On Ethics and Expediency: The ABA's Dubious Vote on Disclosure of Client Fraud

BY CHARLES E. LUNDBERG

INTRODUCTION

The local legal community was in an uproar last fall when the Minneapolis Star & Tribune published an article by Richard Harris criticizing the legal profession generally in the harshest terms. Harris suggested that lawyers were pretty much a worthless lot, leeches on the body politic, doing much more harm than good. Several attorneys responded publicly to Harris, pointing out various fallacies and unwarranted assumptions underlying his vituperative attack on the practice of law. One commentator, however, Professor Douglas Heidenreich of the William Mitchell College of Law, acknowledged that Harris may well be justified in criticizing the "hired gun" mentality that seems to characterize the practice of law in our adversary system.

Professor Heidenreich expanded on this point in his "Inside View" column in the last issue of *The Hennepin Lawyer*, where he asked several difficult and provocative questions about the ultimate justifications for and limits of the adversary system. Does the adversary system put too much emphasis on winning, at the expense of other ideals such as justice? Do the fundamental goals of zealous advocacy — an unbounded devotion to advancing the client's cause, winning at any cost short of illegality — necessarily result in the best possible legal system? What are the costs of such a system, not only in terms of general social good, but also in terms of its effect on the mental health of lawyers themselves, who daily must adopt this win-at-all-costs mindset?

Similar questions about the limits of zealous advocacy have recently been aired on a national level. The American Bar Association, in an attempt to adopt a new code of ethics for lawyers, has become embroiled in a hotly contested argument over just how far an attorney's devotion to his client should extend.

The issue has been raised in its starkest form in connection with the debate on an attorney's continued duty of confidentiality upon discovering that a client has involved the lawyer in fraudulent activity. What should an attorney do when he or she learns that a client is using or has used the professional relationship to commit a fraud on an innocent third party? Should the attorney in such a situation have either the *right* or the *duty* to reveal the deception, if doing so would prevent or help rectify the results of a fraud that the professional relationship has been used to accomplish? Or should the attorney be required to keep information about the client's fraud secret, even if common and basic notions of right and wrong suggest that the attorney's own ethical integrity has been damaged, and can only be restored by preventing or rectifying the fraudulent activity that he or she has unwittingly helped to perpetrate?

These questions go to the very root of the adversary system, and the attorney's role in it. In a situation involving client fraud[1], there is a direct conflict between two normally unquestioned ethical duties: the duty to protect confidential client information, and the duty to guard the integrity of the legal system against those who would use an officer of the court to defraud another party.[2] It is perhaps not surprising, then, that the proposals of the ABA Model Rules of Professional Conduct ["Kutak Report"][3] dealing with this question have sparked widespread controversy in the legal community.

At its February 1983 meeting, the ABA House of Delegates voted to reject Rule 1.6 of the Kutak Report, which would have allowed but not required disclosure of information necessary to prevent a serious fraudulent act by the client or to rectify a client's fraud that the attorney's professional skills had been used to commit.[4] Instead, the ABA adopted a rule, proposed by the American College of Trial Lawyers ["ACTL"], that would discipline the attorney for disclosing the client's fraud in either of these situations.[5]

The practical ramifications of this action have been vigorously attacked in the press.[6] The public seems to have the most difficulty accepting the fact that an attorney may reveal client confidences if necessary to collect a legal fee, but not to prevent or rectify the consequences of a

fraud which the attorney has been or is being used to commit. Some commentators have questioned why the lawyer should in effect be made an unwilling accomplice in the client's continuing fraud, or the continuing cover-up of a completed fraud. More cynical writers have suggested that the ABA's decision can only be explained by reference to attorneys' own financial interest in their client's fraudulent schemes.

While public popularity is not necessarily the *sine qua non* of a proposed code of ethics for lawyers, the fact that many intelligent and morally sensitive non-lawyer commentators find a provision of the proposed ethical code to be ethically unsatisfactory does raise questions about whether the issue has been adequately considered. We are, after all, dealing with a question of *ethics* — morally right and wrong behavior — a subject that one presumably does not need a law school education to understand. If, as seems to be the case, the ultimate moral issue underlying the client fraud question generally finds only lawyers on one side, and the non-lawyer public on the other, one might reasonably wonder whether becoming an attorney has a significant effect on a person's ability to deal with moral issues, either enhancing one's moral sensitivity, allowing the attorney to understand moral imperatives that are incomprehensible to mere mortals, or having the opposite effect.[7]

This article will suggest that the ABA House of Delegates erred in adopting the ACTL's position on the client fraud issue instead of the recommendations of the Kutak Report. The Kutak Report's resolution of the client fraud question was carefully thought out and amply supported both by sound argument and legal and ethical authority. In contrast, the position taken by the ACTL and the other groups that have attacked the Kutak Report client fraud rules simply ignores the central ethical question raised by the

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[1]For purposes of this article, "client fraud" denotes a situation in which a client uses the professional skills and advice of an attorney to assist in the perpetration of a fraudulent act resulting in substantial economic loss to a third person, without the lawyer's knowledge. The critical predicate in this definition is "use" — this analysis applies only where the lawyer has materially *aided* in the commission of the client's fraud.

[2]See Note, *Client Fraud and the Lawyer — An Ethical Analysis*, 62 Minn. L. Rev. 89 & n.2 (1977):

> Because the lawyer plays an essential role in our system of justice, he is given certain rights and privileges. With these comes an obligation to the legal system — an ethical imperative to guard the processes of justice. The Code of Professional Responsibility recognizes this concept: "Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our legal system. A consequent obligation of lawyers is to maintain the highest standards of ethical conduct." *ABA Code of Professional Responsibility*, Preamble.

[3]The ABA Commission on Evaluation of Professional Standards was created to review and propose changes in the ABA Model Code of Professional Responsibility. In January, 1980, the Commission issued a Discussion Draft of the Model Rules of Professional Conduct. After an extensive period of review and comment, a Proposed Final Draft of the Model Rules was released in May, 1981. A Final Draft of the Model Rules was submitted to the ABA House of Delegates in the summer of 1982.

The Commission on Evaluation of Professional Standards, and its proposed Model RKULES OF Professional Conduct, have come to be known in the legal community by the name of the Commission's Chairman, the late Robert J. Kutak. For purposes of distinguishing the Model Rules proposed by the Kutak Commission from the Model Rules as adopted in February by the ABA, this article will denote the former as the "Kutak Report".

[4]RULE 1.6 Confidentiality of Information

(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 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;

(2) to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services had been used;

(3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, or to establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer based upon conduct in which the client was involved; or

(4) to comply with other law.

[5]The ACTL proposal revised Rule 1.6(b), by deleting subsections (b) (2) and (b) (4) in their entirety, limiting (b) (1) to allow disclosure only to prevent imminent death or substantial bodily harm, and broadening the scope of (b) (3):

(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 the client's allegations in any legal proceeding concerning the lawyer's professional conduct for the client.

[6]*See, e.g.*, Stone, *Are Lawyers So Special?*, U.S. News and World Report, February 28, 1983, at 76; O'Brien, *It's No Secret, ABA's Rule Puts Privilege Over Sense*, St. Paul Pioneer Press, February 20, 1983, at 3A; and the following editorials collected in USA Today, February 15, 1983: *ABA's Turns Lawyers Into Accomplices;* Rotunda, *Fraud May Continue, Even If Lawyer Knows; Justice Be Damned — Full Fees Ahead.*

[7]Not all lawyers, of course, accept the conclusion that an attorney's duty of confidentiality should extend to a client fraud situation. Whether the lawyer is actively engaged in practicing law appears to have some effect on how he or she analyzes the question. While academic lawyers generally recognize the limits of attorney confidentiality in a client fraud context, it appears that a near-absolute position on confidentiality is supported by many practicing attorneys, and most strongly by trial lawyers.

What is it about the practice of law that could account for this alignment of views? Might the adversary system have a dulling effect on an attorney's sensitivity to ethical concerns? Practicing lawyers, especially trial attorneys, work daily in the context of a system which requires a zealous devotion to the representation of the client. Young attorneys often need to be reminded that their only role is that of an advocate, responsible not to evaluate the rightness or wrongness of their client's ends, but merely to accomplish them. *See generally*, D. Heidenreich, *Inside View*, Hennepin Lawyer, January-February, 1983, at 3.

In light of this, it is not surprising that trial attorneys experience severe cognitive dissonance where concepts of ethics constrain their otherwise unbounded loyalty to the client's cause. Morally sensitive attorneys, recognizing this fact, will take this effect of the adversary system on trial attorneys' moral perceptions into account in analyzing arguments made by such attorneys in favor of an absolute rule of confidentiality.

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client fraud dilemma, relying instead on dire warnings that proposed Rule 1.6 would result in a radical redefinition of the attorney-client relationship, and would be inconsistent with the attorney-client privilege. From these premises, the ACTL draws the conclusion that the principle of attorney confidentiality is so important that an attorney must *never* be able to reveal a fraud in which the relationship has been used.

The premises the ACTL relies on to support its conclusions are demonstrably incorrect. Moreover, the ACTL position fails to deal with the fact that, in a particular case, an attorney confronted by the client fraud dilemma may recognize a compelling personal moral obligation to prevent or rectify the fraud that he or she has unwittingly helped commit. Since the ACTL amendment to Model Rule 1.6 will absolutely forbid in such situations precisely what morality requires, it is to that extent a bad rule — a rule that the attorney would be morally justified in disobeying.

The fact that an ethical rule adopted by the ABA could be subject to attack on classical civil disobedience grounds suggests that something is desperately wrong with the ABA's ethical analysis. To the extent that the ABA Model Rules are inconsistent with basic and common notions of ethics, the ABA simply cannot justifiably claim to be promulgating an *ethical* code, without raising a much more fundamental and troubling question — whether being an ethical attorney is inconsistent with being an ethical person.

This last issue, of course, is the ultimate question that lawyers must face in deciding what *should* be the rule governing an attorney's conduct in a client fraud situation. If, as the ACTL suggests, "the realities of legal practice" require an ethical rule that is directly contrary to the dictates of considered moral judgments, then perhaps it is time for the ABA to reconsider what are, or should be, the realities of legal practice.

THE CLIENT FRAUD PROBLEM

It must be recognized that the risk of becoming involved in client fraud may well be an inevitable part of the practice of law, just as the risk of a legal malpractice claim is. Lawyers must realize that there exists a class of people — i.e., a class of prospective clients — who are ready and willing to enrich themselves by defrauding and deceiving others; who are continually thinking up creative, innovative methods of swindling others; and who have no compunction at all about involving a lawyer in their fraudulent designs. Lawyers must also recognize that certain types of fraud either require or would be substantially assisted by the special legal skills that only an attorney can offer. While some clients intent on committing fraud may be able to find attorneys willing to risk their careers by knowingly assisting in the deception — for the right price, of course — perhaps most of those clients who want to use an attorney to commit a fraud will have to dupe the attorney, gaining his or her professional assistance without revealing their fraudulent motives.

Thus defined, client fraud appears to be a significant problem in the legal system today. Litigation alleging fraud in which attorneys have played a material role certainly seems to be occurring with increasing frequency. The *OPM Leasing Services* case, for example, which was extensively reported in the press just weeks before the ABA's February meetings, provides a textbook case study of the client fraud problem.[5]

In 1980, the New York law firm of Singer Hutner Levine & Seeman learned that its client, OPM Leasing Services, Inc., had committed a massive fraud involving various computer lease transactions in which Singer Hutner had been intimately involved as attorney. Realizing its predicament, Singer Hutner retained ethics counsel — Henry Putzel, an expert in legal ethics — to advise the firm on how to proceed. Putzel advised Singer Hutner that, under the Code of Professional Responsibility, they could in no event reveal the client's fraud; they could, however, continue to represent OPM, as long as no further fraud was committed. After receiving assurance from Myron Goodman, the principal shareholder of OPM Leasing (and the perpetrator of the fraud), that the deception had indeed ceased, Singer Hutner continued on in the representation.

The fraud, of course, had not stopped, and Singer Hutner lawyers continued unknowingly to aid the client in perpetrating even more fraud through further lease transactions. When the firm learned of this, as well as other information indicating that Goodman could not continue to operate OPM Leasing without continued fraudulent transactions, they did finally decide to withdraw from the representation. But, Putzel advised, they still could not reveal the information, even to prevent what almost certainly would be a continuation of the fraud through OPM's new attorneys, who would, of course, be entirely ignorant of any facts indicating fraud. In addition, the withdrawal had to be accomplished gradually, in such a way as not to alert anyone that anything was wrong. Finally, after the withdrawal, when Singer Hutner was contacted by a senior attorney from OPM's new law firm, who happened to be an old and close friend of Mr. Hutner, Putzel told Mr. Hutner that he could not even warn the new attorney of the imminent danger that his firm, too, was becoming involved in OPM's ongoing fraud.

The *OPM Leasing* case vividly illustrates the problems posed by the client fraud issue. It demonstrates the anomalous results of an absolute rule of attorney confidentiality in such a situation. It poses several pointed questions about the role of a code of legal ethics. Where the client has used and is continuing to use the attorney to commit fraud, how can it be said that the attorney owes any loyalty or allegiance, any further ethical duty, to the client who has so abused the professional relationship? That Mr. Hutner was even forbidden from warning his own close friend that he was becoming involved in massive ongoing fraud is truly an abhorrent result, from a moral point of

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[5] *See, e.g., O.P.M. Fraud Raises Questions About Role Of a Criminal's Lawyer*, Wall Street Journal, December 31, 1982, at 1; Taylor, *Ethics And The Law: A Case History*, New York Times Magazine, January 9, 1983, at 31.

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view. Why should the attorney be compelled, by rules of ethical conduct, to engage in such ethically distasteful behavior?[9]

The ACTL and the other groups that support this extreme view of mandatory attorney secrecy argue that such a rule is required by both the attorney-client privilege and the related but more general principle of lawyer-client confidentiality. In fact, however, neither the privilege nor the policies underlying the principle of professional confidentiality requires the attorney to keep information secret in a client fraud situation.

The attorney-client privilege, as a rule of evidence, operates only as a shield to officially compelled disclosure. Where applicable, the privilege allows the client to prevent an attorney fron answering a question, *in a judicial context*, that the attorney would otherwise be compelled to answer.[10] As a threshold matter, therefore, the evidentiary privilege simply has no application to a private, voluntary, disclosure of the client's fraud by the attorney (such as warning successor counsel of the ongoing fraud in the *OPM Leasing* case).

More fundamentally, however, the attorney-client privilege simply *does not exist* where the client has used the professional relationship to commit a fraud. From its very beginnings at common law, the privilege has never been interpreted to protect a client who intentionally uses the professional relationship to commit a crime or fraud.[11] Thus, the ACTL is plainly wrong in suggesting that the attorney-client privilege presents a legal impediment to the attorney's disclosure of his client's fraud.[12]

The attorney's duty to preserve client confidences, however, is broader than the evidentiary privilege. The client has a right to expect that the attorney will keep information about the representation secret, even though it may be outside the scope of the attorney-client privilege. This ethical duty is presently codified in DR 4-101 of the ABA Code of Professional Responsibility, which provides for a general duty to maintain client confidences and secrets, subject to certain enumerated exceptions.

This has always been the structure of the attorney's ethical duty to preserve client confidences: a general obligation of secrecy, subject to certain limited exceptions, where the principle of confidentiality is overcome by ethical or policy considerations in favor of disclosure. The question before the ABA House of Delegates when Rule 1.6 came up for discussion and a vote, therefore, was simply whether the attorney's ethical duty to preserve client confidences should be subject to an exception when the client has involved the attorney in fraud.

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[9]While Singer Hutner's ethics counsel has been criticized for taking too extreme a view of attorney-client confidentiality under the present Code of Professional Responsibility, there is no question that the same advice would be required under the amendment to Model Rule 1.6 proposed by the ACTL and adopted by the ABA House of Delegates in February.

[10]*See*, Note, *Client Fraud and the Lawyer — An Ethical Analysis*, 62 Minn. L. Rev. 89, 111-12 & n. 101-02.

[11]*See*, Note, *supra*, n. 10, at 112 and n. 103; *See also*, 8 J. Wigmore *Evidence* §2298 at 572-77 (McNaughton Rev. 1961):

> It has been agreed from the beginning that the privilege cannot avail to protect the client in concerting with the attorney a crime or other evil enterprise. This is for the logically sufficient reason that no such enterprise falls within the just scope of the relation between legal advisor and client . . . [The policy reasons in favor of confidentiality] all cease to operate at a certain point, namely, where the desired advice refers not to prior wrongdoing, but to future wrongdoing. From that point onwards, no protection is called for by any of these considerations. *Id.* at 572-73.

[12]Since the Kutak Report cited exhaustive legal precedent on this point, the ACTL's continued assertion, without authority, that the evidentiary privilege somehow precludes disclosure in a client fraud context is arguably disingenuous.

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The ACTL attacked the Kutak Report's affirmative answer to that question as a radical redefinition of the attorney-client relationship, an abrupt transformation in the lawyer's role that "would seriously undermine the confidentiality of communications between the client and his attorney." In fact, however, the client fraud exception to the attorney's duty of confidentiality has long been a part of the ABA's model codes of ethics for lawyers. The 1969 ABA Code of Professional Responsibility, and the ABA Canons of Professional Ethics before that, both contained an exception to the attorney's duty of confidentiality when client fraud was involved.[13] Kutak Report Rule 1.6, then, was in the mainstream of legal ethics precedent, reflecting a long-honored judgment that a client who uses the attorney to commit fraud is simply not entitled to rely on the rule of confidentiality that would otherwise govern the professional relationship. If anyone can be accused of advocating a redefinition of the scope of attorney confidentiality, it is the ACTL, not the Kutak Commission.

Moreover, for all its solicitude in favor of confidentiality, the ACTL itself did not propose an absolute rule of secrecy for attorneys. Under the ACTL amendment to Rule 1.6, an attorney would be allowed to reveal a client's secrets when the attorney's own interests are at stake. Where, for example, the attorney deems it necessary to protect himself against accusations of wrongful conduct, or to collect a legal fee, the ACTL would give its blessing to disclosure of a client's secrets. In addition, where necessary to prevent the client from committing a crime likely to result in imminent death or substantial bodily harm, the ACTL would permit disclosure of client confidences, acknowledging that "such consequences are so serious and may be of such overriding concern to the attorney that he should be permitted, but not required, to disclose confidential information."[14]

But, having acknowledged that preventing serious consequences may override the duty of confidentiality, the ACTL must deal with a significant line-drawing problem: How serious must the consequences be in order to allow disclosure of client information? Why, in principle, should disclosure be allowed to prevent bodily injury — say, spousal physical abuse — but not to prevent a multi-million dollar stock fraud? More fundamentally, why should an attorney have the right to disclose information to protect his or her *own* interests, but not to protect the interests of innocent third persons who have been or will be injured by a fraud in which the lawyer has played a material role?

It should be obvious that a client who uses the attorney to commit a fraud betrays the professional relationship on which the principle of confidentiality is based. The client therefore cannot justly complain when, in order to prevent or rectify the fraud, the attorney is permitted to disregard the right to confidentiality that would otherwise govern the relationship. Just as the attorney-client privilege is abrogated when the client has a fraudulent purpose in seeking legal advice, so must the principle of professional confidentiality cease to exist in a client fraud context. When the lawyer's special office has been so abused by the client, the client forfeits any right to expect that the client's evil secrets will be protected by the attorney.

The ACTL tacitly acknowledges this fact. Their expressed concern is not so much for the fraudulent client, but rather for all other clients, who, it is assumed, will be less likely to communicate sensitive information to the lawyer if they perceive that the attorney may be able to disclose the information. The ACTL raises the spectre of a lawyer having to give the client a "Miranda warning" if Model Rule 1.6, were adopted, since the client should in fairness be warned beforehand that certain information would not be protected from disclosure by the attorney.

This reasoning is highly suspect, relying as it does on questionable empirical assumptions about clients' perceptions of the attorney's duty of confidentiality. Do clients really think that the duty of confidentiality is absolute? If so, perhaps they should be disabused of this notion, since

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[13]*See* ABA Model Code of Professional Responsibility, DR 7-102 (B) (1):

> (B) A lawyer who receives information clearly establishing that:
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> (1) His client has, 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.

Since 1974, several states, including Minnesota, have adopted an amended version of DR 7-102 (B) (1), which adds the following language at the end of the Rule:

> . . . except when the information is protected as a privileged communication.

See generally, Note, *Client Fraud and the Lawyer — An Ethical Analysis*, 62 Minn. L. Rev. 89 (1977) for a discussion of how this exception clause to DR 7-102 (B) (1) in effect swallows the rule.

See also, ABA Canons of Professional Ethics, the predecessor to the Code of Professional Responsibility, Canon 41:

> When a lawyer discovers that some fraud or deception has been practiced, which has unjustly imposed upon the court or a party, he should endeavor to rectify it; at first by advising his client, and if his client refuses to forego the advantage thus unjustly gained, he should promptly inform the injured party or his counsel, so that they may take appropriate steps.

[14]Report of the Legal Ethics Committee, American College of Trial Lawyers, April 2, 1982, at 17.

Even on the level of an attorney's self interest, the ACTL rule is much too narrow. It would not allow disclosure, for example, to the lawyer's malpractice insurer before a claim had been commenced, a result that may well give the insurance carriers grounds to deny coverage for subsequent claims against the lawyer arising out of the client's fraud. Moreover, the ACTL rule would apparently not allow the lawyer to retain counsel, as was done by the Singer Hutner firm in the *OPM Leasing* case.

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that is simply not the case. One wonders whether the members of the ACTL presently give such "Miranda warnings" to their clients, in light of the other exceptions to the duty of attorney confidentiality noted above.

Moreover, how reasonable is it to assume that clients will modify their behavior if they know that the attorney can reveal confidential information to the extent that the client uses the relationship to commit a fraud? Certainly clients who do in fact harbor fraudulent intentions may be more circumspect in what they divulge to their lawyer, but it has already been acknowledged that such clients do not deserve attorney confidentiality. If the client does not intend to engage in fraud, why would he or she be concerned about the client fraud exception to attorney confidentiality? Only where the client is engaged in activity approaching fraud will the existence of the client fraud exception be of any concern to him or her. In such cases, it seems altogether appropriate that the attorney inform the client that the professional relationship may not be used to achieve fraudulent ends.

If, as the ACTL suggests, lawyers must take into account how a proposed ethical rule will be perceived by clients in formulating such a rule, then the question becomes what kind of message attorneys want to send to clients on this issue. What is wrong, as a matter of principle, with forthrightly informing the public that they simply may not reasonably rely on an attorney's duty of confidentiality if they intend to use the attorney to commit a fraud?

Thus understood, the issue is one of policy — what limits should be placed on attorney-client confidentiality to insure the best results for the legal system? The fundamental policy considerations underlying the principle of confidentiality are the subject of *Secrets: On the Ethics of Concealment and Revelation*, a recent scholarly analysis by noted ethics commentator Sissela Bok. In a chapter entitled "The Limits of Confidentiality", Ms. Bok examines the justifications for professional confidentiality, and persuasively argues that while the premises on which this principle is based are valid in general, the social benefits of confidentiality are outweighed when serious harm to others is involved. Ms. Bok demonstrates that the utilitarian arguments in favor of professional confidentiality, while strong, are not without limits. Where the client intends injury to the interest of third parties, the social benefits of confidentiality may well be outweighed by competing concerns. Ms. Bok's analysis suggests that the absolute position on confidentiality espoused by the ACTL cannot be justified, even in terms of the utilitarian policy considerations on which it is based.

Moreover, it can be argued that the ACTL's approach to the client fraud problem runs afoul of a much more fundamental concept. A lawyer who has unwittingly been involved in his client's deception may have a personal moral *privilege* to divulge the fraud, if doing so would result in prevention or rectification of the fraud. This is *not* a question of choosing best consequences, of what kind of rule would be best for the legal system. It is rather an issue of personal moral integrity, a concept that such utilitarian considerations simply cannot adequately account for.

The moral force of the concept of integrity can best be illustrated by a hypothetical example from outside the legal system. Assume that John, a recent acquaintance, asks you to help him move a stereo from what he tells you is his house out to his car. After you do so, you learn that the house (and the stereo) is not really John's, but actually belongs to Jim. In effect, therefore, you have just helped John steal Jim's stereo. As a matter of morality, should you not tell Jim, and then do whatever you can to help him get the stereo back? Irrespective of whether you may have a moral *duty* to disclose the theft that you have helped commit, do you not have a *right* to do so, notwithstanding John's objections? Do you not have a legitimate *personal* interest in taking such steps as are necessary to purge yourself of complicity in John's deception? It is a matter of basic personal integrity: you have been used, your integrity has been soiled. To the extent that disclosure or other action will erase this stain, John certainly has no *moral* right to object to your attempt to extricate yourself from his fraud.

In this hypothetical, the intuitive appeal in favor of disclosing the fraud that one has unwittingly helped commit — as a matter of personal integrity — seems strong indeed. Why should the analysis be any different in an attorney-client context? There, just as in the stolen stereo hypothetical, one party has duped the other into assisting in a deception, causing damage to a third party. Can it really be said that the mere fact that the duped party happens to be an attorney changes the ultimate moral analysis? The personal moral integrity of the attorney is directly in issue. Surely the client, after having abused the attorney's professional skills, involving him or her in a fraud, has no more right to insist on secrecy than John does.

The question here is *not* whether giving an attorney the right to disclose client fraud would yield the best ultimate results for the legal system. Rather, it is an issue of the individual attorney's *personal* right, notwithstanding such utilitarian notions, to protect his own moral integrity.

In a particular case of client fraud, a morally sensitive attorney may reasonably conclude that his or her complicity in the client's fraud, even though un-

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intentional, requires corrective action. An attorney who recognizes such a moral imperative must be free to act accordingly. Therefore, even if the ACTL was correct in arguing that a rule allowing the attorney to disclose client fraud would result in a marginal disutility to society as a whole, the fact remains that the particular attorney must have the right to protect his or her personal integrity, to act in what he or she deems to be a moral manner. The individual lawyer's right to do the right thing is a fundamental one; it cannot be sacrificed for any supposed greater social good.[15]

In a particular case, an attorney who learns that a client has used the professional relationship to commit a fraud may conclude that he or she is morally obligated to disclose information in an attempt to prevent or rectify the consequences of the fraud. Suppose, for example, that the lawyers in the *OPM Leasing* case had learned of their client's deception the day before the closing on a large lease transaction implicated in the fraudulent scheme. Assume further that upon being confronted with the facts, the client refused to stop the deception and indicated an intention to go forward with the scheme with new counsel if necessary. The attorneys, having already participated in the client's fraud, may well decide that they have an obligation to prevent any further deception. If the attorneys do come to this conclusion, should they have to risk professional discipline in order to do the right thing?

At this point, most attorneys would give up any notions of doing the right thing, in favor of protecting their own interest in avoiding disciplinary proceedings. But what if the attorney in question was *committed* to acting consistent with his or her own moral dictates? What if the attorney accepts Thoreau's principles concerning one's duty of civil disobedience when the law is unjust? If morality tells such an attorney to reveal the fraud, then he or she will do so, notwithstanding the risk of disbarment. When the lawyer does reveal the fraud, thereby saving the client's victims from substantial losses, what should be the attitude of the relevant disciplinary body? Should the attorney be disciplined for this action?

Some lawyers, confronted with this issue, have indicated that, in a paradigm client fraud case, they would reveal the fraud notwithstanding the ethical rule prohibiting disclosure. They do not count it a serious risk that they might be disciplined for this action. Perhaps they are right. Perhaps the Disciplinary Committee, recognizing the ultimate moral issue involved here, would blink at the fact that an ethical rule had been deliberately violated by the attorney. But what does that say about the moral worth of the ethical rule in question? And why should the attorney, who is, after all, trying to do the right thing, have to be burdened by *any* risk of professional sanction?

CONCLUSION

An attorney who learns that a client has used the professional relationship to commit fraud is confronted with a personal moral decision. In a paradigm case, the lawyer may determine that a particular disclosure of confidential information about the client's fraud is morally compelled, whether because a close friend is in danger of becoming involved in the fraud, or simply to prevent or remedy the fraud that the *attorney* helped commit. In either case, the attorney must be free to protect his or her own integrity, to act in a morally responsible manner. The ACTL rule, adopted by the ABA, would forbid, in a particular case, what morality would require. The rule must therefore be changed.

The ABA must reconsider Model Rule 1.6. If the rule is finally adopted by the ABA, attorneys who are sensitive to the ultimate moral issue involved here must oppose promulgation of Rule 1.6 at the state level. When the Model Rules are presented to the Minnesota Supreme Court for adoption, Minnesota attorneys will have the opportunity, and responsibility, to support an amendment restoring the Kutak Report proposal on client fraud. The Minnesota Bar must recognize that the question involved here goes to the very foundation of the legal profession. For if one cannot at the same time be an ethical person and an ethical attorney, then something is fundamentally wrong with the role of an attorney. If that is the case, then we all have a difficult personal ethical decision to make.

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[15]Moral philosophers have long recognized that utilitarian moral theories cannot account for, and yield fundamentally counter-intuitive results in, situations where notions of personal integrity conflict with utilitarian value calculations. *See, e.g.*, Williams, *A Critique of Utilitarianism*, in B. Williams & J. Smart, *Utilitarianism: For and Against* 108-18 (1973).