Fraud, Withdrawl & Disclosure: What to Tell the Lawyer Who Steps Into My Shoes

Mark A. Riekhof
FRAUD, WITHDRAWAL & DISCLOSURE: WHAT TO TELL THE LAWYER WHO STEPS INTO MY SHOES

I. INTRODUCTION

Tammy is a lawyer working for the firm of Deebs & Kelmer. Fulco, a major petroleum manufacturer, retains Tammy to litigate claims relating to its refining operations. In its refining operations, Fulco produces four different waste products, each with a different toxicity level. The disposal of this waste is regulated by government standards. Each different waste must be disposed of in a different government dump site with great price variances between the sites; as the toxicity of the waste increases, so does the price of disposal. Tammy learns that Fulco has “mismarked” its toxic waste products in the past so that they may be dumped in the lower-grade dump sites. By mislabeling the waste, the company has saved hundreds of thousands of dollars. The lower-grade waste sites, however, are not equipped to treat the more toxic wastes, and eventually this waste, known to be carcinogenic, will seep into the groundwater of nearby communities.

Tammy immediately informs the company’s board of directors and informs them of the illegality of this practice and the possible ramifications for the communities involved. She also informs them of the detriment it could cause Fulco if the information ever became public. The Chairman of the Board thanks her for bringing the practice to the company’s attention and assures her that it will not continue.

1. The following example is purely hypothetical. Any similarity this hypothetical example may have to real events or cases is purely coincidental. Hypothetical examples similar to this are used by legal ethics teachers and scholars across the country.

2. According to the Model Rules of Professional Conduct, a corporate lawyer is required to go to the highest acting authority within the corporation and inform that person of the legal violation. See Model Rules of Professional Conduct Rule 1.13(b)(3) (1983). The lawyer must also inform the constituents that the client is the corporation and the actions being taken are adverse to the interests of the corporation. See id. at Rule 1.13(c); see also California Rules of Professional Conduct Rule 3-600 (1994).
Tammy, not reassured by the Chairman's promises, decides to withdraw from the representation of Fulco (the situation would be no different if, upon hearing what Tammy knew, Fulco had terminated her services), and the company accepts her withdrawal without hesitation. The Chairman, however, reminds Tammy that all information about the corporation she obtained while working there is strictly confidential. Specifically, he requests that all documentation regarding the illegal toxic dumping be delivered directly to him. The Chairman makes a special point to admonish Tammy regarding her duty to keep that information confidential.

Fulco now retains the legal services of attorney Pat Rasic to replace Tammy. He makes no inquiry as to why she has decided to terminate her representation. Tammy now faces the dilemma of whether or not to tell Pat why she withdrew from representing Fulco.

This hypothetical example presents issues a lawyer confronts when he or she withdraws or is discharged from employment after having discovered a client's criminally fraudulent activity. The scenario poses many problems for Tammy. Can she or must she disclose the information to parties who will be affected by the dumping? Can, or must, she take action personally against Fulco? What are her obligations to Fulco now that she has withdrawn? The specific question this comment attempts to resolve is what a lawyer who has withdrawn from representation because of her client's fraudulent activity can and/or should be able to tell subsequent counsel about that activity.

What Tammy will be able to tell her successor counsel will depend, in large part, upon the ethical rules that have been adopted by the jurisdiction in which she is practicing. Although the ABA has attempted to draft a set of rules that provide recognizable guidelines for lawyers to follow, none of the several drafts have been entirely adequate, especially with respect to confidentiality and termination of employment. The American Bar Association's (ABA) *Model Code of Professional Responsibility* (Model Code) and *Model Rules of Professional Conduct* (Model Rules) address the issue only by

The California Rules of Professional Conduct (California Rules) are similar to the Model Rules, and they also offer little guidance.

Lawyers today, however, need a definitive set of rules that will not leave them guessing when faced with an ethical dilemma. The walls that once protected attorneys from suits by third parties and from indemnification are beginning to crumble, and the threat of a malpractice suit constantly hangs over their heads. Consequently, lawyers are practicing law from a defensive posture, unsure of their ethical responsibilities. This benefits neither the clients nor the public at large. When the lawyer is unsure of what his or her ethical responsibilities are, he or she must make an educated guess. Guesswork leads to inconsistency. Clients then become hesitant to reveal everything to their lawyer, fearing that the lawyer may reveal it to the public. There are also instances when the general public is harmed because of a lawyer's decision that it was his or her duty not to reveal information that eventually caused detriment to a third party.

Given that the ethical codes provide no significant guidance, this comment focuses on the dilemma a lawyer faces when he or she is forced to withdraw from the representation of a client. Specifically, this comment addresses what the withdrawing attorney must tell the attorney who steps into his or her shoes.

To answer this question, this comment analyzes what the current ethical rules provide in the way of guidance for "corporate" lawyers when their representation is termi-

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4. Neither the Model Code nor the Model Rules directly address the issue of disclosure to subsequent counsel. The rules relating to confidentiality, corporate clients, and termination of representation touch upon the issue, but none are directly on point. See generally Freedman, supra note 3.

5. See, e.g., Slotkin v. Citizens Casualty Co., 614 F.2d 301 (2d Cir. 1979) (holding the lawyer liable to a third party for false statements he made to them in the course of his representation of the party they were suing); Seidel v. Public Serv. Co. of New Hampshire, 616 F. Supp. 1342 (D.N.H. 1985) (denying motion to dismiss claims against law firm for violation of federal securities laws); see also generally Stephen Gillers, Ethics that Bite: Lawyers' Liability to Third Parties, 13 Litig. 8 (Winter 1987) (discussing new theories under which lawyers have been held liable).

nated. By analyzing the various ethical rules that attempt to give lawyers guidance in this area, the shortcomings of each will become apparent. Section II outlines what each of the ethical codes provides concerning confidentiality, withdrawal, and the special obligations of corporate lawyers. These codes do not specifically address what, if anything, a corporate lawyer may tell his or her successor. Rather, the lawyer's duties with respect to her successor counsel must be inferred from what the codes do provide. Section III describes various consequences a lawyer could face depending on whether he or she chooses to disclose the client's illegal activity to subsequent counsel or to remain silent. In short, none of these outcomes are very appealing. Therefore, section IV introduces an ethical code that, if adopted by the ABA, would provide lawyers clear guidance for obligations to both subsequent counsel and former client, thus providing greater protection for lawyers, clients, and the general public.

II. BACKGROUND

Before delving into the problems with the ethical codes as they currently exist, it is important to understand their origins. Each set of rules is different in significant ways from its predecessors and contemporaries, and it is these differences that are often the most confusing to lawyers, law students, and laymen alike. These differences can most easily be understood by examining the unique concerns prevalent at

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7. Most jurisdictions have adopted a specific ethical rule regarding the representation of an organization. The so-called "entity theory" makes the organization itself the lawyer's client. See infra text accompanying notes 67-71.

8. There have been various sets of rules that lawyers have used to guide themselves when faced with ethical dilemmas. The ABA's Canons of Legal Ethics was adopted in 1908 and used, with various modifications and additions, for more than half a century. In 1969, the ABA adopted the Model Code of Professional Responsibility. The Model Code was quickly adopted almost verbatim by most states. There was immediate negative response to the Code, leading to the drafting of the Model Rules of Professional Responsibility, which, after much discussion and redrafting, was adopted by the ABA in 1983. States have been much slower to adopt this set of rules, and when they do, it is often with significant modification. See generally infra text accompanying notes 10-93.

9. One example of these differences can be seen in how each set of rules treats confidentiality. The Canons of Legal Ethics are significantly more lenient in terms of confidentiality than either the Model Code or the Model Rules. The California Rules of Professional Conduct, although appearing to adopt much of the language of the Model Rules, are far more stringent. See infra text accompanying notes 76-80.
the time of their drafting. In addition, an analysis of the changes that were adopted, as well as those that were suggested to the ABA but not formally accepted, provide insight into why the rules appear as they do today.

A. The Beginning: The Canons of Professional Ethics (1908)

The Canons of Professional Ethics (Canons), adopted in 1908, were the ABA's first attempt to regulate the conduct of lawyers. They were not, however, drafted solely for the purpose of improving the ethical conduct of lawyers. As Monroe H. Freedman, a leading ethics expert, stated:

[The Canons] were motivated in major part by the large numbers of Catholic immigrants from Italy and Ireland and Jews from Eastern Europe beginning in about 1880. Just as labor unions of the time joined in demanding restrictive immigration laws to restrain competition for jobs, the established bar adopted educational requirements, standards of admission, and "canons of ethics" designed to maintain a predominantly native-born, white, Anglo-Saxon, Protestant monopoly of the legal profession.

Thus, phrases such as "[t]he lawyer should aid in guarding the Bar against the admission to the profession of candidates unfit or unqualified because deficient in either moral character or education" were read broadly to blanket whole groups.

10. Canons 1-32 were adopted in 1908. Canons 33-47 are amendments that were adopted at later dates. See generally Canons of Professional Ethics (1936).


12. ABA Canons of Professional Ethics Canon 29 (1908). Canon 29 provides:

Lawyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession, and should accept without hesitation employment against a member of the Bar who has wronged his client. The counsel upon the trial of a cause in which perjury has been committed owe it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities. The lawyer should aid in guarding the Bar against the admission to the profession of candidates unfit or unqualified because deficient in either moral character or education. He should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice.

Id.
of people and thereby exclude them. It is from these auspicious beginnings that rules governing a lawyer's "ethical" conduct arose.

Regardless of the motivation behind promulgating the Canons, they still served an important regulatory function. Not only were the Canons the sole adopted code of ethics for over fifty years, but they also served as a springboard for the ethical codes that followed. Specifically, the Canons provided three sections that are relevant for the purposes of this comment: Canon 37 (Confidences of a Client), Canon 41 (Discovery of Imposition and Deception), and Canon 44 (Withdrawal From Employment as Attorney or Counsel). As

15. Id. at Canon 41.
16. Id. at Canon 44. The entire text of the rule reads as follows:

   The right of an attorney or counsel to withdraw from employment, once assumed, arises only from good cause. Even the desire or consent of the client is not always sufficient. The lawyer should not throw up the unfinished task to the detriment of his client except for reasons of honor or self-respect. If the client insists upon an unjust or immoral course in the conduct of his case, or if he persists over the attorney's remonstrance in presenting frivolous defenses, or if he deliberately disregards an agreement or obligation as to fees or expenses, the lawyer may be warranted in withdrawing on due notice to the client, allowing him time to employ another lawyer. So also when a lawyer discovers that his client has no case and the client is determined to continue it;
with most of the Canons, each of these are broad, general statements that allowed the lawyer substantial discretion.

1. **Confidentiality under the Canons**

Canon 37 was significant because it allowed disclosure of client confidences where the client intended to commit a criminal act.\(^{17}\) The Canon stated that when it was "[t]he announced intention of a client to commit a crime . . . [the lawyer] may properly make such disclosures as may be necessary to prevent the act or protect those against whom it is threatened."\(^{18}\) By using the broad terminology "a crime" rather than designating any specific types of criminal activity, as in subsequent codes, the lawyer governed by the Canons was free to disclose any and all potential future crimes her client was intending to commit. Criminal activity is thus broad enough to cover even non-felonious criminal conduct, and if applied today this standard would, for instance, allow a lawyer to disclose the fact that a client intended to speed on the freeway on the way home from work.

2. **Fraud**

Canon 41 provided even more expansive authority for the lawyer to reveal client confidences in cases of client fraud.\(^{19}\) This freedom of disclosure, however, was short-lived. Shortly after these canons were added in 1928, there was a great deal of discussion that they created inherent conflicts in the rules. Specifically, it was argued that these later canons authorized disclosure where it was previously not allowed.\(^{20}\) These conflicts were resolved in 1953 with ABA Formal Opinion 287.\(^{21}\)

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17. *Id.* at Canon 37.
18. *Id.* (emphasis added).
19. *Id.* at Canon 41. *See also supra* note 16 for the text of this Canon.
20. Canon 6, adopted in 1908, provides that it is the lawyer's "obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences . . . ." *CANONS OF PROFESSIONAL ETHICS* 6 (1908). The amendments, added in 1928, appear to contradict this rule. *See supra* text accompanying notes 15-19.
The ABA Committee on Professional Ethics stated in the Opinion that the lawyer was obligated to try to persuade the client to reveal the truth, but if the client refused, the lawyer's duty was to remain silent.  

3. Withdrawal

Initially, the Canons provided very liberal language regarding withdrawal from client representation. In 1965, however, the ABA Committee on Professional Ethics in Opinion 314 prohibited the lawyer from "waving the red flag." This essentially precluded the lawyer from withdrawing if withdrawal would inform the court that the client was engaging in prohibited activity.

In sum, the Canons, as initially drafted, allowed the lawyer a wide range of options when confronting potentially criminal conduct by her client. These options were severely limited as the legal community began to place more value on the client's right to have disclosures remain confidential. The lawyer's ethical beliefs took a back seat to the client's right to have confidential communications remain confidential.


In 1969 the ABA adopted the Model Code of Professional Responsibility. The preface to the Model Code stated that the Canons "failed to give adequate guidance, lacked coherence, omitted reference to important areas of practice, and did not lend themselves to meaningful disciplinary enforcement." The Model Code attempted to resolve these deficiencies. The Code was adopted, with some minor variations, by almost all jurisdictions. 

22. See Freedman, supra note 3, at 91.
23. See Canons of Professional Ethics Canon 44 (1936). See also supra note 16.
24. Canons of Professional Ethics Canon 44. See supra note 16.
25. See Freedman, supra note 3, at 93.
26. See id. at 4.
27. See id.
28. See id.
however, the Model Code came under almost immediate criticism.\textsuperscript{29}

The Model Code suffered from many of the same problems as the Canons. The Code was criticized for being "internally inconsistent, ambiguous, unrealistic, and harmful to effective service to clients."\textsuperscript{30} In spite of these criticisms, however, the Model Code is still followed today, with modifications, in approximately half of the states.\textsuperscript{31}

1. \textit{Confidentiality under the Model Code}

The principal confidentiality provision in the Model Code is Disciplinary Rule (DR) 4-101.\textsuperscript{32} The Rule is broken down into four parts. First, the Rule defines both the information to be protected and the scope of the duty.\textsuperscript{33} Second, it sets out certain exceptions.\textsuperscript{34} Third, it provides for disclosure and use of confidential information by the lawyer's agent.\textsuperscript{35} The question of client fraud is treated separately in DR 7-101(B)(1).\textsuperscript{36} Finally, DR 4-101 redefines confidential information. It breaks it down into two subcategories: confidences and secrets.\textsuperscript{37} A "confidence" is information that would be protected under the attorney-client privilege, and a "secret" is information acquired in the professional relationship that the client has requested remain inviolate or that would be damaging to the client if released.\textsuperscript{38} For purposes of disclosure under DR 4-101, however, this distinction makes very little difference. The lawyer's duty, in either case, subject to an exception, is to keep the information confidential.\textsuperscript{39} Even though the distinction matters little in terms of DR 4-101, it

\begin{thebibliography}{99}
\bibitem{29} One expert stated that the Code was "incoherent, inconsistent, and unconstitutional," and noted that application in malpractice of the \textit{Model Code's} ambiguous and contradictory provisions would be "unfair to members of the bar." \textit{Id.} at 4.
\bibitem{30} \textit{Id.}
\bibitem{31} \textit{See id.} at 91.
\bibitem{32} \textit{MODEL CODE OF PROFESSIONAL RESPONSIBILITY} DR 4-101 (1969).
\bibitem{33} \textit{Id.}
\bibitem{34} \textit{Id.}
\bibitem{35} \textit{Id.}
\bibitem{36} \textit{See generally} \textit{Hazard \& Konia}, \textit{supra} note 6, at 242.
\bibitem{37} \textit{MODEL CODE OF PROFESSIONAL RESPONSIBILITY} DR 4-101 (1969).
\bibitem{38} \textit{See infra} text accompanying notes 46-52.
\bibitem{39} \textit{See Model Code of Professional Responsibility} DR 4-101(B) (1969).
\end{thebibliography}
does have importance in how those terms relate to other rules. 40

DR 4-101(C) lists those situations in which the lawyer may reveal confidences or secrets. 41 It appears from the language of DR 4-101(C)(3) that the lawyer is permitted to reveal information demonstrating his or her client's intention to commit a crime and the details necessary to prevent the client from committing a crime. DR 4-101(C)(2) also allows the lawyer to reveal "[c]onfidences or secrets when permitted under Disciplinary Rules or required by law or court order." 42 Furthermore, DR 4-101(C)(4) provides a self-defense exception in which the lawyer is allowed to reveal confidential information to exonerate herself, if she is implicated in her client's criminal conduct. 43

2. Fraud

The ability to reveal confidences in a wide range of circumstances is also bolstered by the rule regulating confidences in situations of client fraud, DR 7-101. 44 As it was originally drafted, DR 7-101 not only allowed, but mandated that if a lawyer received information demonstrating his or her client had perpetrated a fraud upon a person or tribunal in the course of the representation, he or she should reveal the fraud to the affected party. 45 A clause was added subsequently, however, providing that the lawyer should not reveal information relating to the fraud if that information was re-

40. See infra text accompanying notes 46-52.
41. DR 4-101(C) begins with the phrase: "A lawyer may reveal." See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C) (1969) (emphasis added). By using permissive language, lawyers have been left to themselves to decide whether to reveal client confidences.
42. Id. at DR 4-101(C)(2).
43. Id. at DR 4-101(C)(4).
44. Id. at DR 7-101.
45. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102 (B) (1969). A lawyer who receives information clearly establishing that:
   (1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication.
   (2) A person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.
Id. (emphasis added). The emphasized portion was added to the original text in 1974. See FREEDMAN, supra note 3, at 93. The change reflected the ABA's desire to have the communications kept confidential. See id.
ceived as a "privileged communication." This language left open the question of whether a "secret" was a privileged communication. That question was resolved by the ABA Committee on Professional Ethics Opinion 341 (1975). This Opinion reaffirmed Opinion 287 and established that the ethic of strict confidentiality was here to stay.

3. Withdrawal

A lawyer working under the Model Code is guided in the matter of withdrawal by Disciplinary Rule 2-110. The Rule is broken down into three subparts. Subsection (A) provides general guidelines regarding withdrawal. Subsection (B) provides for mandatory withdrawal. Subsection (C) provides for permissive withdrawal.

The key provision in Subsection (B) is section (2), which mandates a withdrawal where the lawyer "knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule." Thus, if the lawyer knows he or she will violate other rules in the course of representation, his or her obligation is to withdraw.

Under Subsection (C), a lawyer is permitted to withdraw under six different circumstances. A lawyer may withdraw if his or her client: (1) insists on presenting a warrantless claim; (2) personally seeks to pursue an illegal course of conduct; (3) insists the lawyer pursue an illegal course of conduct; (4) renders it unreasonable for the lawyer to continue the representation; (5) insists on a course of conduct contrary to the advice of the lawyer; or (6) deliberately ignores a fee arrangement. All of the six appear to be linked directly to client conduct. Therefore, the ability of the lawyer to withdraw is ultimately determined by the conduct of the client. In all cases, however, the lawyer is bound by DR 2-110(A),

46. See Model Code of Professional Responsibility DR 7-102 (B) (1974).
48. See supra text accompanying notes 10-31.
50. Id. at DR 2-110(A).
51. Id. at DR 2-110(B).
52. Id. at DR 2-110(C).
53. Id. at DR 2-110(B)(2).
54. See id.
55. See id. at DR 2-110(C)(1-6).
56. Id.
which requires the lawyer to do as little harm as possible to the client upon withdrawal.\footnote{57} 

4. Organization as Client

The only significant reference in the Model Code to an organization’s clients is Ethical Consideration (EC) 5-18.\footnote{58} EC 5-18 is the first attempt at creating the “entity theory” with respect to the corporation. No comparable provision exists in the Canons. EC 5-18 establishes that the lawyer representing an organization represents the organization itself, as an entity, and not any of its constituents.\footnote{59} Unfortunately, establishing the entity theory is all that EC 5-18 accomplishes. It does not guide the lawyer in situations where there is a conflict of interest with constituents of the corporation, illegality on the part of the constituents, or duties owed to the corporation upon withdrawal. Consequently, because of the limited application of this particular code section, it provides corporate lawyers with very little guidance.

C. The Model Rules of Professional Conduct

The Model Code came under almost immediate criticism after its inception. In 1977, only eight years after promulgating the Model Code, the ABA appointed a commission to reconsider it.\footnote{60} Critics stated that the Code was “incoherent, inconsistent, and unconstitutional and . . . application in malpractice actions of the Model Code’s ambiguous and contradictory provisions would be unfair to members of the bar.”\footnote{61} The Commission concluded that the best solution was to draft an entirely new set of ethical rules. This decision culminated in the ABA’s adoption of the Model Rules of Professional Conduct in 1983.\footnote{62}

Because the Model Rules are discussed in depth later in the comment, the relevant rules are discussed only briefly

\footnote{57. See id. at DR 2-110(A).} \footnote{58. Model Code of Professional Responsibility EC 5-18 states in relevant part: “A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity.” Model Code of Professional Responsibility EC 5-18 (1981).} \footnote{59. Id.} \footnote{60. See Freedman, supra note 3, at 4.} \footnote{61. See id. at 4-5.} \footnote{62. See generally Model Rules of Professional Conduct (1983).}
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here. Those rules are Model Rule 1.6 (Confidentiality of Information), Model Rule 1.13 (Organization as Client), and Model Rule 1.16 (Declining or Terminating Representation).

1. Confidentiality of Information

Model Rule 1.6 was the most controversial rule during the drafting debates.63 In its final form, Model Rule 1.6 is virtually a flat ban on a lawyer disclosing information relating to his or her representation of a client.64 Although Model Rules 1.6(b)(1) and (2) provide limited exceptions to this ban,65 they are significantly less permissive than even the disclosures allowed under the Model Code. Like the Model Code, the Model Rules permit the lawyer to disclose, but do not mandate that he or she do so.66

2. Organization as Client

Model Rule 1.13 goes much further than any previous ethical rule in defining both the organization as the client and the lawyer's obligations to the organization as a client.67 The Rule was designed by the corporate bar for the protection of its members and their clients.68 The Rule was passed with virtually no alteration, because the corporate bar threatened not to agree to the whole body of the Model Rules if Model Rule 1.13 was altered from the way the corporate bar

63. See Freedman, supra note 3, at 99.
64. Model Rule 1.6(a) reads: "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)." Model Rules of Professional Conduct Rule 1.6(A) (1983).
65. Model Rule 1.6(b) provides:

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 harm; or

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

Id. at Rule 1.6(B).
66. See id.
67. See id. at Rule 1.13.
68. See Freedman, supra note 3, at 197-203.
designed it. See id. The corporate bar's attempt to shield itself and its clients from liability was at first a powerful tool. The public's ever-increasing demand that professionals be held accountable, however, has begun to take its toll. Corporate lawyers who were once able to stand on the firm ground of protection granted to corporations are finding that they may not be able to walk away when their clients are mired in the quicksand of public ridicule.

3. Withdrawal

Model Rule 1.16 expands the reasons for which a lawyer may seek permissive withdrawal. Unlike Model Code 2-110, the Model Rules allow the lawyer to withdraw without

69. See id.

70. "[P]ersons not in privity with the lawyer, including the investing public and the client's adversaries or opponents, had no claim. The lawyer's status as a lawyer afforded him a shield against liability that no other participant enjoyed." Gillers, supra note 5, at 8; see also infra text accompanying notes 88-93.

71. Lawyers are not the only professionals who have seen an increase in actions by third parties. Accountants have also realized these increased risks. See, e.g., First Federal Savings and Loan Assoc. of Pittsburgh v. Oppeinheim, Appel, Dixon & Co., 629 F. Supp. 427 (S.D.N.Y. 1986). But see Bily v. Arthur Young & Co., 834 P.2d 745 (1992) (holding that (1) auditors owe no general duty of care to certain non-clients for negligent misrepresentation; (2) plaintiffs must demonstrate privity of contract for negligence actions against accountants; and (3) claims by non-client third parties against accountants are limited to those based on a negligent misrepresentation theory).

72. Model Rule 1.16(B) provides:

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

(1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(2) the client has used the lawyer's services to perpetrate a crime or fraud;

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

(4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(6) other good cause for withdrawal exists.

Model Rules of Professional Conduct Rule 1.16(B) (1983).
cause, so long as withdrawal would not harm the client.\textsuperscript{73} Thus, withdrawal is not as client-driven as it is under the Model Code.\textsuperscript{74} Model Rule 1.16 also allows for six circumstances where the lawyer may withdraw even if the withdrawal will have adverse consequences for the client.\textsuperscript{75} The mandatory withdrawal provisions\textsuperscript{76} are essentially the same as those provided in the Model Code.\textsuperscript{77}

D. The California Rules of Professional Conduct

1. Confidentiality

In California, the lawyer's duty of confidentiality is not addressed in the current California Rules of Professional Conduct (California Rules).\textsuperscript{78} Instead, it appears in the California Business and Professions Code.\textsuperscript{79} Under section 3. Confidentiality

\textsuperscript{73} Id.\textsuperscript{74} See supra text accompanying notes 28-59.\textsuperscript{75} Model Rules of Professional Conduct Rule 1.16(B) (1983). See also supra note 72.\textsuperscript{76} Model Rule 1.16(A) provides:

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law;

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

(3) the lawyer is discharged.

Model Rules of Professional Conduct Rule 1.16(A) (1983).\textsuperscript{77} See supra notes 53-54.\textsuperscript{78} But see California Rules of Professional Conduct Rule 3-100 (Proposed draft 1992). This rule reads in relevant part:

(A) It is the duty of a member to maintain inviolate the confidence, and, at every peril to himself or herself, to preserve the secrets of a client.

. . .

(C) A member is not subject to discipline who reveals a confidence or secret:

(1) With the consent of the client; or

(2) To the extent the member reasonably believes necessary to prevent the commission of a criminal act that the member believes is likely to result in death or substantial bodily harm.

Id. This rule has been proposed to the California Supreme Court for approval and will likely be approved in the near future.

\textsuperscript{79} In California, confidentiality is regulated by California Business and Professions Code § 6068(e). This provision states: "It is the duty of an attorney to do all of the following: . . . (e) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." Cal. Bus. & Prof. Code § 6068(e) (West Supp. 1994).
6068(e) of the Business and Professions Code, it is very clear that the lawyer is bound to keep all client confidences absolutely confidential. At present, however, there are no exceptions similar to those contained in the Model Rules that allow a lawyer practicing in California to disclose client confidences.

2. Withdrawal

If a lawyer has taken all of the actions required by Rule 3-600 and still believes that constituents of the organization will act in an unlawful manner, he or she may, or in some instances must, withdraw according to California Rule 3-700. California Rule 3-700 (Termination of Employment) lists those situations where withdrawal is permissive and those where withdrawal is mandatory. The permissive withdrawal section is essentially identical to that of Model Rule 1.16. The mandatory withdrawal provision is similar to those incorporated in both the Model Code and Model Rules. It defines three situations in which the lawyer, regardless of the consequences to the client, must withdraw.

80. See id.
81. See id.
82. These include asking for reconsideration of the matter and referring the matter to the highest authority that can act on behalf of the corporation. See California Rules of Professional Conduct Rule 3-600(B) (1989).
83. Id. at Rule 3-600(C):
If, despite the member's actions in accordance with paragraph (B), the highest authority that can act on behalf of the organization insists upon action or a refusal to act that is a violation of law and is likely to result in substantial injury to the organization, the member's response is limited to the member's right, and, where appropriate, duty to resign in accordance with Rule 3-700.

Id.
84. Id. at Rule 3-700.
85. Id. at Rule 3-700(C). See also supra note 72 and accompanying text.
86. California Rules of Professional Conduct Rule 3-700(B) (1989). This rule requires the following:
A member representing a client before a tribunal shall withdraw from employment with the permission of the tribunal, if required by its rules, and a member representing a client in other matters shall withdraw from employment, if:
(1) The member knows or should know that the client is bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person: or
(2) The member knows or should know that continued employment will result in violation of these rules or of the State Bar Act; or
Although these situations are narrowly defined, 3-700(B) pro-
vides a lawyer with more guidance than does a rule that is
only permissive.

3. Organization as Client under the California Rules

The California Rules do have a specific provision that ad-
dresses corporate clientele.\textsuperscript{87} \textit{California Rules of Professional
Conduct} Rule 3-600 is similar to Model Rule 1.13 but is more
restrictive with respect to what a lawyer may reveal. The key
difference is that a lawyer representing a corporate client in
California is bound by the confidentiality provisions of Cali-
ifornia Business and Professions Code section 6068(e).\textsuperscript{88}

E. Opening the Door to a Lawyer's Liability

There was a time when lawyers were almost immune to
lawsuits filed against them by third parties.\textsuperscript{89} The so-called
privity barrier prevented actions by non-clients.\textsuperscript{90} The
landmark case of \textit{MacPherson v. Buick Motor Co.}\textsuperscript{91} began the
gradual unraveling of the privity barrier in personal injury
cases. It was not until recently, however, that this barrier
began to fall in professional services cases. \textit{Biakanja v. Ir-
vings,}\textsuperscript{92} decided in 1958, was the first case to break the privity
barrier between lawyers and non-clients.\textsuperscript{93} Since that time,
the scope of a lawyer's potential liability to non-clients has
continued to expand.\textsuperscript{94} The courts have also been willing to
expand the types of damages that can be collected by clients
who sue their former attorneys.\textsuperscript{95}

The expansion of potential liability to lawyers has not
been followed by serious expansions or revisions in ethical

\begin{itemize}
  \item (3) The member's mental or physical condition renders it unrea-
        sonably difficult to carry out the employment effectively.
\end{itemize}

\textit{Id.}

\textsuperscript{87} \textit{See id.} at Rule 3-600.

\textsuperscript{88} "[T]he member shall not violate his or her duty of protecting all confi-
dential information as provided in Business and Professions Code section 6068,
subdivision (e)." \textit{Id.} at Rule 3-600(B).

\textsuperscript{89} \textit{See HAZARD \& KONIAK, supra note 6, at 89.}

\textsuperscript{90} \textit{See id.}

\textsuperscript{91} 111 N.E. 1050 (N.Y. 1916).

\textsuperscript{92} 320 P.2d 16 (Cal. 1958).

\textsuperscript{93} \textit{See id.}

\textsuperscript{94} \textit{See Nancy Lewis, Lawyers' Liability to Third Parties: The Ideology of
Advocacy Reframed, 66 Or. L. Rev. 801 (1987); see also Gillers, supra note 5.}

\textsuperscript{95} \textit{See, e.g., Tara Motors v. Superior Court, 276 Cal. Rptr. 603 (1990).}
rules. Lawyers are being forced to make very difficult ethical decisions knowing that a lawsuit could result no matter which course is followed.

III. Analysis

The steady progression (or, in some instances, regression) of ethical rules has been driven in large part by the changing concerns of the ABA. The concerns have been short-sighted, however, and the rules self-serving. Consequently, the climate lawyers are faced with today is one of almost outright hostility from the general public.

This portion of the comment highlights some of the difficulties today's rules present to lawyers. Specifically, the hypothetical example presented in the introduction section will be analyzed under the Model Code, Model Rules, and California Rules. Although none of these rules specifically address a lawyer's disclosure obligations to successor counsel, an analysis of what these rules do provide will yield an understanding of what a lawyer can or must do under the rules as they stand in their current form.96

A. The Model Code

1. Fulco as the Organization

As noted earlier, the Model Code minimally addresses the issue of representing organizations as clients.97 Tammy represented the entity, Fulco. Consequently, according to Model Code EC 5-18, she owes her "allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity."98 It is the entity, not those who instigated the illegal activity, to whom Tammy owes her allegiance. Therefore, the Model Code may be interpreted as requiring Tammy to inform successor counsel of the Board's illegal activity, thus fulfilling the mandate of Model Code EC 5-18 to keep Fulco's interests "para-

96. Although particular states may have adopted a version that does not precisely match any of these three ethical codes, most versions vary only to a slight degree, thus rendering an analysis of each code both useful and relevant to most jurisdictions. See generally Hazard & Koniak, supra note 6.
97. See supra text accompanying note 59.
mount.” In this respect, Fulco would be better protected if subsequent counsel knew of the previous illegal activity.

It may be also be argued persuasively, however, that by telling successor counsel of the criminal activity, Fulco may not be able to find someone willing to act as corporate counsel. Therefore, informing potential successors of the illegal conduct may not comport with the paramount goal of preserving Fulco’s interests. In sum, Model Code EC 5-18 offers very little in the way of guidance for Tammy. Although it places the interests of Fulco above those of any of its constituents, it is unclear how this affects Tammy’s ability to disclose to successor counsel.

2. Withdrawal from Representation of Fulco

The withdrawal provisions of the Model Code are not as vague as are those of Model Code EC 5-18. Model Code DR 2-110 clearly outlines those instances where withdrawal is mandatory and where it is permissive. Tammy sought a permissive withdrawal allowable under Model Code DR 2-110(C)(5). She would be obligated to take “reasonable steps to avoid foreseeable prejudice to the rights of [her] client, including giving due notice to [her] client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.” Once again, the question becomes, would disclosing Fulco’s criminal activity to successor counsel prejudice Fulco’s rights? As with Model Code EC 5-18, the argument cuts both ways. Disclosure may be seen as prejudicing the client, but non-disclosure may also prejudice the client’s position. Consequently, Tammy must decide whether to disclose, with essentially no guidance from the ABA.

99. Id.
100. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110 (1981).
101. Id. at DR 2-110(C)(5). Model Code DR 2-110(C)(5) reads: “If DR 2-110(B) is not applicable, a lawyer may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because [h]is client knowingly and freely assents to termination of his employment.” Id.
102. Id. at DR 2-110(A)(2).
3. *Fulco and Confidentiality*

In contrast to the previous Model Code sections, the confidentiality provisions of Model Code DR 4-101\(^\text{103}\) do give some guidance to Tammy. Unless the confidential information falls into an exception, Tammy is forbidden to reveal the information.\(^\text{104}\) DR 4-101(C)(1) allows disclosure if Tammy received consent.\(^\text{105}\) Clearly, however, she has not received consent. In fact, she has been admonished specifically to keep the information confidential.

DR 4-101(C)(3) allows Tammy to reveal information when it is the intention of her client to commit a crime and the information is necessary to prevent the crime.\(^\text{106}\) Fulco has not manifested an intention to commit a crime. Rather, Fulco has committed only past violations. Although Tammy may believe the practice will continue in the future, the highest authority within the organization gave assurance that it will not. Therefore, Model Code DR 4-101(C)(3)\(^\text{107}\) does not offer a basis that permits Tammy to reveal the information.\(^\text{108}\)

Model Code DR 4-101(C)(4) provides what is commonly called the self-defense exception.\(^\text{109}\) The central questions

\(103.\) *See supra* notes 36-41.

\(104.\) *Model Code of Professional Responsibility* DR 4-101 (1981). DR 4-101 provides in relevant part:

- **(B)** Except when permitted under DR 4-101(C), a lawyer shall not knowingly:
  - (1) Reveal a confidence or secret of his client . . . .
- **(C)** A lawyer may reveal:
  - (1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.
  - (2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.
  - (3) The intention of his client to commit a crime and the information necessary to prevent the crime.
  - (4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

\(105.\) *Id.*

\(106.\) *Id.*

\(107.\) *Id.*

\(108.\) If the Chairman of the Board had admitted the intent to continue the practice of illegal dumping, Tammy would be able to reveal this information. Any time a client manifests the intention to commit a crime, Model Code DR 4-101(C)(3) permits disclosure so that it may be prevented. *See id.* at DR 4-101(C)(3).

\(109.\) *See supra* note 104.
surrounding this exception are its scope and what triggers a lawyer’s ability to use it.110 Generally it has been held that a lawyer may not reveal confidential information in self-defense where that information will be used to instigate a lawsuit against the client.111 Tammy could reveal the information to a neutral party, who would in turn keep the information confidential. By doing so, Tammy protects herself in the event of a possible lawsuit against Fulco. If at some time in the future Tammy is named as a co-defendant in an action against Fulco, she could present the information previously given to the neutral party to demonstrate her lack of liability in the matter.112 Successor counsel, however, is not a neutral party in the hypothetical example. As Model Code DR 4-101(C)(4) has been interpreted, Tammy would have no right to reveal the information to successor counsel under the guise of self-defense.

Under Model Code DR 4-101(C)(2), Tammy would also be allowed to reveal if permitted by some other Disciplinary Rule, or if required by law or court order.113 The only conceivable Rule that might allow Tammy to reveal the information is Model Code DR 7-102(B)(1).114 This Rule allows the lawyer to reveal limited information in the case of client fraud.115 If a lawyer receives information that the client has perpetrated a fraud upon a person or tribunal, and the client refuses to rectify the fraud, the lawyer is allowed to reveal the fraud to the affected individual or tribunal.116 Undoubtedly, Fulco has committed a fraudulent act. Successor counsel, however, is neither the affected party nor the tribunal. Even if successor counsel could be considered an affected party, the final clause of DR 7-102(B)(1) places a further limitation on what information may be revealed.117 If the information regarding the fraud was received by counsel as a privileged communication, nothing about it may be revealed.118

111. See Hazard & Koniak, supra note 6, at 250-52.
112. See id.
113. See supra note 104.
115. Id.
116. See supra note 45.
117. See supra note 45.
118. See supra note 45.
As such, Tammy would not have the right to reveal anything to Pat regarding Fulco's fraudulent activities.

4. Applying the Model Code: A Summary

The Model Code allows a lawyer very limited discretion as to when and to whom he or she may reveal confidential communications. The ABA generally has held to the ethic of strict confidentiality. But Pat, as successor counsel, is in a unique position. He will also be privy to privileged communications from Fulco. He is given the same responsibilities as Tammy, and Tammy must make the transition as smoothly as possible so as not to prejudice Fulco. But does this limit her ability to tell successor counsel of her reasons for withdrawal? Because the incriminating files were given directly to the Chairman of the Board of Directors, and Pat has not asked for any explanation of why Tammy is withdrawing, Tammy is probably barred from telling Pat of Fulco's illegal conduct under the Model Code. She was specifically told the information was to remain confidential, and there is no exception in the Model Code that permits her to disclose the information voluntarily to Pat.

B. The Model Rules

1. Fulco as the Organization

The Model Rules have a far more detailed rule regarding the representation of an organization than the Model Code. Model Rule 1.13 defines the organization as the entity that the lawyer represents. It then specifies the procedures the lawyer must follow when he or she becomes aware of illegal conduct by the constituents of the organization. Tammy substantially followed all of these procedures. The actions she took were “designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization.”

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121. Id. at Rule 1.13(a). Rule 1.13(a) states: “A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.” Id.
122. Id. at Rule 1.13(b)-(d).
She referred the matter to the highest authority that can act on behalf of the organization. Although the authority gave assurances that the practice will stop, it is her belief that Fulco, under the direction of the present Board, will continue the illegal dumping. She therefore elected to withdraw, and this withdrawal must be executed in accordance with Model Rule 1.16.\footnote{Id. at Rule 1.13(c). Rule 1.13(c) states in relevant part:

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with rule 1.16.

Id.}

2. Withdrawal from Representation of Fulco

The relevant provisions pertinent to withdrawal in Model Rule 1.16 are subdivision (d)\footnote{Id. at Rule 1.16(d). This rule states:

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.

Id.} and comment 9.\footnote{Id. at Rule 1.16 cmt. 9. "Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law." Id.}

Subdivision (d) tells Tammy very little in terms of what her obligations are to successor counsel. On its face, it describes only what her obligations are to Fulco. Comment 9 requires Tammy to mitigate the consequences of her withdrawal to the client. The comment suggests that her obligation is to remain silent about the illegal conduct. Informing successor counsel of the conduct essentially puts Fulco in the same situation it was in once Tammy found out about the illegalities. This hardly seems to mitigate the consequences of her withdrawal.\footnote{127. It should also be noted, however, that there is nothing in the rule that suggests Tammy must leave Fulco in a better situation.} An argument can be made, however, that Pat needs to be informed of the illegal conduct in order for him to represent Fulco properly. There is nothing in Model Rule 1.16, however, that expressly permits Tammy to inform him.
Likewise, although there is an implication that suggests she should not inform Pat, there is nothing that mandates her silence.

3. Fulco and Confidentiality

Because neither the organization nor the withdrawal provisions offer Tammy any firm guidelines regarding disclosures, Tammy must look to a different provision of the Model Rules. That provision is Model Rule 1.6.128 Model Rule 1.6 is essentially the ethical equivalent of the attorney-client privilege. The first aspect to note about the Rule is that it begins with an absolute ban on revealing information related to the representation.129 Secondly, the exceptions to this ban are very limited and strictly permissive. None of the exceptions mandate that a lawyer reveal information relating to the representation.130

Model Rule 1.6 is one of the most controversial provisions of the Model Rules, with much controversy surrounding the scope of the Rule.131 In one sense the Rule is extremely broad. As explained by comment 5, the Rule “applies not merely to matters communicated in confidence by the client

128. Model Rules of Professional Conduct Rule 1.6 (1983). Rule 1.6 states:

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

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

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

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

Id.

129. Id.

130. As a caveat, it must be noted that Model Rule 1.6 comment 19 appears to suggest that if ordered by a court, the lawyer must divulge the requested information. In relevant part it states: “[t]he lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.” Model Rules of Professional Conduct Rule 1.6 cmt. 19 (1983). This is only a comment, however, and does not have any binding effect.

131. See id. at Rule 1.6(b)(1).
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.”132 Consequently, anything Tammy learns about Fulco during her representation is subject to the Rule, including information regarding Fulco’s illegal toxic dumping.

Model Rule 1.6 is extremely narrow in the sense that the exceptions to the Rule are very limited. As adopted, the Rule provides for only two instances when a lawyer is allowed to reveal confidential communications.133 The first exception is Model Rule 1.6(b)(2),134 which, like Model Code 4-101(C)(3)135 provides a "self-defense" exception. Disclosure, however, must be as limited as possible.136 Model Rule 1.6 comment 17 demands the following:

[D]isclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.137

Under this exception, the lawyer is not required to wait until charges are formally brought against him or her before he or she may respond.138 Once an assertion of complicity is made, the lawyer is allowed to present his or her defense.139 As noted earlier in the discussion of Model Code 4-101(C)(3), however, the self-defense exception does not provide an independent means by which Tammy is able to disclose to Pat.140 Revealing the information to Pat does not conform to the limitations suggested by comment 17, because Pat is not a party who would “need” to know the information in order for Tammy to establish her defense.

132. Id. at Rule 1.6 cmt. 5.
133. See supra note 128.
134. See supra note 128.
135. See supra text accompanying note 41.
137. Id.
138. Id.
139. Id.
140. See supra text accompanying note 41.
The other exception to the flat ban on disclosure is Model Rule 1.6(b)(1), permitting disclosure only where the lawyer reasonably believes it 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." 141 This is an extremely limited exception due to the specific prerequisites for its application: the client’s conduct must not yet have occurred; the threat to the endangered party must be imminent; and the lawyer must reasonably believe that the client will carry out the threat. 142

Given the Rule’s broad application and its narrow exceptions, a lawyer guided by Model Rule 1.6(b)(1) has very limited disclosure obligations. 143 The version finally adopted by the ABA delegates, however, is far more limited than others that were proposed. In particular, the Revised Final Draft of June 30, 1982, was significantly more lenient with respect to voluntarily disclosed confidential information. 144 As proposed, Rule 1.6(b)(1) allowed the lawyer to disclose when she reasonably believes it necessary "to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm, or in substantial injury to the financial interests or property of another." 145 This addition would have protected against future client fraud, not just criminal conduct, as in the current Rule. Perhaps even more significant in the proposed draft was subsection (b)(2). 146 Proposed Model Rule 1.6(b)(2) would have allowed the lawyer to disclose where he or she believed it reasonably necessary "to rectify the consequences of a client’s criminal or fraudulent act in the furtherance of which the lawyer’s services had been used." 147 This allowance for disclosure to rectify a client’s past crime or fraud, though qualified by the fact that the lawyer’s services

141. See supra note 128.
142. See Model Rules of Professional Conduct Rule 1.6(b)(1), and comments (1983).
143. See supra notes 128, 130. See also Model Rules of Professional Conduct Rule 1.6 cmt. 15 (1983).
144. Model Rules of Professional Conduct Rule 1.6 (Revised Final Draft, 1982).
145. Id. (emphasis added).
146. The proposed draft, unlike the adopted draft, had four subdivisions under subsection (b). The "self-defense" exception in the proposed draft appeared as Model Rule 1.6(b)(3). See id. at Rule 1.6(b)(3).
147. Id. at Rule 1.6(b)(2).
must have been used in furtherance of the act, still would have allowed lawyers much greater discretion as to when they could disclose. This proposal, however, was rejected by a substantial margin of the voting delegates. 148 This demonstrates the ABA's continued insistence upon maintaining strict confidentiality. Consequently, the lawyer is allowed only very limited discretion to disclose as provided by Rule 1.6. In Tammy's situation, the Rule does not provide her with an exception that would permit her to disclose Fulco's past violations to Pat.

4. Comment 15: A Loophole?

There is one other possible exception to Model Rule 1.6 that may allow Tammy to disclose confidential information concerning Fulco. Model Rule 1.6 comment 15 149 advises that a lawyer is not prohibited from making a "noisy withdrawal." 150 This comment, although not allowing lawyers to "blow the whistle," attempts to give them considerable latitude in "waving the red flag." 151 Thus, in an indirect manner, the lawyer is allowed to send "signals" to third parties that his or her former client committed criminal or fraudulent acts. 152 By giving notice of withdrawal and disaffirming documents and opinions, the withdrawing lawyer may send a warning to those parties that may be affected by his or her former client's illegal conduct. For Tammy, this would mean she could inform Pat that she has withdrawn or disaffirmed any of the work she did for Fulco concerning the toxic dumping. She may not be able to inform him of the contents of such documents, but a noisy withdrawal would inform him of

148. The margin was 207 to 129. See Freedman, supra note 3, at 99.


After withdrawal the lawyer is required to refrain from making disclosure of the clients' confidences, except as otherwise provided in Rule 1.6. Neither this Rule nor 1.8(b) nor Rule 1.16(d) prevents 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.

Id.


152. See supra note 127.
the documents' existence and the possibility of illegal conduct by Fulco.

Comment 15 was heavily criticized because of the way it was tacitly incorporated into the Rule\(^{153}\) and because of its seeming contradiction of the Rule itself.\(^{154}\) A recent ABA opinion, however, appears to legitimize the exception.\(^{155}\) Indeed, ABA Formal Opinion 92-366\(^{156}\) may even make it a lawyer's duty to raise the red flag.\(^{157}\) Although neither Model Rule 1.6 comment 15 nor ABA Formal Opinion 92-366 are binding, the two combined create a strong argument that a withdrawing lawyer may send a signal to interested third parties that there is a problem.

Formal Opinion 92-366, however, is new, remains untested, and is predicated upon a comment that was tacitly incorporated into the Model Rules.\(^{158}\) Accordingly, its overall impact remains unclear. If the Opinion is not overruled or is merely ignored by members of the ABA, it does provide Tammy with a limited means of informing Pat of Fulco's illegal conduct. Tammy, however, is able to signal Pat only if she actually performed work for Fulco related to the illegal conduct. If she merely stumbled upon the information and never produced any documents relating to the matter, there is nothing for Tammy to subsequently disaffirm upon withdrawal and thus no way for her to "raise the red flag."

C. The California Rules of Professional Conduct

1. Fulco in California

Analyzing the hypothetical example under the current California Rules is relatively simple in comparison to the Model Rules. When representing Fulco as an organization,

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153. See Freedman, supra note 3, at 100. Freedman explains that the comment was adopted at a later meeting without the same attention received by Model Rule 1.6. Id. Because of this, a small group of ABA members were able to create the exception and bury it in the comment. Id.

154. See id.


156. Id.

157. One commentator stated: "Rules prohibiting a lawyer from assisting in client fraud and requiring a lawyer to cease representation when continuing would result in any ethical violations may trigger a duty to alert interested parties of the withdrawal." Randall Samborn, 'Noisy Withdrawal' Held a Duty, Nat'l. L. J., Jan. 18, 1993, at 3.

158. See supra note 153.
Tammy's duties to Fulco are dictated by California Rule 3-600.\textsuperscript{159} This Rule expressly provides that "the member shall not violate his or her duty of protecting all confidential information as provided in Business and Professions Code section 6068, subdivision (e)."\textsuperscript{160} Under \textit{California Business and Professions Code} section 6068(e),\textsuperscript{161} Tammy has no right to reveal the information regarding the toxic dumping to Pat. In fact, she is under a strict duty to maintain inviolate the client's confidences at all costs.\textsuperscript{162} She may withdraw according to the provisions of California Rule 3-700,\textsuperscript{163} but there is no exception in any of the current California Rules that allows Tammy to reveal Fulco's illegal dumping to Pat.

\section{Proposed Rule 3-100}

If the California Supreme Court adopts proposed Rule 3-100,\textsuperscript{164} it will give lawyers practicing in California two circumstances where they may reveal confidential information and not be subject to disciplinary action. The first of these exceptions is when the client consents to the lawyer revealing the information.\textsuperscript{165} The second, which is similar to Model Rule 1.6(b)(1),\textsuperscript{166} provides that a member may reveal a confidence or secret "[t]o the extent the member reasonably believes necessary to prevent the commission of a criminal act that the member believes is likely to result in death or substantial bodily harm."\textsuperscript{167} Although the California Rule is different from Model Rule 1.6(b)(1), as there is no requirement that the resulting death or substantial bodily harm be "imminent,"\textsuperscript{168} it is still a very limited exception. Even if Tammy were operating under Proposed Rule 3-100,\textsuperscript{169} it would not

\begin{footnotesize}
\begin{enumerate}
\item[159.] \textit{California Rules of Professional Conduct} Rule 3-600 (1989).
\item[160.] \textit{Id.} at Rule 3-600(B).
\item[161.] \textit{Cal. Bus. \\& Prof. Code} § 6068(e) (West Supp. 1994). \textit{See also supra} note 80.
\item[162.] \textit{See supra} note 80.
\item[163.] \textit{California Rules of Professional Conduct} Rule 3-600(C) (1989). \textit{See also supra} text accompanying notes 80-88.
\item[164.] \textit{See supra} note 78.
\item[165.] \textit{See supra} note 78.
\item[166.] \textit{Model Rules of Professional Conduct} Rule 1.6(b)(1) (1983).
\item[168.] \textit{See} \textit{Model Rules of Professional Conduct} Rule 1.6(b)(1) (1983); \textit{see also} \textit{California Rules of Professional Conduct} Rule 3-600 (1989).
\end{enumerate}
\end{footnotesize}
provide her any means whereby she could disclose Fulco's past violations to Pat.

IV. PROPOSAL

It is not enough, nor is it fair, to put the entire burden of disclosure upon withdrawing counsel. Successor counsel should share in the responsibility. Because each counsel has the possibility of incurring liability, each should be charged with an obligation regarding the transfer of confidential information between them. Therefore, two Rules are proposed. The first Rule specifies withdrawing counsel's obligations to disclose to successor counsel. The second Rule outlines successor counsel's duty to discover information from withdrawing counsel. Analyzing the hypothetical example under these proposed Rules demonstrates how they alleviate the problems currently surrounding withdrawal and the disclosure of confidential information between withdrawing and successor counsel.

A. Proposed Rule for Withdrawing Counsel

This Rule would operate as an amendment to Model Rule 1.6.\textsuperscript{170} A similar version could be adopted into the California Rules and the ethical rules of other jurisdictions. The proposed Rule, identified by underlined text, could read as follows:

Proposed Rule 1.6 Confidentiality of Information

\begin{quote}
(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

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

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon allegations in any
\end{quote}

\textsuperscript{170} MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983). Model Rule 1.6 would remain unchanged with the exception of the additions included in the proposal.
proceeding concerning the lawyer's representation of the client;\textsuperscript{171} or

(3) to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services had been used,\textsuperscript{172} or

(4) to, upon withdrawal, inform successor counsel of all conduct by the client reasonably related to the ongoing representation.

Analyzing the hypothetical example under this Rule, it is clear that Tammy may inform Pat of Fulco's illegal conduct. Under Proposed Rule 1.6(b)(4), she could inform him of the illegal dumping because that information is reasonably related to the ongoing representation of Fulco.

Proposed Rule 1.6(b)(3) revives 1.6(b)(2) from the Revised Final Draft of June 1982.\textsuperscript{173} Proposed Rule 1.6(b)(3) allows a lawyer to nullify work he or she may have performed for the client without knowing its illegal nature. Thus, if Tammy performed services for Fulco that were in furtherance of the illegal dumping, she is able to release confidential information to rectify that harm. Specifically, Tammy may directly inform those parties affected by the dumping.

Proposed Rule 1.6(b)(1) also supports the conclusion that Tammy is able to inform Pat of Fulco's illegal conduct. By including fraudulent, rather than just criminal, acts, and by eliminating the word "imminent," the Rule is far more expansive. Her effort to prevent the client from continuing to dump toxic chemicals falls under Proposed Rule 1.6(b)(1) because the continued practice will eventually result in substantial bodily harm and/or death to the community residents adjacent to the dumping site. Thus, if Tammy reasonably believes Fulco will continue its illegal dumping, she is able to inform successor counsel.

B. Proposed Rule for Successor Counsel

The proposed Rule would operate as an amendment to Model Rule 1.16.\textsuperscript{174} The amendment would read as follows:

\textsuperscript{171} Model Rules of Professional Conduct Rule 1.6(b) (1983).
\textsuperscript{172} Adapted from Model Rules of Professional Conduct Rule 1.6 (Revised Final Draft 1982).
\textsuperscript{173} Id.
\textsuperscript{174} Model Rules of Professional Conduct Rule 1.16 (1983).
Proposed Rule 1.16 Declining or Terminating Representation

(a) When it is reasonable to do so, a lawyer shall not represent a client whose prior counsel has withdrawn without first consulting the client's prior counsel regarding his or her reasons for withdrawing from the representation.\(^{175}\)

This proposal places an affirmative duty on successor counsel at the very least to attempt to question withdrawing counsel regarding the reasons behind the termination of the representation. If withdrawing counsel's reasons are purely personal, he or she need only say so. If counsel is withdrawing due to the client's conduct, however, as in this hypothetical example, he or she may then disclose the factual circumstances surrounding the withdrawal to successor counsel, allowed under Proposed Model Rule 1.6.\(^{176}\) If withdrawing counsel refuses to disclose the reasons for withdrawal, this should raise a red flag to successor counsel. Successor counsel can then question the client about the reasons for prior counsel's withdrawal and decide, based upon the client's response, whether to accept the representation.

V. CONCLUSION

Ethical rules promulgated and enforced by the ABA and state bar associations are designed to provide guidelines for lawyers. The rules are intended to furnish lawyers with direction when they are faced with ethical dilemmas. Unfortunately, in many areas they have failed to do so. One such area is disclosure to subsequent counsel upon withdrawal.

During the course of representation, there is no time when it is more important for lawyers to be clear about their ethical obligations than at the point where they withdraw from the representation. This is especially true if the client has engaged in past illegal activity. Yet the current ethical codes provide little guidance. It is left to the individual law-

\(^{175}\) The current Model Rule 1.16(a) would become Model Rule 1.16(b). Similarly, the rest of the subsections would change their respective subsection letters. There would be no other alteration to Model Rule 1.16.

\(^{176}\) But note that the withdrawing lawyer is bound by Model Rule 4.1 not to make a false statement regarding why he or she is withdrawing. Model Rules of Professional Conduct Rule 4.1 (1983). If he or she refuses to disclose the reasons behind the withdrawal, he or she may not make a false statement as to why he or she is withdrawing.
yers to read between the lines and to make an educated guess regarding whether they may disclose to their successors.

The bar associations need to adopt new rules, or amend those currently promulgated, to better protect the lawyers who practice under their direction. The modifications suggested in this comment provide substantially greater guidance regarding a lawyer's disclosure obligations to successor counsel, thus clarifying a lawyer's overall obligations to clients and enhancing the bar's service to the general public. Without this type of regulation, lawyers will be forced to continue to play guessing games regarding their ethical duties. This type of piecemeal approach helps no one, least of all the legal profession.

Mark A. Riekhof