others and may lead the attorney to violations of law. How much impairment of the truth-finding function or infringement on the rights of others do the concepts of confidentiality and zeal allow? At what point must these concepts give way? Commentators have been debating these questions for some time, but have produced less than satisfying answers. This section will identify the competing interests at stake and examine attempts to resolve these issues taken by the Model Rules, the courts and the bar.

#### II. CONFIDENTIALITY

##### A. Attorney-Client Privilege

The attorney-client privilege prevents attorneys from being compelled to disclose the confidences of their clients. It is an evidentiary privilege and has no application outside the litigation process. In addition, its scope is normally quite narrow. Although, as the case below demonstrates, Missouri takes a broad view of the privilege, it is still available only in limited circumstances as defined by statute and common law.

***State ex rel. Great American Insur. Co. v. Smith***  
**574 S.W.2d 379 (Mo. banc 1978)**

. . .

The attorney-client privilege dates from the reign of Elizabeth I of England. See 8 J. Wigmore, *supra*, § 2290. In recognition of that common law privilege, the legislature has enacted a statute, § 491.060 . . . [This] section has been held in a court of appeals opinion to be declaratory of the common law rule. . . . We agree that it should be so construed. The statute does not limit or diminish the common law rule.

There are two prevailing views as to the scope of the attorney-client privilege, following an emphasis on two different fundamental policies. Dean Wigmore emphasized the fundamental societal need to have all evidence having rational probative value placed before the trier of facts in a lawsuit. While he argued against Jeremy Bentham's suggestion that the attorney-client privilege be abolished, he regarded it as an exception to what he considered to be the more fundamental rule, and one which "ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle." 8 J. Wigmore, *supra*, § 2291 at 554.

A different fundamental policy is emphasized by Sedler & Simeone in "Privileges in the Law of Evidence: The Realities of Attorney-Client Confidences," 24 OHIO ST.L.J. 1 (1963). While the authors acknowledge Wigmore's view of attorney-client privilege as an exception to the policy of disclosure of all evidence, they view confidentiality of communications between attorney and client as the more fundamental policy, to which disclosure is the exception. This view is based in part on the duty of a lawyer to preserve a client's confidences, subject to a very limited privilege of disclosure, which is imposed by the Canons of Professional Ethics. The greater societal need for confidentiality is attributed to the relationship of lawyer to client in giving advice, a relationship in which secrecy has always been considered important. In support of a broad attorney-client privilege, the article states at p. 3:

As long as our society recognizes that advice as to matters relating to the law should be given by persons trained in the law, that is, by lawyers, anything that materially interferes with that relationship must be restricted or eliminated, and anything that fosters the success of that relationship must be retained and strengthened. The relationship and the continued existence of the giving of legal advice by persons accurately and effectively trained in the law is of greater societal value, it is submitted, than the admissibility of a given piece of evidence in a particular lawsuit. Contrary to the implied assertions of the evidence authorities, the heavens will not fall if all relevant and competent evidence cannot be admitted.

We find this analysis of the fundamental policy underlying attorney-client privilege to be preferable to that of Wigmore. There clearly is a societal need for persons to be able to employ and consult with persons trained in the law for advice and guidance as to legal matters. As recognized by Sedler & Simeone, confidentiality of the communications between client and attorney is essential for such relationships to be fostered and to be effective. It was so considered at common law as shown by the following from the case of *Annesley v. Earl of Anglesea*, 17 How.St.Tr. 1139 (Ex. 1743), in which the Honourable Mr. Baron Mounteney said at 1241:

(A)n increase of legal business, and the inability of parties to transact that business themselves, made it necessary for them to employ . . . other persons who might transact that business for them. That this necessity introduced with it the necessity of what the law hath very justly established, an inviolable secrecy to be observed by attorneys, in order to render it safe for clients to communicate to their attorneys, all proper instruction for the carrying on those causes which they found themselves under a necessity of intrusting to their care.

The nature and complexity of our present system of justice and the relationships among people and between the people and their government make the preservation and protection of the attorney-client privilege even more essential. If this is to be accomplished, when one undertakes to confer in confidence with an attorney whom he employs in connection with the particular matter at hand, it is vital that all of what the client says to the lawyer *and* what the lawyer says to the client to be treated as confidential and protected by the attorney-client privilege. This is what a client expects. . . .

[The Court then addressed the issue before it, whether the privilege protects not only what the client tells the lawyer, but what the lawyer tells the client as well. It rejected the more limited Wigmore approach, which] would

protect only (1) advice by the attorney concerning a communication to him by his client, (2) anything the lawyer said which could be an admission of his client, or (3) anything said by the lawyer that would lead to inferences concerning the tenor of what the client had said to him.

We are of the opinion that the Wigmore approach does not provide enough protection for the confidentiality of attorney-client communications to accomplish the objective for which the privilege was created and now exists. Under the Wigmore approach, not all of a lawyer's advice is confidential, and statements by the lawyer which are not in the nature of advice are totally unprotected, except to the extent that they disclose what the client has said. . . . In other words, anything said by the attorney to his clients about the matter he was handling for them would not be treated as confidential unless it was advice on information actually conveyed by the clients to the attorney or what was said would disclose what the clients had told the attorney. All other consultation, opinion and advice is not protected under the Wigmore view.

When a client goes to an attorney and asks him to represent him on a claim which he believes he has against someone or which is being asserted against him, even if he as yet has no knowledge or information about the claim, subsequent communications by the attorney to the client should be privileged. Some of the advice given by the attorney may be based on information obtained from sources other than the client. Some of what the attorney says will not actually be advice as to a course of conduct to be followed. Part may be analysis of what is known to date of the situation. Part may be a discussion of additional avenues to be pursued. Part may be keeping the client advised of things done or opinions formed to date. All of these communications, not just the advice, are essential elements of attorney-client consultation. All should be protected.

This does not mean that discoverable factual information can be made privileged by being recited by the attorney or the client in their confidential communications. Only the actual attorney-client communications are privileged.

The scope of discovery under existing rules and decisions is sufficiently comprehensive to afford parties to litigation ample means of securing factual and other data needed for preparation and trial of a case. . . .

DONNELLY, Judge, dissenting.

In my view, the primary concern of the judicial process is that we seek the truth and then do justice. Deviations from this goal should not constitute "the more fundamental policy." The principal opinion makes paramount the protection from disclosure of what an attorney says to his client. I cannot agree.

SEILER, Judge, dissenting.

. . . The proposed opinion . . . relies heavily on the law review article . . . written in 1963 by Professors Sedler and Simeone (now a judge of this court) which frankly states the view that anything that materially interferes with the attorney-client relationship is to be restricted or eliminated and anything that fosters its success is to be retained and strengthened and expresses concern that the "preserve" of lawyers is constantly being entered by other professions. In my opinion, our view as Judges must be broader than the protection of a "preserve". Not long ago this court saw fit to create an "insured-insurer" privilege. . . . Now we are about to expand greatly the attorney-client privilege. We keep making it harder for the facts to be ascertained. We have gotten along

all right in Missouri for well over one hundred years with the attorney-client privilege as it was until the present decision. There is no need to broaden it at this late date. It may be, as the above article states, that "the heavens will not fall if all relevant and competent evidence cannot be admitted", *Id.* at 3, but by the same token, people will not stop consulting lawyers if the attorney-client privilege is not broadened, either.

The broadened scope of attorney-client privilege established by the proposed opinion will dismantle a good part of the scope of Missouri discovery. Under rule 56.01(b)(1) discovery is limited to matters "not privileged." . . . Lawyers are being presented with a legitimate way to avoid disclosing what has up till now been discoverable facts.

I am in complete accord with Canon 4 of rule 4 that a lawyer should preserve the confidence and secrets of a client. A client expects a lawyer to keep his affairs in confidence and not to talk or gossip about them. A lawyer with a loose tongue is an abomination. But that is not the problem before us and the fact that the ethical lawyer does not talk about his client's confidences does not answer the present problem. We have here a question of discovery, where the courts are being asked to order production of what may be highly relevant evidence, not heretofore privileged, and which cannot otherwise be brought to light.

It is conceivable that communications or advice from the lawyer to the client might be pieced together to discern communications made by the client to the lawyer. In such a case, the lawyer to client communications would be privileged under the present statute, § 491.060, which forbids disclosure by the attorney of any communications made to him by the client. The statute adequately protects against indirect as well as direct disclosure of the client's communications and there is no need for us, *ex gratia*, to expand the rule so as to cover, *carte blanche*, everything the lawyer passes to the client.

I respectfully dissent.

1. To what extent has the Missouri Supreme Court reached an accommodation between the interests at stake? Is it the appropriate one? Can this accommodation be utilized to resolve broader issues of attorney confidentiality or is it limited to application of the privilege itself?

2. Elements of the attorney-client privilege: In Missouri, as in most jurisdictions, the attorney-client privilege extends to (1) confidential (2) communications (3) between an attorney and client (4) regarding the representation of the client. *State v. Pride*, 1 S.W.3d 494, 505 (Mo. App. 1999). See also RESTATEMENT § 68. Confidentiality is key to the privilege, both as a matter of policy and application. See *generally* RESTATEMENT § 71 and Commentary. Thus, disclosures made in a setting that is not confidential, or in the presence of unnecessary third parties, are not covered by the privilege. See *Shire v. Shire*, 850 S.W.2d 923, 931 (Mo. App. 1993). Moreover, in order to invoke the privilege, "the party asserting it must show: (1) the existence of an attorney-client relationship at the time of the interaction or communication, and (2) that an attorney-client relationship existed with regard to the subject matter of the communication or incident. . . . If either of these factors is absent, the privilege does not apply." *Pride*, 1 S.W.3d at 505.

3. The privilege can be asserted by the lawyer or the client, but it belongs to the client and can be waived. See RESTATEMENT §§ 78-81. Standards for waiver can range

from complete waiver whenever confidentiality is breached for any reason (the Wigmore approach) to no waiver unless there is an intentional relinquishment of confidentiality. In Missouri, the privilege is waived by voluntary disclosure. *Smith v. Smith*, 839 S.W.2d 382 (Mo. App. 1992). Where a party places the subject matter of the communication in issue, such that “proof of the party’s claim will necessarily entail proof of the contents of an attorney-client communication,” waiver will be found. *State ex rel. Chase Resorts, Inc. v. Campbell*, 913 S.W.2d 832 (Mo. App. 1996). Where a party relies on an advice-of-counsel defense, the privilege is generally waived. *Williams v. Preman*, 911 S.W.2d 288, 301 (Mo. App. 1995).

Even when the privilege is waived, there may be an issue regarding the scope of the waiver. In some cases, the waiver is limited to the precise information disclosed. In other jurisdictions, the waiver can extend to other communications related to the subject matter. Counsel advising on waiver should explore this issue fully. See generally Restatement § 79, Comment f.

4. There are exceptions to the attorney-client privilege, most notably the crime-fraud exception, found in Restatement § 82. That exception renders the privilege inapplicable 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 or assist a crime or fraud.” The client’s purpose to misuse the attorney-client relationship or the advice obtained therefrom is key to the crime-fraud exception. It is also irrelevant whether or not the lawyer was aware of the crime or fraud. The exception is not applicable, however, where the client consults the attorney for purposes of achieving compliance with the law. See § 82, Comment c.

In Missouri, although the crime-fraud exception has been recognized since 1920 in a criminal context, *Gebhardt v. United Railways Co. of St. Louis*, 220 S.W.2d 677, 679 (Mo. 1920), it is an open question whether it applies in a civil context (where the underlying activity is fraudulent but not criminal). See *State ex. rel. Peabody Coal Co. v. Clark*, 863 S.W.2d 604, 607-608 (Mo. banc 1993) (expressly reserving the question). Where the exception is claimed, the party seeking to raise it has a high burden. The party seeking to avoid the privilege must meet a two part test. First, the party must make a “prima facie showing that the privileged party has committed a crime or fraud. Second, the seeking party must demonstrate that the privileged information bears a direct and contemporaneous relationship to the crime or fraud alleged.” *Id.* at 608. “Timing is critical, for the prima facie showing requires that the ‘client was engaged in or planning a criminal or fraudulent scheme when he sought the advice of counsel to further the scheme.’” *Id.*

5. Many jurisdictions also recognize an exception for lawyer self-protection. See, e.g., *In re National Mtge Equity Corp. Mtge Pool Certif. Secur. Litig*, 120 F.R.D. 687 (D.C. Calif. 1988) (law firm may disclose otherwise confidential attorney-client communications over client objections asserting privilege where the firm has been charged as co-defendant in securities fraud and other violations.); see also Restatement § 83. The privilege does not apply “to a communication that is relevant and reasonably necessary for a lawyer to employ in a proceeding (1) to resolve a dispute with a client concerning compensation reimbursement that the lawyer reasonably claims the client owes the lawyer; or (2) to defend the lawyer against an allegation by any person that the

lawyer, an agent of the lawyer, or another person for whose conduct the lawyer is responsible acted wrongfully during the course of representing a client.” This exception is derived from the “breach of duty” exception in evidence codes. See § 83, Reporter’s Notes. Few reported decisions address this exception.

## B. Model Rule 1.6

As noted, the attorney-client privilege is limited to situations in which the attorney or client is called to testify or produce documents. In other situations, attorneys must find guidance in other sources. The primary source of guidance for attorneys regarding their obligation of confidentiality is Model Rule 1.6. Read Rule 1.6 in its entirety.

The basic tenor of the Model Rules is nondisclosure. MR 1.6(a) establishes the general rule that a client’s information should neither be revealed nor used by an attorney. MR 1.6(b) sets out limited exceptions to the confidentiality requirement, but none, by its own terms, makes disclosure mandatory.

### 1. What is Confidential Information?

Model Rule 1.6 protects “information relating to the representation.” This has been deemed to cover “all information relating to the representation regardless of its source.” ABA Formal Op. 94-380 (1994). “The range of protected information is extremely broad, covering information received from the client or any other source, even public sources, and even information that is not itself protected but may lead to the discovery of protected information by a third party.” ANNOTATED RULES OF PROFESSIONAL CONDUCT (6<sup>th</sup> ed. 2007) at 95.

The Restatement provides protection to “confidential client information,” and defines it as follows:

Confidential client information consists of information relating to the client, acquired by a lawyer or agent in the course of or as the result of representing the client, other than information that is generally known.

RESTATEMENT § 59. Pursuant to the Model Rules, however, there is “no exception permitting disclosure of information previously disclosed or publicly available.” ANNOTATED RULES at 97 (collecting overwhelming majority of cases adopting this view). Compare Model Rule 1.9(c), which prohibits use of information of a *former client* to the disadvantage of the former client except where “the information has become generally known.”

The following Missouri case addresses these questions. Why do you think the majority ruled as it did? Which resolution do you find more appropriate?

***In re Edgar E. LIM***  
**210 S.W.3d 199 (Mo. banc 2007)**

Ronnie L. White, Judge

I.

Respondent Edgar Lim obtained his Missouri license to practice law in 1975. The Office of Chief Disciplinary Counsel (CDC) alleges multiple violations of the rules of professional conduct in connection with Respondent's representation of Ganesh and Padma Krishnamurthy. The Court finds that Respondent violated Rule 4-1.16(d) by withholding property to which his client was entitled upon termination of the representation. A public reprimand is ordered.

II.

The facts are undisputed. Respondent was admitted to the bar in 1975 and has practiced immigration law throughout his career. His disciplinary record contains an admonition in 2003 for violation of Rules 4-1.3 (diligence) and 4-3.1 (frivolous claim). At the time of the disciplinary hearing on the present matter, Respondent maintained a part-time practice in St. Louis.

In 1994, the Krishnamurthys hired Respondent to assist them to obtain a work visa and labor certification enabling Mr. Krishnamurthy to work in the United States and a residency permit for Mrs. Krishnamurthy. Respondent requested a fee of \$4500. Respondent could not produce a written fee agreement but testified that one existed providing for late charges of \$20 per month plus 9% per year. The Krishnamurthys paid Respondent \$1000.

In October 1997, Respondent terminated representation and sent the Krishnamurthys a letter dated November 3 advising them that "once we are paid..., we will release your labor certification which is still our property until you pay for it" (emphasis in original). In December 2002, Respondent filed a collection action against the Krishnamurthys. In January, Respondent instructed his daughter and law partner to send a letter, on Lim & Lim letterhead, to the Krishnamurthys, threatening to report them to the United States Immigration and Naturalization Service (INS) if they failed to pay immediately. In February 2004, Respondent sent a letter to the INS reporting that the Krishnamurthys "lack the good moral character needed to obtain immigration benefits" because they had "lied and deceived our office" and had an outstanding balance of "over \$7000." Respondent asked the INS to place the letter in the Krishnamurthys' file "to prevent them from obtaining any further immigration benefits."

The Krishnamurthys hired Andrew Neill to represent them in Respondent's collection action. Mr. Neill reported Respondent's conduct to the CDC in September 2004, and the CDC filed an information against Respondent's license. The CDC alleged violations of Rules 4-1.16(d) (withholding client property), 4-1.6(a) (disclosure of confidential information without consent) [and] 4-1.9 (use of information to detriment of former client. . . . Following a hearing in March 2006, the Disciplinary Hearing Panel (DHP) recommended that Respondent be suspended for six months. The CDC now seeks affirmation of the DHP's recommendations. This Court has jurisdiction because it has the inherent authority to regulate the practice of law.

### III.

The findings of fact, conclusions of law, and the recommendations from the DHP are advisory. This Court reviews the evidence *de novo* and draws its own conclusions of law. Professional misconduct must be proven by a preponderance of the evidence before discipline will be imposed.

Rule 4-1.16(d) requires in pertinent part that "upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as ... surrendering papers and property to which the client is entitled..." The Court agrees with the CDC that Respondent's November 3 letter to Mr. Krishnamurthy is a bald effort to coerce payment by withholding the labor certification - a document to which the client was entitled - in violation of Rule 4-1.16(d).

The remaining alleged violations arise from Respondent's letter to the INS. While such vindictive behavior casts shame on the entire profession, the Court is not persuaded that the expression of Respondent's personal opinion regarding the Krishnamurthys' character constitutes a disclosure of confidential information under the rules. The cases cited by the CDC are distinguishable in that they involve situations where attorneys divulged substantive facts learned in the scope of representation as opposed to subjective opinions formed thereafter. Further, the outstanding debt was a matter of public record by virtue of the collection action. . . . The Court does not find a preponderance of evidence establishing violations of Rules 4-1.6(a) [or] 4-1.9. . . .

### IV.

The Court orders a public reprimand for Respondent's violation of Rule 4-1.16(d).

Laura Denvir Stith, Judge, concurring in part and dissenting in part in an opinion in which Price and Russell, JJ concur.

I respectfully concur in part and dissent in part. . . .

I disagree with the principal opinion . . . that Mr. Lim's reprehensible and vindictive behavior in reporting his clients to the INS is not a rule violation. I believe that, when added to his coercive attempt to collect a questionable amount of fees from his former client, Mr. Lim's conduct warranted suspension.

While Mr. Lim suggests that it was his obligation to report the alleged "amoral conduct" of his former client to the INS, the only "amoral conduct" that Mr. Lim identifies is Mr. Krishnamurthy's failure to pay Mr. Lim's bill. Further, the January 26, 2004, letter sent by Priscilla Lim, Mr. Lim's daughter and partner, to the Krishnamurthys says that if they pay the Lims' bill of \$6,759.00 then the Lims will *not* report the Krishnamurthys' "amoral character" to the INS. This calls into question whether the Lims truly believed they had a duty to report or truly believed the conduct to be amoral.

Rule 4-1.6 provides that "[a] lawyer shall not reveal information relating to the representation of a client." Rule 4-1.6(a). Comments to Rule 4-1.6 clarify that the term "relating to representation" has broad application. It "imposes confidentiality on information relating to the representation even if it is acquired before or after the relationship existed." Rule 4-1.6 comments. The comment specifically notes



the greater breadth of the phrase "relating to representation" when compared to the language under the former version of the rule, stating that, unlike "[u]nder the Code, . . . DR [Rule] 4-1.6 does not require the client to indicate information that is to be confidential, or permit the lawyer to speculate whether particular information might be embarrassing or detrimental." *Id.* Any information "relating to representation" must be kept confidential unless an exception applies.

A lawyer may reveal otherwise confidential information only (1) if the client consents, Rule 4-1.6(a); (2) to prevent the client from committing a crime likely to result in death or substantial bodily harm, Rule 4-1.6(b)(1); or (3) "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client." Rule 4-1.6(b)(2). These provisions are limited in that they permit "disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified." ABA Rule 1.6, comment 12.

Rule 4-1.9 provides that it is a conflict of interest for a lawyer who has formerly represented a client to "use information relating to the representation to the disadvantage of the former client" *unless* the information may be revealed pursuant to Rule 4-1.6 or because the information has become generally known. The principal opinion says the exceptions to non-disclosure set out in Rule 4-1.9 apply because the information became a matter of public record in the collection suit and because the information disclosed did not relate to "substantive facts learned in the scope of representation." I disagree that an exception to the confidentiality requirements of Rules 4-1.6 and 4-1.9 applies.

Although the collection suit against the Krishnamurthys may have publicized the fact that Mr. Lim claimed they owed him money, it did not make "generally known" any information about the Krishnamurthys' alleged lying or deception or bad moral character. Yet, the Lims' February 18, 2004, letter to the INS did not merely inform the agency of the collection action against the Krishnamurthys. It also asserted that they "lack the good moral character needed to obtain immigration benefits. They have lied and deceived our office" and asked that the INS "place this letter in their file to prevent them from obtaining any further immigration benefits." This goes far beyond merely reporting an unpaid debt. The Lims' disclosure of such information to the INS, which was specifically intended to disadvantage the Krishnamurthys, violated Rule 4-1.9's admonition that a lawyer not "use information relating to the representation to the disadvantage of the former client."

Further, the Lims' allegations of lying and deception on the part of the Krishnamurthys are admittedly based on statements relating to money allegedly owed to Mr. Lim for his representation, statements made by the Krishnamurthys both during and after the Lims' representation. Such statements inherently "relate to" Mr. Lim's representation of the Krishnamurthys. Even as to those alleged lies made *after* the Lims' representation of the Krishnamurthys, the rules impose on the Lims an obligation to keep confidential all information "relating to the representation even if it is acquired before or after the relationship existed." Rule 4-1.6 comments. But, the Lims admit that at least some of the alleged multiple promises to pay by Mr. Krishnamurthy were made during the course of the representation and that the alleged repeated failure to keep these and later promises is what allegedly led to Mr. Lim's withdrawal from Mr. Krishnamurthy's representation.

Finally, the fact that the information revealed concerned the alleged nonpayment by, and amoral and lying character of, the Krishnamurthys does not affect the Lims' obligation not to undertake conduct detrimental to their former client and not to reveal information relating to the Krishnamurthys. Nothing in Rule 4-1.6 requires that in order for information relating to representation to be confidential it must relate to the "substantive facts" of the representation, as the principal opinion suggests. All information that relates to the representation of the client must be kept confidential under Rule 4-1.6.

Mr. Lim's decision to send a letter to the INS condemning the moral character of the Krishnamurthys with the stated intent that it prevent them from "obtaining any further immigration benefits" is comparable to a letter sent by a tax attorney to the IRS informing the agency that a former client, who had been seeking certain relief or shelter from tax liability at the time of the representation, is a person of low moral character and failed to pay the attorney for his services and, therefore, should not get a favorable settlement from or should be audited by the IRS. Under the approach taken in the principal opinion, the outcome would be the same in both cases. But just as a tax attorney should never attempt to goad the IRS into auditing or denying beneficial treatment to former clients because they have failed to pay the attorney, neither should an immigration attorney try to persuade the INS to deport or deny benefits to former clients because the attorney has not been paid for his services. In either situation, the conduct of the attorney is reprehensible, and the attorney should be disciplined accordingly.

I also agree with the disciplinary hearing panel that a more severe sanction for this conduct is warranted than might otherwise be the case because Mr. Lim refuses to express remorse for his conduct or even to acknowledge its vindictiveness and unprofessional nature. He went so far as to tell the disciplinary hearing panel that "If I had it to do all over again, I possibly would do the exact same thing." Further, in this Court, Mr. Lim indicated that he still believed his conduct toward the Krishnamurthys was appropriate.

In these circumstances, I agree with the disciplinary hearing panel's recommendation that Mr. Lim's license to practice law should be suspended with leave to reapply after six months.

## 2. Disclosure Is Generally Prohibited

As a general rule, an attorney may not reveal protected information to anyone other than as appropriate to advance the client's interests. RESTATEMENT § 61. According to the Model Rules, such disclosures are permitted where "impliedly authorized in order to carry out the representation." MR 1.6(a). Even then, the attorney must exercise care to prevent disclosure beyond that which is needed. See MR 5.3 and the revised Comments to M.R. 1.6, ¶¶16 and 17. See also RESTATEMENT § 60(b) ("lawyer must take reasonable steps in the circumstances to protect confidential client information against impermissible use or disclosure . . ."). Violations are possible not only where attorneys (or their staff) make intended disclosures, but where inadvertent disclosures are made as well. What kinds of situations can lead to inadvertent disclosure? How can such disclosure be avoided? Are there means of communication that are not sufficiently secure for attorney-client communications? What about e-mail? See A.B.A. Formal Op. 99-413. What about cell phones?

Are lawyers permitted to talk to spouses about their cases? To other lawyers? Does it matter whether or not they are in the same firm? See Comment ¶5. What about the use of hypothetical situations? Does this constitute revealing protected information? Should it? See Comment ¶4 (prohibition applies to disclosures by a lawyer that do not themselves reveal protected information but could reasonably lead to the disclosure of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation).

Additionally, an attorney may not use protected information of his or her client, whether to the client's disadvantage, MR 1.8(b), 1.9(c)(1), or the attorney's advantage. RESTATEMENT § 60(2); see *Matter of Miller*, 127 Ariz. 299, 620 P.2d 214 (en banc 1980) (attorney violated Code where he used information regarding value of a business and the existence of an outstanding option to his own advantage: attorney purchased option and diluted interests of former client). This duty arises out of the attorney's fiduciary obligations to the client. These duties of non-disclosure and non-use continue even after the termination of the attorney-client relationship. See Comment to MR 1.6, ¶21 (¶18); see also RESTATEMENT §. 60, Comment e.

### 3. Exceptions

The obligation to preserve client information is not, however, absolute. Six exceptions allow for disclosure of information otherwise protected by Model Rule 1.6(a).

#### a. Disclosure is Impliedly Authorized or the Client Consents: M.R. 1.6(a)

An attorney may disclose information protected by Rule 1.6 where the representation itself permits disclosure or with the client's consent. Since the purpose of the confidentiality requirement is primarily to protect the client, this provision makes good sense. Where a client has requested services that necessitate disclosure of information, the attorney can make such disclosure based on implied authorization. This provision prevents the attorney having to seek consent where it is clear from the nature of the representation that the client agrees to the disclosure.

The consent exception applies where the nature of the representation itself does not authorize disclosure. Accordingly, some affirmative manifestation of consent is required. Under the 2001 Model Rules, consent must be "after consultation." Consultation was defined in the terminology section of the Model Rules as "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." *Terminology* ¶ 3. The 2004 Rules require "informed consent," which is defined in Rule 1.0(e) as "the agreement . . . to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."

The Restatement requires that the client be "adequately informed concerning the use or disclosure." RESTATEMENT § 62. However the standard is formulated, lawyers must assure that clients "have a full understanding of what they are being asked to consent to" and that "the consent is a completely voluntary matter with [the client], a consent which [the client] can deny without a sense of guilt or embarrassment." Informal Opinion 1287 (June 7, 1974). This is particularly true when dealing with clients who lack

education or sophistication and who "might be more likely to be submissive to such requests. . . ." *Id.*

b. Future Death or Substantial Bodily Harm: M.R. 1.6(b)(1)

The Model Rules permit disclosure of otherwise protected information in order to avoid death or serious bodily harm. The circumstances that should permit such disclosure have been the subject of much discussion in recent years. In fact, this is an issue on which the new Model Rules have made significant changes.

Prior to the Ethics 2000 changes, the Rules permitted an attorney to disclose information to the extent necessary to "prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm." 1.6(b)(1). The Rules made a clear distinction between past and future crimes. Under the prior Rules, no disclosure of past crime was permitted, but disclosure of a client's intent to commit a crime likely to cause death or serious bodily harm in the future was left to the discretion of the attorney. This was somewhat consistent with both the evidentiary and fiduciary views of confidentiality, since intent to commit a crime is an exception to the evidentiary privilege, and since agents are not privileged to commit crimes on behalf of their principals. The narrow limit on disclosure to cases involving death or serious bodily harm, however, reflected the strong prioritization of loyalty to the client over the interests of others.

Why shouldn't an attorney be *required* to disclose information where such disclosure can prevent imminent death or serious bodily harm? In what situations, if any, should an attorney be allowed to maintain confidentiality where such serious consequences are likely to occur? And why shouldn't an attorney be *permitted* to disclose the client's intent to commit a crime likely to cause serious financial hardship to another? Or non-criminal conduct likely to cause significant harm? What values are being protected here, and at what cost? Does this rule go too far, or not far enough?

What about completed crimes or frauds? Completed crimes that have future consequences? Is the lawyer precluded from disclosing as long as no further *conduct* of the client is expected? Consider the attorney who learns his client has planted a bomb and intends to detonate it in several hours. Can the attorney disclose? On what basis? What if the client has set the bomb to go off in several hours with no further action by the client. Can the attorney disclose in this situation? On what basis? If these situations lead to different outcomes, how are they justified? Are you convinced? If not, what should the rule be?

The 2004 Model Rules have attempted to remedy some of these concerns. The Rule now permits disclosure "to prevent reasonably certain death or substantial bodily harm." 1.6(b)(1)(2002). According to the Comments, this exception "recognizes the overriding value of life and physical integrity." Comment ¶6. Does this revision adequately address the concerns with the prior Rule? Why or why not? What constitutes "reasonably certain death or serious bodily harm"? See Comment ¶6. When can disclosure be made? See RESTATEMENT § 117A(2) ("if the client has acted at the time the lawyer learns of the threat of an injury or loss to the victim, use or disclosure is permissible only if the injury or loss has not yet occurred.").

Note that disclosure under either version of this rule is only permitted where

death or substantial bodily harm is likely. Is this too narrow? Should the exception apply to serious psychological or emotional harm as well? Why or why not?

The Missouri version of this rule is similar to the current Model Rule and provides that a “lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary (1) to prevent death or substantial bodily harm that is reasonably certain to occur.” Mo. S. Ct. R. 4-1.6(b)(1). This appears to be merely a grammatical reformulation of the Rule. The Kansas version of the Rule is significantly broader in many respects, permitting the lawyer to reveal “[t]o prevent the client from committing a crime.” KRPC 1.6(b)(1). There is no requirement that the crime involve death or serious bodily harm.

Where disclosure is permitted, how certain must an attorney be before he or she reveals a client's intent to commit a crime? What factors should an attorney consider in determining whether to exercise discretion in favor of disclosure? See Comments ¶¶14 and 15.

c. Substantial Injury to Financial Interests or Property: MR 1.6(b)(2)(3)

One of the most hotly contested issues in the adoption of the Rules relates to disclosures to prevent, mitigate or rectify substantial injury to the financial interests or property of another. The Ethics 2000 Commission proposed a new Rule 1.6(b)(2) which would permit disclosure “to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services.” A similar amendment had been proposed in 1991. These efforts to broaden discretionary disclosure to some situations in which other than physical harm is threatened were initially defeated by the ABA House of Delegates. Why should economic harms be treated differently? Aren’t there some situations in which economic harms might be as devastating as physical harm? Post-Enron, the ABA reconsidered its position and the House of Delegates ultimately adopted the current Rule. Note that it only extends to crimes or frauds in which the lawyer services were used. Why? Does this rule go too far? Not far enough?

What about completed crimes or frauds? Should an attorney be permitted to disclose to rectify or mitigate the consequences of a client’s criminal or fraudulent acts that have already occurred, especially if the lawyer’s services were unknowingly used in perpetrating the fraud? The Ethics 2000 Commission also proposed a new (b)(3) which would have permitted disclosure to “prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services.” A similar exception had been proposed and rejected in 1991. After the House of Delegates defeated proposed (b)(2), the Commission withdrew this provision, realizing it too was doomed to failure. But this provision, too, was subject to reconsideration the following year and was adopted by a close vote. Should such disclosure be permitted? Why or why not? What are the competing considerations? Would you have voted for this amendment?

Note that neither Missouri nor Kansas adopted 1.6(b)(2) or (3). What is the impact of that decision in each jurisdiction? What is now the scope of permitted disclosure?

d. Attorney Self Defense: M.R. 1.6(b)(5)

Under Canon 37 as originally adopted, an attorney was allowed to disclose client confidences when he or she was falsely accused of misconduct by a client. The word "falsely" was deleted from Canon 37 in 1937. MR 1.6(b) (5) (formerly (b)(2)) currently governs disclosures in "self defense," and is arguably broader than Canon 37. This provision permits disclosure to the extent the lawyer reasonably believes necessary "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based on conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client." See also RESTATEMENT §§ 64, 65.

1. It is clear from the rules and their interpretation that the allegation of misconduct need not come from the client in order for the exception to apply. Is this desirable? Doesn't the client in this situation lose all control over disclosure of confidences he or she has entrusted to the attorney? If a client can lose such control without any action on his or her part, will open and free communication between attorney and client be encouraged? Is this an instance of placing the lawyer's interest above those of the client?

2. When does the right to disclose come into play? A charge of ineffective assistance of counsel provides an attorney with the right to use otherwise protected information of the client in self defense. See e.g., *State v. King*, 24 Wash. App. 495, 601 P.2d 982, 988 (1979). But care must be taken where the charge comes before trial to insure that the defendant's trial rights are not prejudiced. *Butler v. United States*, 414 A.2d 844 (D.C. en banc 1980). A motion to disqualify an attorney has been held not, by itself, to be an accusation of wrongful conduct sufficient to give the attorney the right to disclose confidences in self defense. "A motion for disqualification is not, by itself, an accusation of misconduct. Disqualification is a prophylactic measure. The court does not inquire into whether there have been actual ethical violations, but only whether they might occur." *Levin v. Ripple Twist Mills, Inc.*, 416 F. Supp. 876, 886 (E.D. Penn. 1976). Accordingly, disclosure . . . is inappropriate in that context.

Must there be a formal accusation (i.e., filing a suit, indictment, etc.) before the right to self defense arises? And how much disclosure is "necessary" to defend oneself? See RESTATEMENT § 64, Comment e, requiring "proportionate and restrained use" of such information. In order to properly disclose, "[t]he lawyer must reasonably believe that options short of use or disclosure have been exhausted or will be unavailing or that invoking them will substantially prejudice the lawyer's position in the controversy."

The following Kansas case addresses these and related issues. Although the facts are detailed and the case long, it is worthy of serious consideration.

***In the Matter of DAVID MCLANE BRYAN, Respondent***  
**275 Kan. 202, 61 P.3d 641 (2003)**

ORIGINAL PROCEEDING IN DISCIPLINE

*Per Curiam:*

On October 15, 1999, a complaint was filed on behalf of Helene Eichenwald. . . against David Bryan. The Kansas Disciplinary Administrator filed a formal complaint against Bryan on May 16, 2000. Bryan filed an answer to the complaint in June 2000. . . . [A hearing was held in March 2002.] The hearing panel, after hearing the arguments of the parties and after reviewing the stipulated facts and the exhibits admitted into evidence, made the following findings of fact:

"1. David M. Bryan (hereinafter 'the Respondent') is an attorney at law. . . . In October, 1995, the Respondent was admitted to the practice of law in the state of Missouri. Thereafter, on May 21, 1996, the Respondent was admitted to the practice of law in the state of Kansas.

"2. In 1991 or early 1992, Helene Eichenwald, Marla Worthington, and Ms. Fuller, employees of Krigel's, Inc. in Kansas City, Missouri, retained attorney Stephen Bradley Small to represent them in employment discrimination cases based upon sexual harassment.

"3. In January, 1994, Ms. Eichenwald, Ms. Worthington, and Ms. Fuller terminated Mr. Small. Thereafter, they retained the law firm of McAnany, Van Cleave & Phillips to represent them in their sexual harassment case against Krigel's, Inc. After retaining the McAnany firm, the plaintiffs were made aware that a problem had arisen with the statute of limitations on the plaintiffs' supplemental state law claims.

"4. The Respondent met Ms. Eichenwald in July, 1994. At the time, the Respondent was a second year law student at the University of Missouri Kansas City, School of Law. Also at that time, the Respondent served as a law clerk for attorney Barry R. Grissom. The Respondent suggested to Ms. Eichenwald that she and the other plaintiffs in the sexual harassment case meet with Mr. Grissom to discuss the possibility of a legal malpractice action against Mr. Small.

"5. In December, 1994, Ms. Eichenwald, Ms. Worthington, and Ms. Fuller retained Mr. Grissom to pursue a legal malpractice action against Mr. Small.

"6. In September, 1995, Ms. Eichenwald's lawsuit against Mr. Small was filed in the United States District Court for the District of Kansas. The Respondent assisted Mr. Grissom with Ms. Eichenwald's case in the capacity of a law clerk.

"7. Meanwhile, Ms. Eichenwald, Ms. Worthington, and Ms. Fuller continued to pursue their Title VII sexual harassment claims against Krigel's, Inc. Eventually, on October 12, 1995, the case was settled and Ms. Eichenwald prevailed.

"8. After his admission to the Missouri bar in October, 1995, the Respondent continued to work on Ms. Eichenwald's legal malpractice case. At the same time, the Respondent and Ms. Eichenwald began a romantic relationship. The

relationship between the Respondent and Ms. Eichenwald escalated into a sexual relationship in July, 1996. Although Mr. Grissom remained as counsel for Ms. Eichenwald, during their personal relationship, the Respondent was also actively involved in representing Ms. Eichenwald.

"9. In August, 1996, Ms. Eichenwald told the Respondent that she was going to marry an individual named John Opel. At that time, the sexual relationship between the Respondent and Ms. Eichenwald ceased, but the two continued to see one another on numerous occasions. In December, 1996, the Respondent learned that the engagement between Ms. Eichenwald and John Opel had been broken. In January, 1997, the Respondent and Ms. Eichenwald resumed their sexual relationship.

"10. In March, 1997, the Respondent learned that Ms. Eichenwald was still seeing John Opel. The sexual relationship between the Respondent and Ms. Eichenwald ended, but the Respondent and Ms. Eichenwald still continued to see one another. The Respondent continued to pursue Ms. Eichenwald romantically. In conversations and letters, the Respondent expressed a desire to have a relationship with Ms. Eichenwald. At the time, the Respondent was still one of the attorneys representing Ms. Eichenwald in her lawsuit against Mr. Small.

"11. In the fall of 1997, the Respondent and Ms. Eichenwald resumed their romantic relationship. In November, 1997, Ms. Eichenwald determined that she wanted the Respondent to be her sole counsel. In conversations and letters from November, 1997, to February, 1998, the Respondent expressed his feelings for Ms. Eichenwald and his jealousy of John Opel. At those times, the Respondent was Ms. Eichenwald's sole counsel in her case against Mr. Small.

"12. On or about February 21, 1998, the Respondent learned that Ms. Eichenwald was once again seeing John Opel.

"13. Because the Respondent resented the fact that Ms. Eichenwald was again seeing Mr. Opel, on February 25, 1998, the Respondent sent Ms. Eichenwald a letter terminating his representation of her. The letter contained allegations of theft and fraud. The tone of the letter was unprofessional, rude, and written to embarrass Ms. Eichenwald. Pertinent sections of the letter are set forth below:

' . . . Frankly, I no longer believe any of the allegations you are making in this case, or those you have made in any of your other cases. During the course of this long litigation several things have arisen which have a direct bearing on your truthfulness as a person. I can no longer ignore or rationalize them. Among them are:

'Your termination from Saks Fifth Avenue. As you remember, I investigated this incident at your request. It was then, and still is, obvious that you intentionally attempted to deceitfully manipulate the Saks' return policy for your own financial gain. This is theft, no doubt brought on by what I perceive to be an ever-present belief on your part that you will never get caught because you are far too clever for everyone else. You are not.

'Also, there is the matter of your illegal and fraudulent acquisition of unemployment benefits during the time you were actually employed as a nanny by the Shimshaks. This is a crime, punishable by restitution, fines



and even jail time. At that time you were obtaining these benefits, you could not possibly have thought this was legal. This was only brought to my attention before your deposition, when you figured out that defense counsel might possibly find out and use this against you. Only then, and upon my demand, did you cease this fraud upon the state.

'These things, as well as the fact that I have personally witnessed you display a constant repeating pattern of deception during the course of this litigation toward virtually everyone you know, compel me to believe that your allegations of sexual harassment and for the supposed damage you sustained therefrom are all complete fabrications, invested [sic] for your financial gain. During the more than three years I represented you, I have defended your honesty countless times in social gatherings when others who knew you attempted to enlighten me about your propensity for lying. Now I am forced to accept the fact that I was wrong about you, and everyone else was right. It is impossible for me to represent you when faced with the fact that I actually agree with your opponent Mr. Small that you are a "horribly untruthful person."'

The Respondent included the following paragraph as a footnote to the letter:

'I would be allowed to make public this letter, and anything else I know about your character, under either of two circumstances. First, I could use it as a defense in the event that you sued me, second, as a defense if you made a complaint to the Disciplinary Council. In either case, it would become a matter of public record, which could be used against you in any other action in which it was determined to be relevant evidence. Although I have done nothing to warrant either of these actions, I will not be surprised to see either one, given your track record in these areas.'

"14. After the Respondent terminated his representation of Ms. Eichenwald, it was necessary for her to obtain new counsel. She again retained Mr. Grissom and Mr. Grissom assumed sole responsibility for representing Ms. Eichenwald in the malpractice case against Mr. Small. The Respondent continued to represent Ms. Worthington and Ms. Fuller.

"15. In April, 1999, by court order Ms. Eichenwald's malpractice case was consolidated with Ms. Worthington's case. The court further ordered a compulsory and shared settlement conference with magistrate Sarah Hays.

"16. On May 2, 1999, the Respondent visited Ms. Eichenwald at her place of employment, Nordstrom, Inc., and explained that they were both ordered by the court to appear at the settlement conference. From February 25, 1998 until May 2, 1999, there had been no contact of any kind between the Respondent and Ms. Eichenwald.

"17. During the spring and summer, 1999, the Respondent made numerous shopping visits to Nordstrom, but did not contact Ms. Eichenwald.

"18. On September 9, 1999, Ms. Eichenwald sent the Respondent a letter asking him not to come to Nordstrom anymore because it made her uncomfortable. A copy of Ms. Eichenwald's letter was sent to the Nordstrom store manager and the Nordstrom security manager.

"19. On September 10, 1999, the Respondent learned that Ms. Eichenwald had told others that the Respondent was stalking her, that he was dangerous, and that he was in need of mental health care.

"20. Also on September 10, 1999, the Respondent sent a letter to Mr. Grissom, and included the following paragraphs:

'The point of this letter is to tell you that I may have to defend myself against your client's accusations by making public certain things I know about her which will damage her credibility in the extreme. I have never discussed them with you, or Rachelle, because I was trying to get out of representing her without needlessly hurting her sister's feelings or damaging Helene's reputation, but I can't do that now. I fired your client in March of 1998, but I never told you why. Attached is the termination letter from my office to your client, explaining the reasons why I felt I had to fire Helene. There are other good reasons which I did not put in the letter, but also are extremely damaging to her credibility and admissible in court. If I have to respond to any allegations made against me by Helene, the things in that letter are going to have to go public, which means they will be in the possession of the attorneys for Stephen Small. . . . I can't think of any reason why I shouldn't sue Helene for defamation and put a stop to this, except that her case and Marla Worthington's are consolidated and that might hurt my client too. That's the problem.

'You need to tell Helene to shut her mouth, because if she doesn't she's going to destroy her own case against Steve Small, and maybe Marla Worthington's case too. I will, of course, move the court to "unconsolidate" the cases based upon this conflict, and I will then explain to the Court and Jay Barton that Ms. Eichenwald has now accused me of stalking her at her place of employment. This will immediately tip the other side that something good is there for Steve Small, and I can be deposed about it since I was not her counsel at the time of the incident.'

"21. On September 11, 1999, the Respondent wrote a letter to Nordstrom store manager Kris Allen and Nordstrom Loss Prevention Manager Jennifer Knipp stating, among other things, the following:

'Additionally, I happen to know that Ms. Eichenwald has a history of making false claims such as those she is making against me, and this will all come out in court. During the seven years that I have known Ms. Eichenwald, there has rarely been a period of time when she didn't claim that someone was after her, following her, or stalking her. One particularly telling example of this trait is a police report Ms. Eichenwald filed with the Prairie Village Police Department in 1996. In this police report, Ms. Eichenwald seriously claimed that while she was away from home, some man must have stood at her front door and masturbated on her front door window, in front of passing traffic and four feet off the ground. The police officer and I both tried to tell her that this was impossible and ridiculous, but she insisted that this was what happened. Claims like these make Ms. Eichenwald feel important because they increase concern for her among others, and get her more attention. Ms. Eichenwald likes that very much, and does whatever she can to insure it continues. Believe me, there is not now, nor has there ever been, anyone stalking or harassing Ms. Eichenwald.'

"22. On September 13, 1999, the Respondent sent a letter to Ms. Eichenwald. In the letter the Respondent acknowledged that Ms. Eichenwald had made allegations that the Respondent was stalking her and that she was in fear for her safety. The Respondent demanded that Ms. Eichenwald retract these allegations. The threatened consequences of failing to retract these statements were set out in that letter by the Respondent as follows:

'When I fired you as my client in February of 1998, I told you why I was firing you and warned you that my February 25, 1999 letter could become public if you made any accusations against me. In spite of this clear warning, you have been unable to control yourself. I am no longer going to quietly sit back and let you ruin my reputation. Now, only two things can happen. You will write a retraction of the allegations you have recently made against me and telling everybody that it was all a big mistake and an overreaction by you. You will send it to all those to whom you have made any defamatory allegations.

*'If you do not send these written retractions, I have no choice but to file a lawsuit against you for defamation. When I file this lawsuit against you, several things will happen. First, all the allegations in the petition will become public record and in the possession of the attorneys for Mr. Small. I have checked all the ethical rules, and because of your allegations against me I am now entitled to release the February 1999 termination letter I sent you. This too, will come into the possession of Mr. Small's attorneys who will make ample use of it to destroy your credibility. . . .'*

"23. Ms. Eichenwald, in a note sent *via* facsimile, informed the Respondent that she was unable to retract her 'feelings.' She offered, though, to resolve the issues through mediation.

"24. On September 16, 1999, the Respondent wrote to Ms. Eichenwald refusing to submit the dispute to mediation and again demanding that she retract her allegations against him. Additionally, in that letter, the Respondent reiterated his position regarding his authority to release confidential information:

'As far as releasing any formerly privileged information to whomever might have a use for it, I am on firm legal footing. Kansas Rules of Professional Conduct 1.6(b)(2) states that:

"A lawyer may reveal such [privileged] information to the extent the lawyer reasonably believes necessary: . . . to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client . . . ."

"25. Ms. Eichenwald declined to retract her statements as requested by the Respondent. On September 27, 1999, the Respondent filed suit against Ms. Eichenwald in the District Court of Johnson County, Kansas, case number 99C12748, alleging defamation, invasion of privacy, and tortious interference with a business relationship.

"26. On September 29, 1999, the Respondent wrote a letter to counsel for Mr. Small. The letter confirmed a prior conversation between the Respondent and defense counsel, James Barton. In that conversation the Respondent offered to provide defense counsel with negative information regarding Ms. Eichenwald, if they could reach a settlement agreement regarding Bryan's two remaining clients

in the malpractice litigation.

"27. On September 30, 1999, the Respondent self-reported his romantic and sexual relationship with Ms. Eichenwald to Stanton A. Hazlett, Disciplinary Administrator. In his letter, the Respondent denied that he engaged in misconduct and informed Mr. Hazlett that he expected Ms. Eichenwald to file a disciplinary complaint against him.

"28. On October 6, 1999, Lynne J. Bratcher filed a complaint with the Disciplinary Administrator. Thereafter, on November 1, 1999, the Respondent provided his written response to Ms. Bratcher's complaint. In addition to his complaint, the Respondent provided a large volume of personal information regarding Ms. Eichenwald that was unnecessary to respond to the complaint, including a copy of a petition to foreclose on Ms. Eichenwald's grandmother's house.

"29. In October, 1999, counsel for Mr. Small independently obtained a copy of plaintiff's Petition for Damages in *Bryan v. Eichenwald* and obtained negative information about Ms. Eichenwald disclosed by the Respondent in his petition. Counsel for Mr. Small later subpoenaed and deposed the Respondent and obtained additional negative information about Ms. Eichenwald by the Respondent. The Respondent was listed as a witness for Mr. Small in his defense against Ms. Eichenwald's malpractice claim. (The Respondent previously informed counsel for Mr. Small of the existence of *Bryan v. Eichenwald*.)

"30. On October 25, 1999, the Respondent filed a motion to sever Ms. Worthington's case from Ms. Eichenwald's case. Paragraphs 5 and 6 of that motion were as follows:

'5. Because of the allegations made in *Bryan v. Eichenwald*, Mr. Bryan may become a witness for defendant Stephen Bradley Small in his case against Ms. Eichenwald.

'6. . . . Any attack on Ms. Eichenwald's credibility could also unfairly influence the jury against Ms. Worthington.'

After counsel for Mr. Small objected to the Respondent's motion to sever, the Respondent, on November 8, 1999, filed a reply. That pleading contained the following assertions:

'3. Since the termination of Mr. Bryan's representation of Ms. Eichenwald in her case against her former counsel Mr. Small, Ms. Eichenwald has now been sued by her other former counsel, Mr. Bryan for making defamatory claims of stalking and threats against Mr. Bryan, claims very similar to those Ms. Eichenwald previously made against both Mr. Shine and Mr. Stein in the *Krigel's* case. Because Mr. Bryan is suing his former client, it remains to be determined what information Mr. Bryan will be allowed to use to prove his case against Ms. Eichenwald. A ruling of the Court in *Bryan v. Eichenwald* on this issue could have an adverse effect on Ms. Eichenwald's credibility. It is unfair and prejudicial to make Ms. Worthington suffer for any credibility problems that may arise for Ms. Eichenwald. . . .

'5. The stalking and harassment charges made by plaintiff Eichenwald

against her former counsel, and plaintiff Worthington's current counsel Mr. Bryan, could become part of Mr. Small's defense in this case. Should this happen, plaintiff Worthington's case against Mr. Small would be unfairly prejudiced by the credibility problems Ms. Eichenwald may have. . . .

'7. It is unfair and prejudicial to Plaintiff Worthington's case to have it associated in any way with Ms. Eichenwald. Ms. Eichenwald does not appear on plaintiff Worthington's rule 26 disclosure statement filed with this Court on October 1, 1999, and plaintiff Worthington has never intended to use any testimony from Ms. Eichenwald to support her claims in this case. Plaintiff Worthington plans to file a Motion in Limine regarding Ms. Eichenwald. It is prejudicial and fundamentally unfair to plaintiff Worthington to have her claim rest on the credibility of Ms. Eichenwald.'

"31. Following a finding of probable cause against the Respondent, the case file in this disciplinary proceeding became public record pursuant to Kan. Sup. Ct. R. 222(d). Counsel for Mr. Small obtained a copy of the entire disciplinary file, including information relating to the representation of Ms. Eichenwald by the Respondent. (The Respondent previously informed counsel for Mr. Small of the disciplinary case.)

"32. In December, 1999, the Respondent discovered information that gave rise to a cause of action against Ms. Eichenwald's employer, Nordstrom, Inc., for negligent supervision of its employee, Ms. Eichenwald. The Respondent contacted Nordstrom's counsel and offered to forego a lawsuit against Nordstrom in exchange for Ms. Eichenwald's termination and a letter of apology. Nordstrom refused.

"33. In December, 1999, the Respondent voluntarily dismissed his lawsuit in the District Court of Johnson County, Kansas. Through counsel, the Respondent refiled his case in the United States District Court for the District of Kansas. This case was entitled *David M. Bryan v. Helene Eichenwald and Nordstrom, Inc.*, No. 99-2543-CM.

"34. Both Ms. Eichenwald and Nordstrom attempted to invoke claims of attorney-client privilege as to negative information about Ms. Eichenwald which the Respondent possessed. All parties submitted an agreed-upon Motion for Protective Order. The Court denied this motion and no protective order was ever entered.

"35. On June 24, 2000, the court in *Bryan v. Eichenwald, et al.*, issued an order in which it denied Ms. Eichenwald's attempt to invoke the attorney-client privilege and the rule of confidentiality as to negative information in the possession of the Respondent. The court ruled that such information could be properly disclosed by the Respondent to assert either a claim or defense regarding the allegations made against the Respondent by Ms. Eichenwald in the *Bryan v. Eichenwald* case.

"36. After a lengthy briefing of all issues, the court in *Bryan v. Eichenwald, et al.*, issued an order denying the motions for summary judgment filed by both Ms. Eichenwald and Nordstrom, Inc., stating in pertinent part, 'a reasonable fact finder could conclude that Nordstrom should have foreseen that plaintiff's reputation would be injured by such statements.'

"37. Following denial of defendants' motions for summary judgment the parties settled in the case. Ms. Eichenwald and Nordstrom paid the Respondent \$16,000.00. Additionally, Ms. Eichenwald provided the Respondent with a written apology."

The hearing panel also made conclusions of law. The majority of the panel found that Bryan had violated KRPC 1.6(a), 1.7(b), 1.16(d), and 8.4(a). Panel member M. Warren McCamish dissented from some of the panel's findings and did not agree with the finding that Bryan violated KRPC 8.4(a). The hearing panel, after considering aggravating and mitigating factors, unanimously recommend published censure. Bryan took exception to the hearing panel's findings of fact and conclusions of law. . . .

#### KRPC 1.6

Interpretation of the Kansas Rules of Professional Conduct is a question of law over which this court has unlimited review. *State v. Dimaplas*, 267 Kan. 65, Syl. ¶ 1, 978 P.2d 891 (1999); *Baugh v. Baugh*, 25 Kan. App. 2d 871, 875, 973 P.2d 202 (1999).

KRPC 1.6 states:

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

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

(1) To prevent the client from committing a crime; or

(2) to comply with requirements of law or orders of any tribunal; or

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

Bryan contends the hearing panel erred in interpreting KRPC 1.6 in the following ways: (1) in finding that in order for disclosures of confidential information to be appropriate under KRPC 1.6(b)(3), there must be a formal proceeding initiated; (2) in failing to find that Bryan's disclosures of information to Grissom and Nordstrom employees prior to filing suit against Eichenwald for defamation were reasonable under the circumstances; (3) in finding that Bryan was not authorized to reveal the fact he possessed negative information regarding Eichenwald's credibility and the existence of the defamation suit after it was filed; and (4) in finding that Bryan's duty to his former client outweighed his duty to his current client.

. . .

### *Formal Proceeding Requirement*

Bryan contends that the hearing panel erred in finding that before disclosures of information obtained during representation may be appropriate under KRPC 1.6(b)(3), there must be a formal proceeding initiated. In support of his contention, Bryan cites to numerous authorities for the proposition that the lawyer's right to respond in self-defense arises when the assertion against the lawyer has been made and that the lawyer need not wait until an action or proceeding has been commenced to respond.

The Disciplinary Administrator agrees with Bryan's interpretation of KRPC 1.6 in that an attorney does not have to wait until the commencement of an action or proceeding before using information to protect himself or herself and concedes that the hearing panel's finding that Bryan violated KRPC 1.6 because there was no pending action between Bryan and Eichenwald was in error. . . . The Disciplinary Administrator maintains, however, that the panel's finding that Bryan violated KRPC 1.6 was also based upon its finding that the disclosures were made simply to embarrass Eichenwald. . . .

The Disciplinary Administrator asserts that the hearing panel's finding that Bryan violated KRPC 1.6 was correct because Bryan disclosed confidential information beyond what was necessary and allowed under KRPC 1.6(b)(3). To support this argument, the Disciplinary Administrator relies upon the Comment to KRPC 1.6, which states in part:

"Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(3) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. *In any event, disclosure should be not greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.*" (Emphasis added.)

In his reply brief, Bryan asserts that his disclosures of confidential information to Grissom and Nordstrom employees were reasonable. He first argues that these disclosures were reasonable as a matter of law because the United States District Court of Kansas in *Bryan v. Eichenwald*, 2001 WL 789401 (D. Kan.2001), determined that Eichenwald could not prevent Bryan from disclosing formerly confidential negative information in self-defense, and later determined, in denying Eichenwald's motion for summary judgment, that Bryan's claims were supported in fact and in law.

Additionally, Bryan argues that the hearing panel based its finding that he violated KRPC 1.6 solely upon the lack of a formal proceeding at the time of

disclosure. In support, Bryan relies upon a footnote in the panel's decision in which the panel stated that the disclosure made by Bryan of information gained during his representation of Eichenwald in filing his defamation suit was "clearly permitted by KRPC 1.6(b)(3)." Bryan accuses the Disciplinary Administrator of attempting to read into the panel's decision an additional finding that disclosure was beyond what was reasonable. Thus, Bryan asserts that the panel made no finding as to the reasonableness of the disclosures and that the matter should be dismissed because the disclosures were reasonable as a matter of law and clearly reasonable under the facts of the case. Furthermore, Bryan contends the final hearing report does not contain the necessary factual findings to support the violations found by the panel. Alternatively, Bryan asserts that he is entitled to another hearing before an impartial panel to determine whether his disclosures were reasonable.

In reviewing the conclusions of law of the panel, it is difficult to conclude that Bryan's disclosures to Grissom and the Nordstrom employees were reasonable; therefore, they constituted violations of KRPC 1.6. We note that the panel relied upon the erroneous belief that a formal proceeding was necessary before disclosures in self-defense could be made under KRPC 1.6. Under the circumstances, however, the disclosures to both Grissom and the Nordstrom employees exceeded that which was reasonably necessary for him to defend against Eichenwald's allegations.

#### *Post-Filing Disclosures*

Bryan next takes issue with the panel's conclusion . . . that he was not authorized to reveal the existence of his defamation suit against Eichenwald and that he possessed negative information regarding Eichenwald's credibility. In essence, Bryan argues that once this information was found to have been properly disclosed, all subsequent disclosures were appropriate. Bryan asserts that information previously disclosed to the general public in court pleadings does not retain any confidentiality that would prohibit subsequent disclosure of that information. In support, he cites *State v. Spears*, 246 Kan. 283, 287, 788 P.2d 261 (1990), where this court recognized that under K.S.A. 60-426 a partial waiver of the attorney-client privilege constitutes a complete waiver of the privilege as to the entire subject matter. Bryan contends that the Disciplinary Administrator is "picking and choosing" and is incorrectly fixed on the "use" of the information that was properly disclosed rather than the fact the information had been properly disclosed. The Disciplinary Administrator disagrees with Bryan's assertions that he was entitled to reveal the information because it was already a matter of public record, distinguishing *Spears* from the facts of this case.

*Spears* involved attorney-client privilege rather than the ethical rule on confidentiality. The Comment to KRPC 1.6 states:

"The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in all situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the



representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law."

The attorney-client privilege is narrowly defined by the courts because it works to deprive the factfinder in a case of otherwise relevant information. See *State ex rel. Stovall v. Meneley*, 271 Kan. 355, 373, 22 P.3d 124 (2001). The ethical requirement of confidentiality is, however, interpreted broadly, with the exceptions being few and narrowly limited. Thus, Bryan's reliance upon *Spears* is misplaced.

The Disciplinary Administrator contends that even though Bryan was entitled to place into the public record this same information in filing his defamation suit, Eichenwald had an expectation of confidentiality that would prohibit Bryan from divulging the information in her malpractice action against Small. The Disciplinary Administrator cites for support *NCK Organization Ltd. v. Bregman*, 542 F.2d 128 (2d Cir. 1976), (*ORG*), and *Kaufman v. Kaufman*, 63 App. Div. 2d 609, 405 N.Y.S.2d 79 (1978).

In *ORG*, defense counsel was disqualified after the plaintiff filed a motion to disqualify. Defense counsel had previously conferred with an individual who was the former vice president and former in-house counsel for the plaintiff, who later also became counsel for the defendant, regarding the defendant's contract rights against the plaintiff. The defendant's contract rights were the subject of the dispute between the plaintiff and the defendant. The *ORG* court held:

"The confidential nature of the information to which [the attorney] had access in his fiduciary capacity as house counsel is not dependent upon whether it was secret from or known to [the defendant] as a corporate officer and director. As the court, strictly to be sure, explained in *Emle Industries, Inc. v. Patentex, Inc.*, [478 F.2d 562, 572-73 (2d Cir. 1973)], quoting from H. Drinker, *Legal Ethics* 135 (1953):

'(T)he client's privilege in confidential information disclosed to his attorney "is not nullified by the fact that the circumstances to be disclosed are part of a public record, or that there are other available sources for such information, or by the fact that the lawyer received the same information from other sources."

"The Code itself in Ethical Consideration (EC) 4-4 notes that

'(t)he attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge. . . .'

"Even if, as [the attorney] asserted, all confidential information to which he as house counsel had access was independently known to [the defendant] from his own employment or from another source, *ORG*'s privilege in this information as disclosed to its attorney . . . is not thereby nullified." 542 F. 2d at 133.

In *Kaufman*, the plaintiff in a matrimonial proceeding contended that the defendant's attorney had a conflict of interest. Defense counsel had previously represented the plaintiff in a different matrimonial proceeding and was privy to all

the facts and circumstances surrounding the plaintiff's financial and matrimonial problems. The *Kaufman* court dismissed the attorney's claim that all the information he received was from public records, relying upon *ORG*, and remanded the issue for an evidentiary hearing on whether there was a conflict of interest. 63 App. Div. 2d at 610.

Bryan argues that these cases have no application to the facts of this case because neither case involves the self-defense exception to confidentiality or the rights of and obligations to an innocent third party such as Worthington. Bryan contends that it is "absurd" to think that Eichenwald maintained an expectation of confidentiality after he filed open court pleadings in the defamation action against Eichenwald. Bryan asserts that in this case Eichenwald's privilege of confidentiality was "nullified" by the exceptions set out in KRPC 1.6(b)(3).

Although *ORG* and *Kaufman* involve different facts, the cases are relevant because they address the survival of the ethical duty of confidentiality in instances where the information was available through other sources. The Comment to KRPC 1.6 states: "A lawyer may not disclose [information relating to the representation] except as authorized or required by the Rules of Professional Conduct or other law." Bryan's disclosures in the motion and reply involved information related to the representation but were not reasonably necessary to defend against his claim of defamation. . . .

The hearing panel's findings of fact are supported by clear and convincing evidence. Bryan violated KRPC 1.6(a) . . . .

IT IS THEREFORE ORDERED that the respondent, David McLane Bryan, be and he is hereby disciplined by published censure in accordance with Supreme Court Rule 203(a)(3) (2002 Kan. Ct. R. Annot. 224) for his violations of the KRPC.

IT IS FURTHER ORDERED that this order be published in the official Kansas Reports and the costs of this action be assessed to the Respondent.

4. Is there a risk that expansive interpretation of MR 1.6(b)(2) could lead to the indiscriminate joining of attorneys in law suits? The Court in *Sullivan v. Chase Investment Services of Boston Inc.*, 434 F. Supp. 171 (N.D. Cal. 1977) thought so. It commented on the possibility that "the prospect of obtaining potentially damaging and otherwise unavailable evidence will encourage plaintiffs to sue defendants' attorneys routinely as aiders and abettors. *Id.* at 188. Is this likely? What can and should be done?

5. Consider the following proposed revision of the attorney self-defense provision suggested by Henry D. Levine in his article *Self Interest or Self Defense: Lawyer Disregard of the Attorney-Client Privilege for Profit and Protection*, 5 HOFSTRA L. REV. 783 (1977):

Confidences or secrets necessary to establish or collect a reasonable fee, defend against a false accusation of wrongful conduct, or prevent the conviction of one wrongfully accused of crime, when permitted by a Court order confirming the justice and necessity of disclosure.

Disclosure by an attorney on his own behalf under [the preceding section] shall be

reviewed by the appropriate bar association to determine its ethical propriety. A final judgment against an attorney claiming compensation or in favor of one accusing an attorney of wrongful conduct shall create a presumption that disclosure was unethical and in violation of the Code.

Does this revision adequately address and solve the problems posed by the current rules? Can you formulate a better rule?

e. Permitted by Rules or Required by Law or Court Order: M.R. 1.6(b)(6)

The Code contained an express provision, DR 4-101(c)(2), that permitted an attorney to disclose confidences or secrets where required by law or allowed by the Code. The original Model Rules did not, within Rule 1.6 itself, contain a similar provision. The Commentary indicated that a “lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client,” ¶19, and that, in addition to specific provisions of the Rules that mandate or permit disclosure, “a lawyer may be obligated or permitted by other provisions of law to give information about a client.” ¶20. The Commentary further added that “[w]hether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against supersession.” *Id.*

The 2004 Model Rules have reinstated such a provision in the “black letter” rules. M.R. 1.6(b)(6) permits disclosure to the extent reasonably necessary “to comply with other law or a court order.” The new Comments also note that “[w]hether such a law supersedes Rule 1.6 is a question of law beyond the scope” of the Rules, ¶12, and disclosure requires consultation with the client where the issue is not clear. The Comments continue to urge lawyers to assert all non-frivolous claims to protect client information and require consultation with the client regarding whether to appeal if disclosure is ordered. Where no review is sought of a court’s order to disclose, “(b)(6) permits the lawyer to comply with the court’s order.” Comment, ¶13.

Whether the Rules or the policies underlying them would prevent a citation of contempt for failure to comply with a court order is not clear, but the probable answer is no. Nor is it likely that the Rules or their underlying policy of confidentiality would prevent the application of criminal sanctions against an attorney who refused to disclose information required by law. In a case involving an attorney who was charged with a public health violation for failing to disclose the location of a body he learned in a confidential communication from his client (a defendant on trial for murder) and for failing to provide burial, the New York Court dismissed the indictment, finding the confidentiality claim outweighed the “trivia of a pseudo-criminal statute,” *People v. Belge*, 372 N.Y.S.2d 798 (1975). The court speculated, however, that it would have had more difficulty had the charge been obstruction of justice.

The best course of action for an attorney faced with what he or she considers an erroneous, although binding, order to disclose client confidences or produce protected documents would be to attempt to appeal the decision rather than comply. If the ultimate decision goes against the attorney, however, failure to comply could lead to both contempt and discipline, and compliance at that point is appropriate. See RESTATEMENT § 63, which allows disclosure when required by law “after the lawyer takes reasonably appropriate steps to assert that the information is privileged or otherwise protected against disclosure.”

(f) Seeking Ethical Advice: 1.6(b)(4)

M.R. 1.6(b)(4), as adopted in 2002, explicitly permits a lawyer to reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary “to secure legal advice about the lawyer’s compliance with these rules.” While this was not explicit in the earlier version of the Rules, it was generally understood to be permitted. See ABA Formal Op. 98-411, fn. 1.

(g) Mandated disclosure

Note that, while generally the Model Rules do not require disclosure by their own terms, Rule 3.3 directly overrides confidentiality and may require that the lawyer reveal confidential information in some circumstances. Where this rule is involved, disclosure may be mandatory. This Rule will be discussed at length in the next section.

### **III. PERJURY AND FRAUD: CONFIDENTIALITY AND CANDOR IN AN ADVERSARY SYSTEM.**

One of the most difficult professional responsibility problems confronting an attorney is dealing with perjury and fraud. This problem can arise in both counseling and litigation situations and in both criminal and civil cases.

There are many situations in which client perjury or fraud can arise. Consider the following examples: what does the attorney do when confronted with a client who intends to commit perjury? Who does the attorney believe will commit perjury or fabricate evidence if given particular information about available defenses, or who reveals that he or she has committed perjury at a prior proceeding? While the incidence of client (or witness) perjury or fraud is hard to ascertain, the issues involved put the competing values of confidentiality and zeal in focus. The next section will address the issues in this area and attempts at their resolution. As you read this material, think about the values at stake. Are the responses clear? Are they correct? What counter-arguments should be made? Are the issues the same in the criminal and civil context? In litigation and non-litigation situations? If not, what differences should there be in required or permitted responses?

Read Model Rule 3.3 and 1.2(d).

A. The Lawyer’s Personal Obligation of Candor: Model Rule 3.3(a)(1)

Initially, an attorney has a clear duty of candor in his or her own statements to a tribunal. Rule 3.3(a)(1) governs statements by attorneys and prohibits lawyers from knowingly making a false statement of law or fact to a tribunal. Note that there is no longer any materiality requirement in this part of the Rule. Any knowingly false statement to a tribunal subjects an attorney to disciplinary liability. The breadth of this Rule is reflected in the ANNOTATED MODEL RULES, which state, at 311:

Rule 3.3(a)(1) prohibits a lawyer from knowingly misstating anything to a tribunal, whether material or not, whether fact or law, whether in writing or not, and whether in an affidavit, a report, a pleading, or other document. This means whenever a lawyer makes an assertion based upon personal knowledge, the lawyer must either know the

assertion is true, or believe it to be true “on the basis of a reasonably diligent inquiry.” Model Rule 3.3, cmt. [3].

Pursuant to this Rule, an attorney also has a duty to “correct a false statement of material fact or law previously made to a tribunal by a lawyer.” Thus, if a lawyer makes a statement to a tribunal that the lawyer believes to be true and later learns of its falsity, this Rule requires the attorney to correct the statement as long as the statement was material.

## B. The Client Who Lies: Reconciling Candor and Confidentiality

Prior to the Model Rules, the prevailing view was that an attorney could not participate in the presentation of false evidence but was generally not to breach client confidences in order to prevent it. Thus, where an attorney discovered that a client intended to commit perjury, he or she was required to remonstrate with the client in an attempt to persuade the client to testify truthfully. If that effort failed, the attorney was to attempt to withdraw. Only if all else failed did some jurisdictions allow disclosure to the court. In some cases, particularly those involving criminal defendants, a middle ground was suggested: allowing the client to testify in a free narrative, without questions from counsel, and prohibiting counsel from arguing the false testimony in summation. These proposed solutions -- withdrawal and free narrative -- removed the *attorney's* involvement in the perjury but did little to effectively solve the underlying problem. These attempted solutions likewise reflected an ambivalence in the prioritization of competing values: candor to the tribunal and loyalty (confidentiality) to the client.

Both the United States Supreme Court decision in *Nix v. Whiteside*, 475 U.S.157 (1986), and the adoption of ABA Model Rule 3.3 significantly altered and more definitively settled the scope of the attorney's obligations with regard to client (or witness) perjury. *Whiteside* held that it was not ineffective assistance of counsel for an attorney to prevent a client from committing known perjury. Looking at the rules of conduct that prohibit an attorney from knowingly using perjured testimony or false evidence and from assisting a client in conduct the lawyer knows to be criminal or fraudulent, the Court stated:

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.

The Model Rules reach a similar conclusion. As most recently amended, Rule 3.3(a)(3) prohibits a lawyer from offering evidence the lawyer knows to be false. The Rule goes on to require a lawyer to take reasonable remedial measures when the lawyer discovers that the lawyer, the lawyer's client or a witness called by the lawyer has offered material evidence that the lawyer comes to know is false.

While this resolution of the basic problem appears clear, the Rules attempt to clarify the extent and scope of these obligations.

1. The strict rules of candor in Rule 3.3 apply only when a tribunal is involved. In other situations, Rule 4.1, which is more qualified and which does not contain a confidentiality override, applies. When does “a tribunal” become involved for purposes of this rule? Rule 1.0(m) defines “tribunal” as “a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity.”

What about the client who lies in a deposition? Arguably, there is no tribunal involved at that point. In that situation, do we look to Rule 3.3 or 4.1 for guidance? Comment 1 to Rule 3.3 directly address this issue, indicating that the Rule “applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal’s adjudicative authority.” This includes statements made in a deposition.

2. When do the duties of Rule 3.3 “kick in?” When does a lawyer “know” evidence is false, or that failure to disclose is necessary to assist the client in a fraud? See Rule 1.0(f). How certain must a lawyer be before taking action? Comment 8 to Rule 3.3 addresses this issue. The Rule applies only when the lawyer knows of the falsity and not when the lawyer merely “reasonably believes” evidence to be false. A lawyer’s knowledge, however, “can be inferred from the circumstances,” and although a lawyer should resolve doubts in favor of the client, “the lawyer cannot ignore an obvious falsehood.” *Id.* Determining whether an attorney had knowledge can be difficult. Compare the majority and dissenting opinions in *In re Mirabile*, 975 S.W.2d 936 (Mo. banc 1998). Some lawyers try to avoid such knowledge by avoiding taking action to find out if information is false. Can a lawyer avoid knowing in this way? Can he or she do so consistent with good lawyering and one’s obligations of competence under Rule 1.1?

The question of whether or when an attorney “knows” the client will commit or has committed perjury is especially problematic in the criminal context, where the client has both a right to effective assistance of counsel and a right to present a defense. As Justice Stevens noted in his concurring opinion in *Whiteside*:

Justice Holmes taught us that a word is but the skin of a living thought. A “fact” may also have a life of its own. From the perspective of an appellate judge, after a case has been tried and the evidence has been sifted by another judge, a particular fact may be as clear and certain as a piece of crystal or a small diamond. A trial lawyer, however, must often deal with mixtures of sand and clay. Even a pebble that seems clear enough at first glance may take on a different hue in a handful of gravel.

As we view this case, it appears perfectly clear that respondent intended to commit perjury, that his lawyer knew it, and that the lawyer had a duty--both to the court and to his client, for perjured testimony can ruin an otherwise meritorious case--to take extreme measures to prevent the perjury from occurring. The lawyer was successful and, from our unanimous and remote perspective, it is now pellucidly clear that the client suffered no “legally cognizable prejudice.”

Nevertheless, beneath the surface of this case there are areas of uncertainty that cannot be resolved today. A lawyer’s certainty that a change in his client’s recollection is a harbinger of intended perjury--as well as judicial review of such apparent certainty--should be tempered by the realization that, after reflection, the most honest witness may recall (or sincerely believe he recalls) details that he previously overlooked. Similarly, the post-trial review of a lawyer’s pretrial

threat to expose perjury that had not yet been committed--and, indeed, may have been prevented by the threat--is by no means the same as review of the way in which such a threat may actually have been carried out. Thus, one can be convinced--as I am--that this lawyer's actions were a proper way to provide his client with effective representation without confronting the much more difficult questions of what a lawyer must, should, or may do after his client has given testimony that the lawyer does not believe. The answer to such questions may well be colored by the particular circumstances attending the actual event and its aftermath.

In response to this concern, courts have attempted to articulate a standard that adequately balances these competing interests. In *United States v. Long*, 857 F.2d 436, 444-47 (8th Cir. 1988), *cert. denied*, 502 U.S. 828 (1991) the court concluded that

[c]ounsel must act if, but only if, he or she has "a firm factual basis" for believing that the defendant intends to testify falsely or has testified falsely.... It will be a rare case in which this factual requirement is met. Counsel must remember that they are not triers of fact, but advocates. In most cases a client's credibility will be a question for the jury.

3. What action is required by an attorney to prevent or remedy falsity or fraud on a tribunal? Rule 3.3 requires taking "reasonable remedial measures, including, if necessary, disclosure to the tribunal." But how does the lawyer know what to do? Comment 10 addresses remedial measures and indicates that the first step is always to remonstrate with the client confidentially, advise the client of the duty of candor and seek the client's cooperation in correcting the false statements or evidence. If this fails, further action is required, up to and including notifying the court. At that point, it is for the tribunal to determine what should be done.

4. How long do the duties under Rule 3.3 last? What if the perjury or fraud is not discovered until after the proceedings are over? Rule 3.3 would appear to let the attorney "off the hook." Rule 3.3 (c) indicates that the obligations in paragraphs (a) and (b) "continue to the conclusion of the proceedings," and the Commentary elaborates as follows: "A practical time limit on the obligation to rectify" has to be established. "The conclusion of the proceeding is a reasonably definite point for the termination of the obligation." Comment to Rule 3.3, at ¶13. What is the justification for ending the lawyer's responsibility at the conclusion of the proceeding? Does this make sense? What restrictions on the lawyer remain in such circumstances? See Rule 1.2(d). New ¶13 provides guidance on what constitutes the "conclusion" of a proceeding.

5. Note that Rule 3.3 allows less than complete loyalty to the client even where the lawyer does not "know" the evidence is false. Rule 3.3(a)(3) allows the lawyer to refuse to offer evidence the lawyer "reasonably believes" is false. The lawyer may not disclose in such circumstances, but this Rule allows the lawyer to override the client's wishes in such situations, except where a criminal defendant is involved. Is the "reasonable belief" standard high enough? Is this an appropriate resolution?

#### C. Counseling or Assisting Illegality or Fraud

1. When does a lawyer "counsel" or "assist" illegal or fraudulent conduct? Can merely providing information without suggesting a course of conduct violate the Rules? Is it a violation to know the client will act on information you have provided and fail to

prevent it? To believe the client will so act? Rule 1.2(d) prohibits a lawyer from counseling a client to engage in, or assisting a client in, conduct the lawyer knows is criminal or fraudulent. The Rule does allow the lawyer to “discuss the legal consequences of any proposed course of conduct.” The Commentary advises that “[t]here is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.” Comment, ¶9.

While this Rule appears clear on its face, it becomes much more complex when one begins to look at the processes of memory and recollection. In an illuminating chapter on “Counseling the Client: Refreshing Recollection or Prompting Perjury” from his controversial book, *LAWYERS ETHICS IN AN ADVERSARY SYSTEM*, Monroe Friedman explores the psychological literature on memory in the context of the ethical issues involved in counseling and advising clients. After describing several studies, he concludes:

[T]he process of remembering is not one dependent on “memory traces,” which can be played back as if by placing a stylus into the groove of a phonograph record. Rather, the process is one of active, creative reconstruction, which begins at the moment of perception. The 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 possibly can.

These conclusions might seem to suggest that the conscientious lawyer should avoid giving a client or other witness an understanding of what is relevant and important and should rely only upon narrative statements unassisted by questions that seek to elicit critical facts. However, anyone who has conducted interviews will immediately recognize that such a procedure would be highly impractical. An untrained and perhaps inarticulate person cannot be expected to relate all that is relevant without a substantial amount of direction. That is why one of the most important functions of the lawyer is to provide an awareness of what is legally relevant. Moreover, the same psychological authorities support the necessity of prompting in order to maximize recall. What prompting can do is to trigger recognition, which is a less complex process than remembering. . . . [I]n any experimental series, “only a relatively small portion of the material that can be recognized can, as a rule, be recalled.” Another authority observes similarly that narrative is “the most accurate” but “the least complete” of all forms of recall. That is, if we rely only upon unprompted narrative, many important facts will be omitted, facts which can be accurately reported if memory is prompted by recognition, such as through leading questions. Obviously, therefore, we are faced with another dilemma. On the one hand, we know that by telling the client that a particular fact is important, and why it is important, we may induce the client to “remember” the fact even if it did not occur. On the other hand, important facts can truly be lost if we fail to provide the client with every possible aid to memory. Furthermore, since the client’s memory is inevitably going to be affected by reconstruction consistent with self-interest, a client who has a misunderstanding of his or her own legal interest could be psychologically inclined to remember in a way that is not only inconsistent with the client’s case, but also inaccurate.

The complexity of the difficulty is heightened, both on a practical and ethical level, if we reconsider at this point the attorney’s professional responsibility to “know all the facts the client knows” . . . .



How, then, does an attorney interview clients and witnesses in a way that is likely to obtain truthful, complete, necessary information while at the same time not consciously or unconsciously prompting the client or witness? What about dealing with a client or witness whose memory may have been affected by improper questioning by another? How far can/should you go in that instance? And how does this all impact on what and when the lawyer “knows” with regard to the truth?

A related problem exists where legal rights turn on a particular state of mind, but the client may not have had any thoughts at all with regard to that matter at the crucial time. An example from Friedman addresses this problem:

A young man and a young woman decide to get married. Each has \$1,000. They decide to begin a business with those funds, and the young woman gives her funds to the young man for that purpose. Was the intention to form a joint venture or a partnership? Did they intend that the young man be an agent or a trustee? Was the transaction a gift or a loan? Most likely, the young couple’s state of mind did not conform to any of the modes of “intention” that the law might look for. Thus, if the couple should subsequently visit a tax attorney and discover that it is in their interest that the transaction be viewed as a gift, they might well “remember” that to have been their intention. On the other hand, should their engagement be broken and the young woman consult an attorney for the purpose of recovering her money, she might “remember,” after proper counseling, that it had been her intention to make a loan.

The foregoing is not intended in a cynical way. As in many other instances, the rules of law require determinations of “fact” where the facts are truly ambiguous. Moreover, as we have seen in the normal process of remembering/reconstructing, the client’s honest recollection is inevitably going to be affected by what the client assumes to be in his or her best interest. In such an ambiguous situation, therefore, it would be absurd for the lawyer to insist that the client state the conclusion as to whether the intent had been to make a gift or a loan, without first explaining to the client what the applicable law is and what the significance would be of each of the possible responses.

Can the attorney probe for facts that the witness does not appear to remember? At what point does this lead to *creating of new memory*, rather than elicitation of what is really there? There is a clear line in the rules between providing information and assisting the client in fraudulent or criminal conduct. Often that line is clear in practice as well, but not always. And frequently, there are strong incentives to cross that line. Friedman ultimately concludes as follows:

In interviewing, therefore, the attorney must take into account the practical psychological realities of the situation. That means, at least at the early stages of eliciting the client’s story, that the attorney should assume a skeptical attitude, and that the attorney should give the client legal advice that might help in drawing out useful information that the client, consciously or unconsciously, might be withholding. To that extent -- but on a different and more limiting rationale, I adhere to my earlier position that there are situations in which it may be proper for the attorney to give the client legal advice even though the attorney has reason to believe that the advice may induce the client to commit perjury. There does come a point, however, where nothing short of “brute rationalization” can purport to justify a conclusion that the lawyer is seeking in good faith to elicit truth rather than actively participating in the creation of perjury.

Frequently, the lawyer who helps the client to save a losing case by contributing a crucial fact is acting from a personal sense of justice: the criminal defense lawyer who knows that prison is a horror and who believes that no human being should be subjected to such inhumanity; the negligence lawyer who resents the arbitrary rules that prevent a seriously injured and impoverished individual from recovering from an insurance company; the prosecutor who does not want to see a vicious criminal once again turned loose upon innocent citizens because of a technical defense; or the tax attorney who resents an arbitrary and unfair system that leaves Peter with his wealth while mulcting Paul. I have sometimes referred to that attitude (with some ambivalence) as the Robin Hood principle. We are our client's "champions against a hostile world," and the desire to see justice done, despite some inconvenient fact, may be an overwhelming one. But Robin Hood, as romantic a figure as he may have been, was an outlaw. Those lawyers who choose that role, even in the occasional case under the compulsion of a strong sense of the justness of the client's cause, must do so on their own moral responsibility and at their own risk, and without the sanction of generalized standards of professional responsibility.

2. What about completed fraud? What if the attorney discovers that the client has used information or advice provided to perpetrate a fraud during the course of the representation? As the previous materials note, under the old (2001) version of the Rules, the attorney could not disclose that fraud, but under the current Rules, whether the attorney may disclose turns on whether the lawyer believes disclosure is necessary to prevent, mitigate or rectify substantial injury to the financial interests or property of another. MR 1.6 (b)(3). Keep in mind that, even if disclosure is authorized, it is discretionary, not mandatory. In any event, the attorney may not act in a way that continues to advance the fraud. As the Commentary to Rule 1.2 indicates, a lawyer "may not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent." Withdrawal from the representation . . . may be required." ¶10. Why must the attorney disclose (or at least take remedial measures) in the preceding situation (client perjury), but not here? And why may withdrawal be a satisfactory solution here, when it is rejected in the prior situation?

The rationale for the different responses stems from the different competing concerns. In the prior situation, confidentiality and loyalty were positioned against candor to the tribunal. Where these principles clash, candor to the court prevails. But in the latter situation, confidentiality and loyalty are pitted against fairness to third parties, and here fairness loses. Thus, although it is clear that the attorney cannot affirmatively participate in criminal or fraudulent conduct, no matter what other interests are at stake, where no tribunal is involved, the attorney has no obligation to rectify the consequences of a client's fraudulent activity and disclosure is only permissive at best. Where disclosure is not permitted, the attorney may disassociate him or herself from the client, and must do so if not doing so will involve the attorney in the fraud. M.R. 1.16(a)(1). In some cases, "noisy" withdrawal may be warranted or required. See Comment, ¶10 to Rule 1.2. Is this the proper resolution?

#### IV. ZEAL: The Juncture of Loyalty and Fairness

Read the remainder of Rule 1.2, 1.4, 2.1, 3.1-3.6, and Rule 4.

We have seen that the attorney-client relationship brings with it many duties on behalf of the client. These include the duty to protect client information as well as the duty to competently carry forward the aims of the representation in consultation with the client. Rule 1.2, 1.3, 1.4. Not surprisingly, however, these duties are qualified by other obligations. The Code perhaps stated it best in Canon Seven, which required that “A lawyer should represent a client zealously within the bounds of the law.” EC 7-1 recognized that this is a duty that inures to both the client and the legal system, and that the bounds of law includes the rules and “enforceable professional regulations.” However, EC 7-2 recognized that “[t]he bounds of law in a given case are often difficult to ascertain.” This section will attempt to ascertain and explore those bounds.

##### A. Communication with Parties, Witnesses, and Jurors

1. Model Rule 4.2 prohibits an attorney, in representing a client, from communicating with a person who is known to be represented by counsel without that attorney’s consent unless authorized by law or court order. While the Rule prohibits communications where the attorney “knows” the party to be represented, such knowledge may be “inferred from the circumstances.” ABA Formal Opinion 95-396. Although there is no general duty to inquire, “a lawyer may not avoid Rule 4.2’s bar against communication with a represented person simply by closing her eyes to the obvious.” *Id.* The rule applies in both litigation and transactional contexts. *Id.* See, e.g., *In re Waldron*, 790 S.W.2d 456, 458-9 (Mo. banc 1990).

This Rule applies to “persons” who are represented. This is a change from the term “parties,” which had existed in the rule prior to 1995. The ABA Committee had construed the term “party” broadly to include any person who had retained counsel and whose interests were potentially distinct from those of the client on whose behalf the attorney was acting. The Committee found this interpretation necessary if the Rule was to serve its purposes - to protect against overreaching by adverse counsel, to protect the lawyer-client relationship from interference by the opponent, and to protect against disclosure of protected information. Formal Op. 96-396; see also Comment ¶1. There was a dissent from this broad construction, based on the use of the term “party” in Rule 4.2, in contrast to the use of the word “person” elsewhere, including Rule 4.3. The amendment was apparently to bring the language of the rule in conformance with the majority’s interpretation. The Rule only applies to communications regarding the subject matter of the representation.

Where an attorney representing a client finds that a person with whom he or she is dealing is unrepresented, the attorney may continue the communication, but must not state or imply that the attorney is disinterested. Rule 4.3. Moreover, if the lawyer knows or should know that the unrepresented person misunderstands the attorney’s role, the attorney is required to correct that misunderstanding. An attorney may not give advice (other than the advice to seek counsel) to one whose interests have a reasonable likelihood of being in conflict with the interest of a client. *Id.* Note that the rule applies to lawyers and, through 8.4(a), to agents of the lawyer. The clients themselves, however, are not prohibited from communicating with each other. Comment, ¶4; RESTATEMENT § 158(2). The line between what is prohibited and permissible communication in this

regard is hazy. See, e.g., *In re Pyle*, 91 P.3d 1222, 1228-1230 (Kan. 2004); see also ANNOTATED RULES at 408-411.

These rules can act as a trap for the unwary, because the conduct the attorney undertakes may not appear inherently wrong. But the ABA has indicated that the predecessor provision, DR 7-104, precludes communication even where counsel has reason to believe that settlement offers are not being communicated to the opposing party and the communication may be in that party's best interest. Informal Opinion 1348 (August 19, 1975); see also ABA Formal Opinion 92-362 (lawyers may not communicate settlement offers to opposing client, but may advise their own clients that they are free to do so). Moreover, courts have disqualified lawyers from continuing representation in cases where the rule has been violated. See, e.g., *Papanicolaou v. Chase Manhattan Bank*, 720 F. Supp. 1080 (S.D.N.Y. 1989); *Cronin v. Nevada District Court*, 781 P.2d 1150 (Nev. 1989); and have required other sanctions including exclusion of evidence, disclosure of statements and monetary sanctions. See e.g., *Holdren v. General Motors Corp.*, 13 F. Supp. 2d 1192 (D. Kan. 1998); see also ANNOTATED RULES at 405.

One issue that has frequently arisen is the extent to which contact can be made with employees of a corporate party. Generally, any person who has the power to bind the corporation or to implement advice from corporate counsel should be deemed a party for these purposes. Opinion 95-396. Communication with former employees is not prohibited according to ABA Formal Opinion 91-359 and the revised Comments to Rule 4.2.

The rule prohibiting contact without the attorney's consent has been criticized by commentators, who argue that giving power over communication to the attorney is inconsistent with the control vested in the client. See, e.g., Leubsdorf, *Communicating With Another Lawyers' Client: The Lawyer's Veto and the Client's Interests*, 127 U. OF PENN. L. Rev. 683 (1979). Do you agree?

2. Communication with witnesses is not within the purview of Rule 4.2 unless the witness is represented. The general view is that an attorney may interview opposing witnesses without the presence or consent of opposing counsel. This is permitted as long as there is no deception and counsel is fully identified. M.R. 4.3.

Dealing with favorable witnesses is governed by Rule 3.4. Rule 3.4(b) prohibits a lawyer from counseling or assisting a witness to testify falsely or from offering an inducement prohibited by law. An attorney who advises a witness, whether it be the client or someone else, to testify falsely is subject to discipline. See *In re Oberhellman*, 873 S.W.2d 851 (Mo. banc 1994); *In re Stormont*, 873 S.W.2d 227 (Mo. banc 1994). This rule also applies to the payment of a fee to a witness that is not permitted by controlling law, such as a contingent fee for witnesses.

Rule 3.4(f) prohibits requesting that a person other than the client refrain from giving relevant information to another party unless the person is a relative, employee or other agent of the client and the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving the information. Note that attorneys must comply with state and local laws governing tampering with witnesses. For example, in Missouri, R.S.Mo. § 575.270 prohibits "tampering with a witness" and criminalizes the use of force, threat or deception to induce a witness to absent himself, withhold evidence or testify falsely, and the offering of any benefit to a witness for such

purpose.

Tampering with or obstructing access to evidence is prohibited by Rule 3.4(a). This obligation is arguably co-extensive with the general obligation under the criminal code. See R.S.Mo. § 575.100.1(1), making it a crime to alter, destroy, suppress or conceal any record, document, or thing with the purpose to impair its verity, legibility or availability in any official proceeding or investigation. See also *State v. Stapleton*, 539 S.W.2d 655, 658 n.1 (Mo. App. 1976).

What about physical evidence of a crime? Must an attorney turn over such evidence to the government if he or she knows of its location? If he or she receives it from the client? From another person? See M.R. 3.4, Comment ¶2.

The prevailing view is that, where the attorney merely learns of the existence of evidence but does not take possession of it, the attorney is not required to advise the government of its existence. This obligation will be different in civil cases where there may be a duty to produce as part of discovery. Where an attorney in a criminal case takes possession of evidence, however, the attorney must turn that evidence over to the prosecution after a reasonable time for investigation. The prosecutor may not use the source of the information if the attorney received the item from the client or an agent of the client. Where the attorney received the item from a third party, however, the government can inquire into its source.

3. Rule 3.5 deals with communications with judges, jurors and prospective jurors. For the most part, this rule incorporates the law in the jurisdiction and makes failure to comply with that law a violation of the rules. Thus, the extent of contact with jurors and prospective jurors is governed largely by local law. Generally, such contacts are strictly controlled. The Rules also address communication with jurors after discharge. See 3.5(c). Rule 3.5 also limits ex parte communication with the court and prohibits conduct intended to disrupt a tribunal. See 3.5(b) and (d). Frequently, such conduct will also subject an attorney to contempt. For examples of conduct falling within this rule, see ANNOTATED RULES, 344-47.

## B. Bringing and Prosecuting Claims

1. An attorney is required to advance the client's legitimate interests. Generally, the decision whether to pursue a matter belongs to the client. M.R. 1.2(a). Once a lawyer undertakes a matter, the lawyer must act with reasonable competence and diligence. M.R. 1.1, 1.3. A lawyer may not, however, bring a case merely because the client wants to do so.

Rule 3.1 prohibits bringing or defending a proceeding, or asserting or controverting an issue, where there is no basis for doing so that is not frivolous. A lawyer may make a good faith argument for extension or change of the law, and a criminal defendant may require that every element of the government's case be established. This obligation is similar to that imposed by Rule 11 of the Federal Rules of Civil Procedure, and discipline is possible in many cases where sanctions are imposed.

2. Once a claim is brought, Rule 3.2 requires that a lawyer make reasonable efforts to expedite litigation consistent with the interests of the client. While this rule can lead to discipline where an attorney does not diligently pursue litigation to the detriment

of his or her client, see also Rule 1.3, it is more difficult to use where the attorney delays to advance an interest of the client. In such circumstances, the question is whether there is some substantial purpose other than delay. Comment to Rule 3.2. Rule 3.4(d) prohibits frivolous discovery requests and failure to respond diligently to discovery requests from the opposing party.

3. In-court conduct is governed by Rule 3.4(c) and (e) and 3.5. These rules prohibit knowing disobedience of the rules of a tribunal except for an open refusal on the grounds no obligation exists, alluding to evidence not reasonably believed to be admissible, assertion of personal knowledge when not testifying, and stating personal opinions regarding matters of justice or credibility. As previously noted, Rule 3.5 prohibits disruption of a tribunal.

Rule 3.3(a)(2) requires that a lawyer disclose legal authority in the controlling jurisdiction known by the lawyer to be directly contrary to the position of the lawyer and not disclosed by opposing counsel. This is tactically advisable in any event.

Out-of-court comment regarding on-going cases is governed by Rule 3.6, which limits the permissible scope of trial publicity. This rule attempts to balance the lawyer's and client's First Amendment rights while protecting the fair administration of justice. See *Gentile v. Nevada State Bar*, 501 U.S. 1030 (1991). See generally ANNOTATED RULES, 351-56.

4. Several rules address aspects of fairness to others. Rule 4.1 prohibits a lawyer from making false statements of material fact or law to a third person or failing to disclose a material fact to a third person when disclosure is necessary to avoid assisting the client in a criminal or fraudulent act. While this obligation sounds a lot like that in Rule 3.3, note that there is a confidentiality override in Rule 3.3, but there is no such override here. Thus, the attorney has no duty to disclose to a third party, and in fact, it appears that such disclosure would be a violation of the rules. See *Roth v. La Societe Anonyme Turbomeca France*, 120 S.W.3d 764, 777 (Mo. App. W.D. 2003).

Rule 4.4 prohibits the lawyer, in the course of representing a client, from using means that have no substantial purpose other than embarrassment, delay or burdening of a third person. The "substantial purpose" limitation limits effective use of this rule to sanction attorneys. The rule can be used in some circumstances to address threats by attorneys to bring criminal charges or file a disciplinary complaint. See ANNOTATED RULES, 438-39. The Code specifically prohibited threatening criminal charges to gain advantage in a civil case, D.R. 7-105, but this provision was not included in the Model Rules. Where an attorney's conduct appears extortionary, other provisions of the Model Rules are deemed to apply. See 8.4(d).

Rule 4.4(b) addresses receipt of inadvertently sent documents and requires that the lawyer who receives such documents promptly notify the sender. It does not otherwise resolve the obligations of the sending or receiving lawyer.