

PRIVILEGES LOST? PRIVILEGES RETAINED?

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priv•i•lege . . . *n.* 1.a. A special advantage, immunity, permission, right, or benefit granted to or enjoyed by an individual, a class, or a caste. . . . b. Such an advantage, an immunity, or a right held as a prerogative of status or rank, and exercised to the exclusion or detriment of others. . . . 3. *Law.* The right to privileged communication in a confidential relationship, as between client and attorney, patient and physician, or communicant and priest.¹

I. INTRODUCTION

Two privileges that have served as cornerstones of the practice of law in the United States were threatened during the past year. One threat was widely publicized: the American Bar Association considered proposals to weaken the duty of confidentiality that serves as the ethical analogue to the attorney-client evidentiary privilege. The other was barely noticed outside the world of civil litigation: fundamental changes were made to the rules governing discovery in federal courts that were designed to restrict the independent prerogatives long exercised by lawyers.

Although these efforts addressed different sets of rules and were undertaken by distinct institutions within the legal universe, their contemporaneous appearance may not have been a coincidence. The simultaneous assaults on both the privilege long held by attorneys to manage most aspects of pretrial discovery and the confidentiality of some attorney-client communications suggested a widespread dissatisfaction with the behavior of lawyers as adversarial advocates of their clients' interests.

The year 2000 amendments to the federal discovery rules were aimed at a large subset of practicing attorneys—civil litigators—and were designed to curtail their ability to manipulate the pretrial discovery process to benefit their clients. The proposed amendments to Rule 1.6(b) of the American Bar Association's (ABA) Model Rules of Professional Conduct (Model Rules) were directed at all attorneys who represent clients. These proposals were intended to permit, and perhaps encourage, attorneys to disclose confidential information received from their clients to protect third parties from certain harms—even if the disclosures injured the attorneys' own clients.

It is striking that these indicators of discontent with the behavior of lawyers emerged from within the legal profession itself. The year 2000 amendments to the Federal Rules of Civil Procedure (Federal Rules) were produced initially by an Advisory Committee composed of distinguished

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1. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1442 (3d ed. 1992).

lawyers—academics, practitioners, and judges—whose efforts included obtaining advice from a broad cross-section of the profession. The Advisory Committee's proposals then were reviewed and revised by the federal Judicial Conference, and scrutinized by the Supreme Court, before being sent to Congress for final review. Similarly, the proposed amendments to the ABA's Model Rules were the product of years of work by a distinguished group of lawyers (labeled the "Ethics 2000 Commission") drawn from various professional settings, who solicited advice from a broad cross section of the profession and whose proposals were prepared for submission to the ABA's House of Delegates. These reform efforts thus serve as markers of interest among lawyers to change fundamental attributes of the practice of law that have existed for decades.

Despite their analogous institutional backgrounds, the course of these separate reform efforts diverged in fundamental ways. In 2000, rules proposed by the drafting committee that weakened lawyers' privileged position over the processes of civil discovery ultimately were adopted by the relevant national rule makers—the Judicial Conference, the Supreme Court, and Congress. As has often been true over the past six decades, federal rule makers have taken the lead in crafting innovations in pretrial discovery, while their counterparts in the states have been left to decide whether to emulate these changes.

In contrast, in 2001 the national institutional ethics rule maker, the ABA House of Delegates, effectively scuttled the most important proposals to permit broader disclosure of client misconduct offered by its drafting committee.² Because many states already have adopted similarly permissive disclosure rules, the national rule maker is not leading; rather, it is lagging behind the states on this issue.³

This Article begins with a discussion of the 2000 Amendments to the Federal Rules, in part because this Symposium focuses on the federal procedural rules, and also because these amendments became effective for all federal courts on December 1, 2000. The discussion examines some of the ways the 2000 amendments could change the nature of civil discovery and impair the autonomy of lawyers working within that process. The discussion then turns to the recent treatment of proposed amendments to ABA Model Rule 1.6 by the ABA House of Delegates, and the potential impact of this action on attorneys and their clients.

2. See *infra* Part III.

3. See *infra* Part III.

II. ATTORNEY CONTROL OF DISCOVERY UNDER THE FEDERAL RULES OF CIVIL PROCEDURE

But of this tree we may not taste nor touch;
God so commanded, and left that command
Sole daughter of his voice; the rest, we live
Law to ourselves, our reason is our law.⁴

—JOHN MILTON, *Paradise Lost*

For more than half a century, the Federal Rules granted attorneys the privilege of managing the processes of pretrial discovery.⁵ The discretionary authority the Rules ceded to attorneys left them to act practically as a law unto themselves in the daily conduct of discovery, free to manipulate the process without judicial oversight unless a party brought a dispute to a judge for resolution. The Rules not only supplied attorneys with an unprecedented arsenal of discovery devices,⁶ but also granted them expansive discretion to select which discovery devices to employ, and the scope, timing, and quantity of their inquiries.⁷ Judges retained authority to regulate the discovery process, but in practice were left to act primarily as referees, typically intervening only when discovery disputes were brought to them by the litigants.⁸

4. 2 JOHN MILTON, *PARADISE LOST*, BOOK IX 186-87, lines 651-54 (John Exshaw 1773) (1667).

5. In this Article, the discussion of the Federal Rules as they existed prior to the December 1993 and December 2000 amendments to the federal discovery rules will quote from the version of the Federal Rules in effect following the December 1991 amendments until the December 1993 changes. This version of the Rules is used for several reasons. It was the last version of the rules in effect before the potentially radical 1993 and 2000 changes to the Rules; the theories and language of the 1991 Rules were substantively unchanged from the original 1938 version of the Rules; and this text contains language similar to that still found in many of the state procedural systems.

6. The Federal Rules specified:

(a) Discovery Methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

FED. R. CIV. P. 26(a) (1991); cf. GEORGE RAGLAND, JR., *DISCOVERY BEFORE TRIAL* 25-26, 267-72 (1932); Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 698-710 (1998).

7. The authority was granted explicitly:

(d) Sequence and Timing of Discovery. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery. FED. R. CIV. P. 26(d) (1991).

8. For example, the Rules authorized judges to protect litigants from discovery abuse, but required those seeking relief to trigger the judicial action: "Upon motion by a party or by

In the decades following the adoption of the 1938 Federal Rules, most states adopted discovery schemes modeled after the federal plan,⁹ and despite numerous amendments to the discovery rules over the years,¹⁰ attorney autonomy survived as the norm in most federal litigation. The 2000 amendments to the federal discovery rules both retain and expand upon changes in the Rules initiated in the 1993 round of amendments—changes that, if strictly enforced, will erode the authority and autonomy that attorneys have exercised for decades.¹¹

When viewed together, it is obvious that the 1993 and 2000 amendments were designed to truncate lawyer autonomy in the discovery process. While the most obvious restrictions were those imposing quantitative limits on discovery, the amendments also imposed new constraints on attorney control over the timing and conduct of depositions. A written stipulation or judicial permission now was required if an attorney wanted to take more than ten depositions, to depose someone previously deposed in the case, to take a deposition that lasts more than seven hours,¹² or to take a deposition before

the person from whom discovery is sought, and for good cause shown, the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense" FED. R. CIV. P. 26(c) (1991). A classic example of the authority ceded to the attorneys conducting litigation exists in the basic Rule governing depositions:

All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. FED. R. CIV. P. 30(c) (1991).

9. See, e.g., GA. CODE ANN. § 9-11-26 to -37 (1993) (Georgia civil discovery rules generally modeled after the pre-2000 Federal Rules); John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1378-1433 (1986) (discussing states' adoption of rules that are copying, modeled after, or influenced by the Federal Rules, including the rules governing discovery).

10. The federal discovery rules have been amended numerous times. For example, prior to the important 2000 amendments to Rule 26, that rule had been amended in 1948, 1963, 1966, 1970, 1980, 1983, 1987, and 1993. See FED. R. CIV. P. 26 advisory committee notes.

11. For a more extensive analysis of how the federal discovery rules permitted attorneys to control the discovery process before the 2000 amendments, see Morgan Cloud, *The 2000 Amendments to the Federal Discovery Rules and the Future of Adversarial Pretrial Litigation*, 74 TEMP. L. REV. 27 (2001).

12. The 2000 amendments imposed presumptive limits on the length of depositions: "Unless otherwise authorized by the court or stipulated by the parties, a deposition is limited to one day of seven hours." FED. R. CIV. P. 30(d)(2) (2000). This supplemented restrictions on the number of depositions enacted in the 1993 amendments to the federal discovery rules, which provided that a party had to obtain judicial permission to take a deposition if "a proposed deposition would result in more than ten depositions being taken . . . [or] the person to be examined already has been deposed in the case." FED. R. CIV. P. 30(a)(2)(A)-(B) (1993). Rule 33(a) was amended in 1993 to impose a limit of twenty-five interrogatories, including subparts, unless a greater number was

taking some steps required for the Rule 26(f) discovery conference.¹³ New language specified how attorneys were to pose objections during depositions.¹⁴

Similar constraints were imposed upon the use of interrogatories. Once again, either a written stipulation or judicial permission was required before a party was permitted to serve more than twenty-five interrogatories, including subparts, or to serve interrogatories before conferring pursuant to Rule 26(f).¹⁵ New language defined how objections to interrogatories should be made.¹⁶

permitted by court order or stipulation of the parties. FED. R. CIV. P. 33(a) (1993).

13. The text of Rule 30(a) was amended to require leave of court in the circumstances set forth below.

(1) A Party may take the testimony of any person, including a party, by deposition upon oral examination without leave of court except as provided in paragraph (2). . . .

(2) A party must obtain leave of court, which shall be granted to the extent consistent with the principles stated in Rule 26(b)(2), . . . if, without the written stipulation of the parties,

(A) a proposed deposition would result in more than ten depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by third-party defendants;

(B) the person to be examined already has been deposed in the case; or

(C) a party seeks to take a deposition before the time specified in Rule 26(d) unless the notice contains a certification, with supporting facts, that the person to be examined is expected to leave the United States and be unavailable for examination in this country unless deposed before that time.

FED. R. CIV. P. 30(a) (2000). Substantially identical limitations were imposed upon the use of written depositions under Rule 31. *See* FED. R. CIV. P. 31 (2000).

14. Rule 30(d)(1) reads:

(1) Any objection to evidence during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. A party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion under paragraph (3).

FED. R. CIV. P. 30(d)(1) (1993).

15. FED. R. CIV. P. 33(a) (1993). Federal Courts undoubtedly possess the inherent power to limit the quantity of discovery by local rule or case orders, but the imposition of specific, quantitative limits in the text of the rules represents an unequivocal move in the direction of power in the hands of rule makers, and away from attorney autonomy. *See, e.g.*, FED. R. CIV. P. 26(b)(2) (2000) ("By order, the court may alter the limits in these rules on the number of depositions and interrogatories or the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.").

16. After the 1993 amendments, Rule 33 provided, in part:

(a) AVAILABILITY. Without leave of court or written stipulation, any party may serve upon any other party written interrogatories, not exceeding 25 in number including all discrete subparts, to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Leave to serve additional interrogatories shall be granted to the extent consistent with the principles of Rule 26(b)(2). Without leave of court or written stipulation,

The 1993 and 2000 amendments also placed new emphasis upon the Rule 26(f) discovery conference. Previous versions of the federal rules de-emphasized the importance of the discovery conference, requiring one only if a party made a proper motion to the court. Under the new Rule, the 26(f) discovery conference not only is mandatory, but its provisions even serve as a trigger for the commencement of formal discovery.¹⁷ Rule 26(d) now commands that “[e]xcept in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E), or when authorized under these rules or by order or agreement of the parties, a party *may not seek discovery from any source before the parties have conferred as required by Rule 26(f).*”¹⁸ Under Rule 26(f), parties must confer in advance of the conference, “make or arrange for” mandatory disclosures under Rule 26(a)(1),¹⁹ prepare and submit a discovery plan to the court, and comply with specific time limits imposed by the Rule.²⁰

interrogatories may not be served before the time specified in Rule 26(d).

(b) ANSWERS AND OBJECTIONS.

(1) Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for objection and shall answer to the extent the interrogatory is not objectionable. . . .

....

(4) All grounds for an objection to an interrogatory shall be stated with specificity. Any ground not stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown.

FED. R. CIV. P. 33(a), (b)(1), (b)(4) (1993).

17. FED. R. CIV. P. 26(f) (2000).

18. FED. R. CIV. P. 26(d) (2000) (emphasis added).

19. FED. R. CIV. P. 26(f); *see infra* Part II.B.

20. *See supra* note 18 and accompanying text. The new Rule 26(f) includes the following text (italicized language indicates text added in the December 2000 amendments):

Conference of Parties; Planning for Discovery. Except in *categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E)* or when otherwise ordered, the parties *must*, as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), *confer to consider* the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by Rule 26(a)(1), and to develop a proposed discovery plan

The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging *the conference*, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the *conference* a written report outlining the plan. *A court may order that the parties or attorneys attend the conference in person. If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule (i) require that the conference between the parties occur fewer than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b), and (ii) require that the written report outlining the discovery plan be filed fewer than 14 days after the conference between the parties, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.*

Standing alone, these various changes to the Federal Rules would represent an unmistakable movement away from a system in which attorneys independently manage discovery and toward a discovery system in which their autonomy is restricted by written rule or judicial order. But two other sets of changes, effective since December 1, 2000, dwarf those discussed above in both practical and theoretical significance. New limitations were imposed upon the scope of the discovery that parties are entitled to conduct and mandatory disclosure requirements were imposed on all federal districts.²¹ These amendments to Rule 26 suggest that we may be witnessing a fundamental shift in the philosophy upon which the rules governing pretrial discovery in federal courts are based.

A. Rule 26(b)(1): Restricting the Scope of Discovery

1. "Attorney-Managed" and "Court-Managed" Discovery

The most significant revision narrows the scope of the subject matter that parties are entitled to pursue during discovery. Before the December 2000 amendments, the scope of discovery was so broad that "[p]arties [could] obtain discovery regarding any matter, not privileged, which [was] relevant to the subject matter involved in the pending action, whether it relate[d] to the claim or defense of the party seeking discovery or to the claim or defense of any other party"²²

This broad definition entitled attorneys to conduct detailed inquiries about matters not directly related to the issues in dispute in the litigation. For example, an attorney might inquire at a deposition about the deponent's education and employment background, even when that information was not directly at issue in the lawsuit, as long as the "information sought appear[ed] reasonably calculated to lead to the discovery of admissible evidence."²³ The rules did not require that the attorney obtain permission from the witness, the adversary, or the judge to pursue these peripheral topics—she was entitled to pursue the topic by the broad authority granted by the text of Rule 26.

The broad scope of topics that parties were entitled to pursue has been one source of the now legendary problems associated with the wide-open discovery enacted in the federal rules. The December 2000 amendments to Rule 26(b)(1) were designed to reduce these problems by narrowing the scope of the discovery that parties can pursue without obtaining judicial permission. To accomplish this goal, the drafters created two categories of discovery. The first, "attorney-managed" discovery, includes the topics an attorney may

FED. R. CIV. P. 26(f) (2000) (emphasis added).

21. FED. R. CIV. P. 26 (2000).

22. FED. R. CIV. P. 26(b)(1) (1991).

23. *Id.*

discover without getting permission from a judge. The second category, "court-managed" discovery, requires judicial approval before parties may obtain discovery of covered topics.²⁴

The new text of Rule 26(b)(1) defines both categories. It directs that, unless altered by court order, "[p]arties may obtain discovery regarding any matter, not privileged, that is *relevant to the claim or defense of any party* *For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action.*"²⁵

Rule 26(b)(1) now specifically limits the scope of the topics which parties are entitled to discover—this is "attorney-managed" discovery. Attorneys now are only entitled to "obtain discovery regarding any matter, not privileged, that is *relevant to the claim or defense of any party*."²⁶

This new test, *relevance to claims and defenses*, is purposely narrower than the previous standard, *relevance to the subject matter of the litigation*.²⁷ The traditional attorney authority and autonomy in the discovery process are now limited in their substantive scope as well as in their quantity and timing—at least in the text of the Rules. Lawyers now are entitled to conduct discovery—subject to the limitations now imposed on the quantity and timing of discovery—using any means, and in any sequence, only about matters that fit within the classification of "attorney-managed" discovery.

Before attorneys can conduct discovery that ranges as broadly in scope as the Rules have permitted for the past six decades, attorneys first must secure judicial permission. Rule 26(b)(1) now decrees that to inquire about topics not "*relevant to the claim or defense of any party*" but merely "*relevant to the subject matter involved in the [pending] action[,]*" attorneys must persuade a judge that "*good cause*" exists for this additional discovery.²⁸

Of course, that approval is not guaranteed or required. Judges possess discretion to decide whether to permit discovery that parties typically would have been entitled to pursue in the past. The new language in Rule 26(b)(1) is intended to prod lawyers into narrowing the scope of their discovery efforts while encouraging judges to take a more active role in managing that process.

2. Potential Problems

The bifurcation of the scope of discovery is likely to produce difficulties for lawyers and judges, as well as litigation expenses for the lawyers' clients.

24. The Advisory Committee uses these labels to describe the two categories of discovery. See, e.g., Minutes: Civil Rules Advisory Committee (Mar. 16 and 17, 1998) *4, *13, available at <http://www.uscourts.gov/rules/Minutes/0398civilminutes.htm> (last visited Nov. 30, 2001) [hereinafter March 1998 Minutes].

25. FED. R. CIV. P. 26(b)(1) (2000) (emphasis added).

26. *Id.* (emphasis added).

27. See FED. R. CIV. P. 26(b)(1) (1993).

28. FED. R. CIV. P. 26(b)(1) (2000) (emphasis added).

For example, the text of Rule 26(b)(1), the Advisory Committee Notes, and the legislative history all fail to provide detailed guidance for judges or lawyers attempting to identify the murky line between topics relevant to claims and defenses and those relevant to the litigation's subject matter. The proponents of this approach left it for judges and lawyers to answer this question on a case by case basis, assuming that eventually the categories' parameters would emerge from the litigation process. This may well happen, but it will inevitably prove to be an expensive (in time and money) method for defining these categories.

It is likely that some members of the profession will simply continue to practice as they have in the past until uncooperative adversaries or judges who are sticklers for enforcing the rules force them to grapple with this problem. We can anticipate that some lawyers will finesse the issue by either tacit or explicit agreement. If all parties want to engage in wide-ranging discovery, mutual incentives exist for ignoring this distinction. If no one complains to the judge, this distinction is likely to have little practical effect. Parties also can cooperate in seeking to persuade judges to grant additional discovery during the Rule 26(f) discovery conference.

But centuries of experience demonstrate that lawyers engaged in the contentious processes of litigation will not always agree. Nowhere has this been more true than in the realm of pretrial discovery. We can predict with confidence that some parties and their attorneys will disagree about the proper scope of discovery in individual lawsuits. As a result, bifurcating the scope of discovery is almost certain to provoke discovery battles that will, in turn, generate motion practice.

For example, if a lawyer does not want her client to answer a discovery request, whether presented in an interrogatory, a request for admission, a deposition question, or a request for production, Rule 26(b)(1) now permits her to attempt to evade discovery by asserting that the requested information falls outside the scope of "attorney-managed" discovery. (We will assume for this discussion that a good faith basis exists for this claim). The discovery opponent can object to the question and file a motion for a protective order, claiming that even if the disputed deposition question, request, or interrogatory is relevant to the subject matter of the litigation, it is not relevant to a claim or defense, and discovery should be prohibited on the issue. Rather than incur the expense of fighting to obtain the information, the discovery proponent might simply abandon the inquiry, and discovery will have been successfully impeded. On the other hand, if she wishes to force her recalcitrant adversary to answer, the discovery proponent will be forced to file a motion to compel discovery, along with a response in opposition to the motion for protective order. The discovery opponent then would file a response in opposition to the motion to compel.

Because Rule 26(b)(1) defines the scope of discovery for all parties in federal litigation, the new system of bifurcated discovery categories will supply countless opportunities for collateral discovery disputes of the sort

described above. These disputes may in turn generate motions, hearings, and litigation expenses, all resulting from a new classification system that is designed both to constrain the discovery conducted by lawyers and to involve judges more directly in the process of shaping discovery in individual cases.

How and when parties will raise the objection that a discovery request exceeds the scope of "attorney-managed" discovery are other unanswered questions. It appears likely that the procedure for raising this objection will not raise any new difficulties with some discovery methods. For example, an attorney objecting to an interrogatory can simply state this as her ground for refusing to answer in the written response.²⁹ Objections to requests for admissions and requests for production also can be made in written responses to these discovery requests.³⁰

But this objection raises more difficult questions for deposition practice. It is possible to argue that the opponent can make the objection after a question is asked, but the deponent should then answer it. After all, Rule 30 still commands that during depositions

[a]ll objections made at the time of the examination to the . . . manner of taking it, to the evidence presented, to the conduct of any party, or to any other aspect of the proceedings shall be noted by the officer upon the record of the deposition; but the examination shall proceed, with the testimony being taken subject to the objections.³¹

This language suggests that the proper procedure is for the discovery opponent to object during the deposition and then oppose the use of the answer at subsequent proceedings. Another part of Rule 30 supports this view of the proper "beyond the scope" objection. Rule 30(d)(1) specifies that "[a] person may instruct a deponent not to answer only when necessary to preserve a privilege."³²

It is arguable, however, that it is appropriate for counsel not merely to object, but also for the attorney representing the deponent to instruct her client not to answer questions beyond the scope of "attorney-managed" discovery. This approach is consistent with the logic of the amendment. The rule decrees that a party may obtain discovery of information relevant to claims and defenses. The discovering party simply is not entitled to obtain information falling outside that realm. It seems to contradict the very purpose of the 2000 amendments to require a deponent to answer questions falling outside this boundary.

29. See FED. R. CIV. P. 33(b)(1)(1993) ("Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for objection and shall answer to the extent the interrogatory is not objectionable.").

30. See FED. R. CIV. P. 34(b), 36(a) (2000).

31. FED. R. CIV. P. 30(c) (1993).

32. FED. R. CIV. P. 30(d)(1) (2000).

The solution may turn on practical considerations. The drafters' goals in restricting the scope of discovery included encouraging attorneys to focus on the important issues in the case rather than devote time and effort to peripheral matters, to save time and reduce costs, and to discourage discovery abuse. These goals will be defeated in many cases unless an attorney can instruct her client not to answer questions outside the scope of attorney-managed discovery, because lawyers will be able to range as far afield as they have under the old system.

On the other hand, it is not hard to imagine that some judges might conclude that the simplest, most cost effective way to accommodate the problems created by the new and opaque distinction adopted in 26(b)(1) is to require the deponent to answer questions posed, and leave it to the opponent to seek judicial relief from future use of the colloquy. Rule 26(c) may support this analysis. It provides that

[u]pon motion by a party or by the person from whom discovery is sought . . . and for good cause shown, the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including . . .

. . . .
(4) *that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters . . .*³³

But the argument is not settled even by this passage. This language also seems to complement the scope of discovery restrictions now contained in Rule 26(b)(1), and suggests that the Rules permit a deponent to refuse to answer questions exceeding the scope of "attorney-managed" discovery. This approach would forestall more wide-ranging discovery until a judge rules that the topic is relevant to the claims and defenses asserted by the parties.³⁴

33. FED. R. CIV. P. 26(c) (1993) (emphasis added).

34. The amendments to Rule 26(b)(1) also may affect pleading practice. Simply put, the 2000 amendments provide incentives for attorneys to plead more broadly, both by asserting all conceivable claims and by pleading with greater factual specificity. By linking the scope of "attorney-managed" discovery to information relevant to claims and defenses pleaded by the parties, the Rules now encourage attorneys who hope to engage in wide-ranging discovery to include all possible claims and defenses in their pleadings. Expanding the scope of their claims and defenses will entitle attorneys to obtain discovery about a broader range of issues without being forced to get judicial approval.

Similarly, one way to establish that a particular fact, issue, or topic falls within the scope of the claims and defenses would be to describe that item with great specificity in the pleadings. Some attorneys may well conclude that they are more likely to prevail in disputes about the scope of "attorney-managed" discovery if their pleadings contain much greater detail than the bare bones pleading required under Rule 8. Longer and more detailed pleadings consume more time and money to produce. More factually detailed pleadings might even generate additional motion practice, including motions to dismiss for failure to state a claim,

It is possible that all of this will do little to improve the state of litigation in the federal courts. For more than half a century, the goals of the federal discovery rules have been to create a faster, cheaper, more efficient procedural system that would focus litigants upon the merits of cases and discourage procedural machinations. The unfortunate reality is that decades of reform have produced a system of civil litigation that is slow, expensive, inefficient, and that frequently rewards procedural gamesmanship.

The failure of procedural reforms predates the federal rules by generations. Over the past couple of centuries, our legal system has abandoned the forms of action, merged law and equity, and replaced common law and code pleading with notice pleading and wide open discovery. Yet we are left with the same generic complaints about delay and expense (the details differ, but the song remains the same) that helped produce the Field Code in the mid-nineteenth century. It is reasonable to doubt that another change in

motions to strike, and motions for a more definite statement. *See, e.g.*, FED. R. CIV. P. 8(c)(1), 12(b)(6), 12(e), 12(f) (2000).

The federal rules do provide some mechanisms for avoiding such potential costs. For example, the quantitative limits now imposed on discovery might reduce incentives to plead broadly in order to obtain broader discovery as a matter of right. The rules specify that a party is only entitled to serve twenty-five interrogatories, including subparts, and to take ten depositions, each lasting only seven hours. *See* FED. R. CIV. P. 30(a)(2)(A), 30(d)(2), 33(a). The language of these rules does not guarantee waivers of these quantitative limits merely because many claims are pleaded. If litigants assert these limits and federal judges enforce the rules strictly, these limits could serve to discourage expansive pleading.

Conversely, the rules permit a judge to expand these quantitative limits in individual cases. A judge might be more willing to relax these limits, particularly in complex products liability, antitrust, or class action litigation, if lengthy pleadings contained expansive claims that in turn included detailed factual allegations. The Rules apparently grant judges authority to require parties seeking broad discovery to pay their adversaries' costs in complying with these requests, a power that could readily dissuade parties from seeking expansive discovery. Rule 26(b)(2) apparently permits this kind of cost shifting by judges. This point was discussed during meetings of the Rules Advisory Committee, which drafted specific language emphasizing this idea, although the Judicial Conference later eliminated this language. *See* March 1998 Minutes, *supra* note 24, at *16; Minutes: Civil Rules Advisory Committee (Apr. 19 and 20, 1999) *13, available at <http://www.uscourts.gov/rules/Minutes/0499civilminutes.htm> (last visited Nov. 30, 2001) [hereinafter April 1999 Minutes]. The Rules provide that a court shall limit discovery requests if it determines that:

- (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

FED. R. CIV. P. 26(b)(2) (1993).

the text of the procedural rules will eliminate these complaints or the underlying reasons for them. If left to their own devices, lawyers will continue to attempt to "game" the procedural rules governing litigation, as they have done for centuries.

On the other hand, there is some reason to hope that one element of the latest rounds of reforms could at least speed up the resolution of many litigated disputes. It seems clear that one goal of the recent changes to the federal discovery rules is not merely to reduce attorney autonomy in the process, but also to force the judiciary to become more active in managing pretrial discovery. Recent experience suggests that when judges actively manage pretrial litigation, it can be completed more expeditiously—although perhaps not more inexpensively—than in jurisdictions where lawyers generally manage pretrial litigation. The best known example is the Eastern District of Virginia (the so-called "Rocket Docket"), where by local rule the judges have enforced strict limits on pretrial litigation. Among the constraints are limits on the quantity of discovery similar to those recently enacted in the federal rules.³⁵

In the long run, the most important changes achieved by recent amendments to the federal discovery rules may be to dilute the authority of attorneys. To many, this may be cause for alarm, but weakening the profession's privileged position in the discovery arena may be a necessary element of any attempt to make the process more efficient. Of course, the struggle to define the lawyer's role in the litigation process continues. The conflict between lawyer autonomy and rule-imposed constraints is perhaps most obvious in the implementation of a new mandatory duty to "voluntarily" disclose information.

B. Mandatory Disclosures

1. The 1993 Amendments to Rule 26(a)

The December 2000 amendments imposed mandatory disclosure obligations in all districts for the first time.³⁶ This completed a revision to Rule 26(a)(1) that was commenced in 1993. To understand the significance of the 2000 revisions to this Rule requires a brief look at the 1993 amendments.

35. The text of the December 2000 amendments suggests that the Rules Advisory Committee was influenced by the local rules and practices of the Rocket Docket. The Advisory Committee even included language in Rule 26 designed to preserve expedited pretrial schedules, particularly as enforced in the Eastern District. Rule 26(f) provides, in part, that "[i]f necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule" require parties to comply with the procedural requirements adopted in 26(f) more rapidly than that rule requires. FED. R. CIV. P. 26(f) (2000).

36. See FED. R. CIV. P. 26 (2000).

Prior to 1993, the federal rules generally left it to the litigating attorneys to decide what discovery devices to use, the quantity of discovery to pursue, and the timing and sequence of discovery. This system was designed so that parties would only obtain the information they requested by using the available discovery methods.³⁷ The 1993 amendments to Rule 26(a) required parties to disclose certain information to their adversaries without awaiting a discovery request.³⁸ In addition, the timing of the beginning of the discovery process was delayed until the "parties have met and conferred as required by Rule 26(f)."³⁹

The disclosure innovation was inserted into Rule 26(a)(1), which decreed: "Except to the extent otherwise stipulated or directed by order or local rule, a party shall, without awaiting a discovery request, provide to other parties"⁴⁰ the name, address, telephone number, and subjects of information possessed by potential witnesses,⁴¹ information about documents and other potential evidence,⁴² and disclose information about damages and insurance.⁴³

Even harmful information had to be disclosed. The scope of mandatory disclosures required parties to disclose information that was "relevant to disputed facts alleged with particularity in the pleadings."⁴⁴ On its face, the new language in Rule 26(a) required attorneys to first decide what facts were disputed and alleged with particularity in the pleadings, then supply their adversaries with the information satisfying that test.

The attempt to impose these duties on attorneys produced opposition, and it is not difficult to understand why. The mandatory disclosure rules forced lawyers to assist their opponents by requiring them to identify information potentially helpful to the adversary, and then disclose this to the opponent,

37. Of course, parties were free to disclose information to their adversaries, but such disclosures would be truly voluntary and not mandated by the Rules.

38. See FED. R. CIV. P. 26(a) (1993).

39. FED. R. CIV. P. 26(d) (1993).

40. FED. R. CIV. P. 26(a)(1) (1993).

41. The new rule required disclosure of "the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information." FED. R. CIV. P. 26(a)(1)(A) (1993).

42. The Rule now dictated that parties must provide their adversaries with "a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings." FED. R. CIV. P. 26(a)(1)(B) (1993).

43. In addition to information about witnesses and evidence, parties were also required to disclose

a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered and information about relevant insurance coverage. FED. R. CIV. P. 26(a)(1)(C), (D) (1993).

44. FED. R. CIV. P. 26(a)(1)(A) (1993).

without even awaiting a discovery request. On its face, the mandatory disclosure concept conflicts with the adversary discovery model upon which pretrial discovery has rested.⁴⁵

The 1993 attempt to impose mandatory disclosures and the opposition it generated led to the oddest of compromises, particularly when we recall that the Federal Rules were intended to create a uniform system of procedural rules for the federal courts. The 1993 compromise specifically authorized the individual federal districts to "opt out" of the disclosure rules,⁴⁶ and nearly half ultimately did.⁴⁷ The result was a crazy quilt of rules that varied from district to district.⁴⁸ The "opt out" language produced an even odder rule discrepancy. Although other mandatory disclosure provisions adopted in 1993 did not contain an "opt out" provision,⁴⁹ a significant minority of districts opted out of those disclosure rules, as well.⁵⁰

2. The 2000 Amendments to Rule 26(a)

As a result of the fragmented adoption of the 1993 amendments, the mandatory disclosure provisions were not imposed in all of the federal districts until the December 2000 amendments, which eliminated the "opt out" mechanism, and required mandatory disclosures in all districts.⁵¹ As an apparent compromise with opponents of mandatory disclosures, the 2000 amendments also narrowed the scope of the information that must be

45. In 1993, Rule 37 was amended to incorporate the new disclosure mechanisms, giving courts which had not "opted out" authority to impose sanctions on those who failed to make the disclosures required under Rule 26(a). See FED. R. CIV. P. 37(c)(1) (1993). A range of sanctions was authorized for violations of the disclosure obligations. Courts could forbid the use of non-disclosed evidence or witnesses at trials and hearings, require payment of the adversary's "reasonable expenses, including attorney's fees, caused by the failure," or impose any other "appropriate sanctions," including those previously available for violations of the discovery rules. FED. R. CIV. P. 37(c) (1993); see also FED. R. CIV. P. 37(a) (1993).

46. The "opt out" provision was enacted with the following introduction to the mandatory disclosure requirement: "Except to the extent . . . directed by . . . local rule . . ." FED. R. CIV. P. 26(a)(1) (1993).

47. See DONNA STIENSTRA, FEDERAL JUDICIAL CENTER, IMPLEMENTATION OF DISCLOSURE IN UNITED STATES DISTRICT COURTS, WITH SPECIFIC ATTENTION TO COURTS' RESPONSES TO SELECTED AMENDMENTS TO FEDERAL RULE OF CIVIL PROCEDURE 26, at 4 (Mar. 30, 1998).

48. See generally *id.*

49. Rule 26(a)(2) as enacted in the 1993 amendments imposed new and extensive disclosure duties regarding experts and expert testimony and Rule 26(a)(3) imposed on each party extensive obligations to disclose information "regarding the evidence that it may present at trial other than solely for impeachment purposes." FED. R. CIV. P. 26(a)(3).

50. See STIENSTRA, *supra* note 47, at 5 tbl.1.

51. The mechanism used to eliminate the "opt out" provision required nothing more than deleting the phrase "local rule" from Rule 26(a)(1). Compare FED. R. CIV. P. 26(a)(1) (1993), with FED. R. CIV. P. 26(a)(1) (2000).

disclosed without awaiting a discovery request.

The 1993 version of Rule 26(a)(1) required that litigants disclose specified information about witnesses, evidence, damages, and insurance that was "*relevant to disputed facts alleged with particularity in the pleadings.*"⁵² The 2000 amendments retained the categories of information subject to disclosure,⁵³ but dramatically altered the scope of the obligation to disclose information about witnesses and evidence.

Parties now must disclose only information about witnesses and evidence "that the *disclosing party may use to support its claims or defenses, unless solely for impeachment . . .*"⁵⁴ The new scope provision eliminates the need of "voluntarily" disclosing harmful information, while providing attorneys more strategic control over the information they must disclose. Parties need not disclose evidence that is the proverbial "smoking gun" because this is evidence they will not use in support of their claims or defenses. They still may be forced to turn over this information, but only if an adversary presents a proper discovery request.

Narrowing the scope of the information that must be disclosed obviously reinforces the attorney's role in managing litigation. But it is important to note that this is a reduced obligation to gather information and supply it to adversaries without requiring them to even serve a discovery request. Before 1993, Rule 26(a) defined rules governing the process of discovery. Following the 1993 and 2000 amendments, Rule 26(a)(1) emphasizes the new duties to disclose information without awaiting discovery requests. This change represents a dramatic reduction of attorney autonomy in the information gathering process. Attorneys litigating in districts that did not opt out of the 1993 amendments will now have more control over the content of the information that they must disclose, but as a tradeoff, attorneys in all districts are forced to disclose information about witnesses and evidence.

The 2000 amendments contain a significant restriction on the scope of the cases impacted by the mandatory disclosure rules. The drafters attempted to reduce the impact of the disclosure rules by exempting eight categories of litigation from the mandatory disclosure rules.⁵⁵ The Advisory Committee

52. FED. R. CIV. P. 26(a)(1) (1993) (emphasis added).

53. The mandatory disclosures about experts remain unchanged under Rule 26(a)(2). The disclosures required for "information regarding the evidence that it may present at trial other than solely for impeachment" (information about witnesses, evidence, et cetera) also remain unchanged, except that the rule was amended to specifically refer to "the disclosures required by Rule 26(a)(1) and (2)," and it now requires that, in addition to providing that information "to other parties," it must also "promptly file [it] with the court." FED. R. CIV. P. 26(a)(2)-(3) (2000). The time periods for making these trial-related disclosures are unchanged.

54. FED. R. CIV. P. 26(a)(1)(B) (2000) (emphasis added).

55. The new Rule 26(a)(1)(E) exempts from the initial disclosures required by Rule 26(a)(1):

- (i) an action for review on an administrative record;
- (ii) a petition for habeas corpus or other proceeding to challenge a criminal conviction

proposed the exemptions in categories of cases in which disclosures were thought not to be warranted or useful, or when they were frequently not used by the parties. Some of the types of cases were selected because the nature or value of the dispute likely would not justify forcing the litigants to incur the costs of complying with the disclosure requirements.

Despite these exempted categories of cases, it is undeniable that the imposition of the mandatory disclosure rules will reduce attorney autonomy in managing the discovery process. As noted earlier, the 1993 amendments imposed limits on the sequence and timing of discovery. They prohibited any discovery until the parties had met and conferred to plan discovery under Rule 26(f).⁵⁶ They also dictated the timing of the disclosures, requiring that "[u]nless otherwise stipulated or directed by the court, these disclosures shall be made at or within 10 days after the meeting of the parties under subdivision (f)."⁵⁷ The revised version of Rule 26(a) specified the timing of pretrial and expert witness disclosures, as well.⁵⁸

The potential impact of the mandatory disclosure duty upon litigation control and planning by attorneys is highlighted by another restriction created in the new text of Rule 26(a)(1).⁵⁹ The Rule emphasized that the duty to disclose could not be deferred, even for legitimate tactical considerations.⁶⁰ As a result, disclosures could not be delayed until a party had completed its investigation of the matter. In other words, parties could be compelled to make disclosures according to the schedule promulgated in Rule 26, even if they legitimately needed additional time to investigate the matter.⁶¹ And

or sentence;

(iii) an action brought without counsel by a person in custody of the United States, a state, or a state subdivision;

(iv) an action to enforce or quash an administrative summons or subpoena;

(v) an action by the United States to recover benefit payments;

(vi) an action by the United States to collect on a student loan guaranteed by the United States;

(vii) a proceeding ancillary to proceedings in other courts; and

(viii) an action to enforce an arbitration award.

FED. R. CIV. P. 26(a)(1)(E) (2000).

56. Rule 26(d) provided: "Timing and Sequence of Discovery. Except when authorized under these rules or by local rule, order, or agreement of the parties, a party may not seek discovery from any source before the parties have met and conferred as required by subdivision (f)." FED. R. CIV. P. 26(d) (1993). The same moratorium exists under the December 2000 version of 26(d) until the parties have conferred.

57. FED. R. CIV. P. 26(a)(1) (1993).

58. *See id.* (timing of disclosures); FED. R. CIV. P. 26(a)(2)(C) (1993) (timing of expert disclosures).

59. FED. R. CIV. P. 26(a)(1) (1993).

60. *Id.*

61. As a result of these changes in Rule 26(a), the drafters also revised the duty to supplement responses. First, Rule 26(e) was amended to include mandatory disclosures. It

delays could not be justified by a party's belief that its adversary was not complying with the mandatory disclosure rules.⁶² Under the new rules, a

party shall make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.⁶³

Forcing parties and their attorneys to disclose information relating to their claims and defenses, according to a prescribed schedule, and before they have completed their fact investigations, diminishes attorney control over the litigation. As with the amendments to Rule 26(b)(1), this may prove to be a worthwhile change. Experience under the 1993 mandatory disclosure rules suggests that the process of gathering information ultimately may prove to be as expensive as formal discovery. But the changes may produce beneficial results. They may force attorneys to expedite their fact investigations and analyze the strengths and weaknesses of their cases more quickly. The process of sharing information (and preparing for the Rule 26(f) conference) also may facilitate cooperation and perhaps even case settlement. Only time will tell what the effect of mandatory disclosures will be upon the course of litigation in the federal courts.

We need not wait for those results, however, to recognize that these rules inevitably curtail the privileged position lawyers previously occupied in the realm of pretrial discovery. This was a privilege in the sense of a "special advantage, immunity, permission, right, or benefit granted to or enjoyed by an individual, a class, or a caste."⁶⁴ It is a privilege that may not survive the

imposed upon parties who had either made disclosures or responded to discovery requests "a duty to supplement or correct the disclosure or response to include information thereafter acquired if ordered by the court" or if certain other circumstances specified by the Rule existed. FED. R. CIV. P. 26(e) (1993).

Second, the duty to supplement disclosures and responses also was expanded, which is a logical corollary to a scheme requiring parties to make disclosures even if they have not completed investigation of the case. Rule 26(e) now commanded that

[a] party is under a duty to supplement at appropriate intervals its disclosures under subdivision (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

FED. R. CIV. P. 26(e)(1) (1993). Identical duties were imposed for responses to written discovery requests. FED. R. CIV. P. 26(e)(2) (1993). On its face, this language expands the earlier duty to supplement discovery responses that arose only when the party *knew* an earlier response was incorrect or no longer was correct and failing to amend amounted to a "knowing concealment." FED. R. CIV. P. 26(e)(2) (1991).

62. FED. R. CIV. P. 26(a)(1) (1993).

63. *Id.*

64. See *supra* note 1 and accompanying text.

ongoing process of federal rule making. Another privilege the legal system has granted attorneys has survived its most recent challenge.

III. CONFIDENTIAL COMMUNICATIONS AND DISCLOSURE OF CLIENT MISCONDUCT

*Conceals not from us, naming thee the Tree
Of Knowledge, knowledge both of good and evil*⁶⁵

Lawyers are subject to an ethical obligation "to hold inviolate confidential information of the client,"⁶⁶ which is intended to encourage clients to confide in their lawyers, whether the information conveyed is "good or evil." This duty of confidentiality is the ethical analogue to the attorney-client privilege. Although the ethical duty and the evidentiary privilege are not identical in scope or application,⁶⁷ they are closely linked.⁶⁸ Over the past three decades, the legal profession has struggled to define when the duty and the privilege can or must be abandoned to protect third parties from past, present, or future harms caused by the attorney's client. Within the ABA, no ethical issue has produced more recurring or divisive controversies.

A. Canons, Codes, and Rules

The ABA began grappling with the tension between the lawyer's professional duty to clients and the social or moral duty to protect third parties from harms caused by clients long before the current debate about the text of

65. MILTON, *supra* note 4, at lines 751-52 (emphasis added).

66. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 2 (1998).

67. *See id.* The commentary to Model Rule 1.6 provides:

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 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.

MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 5 (1998).

68. The privilege and the duty frequently overlap. For example, Model Rule 1.6, which expresses the duty of confidentiality, requires a lawyer who has been called as a witness to invoke the attorney-client privilege on behalf of her client unless the client waives the privilege. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 20 (1998). The linkage is sufficiently close that even the ABA's rule makers have been known to confuse them. *See infra* note 81 and accompanying text

Model Rule 1.6. For example, the Canons of Professional Ethics, which were initially adopted by the ABA in 1908 and survived, as amended, for more than sixty years,⁶⁹ announced a duty of confidentiality⁷⁰ but permitted attorneys to disclose confidences to prevent client crimes that would harm third parties. Canon 37 provided that the “announced intention of a client to commit a crime is not included within the confidences” that an attorney “is bound to respect,” and a lawyer “may properly make such disclosures as may be necessary to prevent the act or protect those against whom it is threatened.”⁷¹

The ABA replaced the Canons with the Model Code of Professional Responsibility.⁷² The Model Code retained the lawyer’s duty to preserve client confidences and secrets, but also addressed the problem of disclosure of confidences and secrets in a bewildering series of overlapping and interconnected provisions that were at best opaque, and at worst inconsistent to the point of incomprehensibility. Consider DR 4-101(B), which decrees that “a lawyer shall not knowingly . . . [r]eveal a confidence or secret of his client [or] [u]se a confidence or secret of his client to the disadvantage of the client . . . [or] for the advantage of [the lawyer] or of a third person.”⁷³ This seemingly straightforward statement of the duty is riddled with exceptions. Disclosure was permitted by DR 4-101(B) if the client consented after “full disclosure,” or when “permitted by DR 4-101(C).”⁷⁴

Unfortunately, DR 4-101(C), only exacerbates the problem. It reiterates that a “lawyer may reveal . . . [c]onfidences or secrets” with the client’s informed consent, and also “when permitted under Disciplinary Rules or required by law or court order.”⁷⁵ One of the exceptions permits, but does not require, a lawyer to reveal the “intention of his client to commit a crime and the information necessary to prevent the crime.”⁷⁶

A lawyer attempting to discern whether the Disciplinary Rules permit a particular disclosure might examine DR 7-101(A)(3), which commands that a “lawyer shall not intentionally . . . [p]rejudice or damage his client during the course of the professional relationship except as required under DR 7-102(B).”⁷⁷

69. THOMAS D. MORGAN & RONALD D. ROTUNDA, PROFESSIONAL RESPONSIBILITY 686 (2002). The original 32 Canons were supplemented by Canons 33-47, which were adopted after 1908. See PROFESSIONAL RESPONSIBILITY STANDARDS, RULES & STATUTES 644 (John S. Dzienkowski ed., 2001).

70. See, e.g., ABA CANONS OF PROFESSIONAL ETHICS Canon 37 (1969), quoted in MORGAN & ROTUNDA, *supra* note 69, at 696 (“It is the duty of a lawyer to preserve his client’s confidences.”). One exception adopted in Canon 37 permitted attorneys to disclose confidences to defend against accusations made against the attorney by the client. *Id.*

71. *Id.*

72. See MORGAN & ROTUNDA, *supra* note 69, at 686.

73. MODEL CODE OF PROF’L RESPONSIBILITY DR 4-101(B) (1983).

74. *Id.*

75. MODEL CODE OF PROF’L RESPONSIBILITY DR 4-101(C) (1983).

76. *Id.*

77. MODEL CODE OF PROF’L RESPONSIBILITY DR 7-101(A)(3) (1983).

Turning to DR 7-102(B) may not answer the lawyer's questions, either. It decrees that

[a] lawyer who receives information clearly establishing that . . . [h]is client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication.⁷⁸

On its face, this rule directs a lawyer who possesses information "clearly establishing" that his client has committed a fraud during the course of the representation to try to persuade the client to rectify the situation.⁷⁹ If the client refuses, the attorney *must* reveal the fraud to the "affected person or tribunal;" *unless* the "information is protected as a privileged communication."⁸⁰ The commands seem circular, and the interpretive difficulties do not end with the rule's circularity. If the fraud is a crime, does DR 4-101(C) control? The language of the rules suggests that this is a significant question, because DR 4-101(C) protects confidences and secrets, while DR 7-102(B) protects only the smaller set of privileged communications—although subsequent interpretation of the latter rule has attempted to ameliorate the difficulty.⁸¹

Yet another rule, DR 7-102(A), adds to the confusion. This rule decrees that in representing clients, a lawyer must refrain from specified misconduct and must make certain disclosures.⁸² For example, DR 7-102(A)(3) prohibits lawyers from concealing or knowingly failing "to disclose that which he is required by law to reveal."⁸³ A lawyer must determine whether information about a client falls within that category, and also whether the duty of confidentiality or the evidentiary privilege trumps some other legal duty that requires a disclosure.

Another provision, DR 7-102(A)(5), forbids lawyers from knowingly

78. MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102(B) (1983).

79. *Id.*

80. *Id.*

81. The original version of DR 7-102(B)(1), adopted by the ABA in 1970, appeared to require disclosures when the client had perpetrated a fraud on a third party or tribunal in the course of the attorney's representation. MORGAN & ROTUNDA, *supra* note 69, at 151. The ABA narrowed the disclosure rules in DR 7-102(B)(1). Although the drafters apparently intended to protect the broader class of information comprising confidences and secrets of the client, the text only exempted information falling within the narrower category of communications protected as privileged. The textual error may have been resolved in 1975 by the ABA Committee on Ethics and Professional Responsibility, Formal Opinion 341, which concluded that the term "privileged communication" in the rule actually encompassed confidences and secrets. See, e.g., *id.*

82. MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102(A) (1983).

83. *Id.*

making false statements of law or fact.⁸⁴ Does this require lawyers to disclose the truth about client misconduct when communicating with third parties? The text of the rule does not tell us.

Here, it is worth remembering that the ABA's versions of the Model Code and Model Rules are not themselves binding upon lawyers practicing in any particular state; the lawyers are bound by the ethical rules adopted in the relevant states. From an empirical perspective, the Model Rules are more significant to the entire profession. Only six states—Iowa, Nebraska, New York, Ohio, Oregon, and Tennessee—currently retain the Model Code.⁸⁵

In each of these six states, disclosure of confidences is *permitted* in some circumstances. In each state, DR 4-101(C) provides that a "lawyer *may reveal* . . . [t]he intention of his client to commit a *crime* and the information necessary to prevent the crime."⁸⁶ One of the Model Code states, Ohio, *requires* some disclosures. Ohio has retained the original version of DR 7-102(B)(1),⁸⁷ which *requires* attorneys to make disclosures if the lawyer has information "clearly establishing" that the client "has, *in the course of the representation*, perpetrated a *fraud* upon a person or tribunal."⁸⁸ The other five states have adopted the 1974 version of this rule, which blunts this command with the caveat that the disclosure is required *unless* the communication is privileged.⁸⁹ Thus, the prohibition against disclosure of confidences is not absolute in the Model Code states. One state diverges from the current Model Code and requires some disclosures relating to client fraud. The other five adhere to the current ABA version, permitting some disclosures relating to client frauds, but only for non-privileged information.

The remaining forty-four states that have adopted versions of the Model Rules not only permit some disclosures, but many also have adopted rules permitting or requiring disclosures far more expansive than allowed under the ABA's restrictive position on this issue. This divergence between the laws of many states and the ABA's Model Rules may have helped fuel the recent effort to reform Model Rule 1.6. The ABA's current version of Rule 1.6 commands:

(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).

84. MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102(A)(5) (1983).

85. One of those six states, Tennessee, has been engaged in a lengthy process which may lead to adoption of its version of the Model Rules. Georgia was a Model Code state until recently. Its version of the Model Rules went into effect on January 1, 2001.

86. MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101(C) (1983) (emphasis added).

87. See MORGAN & ROTUNDA, *supra* note 69, at 151.

88. MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102(B)(1) (1969) (emphasis added), quoted in MORGAN & ROTUNDA, *supra* note 69, at 151.

89. MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102(B)(1) (1974).

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

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm⁹⁰

The duty of confidentiality is announced clearly in paragraph (a): "A lawyer shall not reveal information relating to the representation of a client"⁹¹ The duty is broad, but not absolute. The client can consent to disclosure; in some matters the nature of the representation carries an implied authorization for some disclosures; and paragraph (b) lists specific exceptions.⁹² Arguments about the proper scope of these exceptions have persisted throughout the history of the Model Rules, particularly over the authority of an attorney to disclose information about client misconduct to prevent or rectify harms to third parties.

The current ABA version of Rule 1.6(b)(1) allows an attorney to disclose confidential information to protect third parties only if the lawyer "*reasonably believes [the disclosure is] 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.*"⁹³ It is hard to imagine how the ABA could have adopted an exception to the confidentiality rule that would have been more grudging and constricted than this. It is not much of an exaggeration to characterize the current ABA rule as saying that a lawyer may—but is not required to—disclose confidential information to keep her client from killing someone.

As formulated almost twenty years ago by the ABA's Kutak Commission, Rule 1.6 would have permitted disclosure to prevent and to rectify a wider range of harms.⁹⁴ The Kutak Commission proposed that disclosures would be permitted when the lawyer reasonably believed disclosures were necessary not only to prevent substantial bodily harm or death, but also "to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result . . . in substantial injury to the financial interests or property of another; [or] to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services had been used."⁹⁵

90. MODEL RULES OF PROF'L CONDUCT R. 1.6 (1998).

91. *Id.*

92. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2) (1998). This provision also permits a lawyer to disclose confidential information when necessary "to establish a claim or defense on behalf of the lawyer in" classes of disputes specified in this paragraph. *Id.*

93. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1) (1998) (emphasis added).

94. See MORGAN & ROTUNDA, *supra* note 69, at 18.

95. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1) (Revised Final Draft 1982) (emphasis added), *quoted in* MORGAN & ROTUNDA, *supra* note 69, at 18.

It is unnecessary to review the debate created by this proposal.⁹⁶ Suffice it to note that after a long and fractious debate, the ABA eventually eliminated authorization for these disclosures when it adopted the Model Rules nearly two decades ago. It is this constricted scope of disclosures that was challenged by the Ethics 2000 Commission's proposed amendments to Rule 1.6,⁹⁷ which revived the Kutak Commission's earlier concept of broader disclosures, by adding and deleting text from the current version of the rule. In the following excerpt from the proposed rule, the underlined text indicates proposed additions to the rule, while language to be deleted is lined through.

RULE 1.6: CONFIDENTIALITY OF INFORMATION

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

(b) A lawyer may reveal ~~such~~ information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

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

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

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another ~~that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services~~⁹⁸

Paragraph (a) retains the duty of confidentiality, subject to client consent (express or implied) or as permitted in paragraph (b). Paragraph (b) would permit, but not require, attorneys to make disclosures in an expanded set of circumstances. First, the new language permits disclosures to prevent death

96. "Model Rule 1.6 generated more controversy than any other Rule during the six-year (1977-83) Model Rules project." MORGAN & ROTUNDA, *supra* note 69, at 149.

97. The proposed changes were not limited to Rule 1.6. Information about the Ethics 2000 Commission, including the full text of its proposed changes to numerous provisions within the Model Rules can be found at <http://www.abanet.org/cpr/ethics2k.html> (last visited Nov. 30, 2001).

98. MODEL RULES OF PROF'L CONDUCT R. 1.6 (Proposed Draft 2001) [hereinafter PROPOSED RULE 1.6], available at <http://www.abanet.org/cpr/e2k-rule16.html> (last visited Nov. 30, 2001).

or substantial bodily harm even if those harms are not imminent, so long as the lawyer reasonably believes disclosure is necessary to prevent harms that are *reasonably certain* to occur.

This is the one proposed amendment to Rule 1.6 given preliminary approval by the ABA's House of Delegates at its summer 2001 Annual Meeting.⁹⁹ If adopted by the states, this new language "would allow lawyers not only to prevent a planned murder or attack, but also to warn the public of, for example, a negligent toxic chemical spill in drinking water or defective tires"¹⁰⁰ even if the client's act is not a crime.¹⁰¹

Other proposed expansions of the disclosures permitted under Rule 1.6 received less favorable treatment at the ABA's most recent annual meeting. A majority of the House of Delegates voted to delete proposed paragraph 1.6(b)(2), which would have permitted, but not required, lawyers to make disclosures to prevent a client's "*crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another*" and "the client has used or is using the lawyer's services" to further the crime or fraud.¹⁰² After this proposal was rejected, the proponents withdrew from consideration proposed paragraph (b)(3), which would have permitted disclosures "*to prevent, mitigate or rectify*" similar harms.¹⁰³

The result is that once again the ABA House of Delegates has thwarted attempts to enact a Model Rule 1.6 allowing lawyers to make disclosures in these kinds of circumstances without violating their ethical duties to their clients.¹⁰⁴ This should not have been too surprising. The ABA has rebuffed attempts to adopt a more expansive version of Rule 1.6 for nearly twenty years. The argument that allowing disclosures would transform lawyers into

99. For summaries of these actions, see Press Release from Nancy Cowger Slonin, Media Contact, ABA Begins Action on Updating Ethics Rules, Adopts Election Administration and Guidelines (Aug. 15, 2001), at <http://www.abanet.org/media/aug01/houseaction.html> (last visited Nov. 30, 2001). Summaries are also available at http://www.abanet.org/cpr/e2k-summary_2001.html (last visited Nov. 30, 2001). Information about the ABA House of Delegates can be found at <http://www.abanet.org/leadership/delegates.html> (last visited Nov. 30, 2001).

100. Molly McDonough, *Caution is the Keynote at ABA Gathering*, 23 NAT'L L.J., Aug. 20, 2001, at A1. For an example of how the proposed rule would operate in the context of environmental harm caused by the client, see Michael C. Dorf, *Debate over an ABA Legal Ethics Rule Underscores Lawyers' Competing Obligations to Keep Secret and to Disclose*, Aug. 9, 2001, at <http://writ.news.findlaw.com/dorf/20010809> (last visited Nov. 30, 2001).

101. See, e.g., Jeff Blumenthal, *ABA Rejects Change to Rule Forbidding Disclosure to Police*, FULTON COUNTY DAILY REP., Aug. 9, 2001, at 1.

102. PROPOSED RULE 1.6, *supra* note 98 (emphasis added); see ABA, *Ethics 2000 Commission*, at http://www.abanet.org/cpr/e2k-summary_2001.html (last visited Nov. 30, 2001).

103. PROPOSED RULE 1.6, *supra* note 98; see *Ethics 2000 Commission*, *supra* note 102.

104. In addition to the recent rejection of the Ethics 2000 Commission proposals and the original Kutak Commission proposals, attempts at similar reforms were rebuffed in 1991. See MORGAN & ROTUNDA, *supra* note 69, at 18.

informers against their clients, which ultimately would dissuade clients from conversing openly with attorneys, has repeatedly carried the day.

This argument is not without merit. After all, open communication between attorney and client is one of the fundamental justifications for the duty of confidentiality and the attorney-client privilege. By restricting the scope of permitted disclosures, the ABA has clung to the most ancient of the privileges accompanying the practice of law.¹⁰⁵

B. Symbolism Versus Practical Reality

The ABA's tenacious embrace of a restrictive version of Rule 1.6 is surprising, nonetheless, for two reasons. First, the permission to make disclosures proposed by the Ethics 2000 Commission would relieve some of the ethical double binds embedded within the Model Rules by permitting disclosures to prevent indefensible wrongs to third parties. Second, as noted above, a majority of states appear to have adopted more permissive disclosure rules.

Even a quick review of related rules demonstrates the profession's recognition that a lawyer's duty to her clients is not absolute; that a lawyer cannot legally or ethically participate in some activities, or assist a client committing those activities; and that a lawyer must communicate truthfully to courts and third parties. Model Rule 4.1, for example, commands that, in the course of representing a client, lawyers "shall not knowingly . . . make false statement[s] of material fact or law to" third parties.¹⁰⁶ This rule is consistent with the reality that lawyers are governed by other bodies of substantive law in addition to the ethical rules of the profession. By knowingly lying about material facts to a third party, a lawyer may be committing a tort or a crime. Of course, they are not permitted to engage in such conduct.

Yet the ethical dilemma created for lawyers by the Model Rules is obvious in the next sentence of Rule 4.1. The first clause of the sentence is consistent with the common-sense rule that a law license is not a license to commit crimes: "[A] lawyer shall not knowingly . . . fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client"¹⁰⁷ The second clause, however, places the lawyer in a double bind by adding a restriction: the lawyer must make these disclosures "unless disclosure is prohibited by Rule 1.6."¹⁰⁸ Under

105. "The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (citing 8 J. WIGMORE, EVIDENCE § 2290 (McNaughton rev. 1961)); see also CHRISTOPHER B. MUELLER & LAIRD KIRKPATRICK, EVIDENCE 347 (2d ed. 1999) (discussing early common law decisions announcing the attorney-client privilege).

106. MODEL RULES OF PROF'L CONDUCT R. 4.1 (1998).

107. *Id.*

108. *Id.*

the ABA's current version of Rule 1.6, disclosures are prohibited except to prevent death or substantial physical injury.¹⁰⁹

Model Rule 1.2(d) is not so equivocal. It states that "[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent."¹¹⁰ On the other hand, the rule suggests discussion and counseling with the client—not disclosure—if the client persists in criminal or fraudulent endeavors.¹¹¹

Model Rule 1.16 directs that a lawyer must refuse representation, or withdraw from an existing representation, if "the representation will result in violation of the rules of professional conduct or other law."¹¹² In addition, "a lawyer may withdraw" in the following circumstances: if she can withdraw "without material adverse effect on the interests of the client"; if "the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;" or if "the client has used the lawyer's services to perpetrate a crime or fraud."¹¹³ Once again, the appropriate response described in the rule is something other than disclosure.¹¹⁴ Nonetheless, the commentary to Model Rule 1.6 seems to contemplate "noisy withdrawals," whose only purpose is to alert third parties to client misconduct.¹¹⁵

Finally, in some circumstances, the Model Rules require disclosures of confidential information to third parties within the context of litigation. Rule 3.3(a) prohibits lawyers from knowingly making "false statement[s] of material fact or law" to courts, and requires disclosure of material facts of which the lawyer has knowledge "when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client."¹¹⁶ Rule 3.3(b) specifies that the obligations to make these disclosures "apply even if compliance requires disclosure of information otherwise protected by Rule 1.6."¹¹⁷

109. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1) (1998). As this Article was written, the modest relaxation of these restrictions adopted at the August 2001 Annual Meeting of the ABA had not yet received formal and final approval. See, e.g., Press Release, *supra* note 99; see also *Ethics 2000 Commission*, *supra* note 102.

110. MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (1998).

111. *Id.*

112. MODEL RULES OF PROF'L CONDUCT R. 1.16(a) (1998).

113. MODEL RULES OF PROF'L CONDUCT R. 1.16(b)(1)-(2) (1998).

114. Indeed, without a client's consent, Model Rule 1.8(b) would seem to explicitly preclude such disclosures after withdrawal. It provides: "A lawyer shall not use information relating to representation of a client to the disadvantage of the client . . . except as permitted or required by Rule 1.6 or Rule 3.3." MODEL RULES OF PROF'L CONDUCT R. 1.8(b) (1998).

115. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 16 (1998) (noting that Rules 1.6, 1.8(b), and 1.16(d) do not prevent "the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like."); see also MORGAN & ROTUNDA, *supra* note 69, at 149-50.

116. MODEL RULES OF PROF'L CONDUCT R. 3.3(a) (1998).

117. *Id.* at 3.3(b). Model Rule 3.4 also prohibits misconduct relating to evidence and

Taken together, the contradictory and far from self-explanatory commands of the Model Rules, particularly Rules 1.2, 1.6, 1.8, 1.16, 3.3, and 4.1, create difficult, if not insoluble, moral, legal, and ethical difficulties for lawyers. In many circumstances, these dilemmas could be resolved by permitting disclosures to prevent or rectify harms suffered by third parties because of crimes or frauds committed by the lawyers' clients. This solution seems particularly appropriate when clients have utilized lawyers' services in perpetrating the harm.

Rule makers in a majority of the states seem to have reached the same conclusion. Analysis conducted by the Attorneys' Liability Assurance Society, Inc. (ALAS) suggests that although the rules vary among the states, the overwhelming majority permit disclosures broader than permitted by the ABA's version of Rule 1.6.¹¹⁸ Only ten Model Rules jurisdictions prohibit any disclosure to prevent client misconduct.¹¹⁹ Conversely, nearly three-quarters of the Model Rules states permit some type of disclosure,¹²⁰ and nine states require it to prevent at least one category of harms.¹²¹ Two allow disclosures to prevent any crime or fraud,¹²² eighteen permit disclosures to prevent any crime,¹²³ six to prevent any fraud,¹²⁴ and twenty-eight to prevent criminal frauds.¹²⁵ Two Model Rules states *require* disclosures to prevent any crime,¹²⁶ and two require disclosures to prevent non-criminal frauds.¹²⁷

The Model Rules states have enacted varying rules governing disclosures to *rectify* harms caused by clients' past, present, and ongoing misconduct. Once again, some states' rules are more permissive than are the ABA's

testimony in court. For example, Rule 3.4(a) commands that lawyers shall not "unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act" MODEL RULES OF PROF'L CONDUCT R. 3.4(a) (1998).

118. See MORGAN & ROTUNDA, *supra* note 69, at 133-53 (containing ALAS charts presenting this analysis).

119. *Id.* at 135-49 (citing Alabama, California, Delaware, District of Columbia, Kentucky, Louisiana, Missouri, Montana, Rhode Island, South Dakota).

120. *Id.* at 149.

121. *Id.* (citing Arizona, Connecticut, Florida, Illinois, New Jersey, North Dakota, Vermont, Virginia, and Wisconsin).

122. *Id.* at 135-49 (citing Nevada and Pennsylvania).

123. *Id.* (citing Arizona, Arkansas, Colorado, Idaho, Illinois, Indiana, Kansas, Maine, Michigan, Minnesota, Mississippi, North Carolina, Oklahoma, South Carolina, Vermont, Washington, West Virginia, and Wyoming).

124. *Id.* (citing Alaska, Hawaii, Maryland, Massachusetts, North Dakota, and Utah).

125. *Id.* (citing Alaska, Arizona, Arkansas, Colorado, Connecticut, Hawaii, Idaho, Illinois, Indiana, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, New Hampshire, New Jersey, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Carolina, Utah, Vermont, Washington, West Virginia, and Wyoming).

126. *Id.* (citing Florida and Virginia).

127. *Id.* (citing New Jersey and Wisconsin).

rules,¹²⁸ and as a group they have adopted just about all possible variations. Thirteen states permit disclosures to rectify harms caused by prior misconduct using a lawyer's services and require disclosures to rectify ongoing client crimes or frauds.¹²⁹ Two states permit disclosures to rectify both prior misconduct using a lawyer's services and for ongoing client crimes or frauds.¹³⁰ One state requires disclosures to rectify harm caused by both prior and ongoing crimes or frauds.¹³¹ Disclosure is permitted to rectify harms from past misconduct but not for ongoing misconduct in one state,¹³² while twenty-five jurisdictions permit disclosures to rectify only ongoing misconduct.¹³³

When the varying state rules under the Model Rules and the Model Code are combined, it appears that state rule makers have deviated from the ABA's restrictive position on the scope of permissible disclosures. By one estimate, forty-one states have adopted rules "that go further in encouraging or requiring lawyers to report wrongdoing."¹³⁴ One well-known professor commented that the ABA delegates who opposed the amendments to Rule 1.6 in 2001 "seem to be fighting a rear-guard battle and losing."¹³⁵

If he is correct, then the duty to keep client confidences, and the evidentiary privilege for attorney-client communications, are becoming more porous than their strongest adherents believe is beneficial for attorneys or their clients. A member of the Ethics 2000 Commission who opposed the proposed amendments to Rule 1.6(b)(2) has argued that eroding the rule of confidentiality "would have poisoned the [attorney-client] relationship because the client would be less apt to share information that might help his case."¹³⁶

Ultimately, this argument rests upon a client-centered theory that rigorous confidentiality encourages clients to speak openly with their lawyers, which in turn allows the attorneys to provide better representation, which includes advising clients to refrain from criminal or fraudulent conduct that the client felt free to discuss because of the confidential nature of the relationship.¹³⁷

128. See generally MODEL RULES OF PROF'L CONDUCT R. 1.2(d), 1.6(a), 3.3(a)(2), 4.1(b) (1998).

129. MORGAN & ROTUNDA, *supra* note 69, at 135-49 (citing Connecticut, Maryland, Massachusetts, Michigan, Nevada, New Jersey, Oklahoma, Pennsylvania, South Dakota, Texas, Utah, Virginia, and Wisconsin).

130. *Id.* (citing North Carolina and North Dakota).

131. *Id.* (citing Hawaii).

132. *Id.* (citing Minnesota).

133. *Id.* (citing Alabama, Alaska, Arizona, Arkansas, Colorado, Delaware, District of Columbia, Florida, Idaho, Illinois, Indiana, Kansas, Louisiana, Maine, Mississippi, Missouri, Montana, New Hampshire, New Mexico, Rhode Island, South Carolina, Vermont, Washington, West Virginia, and Wyoming).

134. Blumenthal, *supra* note 101.

135. McDonough, *supra* note 100 (quoting Ronald Rotunda).

136. Blumenthal, *supra* note 101 (quoting Lawrence Fox).

137. See MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 4 (1998). Comment 4 asserts this

Thus, confidentiality benefits both the client, who can be steered away from impermissible conduct, and society.

A less benign explanation can be found, however. In our litigious society, it is not hard to imagine that rules permitting lawyers to disclose client crimes and frauds will ultimately lead to more lawsuits against those lawyers. The incentives to sue lawyers may be irresistible if a legal justification can be found. One example should suffice. The lawyers (and their professional liability policies) may be the only deep pockets left to sue when their clients are caught and punished for their crimes, or have filed for bankruptcy. It is not a terribly large analytical leap for a plaintiff to charge that once a lawyer was permitted to disclose information to prevent or rectify a crime or fraud, she had a duty to do so. This argument has particular power when applied to situations in which the client has used the lawyer's services in the transaction.

Apparently I am not alone in believing that an erosion of the duty of confidentiality is likely to produce more lawsuits (and perhaps criminal prosecutions) naming lawyers as defendants.¹³⁸ Perhaps this is one reason the ABA delegates have struggled to preserve this privilege; ultimately, it protects the lawyers whose clients commit crimes or carry out frauds.

IV. CONCLUSION

This Article has examined two recent attempts to erode privileges long held by attorneys. The recent amendments to the federal discovery rules are designed to weaken lawyers' longstanding control of that process. In a very real sense, rule makers within the federal system have acted to reduce lawyer authority and autonomy during pretrial discovery. If these new rules are enforced, judges will become more active in managing pretrial discovery and lawyers will operate within new rule generated constraints.

theory: "A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter." *Id.*

It is interesting to note that even as it proposed changes permitting attorneys to breach this duty, the Ethics 2000 Commission embraced this idea. Its proposed amendments to Model Rule 1.6 included the following passage:

The lawyer needs this [embarrassing or legally damaging] information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

PROPOSED RULE 1.6, *supra* note 98, at cmt. 2.

138. See McDonough, *supra* note 100 (quoting Ethics 2000 Commission member Lawrence Fox: "As soon as we lose the shield of confidentiality, we will be the target of litigation.").

At about the same time, rule makers within the ABA have resisted most attempts to permit lawyers greater latitude in disclosing client crimes or frauds to prevent or rectify harms done to third parties. Opponents of greater disclosures in the ABA House of Delegates have won another battle within that organization, but they may have lost the more important "war." The rules adopted by a majority of states to regulate the behaviors of lawyers already may permit the kind of disclosures rejected by the ABA in 2001. The duty of confidentiality and the attorney-client privilege have not been abandoned in these jurisdictions, but they have been weakened. And experience with prior reform efforts suggests that in the wake of the Ethics 2000 debate, some states may adopt the more permissive rules rejected by the ABA.¹³⁹ If a restrictive duty of confidentiality is a privilege, it may be one that is already lost for many lawyers.

139. See, e.g., McDonough, *supra* note 100 (referring to statements by Geoffrey Hazard, primary reporter for the Kutak Commission, which proposed similar amendments nearly twenty years ago).

