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SUMNER CANARY LECTURE

UNDER SHELTER OF CONFIDENTIALITY¹

Geoffrey C. Hazard, Jr.[†]

The law confers on lawyers two strong legal powers that endow us with unique authority in our constitutional system. One of these powers is the right to maintain litigation on behalf of clients against others. The other is that of maintaining secrets imparted by clients in the course of seeking legal advice or assistance. Neither of these powers is unqualified. The power to prosecute or defend litigation is qualified by the duty to refrain from frivolous litigation, a duty memorialized in the rules of ethics and in Rule 11 of the Federal Rules of Civil Procedure.² The power to maintain client secrets is also

¹ This article is adapted from a lecture delivered by Geoffrey C. Hazard, Jr. at Case Western Reserve University School of Law as part of the 1999 Sumner Canary Memorial Lecture Series.

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² Rule 11 of the Federal Rules of Civil Procedure provides, in relevant part, that:

[b]y presenting to the court . . . a pleading, written motion, or other paper, an attorney . . . is certifying that to the best of the person's knowledge, information, and belief[:]

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

FED. R. CIV. P. 11.

Model Rule 3.1 provides that:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

qualified. One qualification is that the client may waive the privilege.³ Another is that the privilege does not protect communications in furtherance of crime or fraud.⁴ Nevertheless, these qualifications are relatively narrow in scope and rarely have application when a lawyer is engaged in a good faith effort to carry out his professional responsibilities. Put differently, a lawyer seriously endeavoring to represent a client can be confident that the law, ordinarily, will provide her with legal immunity for the aggression involved in conducting litigation and the dissimulation involved in withholding confidential client information.

I use the terms "aggression" and "dissimulation" advisedly. Concerning aggression in litigation, those of us within the Bar can too easily forget the true nature of litigation. From the viewpoint of the legal system, litigation is a search for justice; but from the viewpoint of the litigants it is a combination of unfriendly aggression and exasperating frustration, and usually expensive as well. Yet lawyers are permitted by law to orchestrate these psychological brutalities. Trial lawyers refer, usually with some pride, to their work as being "in the pit"—meaning, I suppose, a bear pit or perhaps a snake pit.

I. THE POWER OF MAINTAINING CLIENT SECRETS

Lawyers are perhaps even less sensitive to the social and moral significance of our power and duty to maintain client confidences. In this analysis I shall refer to the concept of client confidentiality and

MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1998). Rule 3.1 corresponds in its essentials to the counterpart in the Code of Professional Responsibility DR 7-102, which provides:

(A) In his representation of a client, a lawyer shall not:

- (1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.
- (2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.
- (3) Conceal or knowingly fail to disclose that which he is required by law to reveal.
- (4) Knowingly use perjured testimony or false evidence.
- (5) Knowingly make a false statement of law or fact.
- (6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102 (1981).

Other limitations are imposed by statute in some jurisdictions. *See, e.g.*, 28 U.S.C. § 1927 (1994) (empowering a court to impose sanctions on one who multiplies litigation vexatiously).

³ *See* CFTC v. Weintraub, 471 U.S. 343 (1985) (holding that a trustee of a corporation in bankruptcy may waive the corporation's attorney-client privilege); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 128 (Proposed Final Draft No. 1, 1996).

⁴ *See, e.g.*, United States v. Hodge & Zweig, 548 F.2d 1347, 1354 (9th Cir. 1977) ("[T]he attorney-client privilege is not to be used as a cloak for illegal or fraudulent behavior."); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, *supra* note 3, § 132 (stating the exception for client crime or fraud).

attorney-client privilege more or less interchangeably, even though there are distinct differences between these concepts. The rule of client confidentiality is a duty of a lawyer to keep confidential all matter relating to a client, including information acquired from third-party sources.⁵ The rule of attorney-client privilege is a right of the client to prohibit inquiry in a legal proceeding into a subset of those confidences, that is, the client's communications to the lawyer.⁶ However, the two concepts are linked in policy and in practical consequences. The policies allowing a client to keep his legal business and his legal troubles to himself are based on the notion that without confidentiality, effective representation is impossible. The practical consequence is that the attorney-client privilege becomes the legal basis for preventing third parties from inquiring into matters that the lawyer is obliged to keep secret.

There was a time when the attorney-client privilege had limited scope and when the duty of confidentiality was not separately articulated. Until the 17th century, a defendant in a criminal case was not accorded a right to counsel, let alone a right to confer confidentially with a lawyer.⁷ It was only in the 18th century that assistance of counsel became common in civil litigation.⁸ According to the decided cases the issue of client confidences was not often pressed. Probably it was simply assumed that a client's consultation with a lawyer should not be inquired into. At all events, it was not until the 19th century that the attorney-client privilege became firmly established in the common law rules of evidence.

Even then, however, there was doubt whether the privilege was available not only to individuals, but also to organizations such as a corporation. Indeed, uncertainty as to whether the privilege could be claimed by corporations persisted until the 1960s, when a Federal District Judge shocked the legal world by holding the privilege unavailing to corporations, only to be summarily reversed by the 7th Circuit Court of Appeals.⁹ The leading modern case, *Upjohn Co. v.*

⁵ See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. (1998) (stating that an attorney may not reveal information regarding the representation of a client); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, *supra* note 3, § 111 cmt. 6 (stating that confidential client information includes information gathered from third-party sources); *id.* § 112 (stating that a lawyer may not disclose confidential client information).

⁶ See, e.g., JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE, §§ 87-97 (4th ed. 1992) (providing background on attorney-client privilege).

⁷ See generally, John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 307-14 (1978) (discussing the evolution of the rights of criminal defendants to confer with counsel before the more modern protections of the 5th Amendment and other mechanisms came into being).

⁸ See *id.* (noting that the right to counsel was formally guaranteed only in the Prisoner's Counsel Act of 1836).

⁹ See *Radiant Burners, Inc. v. Am. Gas Ass'n*, 207 F.Supp. 771 (N.D. Ill. 1962), *rev'd*, 320 F.2d 314 (7th Cir.), *cert. denied*, 375 U.S. 429 (1963) (holding that the attorney-client privilege *does* extend to corporate entities).

United States,¹⁰ established that corporations are entitled to client secrecy like individuals, but the Court did so by presupposition rather than direct affirmation. The extension of the attorney-client privilege to corporations and other organizations was not compelled by the logic of the privilege. A comparable privilege—that against self-incrimination—is not extended to corporations,¹¹ and a corporation obviously cannot enjoy the other “classic” privileges: priest-penitent, doctor-patient, and spousal communication.¹² Corporate enjoyment of the privilege is of great practical importance, however, particularly in civil matters—that is, apart from representations of individuals accused of crime.

In statistical terms, the largest fraction of legal services in this country is provided to corporations and other organizations.¹³ Hence, it is in the corporate setting that the protection of confidentiality has most frequent operation. More fundamentally, in today's complex world, most legal deliberations are conducted by organizations on either one side or both sides of a transaction. It may be an historical coincidence, but perhaps not, that the confirmation of the attorney-client privilege in favor of corporations emerged in the same present era in which the scope of discovery in civil cases was so broadly extended under the Federal Rules of Civil Procedure. Sixty years ago, on the eve of adoption of the Federal Rules, a corporation may have been insecure as to whether it could claim attorney-client privilege for its documents, but its documents were subject to discovery only if specifically identified and indicated to be relevant.¹⁴ By the 1980s, the counterpoise had been reversed: Discovery of documents was virtually unconstrained except by the rules of privilege, but the protections of attorney-client privilege and the related work product immunity doctrine had been accorded to corporations.

At all events, I suggest that the shelter of confidentiality accorded to legal consultations is of greatest practical significance in

¹⁰ 449 U.S. 383 (1981).

¹¹ See *Braswell v. United States*, 487 U.S. 99, 105 (1988) (citing *Hale v. Henkel*, 201 U.S. 43 (1906), for the proposition that the 5th Amendment privilege against self-incrimination does not extend to corporations).

¹² See STRONG ET AL., *supra* note 6, §§ 78-86, 98-105, 76.2 (describing the privileges for marital communications, communications in the physician-patient relationship and communications between clergyman and penitents).

¹³ See Marc Galanter, *News from Nowhere: The Debased Debate on Civil Justice*, 71 DENV. U. L. REV. 77, 88 n.47 (1993) (citing a 1992 National Association of Manufacturers' estimate that business expenditures on legal services in 1992 were \$110 billion out of a total of \$163.4 billion).

¹⁴ See Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 TEX. L. REV. 1665 (1998) (detailing early interpretation of the scope of document discovery); see also Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 700 (1998) (citing then-existing rules requiring that documents discovered contain “evidence material to the cause of action” and that an adverse party admit possession of a document to be discovered).

defense of criminal matters and in the deliberations of corporations and other organizations about their legal positions and strategies.

II. "EXTERNAL" AND "INTERNAL" RULES REGARDING CLIENT CONFIDENTIALITY

The rules qualifying the principle of confidentiality are of two general kinds. The lawyer with whom the client is engaged administers one set of qualifications. I shall call these "internal" qualifications, meaning that these rules operate internally in the lawyer-client relationship. These matters are the principal focus of this analysis and are addressed presently. The other qualifications are typically invoked by a party opposing the client and are applied by the courts to deny or restrict protection of the privilege. These "external" rules include the following:

The crime/fraud exception, which denies protection to communications made in furtherance of crime or fraud. The concept is that the right of privacy recognized in the privilege should not shelter the plotting of criminal and fraudulent harms against others.¹⁵

The "defense of legal advice" exception, which denies protection to confidentiality where legal advice is asserted as excuse or justification for conduct that would otherwise be criminal or tortious. The concept is that when the "alibi" of legal advice is offered, the tribunal is entitled to be fully informed as to what the advice in fact was all about.¹⁶

The "disclosure" exception, which denies protection where the client has previously disclosed the protected communication.¹⁷

The "lawyer self defense" exception, which permits the lawyer to reveal confidences to the extent necessary to defend against charges arising out of the representation, including charges made by the client.¹⁸

Administration of the exceptions is complicated by a chicken-and-egg dilemma: How to avoid disclosure of the communication in determining whether or not the communication is open to disclo-

¹⁵ See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, *supra* note 3, § 132 (describing the exception for crime or fraud).

¹⁶ See *id.* § 130 (describing waiver by putting assistance or communication in issue).

¹⁷ See *id.* § 129 (describing waiver by subsequent disclosure).

¹⁸ See *id.* § 133 (stating exceptions for lawyer self-protection).

sure.¹⁹ Subject to the difficulties posed by this dilemma, the "external" limitations on the attorney-client privilege are administered through the procedure that is employed in the law generally, that is, through proof of objective evidence, including circumstantial evidence, assessed by a disinterested judge after a bilateral adversarial proceeding. Proceedings challenging the privilege necessarily involve implicit or explicit charges of professional misconduct by the lawyer and typically are correspondingly embittered. The administration of the "internal" rules governing confidential communications is quite different. Indeed, it is usually invisible and inaudible.

III. RULES OF CONFIDENTIALITY ADMINISTERED BY "INTERNAL" PROCEDURE

The rules administered by "internal" procedure are those interpreted and applied by the lawyer whose conduct is governed by those rules. Their observance thus is primarily and ordinarily a matter of the lawyer's conscience. In terms of the procedure for their observance, these rules therefore operate as moral norms rather than legal rules.²⁰ In one sense, of course, all the rules regulating lawyers are in the first instance self-administered, in that the lawyer is obliged to regulate her conduct according to these norms and can claim them as justification if that conduct is later called into question. However, in the case of the rules whose operation is internal to a client-lawyer relationship, the lawyer's compliance ordinarily remains invisible and inaudible to anyone except the client. The focus here is on those rules.

The prevailing codification of the rules of professional ethics is the American Bar Association's Model Rules of Professional Conduct.²¹ An important internal regulation is that in Rule 1.1, dealing with competency. Rule 1.1 provides that "A lawyer shall provide competent representation to a client."²² A lawyer addresses the

¹⁹ See *United States v. Zolin*, 491 U.S. 554, 556 (1989) (holding that the applicability of the crime-fraud statute may be resolved by an *in camera* inspection of the allegedly privileged material). In the less sensitive context of disqualification, the dilemma is handled by the rule that the claimant need only show that the present matter is "substantially related" to that in which the confidential information was presumably imparted. See *RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS*, *supra* note 3, § 135 (invoking the attorney-client privilege and its exceptions).

²⁰ See Geoffrey C. Hazard, Jr., *Law, Morals and Ethics*, 19 S. ILL. U. L.J. 447, 458 (1995) (explaining the distinction and overlap between the law, morals and ethics).

²¹ See *MODEL RULES OF PROFESSIONAL CONDUCT* (1998). The ABA adopted the Rules of Professional Conduct in 1983. Ohio and several other states, notably California, Illinois, and New York, have not adopted the Rules of Professional Conduct, although they have drawn on various provisions. These and other states adhere to rules more or less resembling the ABA's previous codification, the Code of Professional Responsibility. For purposes of the present analysis, however, the differences between the Rules and the Code are of little significance.

²² Model Rules of Professional Conduct Rule 1.1 (1998).

problem of his competence only when a client has come into view. A lawyer obviously has a subjective viewpoint and a conflict of interest in assessing his own competence, and hence whether to undertake a new matter.²³

An important cluster of internal regulations is in Rule 1.2. Rule 1.2(a) requires the lawyer to defer to the client concerning "the objectives" of the representation and to consult with the client concerning "the means." The distinction between "objectives" and "means" is clear at either end of a spectrum but notoriously and unavoidably ambiguous in the middle range.²⁴ However, Rule 1.2(a) elaborates certain particulars, requiring a lawyer to defer to the client in "whether to accept an offer of settlement[.]"²⁵ Similarly, in a criminal case, the rule applies to the decision whether to plead guilty or *nolo contendere*, whether to waive jury trial, and whether to take the stand (and thus waive the privilege against self-incrimination).

Rule 1.2(c) authorizes a lawyer to "limit the objectives" of a representation. This rule is a correlative of the principle that a client-lawyer relationship is one of contract, wherein the contract must have some express or implied scope. A familiar example of the problem of scope is whether counsel engaged to try a case also has responsibility for taking an appeal.²⁶ The question of scope ordinarily is worked out, for better or worse, under the shelter of confidentiality, so that an opposing party and the courts typically are unaware of the issue unless the client later objects.²⁷

²³ The disciplinary standard of competence is notoriously modest. See Edmund B. Spaeth, Jr., *To What Extent Can A Disciplinary Code Assure the Competence of Lawyers*, 61 TEMP. L. REV. 1211 (1988) (stating that the principal external review of competence is the action for legal malpractice). See generally RONALD E. MALLIN & JEFFREY M. SMITH, *LEGAL MALPRACTICE* (4th ed. 1996).

²⁴ See Robert F. Cochran, Jr., *Legal Representation and the Next Steps Toward Client Control: Attorney Malpractice for the Failure to Allow the Client to Control Negotiation and Pursue Alternatives to Litigation*, 47 WASH. & LEE L. REV. 819, 825-30 (1990) (noting that in many cases it is difficult to distinguish between means and ends, and that clients may have multiple ends and hence should be involved in choices of means which impact each of those ends differently); Judith L. Maute, *Allocation of Decisionmaking Authority Under the Model Rules of Professional Conduct*, 17 U.C. DAVIS L. REV. 1049, 1061 (1984) (noting that the distinction between means and objectives is not a "bright line" and that "sometimes a clear distinction is impossible"); David Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454, 459 n.9 (1981) (arguing that "[t]actical decisions in a valid legal order are never merely decisions about means [for example, a defendant may] want to win acquittal by asserting a certain right . . . or he may wish to obtain a settlement without using a certain tactic, because he disapproves of the tactic").

²⁵ Model Rules of Professional Conduct Rule 1.2(a) (1998).

²⁶ See generally RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, *supra* note 3, § 28 (stating that a lawyer's duties to client in general); *id.* cmt. f ("Contracts generally create or define the duties the lawyer owes the client."). See, e.g., *Saferstein v. Paul*, 1997 WL 102521, at *3 (E.D. Pa. 1997) (dismissing a client's malpractice claim based on attorney's refusal to file an appeal).

²⁷ An attorney is presumed to have the authority to conclude settlement negotiations on behalf of a party, and an agreement will only be set aside where there is affirmative proof that

Rule 1.2(d) reiterates the common law rule that a lawyer may not "counsel or assist" a client in crime or fraud. However, the rule goes on to allow a lawyer to "discuss the legal consequences of any proposed course of conduct"²⁸ Here there is another spectrum along which there is a clearly prohibited zone at one end ("Let me tell you how to evade the income tax law") but also unavoidable indeterminacy.²⁹ Perhaps the most vivid illustration of that indeterminacy is the line delivered by Jimmy Stewart as the lawyer in *Anatomy of a Murder*, where he exits the interview with the client saying: "Now, lieutenant, how crazy were you?"³⁰ Rule 1.2(e) states a corollary as follows: "When a lawyer knows that a client expects assistance not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct."³¹

Rule 1.5 governs fee arrangements with clients, an essential aspect of a legal representation, particularly from the client's viewpoint. For new representations, where the client has not been previously represented by the lawyer, Rule 1.5 requires that the terms of the fee be "communicated" at the beginning of the engagement, "preferably in

no such authority existed. See *Surety Ins. Co. v. Williams*, 729 F.2d 581, 583 (8th Cir. 1984) (ruling that the Williams' must prove through affirmative evidence that their attorney acted without actual, implied, or apparent authority); see also *Capital Dredge & Dock Corp. v. Detroit*, 800 F.2d 525, 530 (6th Cir. 1986) (litigating lawyer has apparent authority to settle on behalf of her clients); *International Telemeter Corp. v. Teleprompter Corp.*, 592 F.2d 49 (2d Cir. 1979) (finding that a party's lawyer had apparent authority to conclude settlement negotiations). But see *Fennell v. TLB Kent Co.*, 865 F.2d 498 (2d Cir. 1989) (holding that an attorney had no apparent authority to settle where his client had never manifested such authority to the opposing party's lawyer).

²⁸ MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(d) (1998). Rule 1.2(d) continues that a lawyer may "counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law." *Id.* This proviso recognizes the pervasive significance of judicial review in the American form of government, allowing the lawyer to invoke the powers of the courts to construe legislation and administrative action and, when appropriate, to invalidate it on constitutional grounds.

²⁹ Outside of fiction there is only rare documentation of this kind of interview, because neither lawyer nor client ordinarily has incentive to disclose such an exchange. There have been some disciplinary and malpractice cases involving a complaint that the lawyer advised the client to lie. See *In re Oberhellman*, 873 S.W.2d 851 (Mo. 1994) (disciplining an attorney for advising his client to testify falsely concerning her residence); *In re Edson*, 530 A.2d 1246 (N.J. 1987) (sanctioning a lawyer who counseled client to fabricate a material fact). A sense of what is involved, however, can be inferred from study of interaction between client and counsel in criminal cases. Experienced counsel do not want to know from the client whether he is "really guilty." See KENNETH MANN, *DEFENDING WHITE-COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK* (1985); *Nix v. Whiteside*, 475 U.S. 157 (1986) (finding that an attorney's refusal to cooperate with defendant in presenting perjured testimony did not violate the Sixth Amendment right to assistance of counsel).

³⁰ *ANATOMY OF A MURDER* (Columbia 1959).

³¹ Model Rules of Professional Conduct Rule 1.5 (1998). It may be noted that this rule does not require the lawyer to be a "preacher" regarding the client's conduct. Rather, the requirement concerns informing the client as to what actions the lawyer cannot take. Obviously, in most situations the latter admonition has necessary and significant implications as to the client's legal obligations.

writing.”³² The common law rules governing this threshold phase of a client-lawyer relationship are somewhat peculiar. Until the contract is formed, the common law treats prospective client and lawyer as dealing at arms’ length, so that the client can agree to virtually any arrangement that is not illegal, fraudulent, or grossly unreasonable.³³ On the other hand, after the contract is formed the lawyer owes the client a fiduciary duty of the highest degree.³⁴ The rule could be, but is not, that a fiduciary duty to a prospective client extends to the fee negotiations. A recurrent issue has been contingent fee agreements in matters in which actual contingency of recovery is virtually nonexistent—the fee to be charged for “slam dunk” claims. The ABA Standing Committee on Ethics has wrestled with this issue but produced only equivocal guidance.³⁵ In any event, unless a dispute later erupts between lawyer and client, the bargaining process concerning the fee remains secret.

Rule 1.6, dealing with confidentiality, has important qualifications concerning crime, fraud, and lawyer self-defense.³⁶ However,

³² *Id.* Model Rule 1.5(b) states that “[w]hen the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.” MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(b) (1998). Rule 1.5(c) requires contingent fee agreements to be in writing. *Id.* Rule 1.5(c). A few states now require all or most fee agreement to be in writing. *See* CAL. CODE ANN. BUS. PROFESSIONS § 6147 (West 1990); OR. REV. STAT. ANN. § 20.340(a) (Supp. 1998).

³³ *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, *supra* note 3, § 46. On the standard of unconscionability that may void a fee contract, see *Brobeck v. Telex Corp.*, 602 F.2d 866, 875 (9th Cir. 1979) (holding that a contract requiring a retainer fee of \$25,000 to be paid even if the motion for *certiorari* was denied was not unconscionable); *McKenzie Constr., Inc. v. Maynard*, 758 F.2d 97, 100 (3d Cir. 1985) (holding that an “unreasonable” standard rather than the clearly excessive standard should be used in determining the reasonableness of a contingent fee).

³⁴ *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, *supra* note 3, § 28. The classic statement of fiduciary duty is that by Judge Cardozo in *Meinhard v. Salmon*, 249 N.Y. 458, 464 (1928) (holding that “[n]ot honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior”).

³⁵ *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 94-389 (1994) (opining that even when the opposing party’s liability is clear, a contingent fee does not violate ethical standards “as long as the fee is appropriate and reasonable and the client has been fully informed of the availability of alternative billing arrangements”); Lester Brickman, *ABA Regulation of Contingency Fees: Money Talks, Ethics Walks*, 65 FORDHAM L. REV. 247, 271 (1996) (arguing that the ABA disingenuously ducked the ethical issues posed by contingent fees in cases where recovery is likely, and that charging contingent fees in such cases “violates fiduciary law”); Michael Horowitz, *Making Ethics Real, Making Ethics Work: A Proposal For Contingency Fee Reform*, 44 EMORY L.J. 173, 174 n.4 (1995) (criticizing the ABA opinion’s “singular focus on risks to attorneys”).

³⁶ Model Rule 1.6 states:

A lawyer shall not reveal information relating to representation of a client . . . except . . . to the extent the lawyer believes reasonably 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 re-

these essentially mirror the qualifications concerning the attorney-client privilege previously mentioned.³⁷ Perhaps it need only be noted that the lawyer himself administers the rule of confidentiality, whereas the attorney-client privilege is a forensic rule administered by the courts.

The rules concerning conflict of interest, Rules 1.7-1.11, generally permit consent by the client to regularize a representation that would otherwise be impermissible on account of conflict of interest. Effective client consent, however, must be predicated on the client being "adequately informed"—a concept conventionally shorted into the formula of "informed consent."³⁸ The provision of information, discussion of the implications and resolution of a lawyer's request for such consent occurs in confidence and is protected by the attorney-client privilege. Accordingly, the content of those communications is ordinarily shielded from external scrutiny and, generally speaking, properly so.

Particularly sensitive is the problem of client consent in settlement of claims where more than one client is represented by the same lawyer. This situation is a variation of a "consentable conflict," i.e., a representation involving conflict of interest that is permissible only on the basis of informed consent. However, the problem is a common one and is specifically addressed in Rule 1.8(g), which provides:

A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims for or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the

spond to allegations in any proceeding concerning the lawyer's representation of the client.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1998).

Comment 16 to Rule 1.6 in effect allows a lawyer to disclose client fraud. See Geoffrey C. Hazard, Jr., *Rectification of Client Fraud: Death and Revival of a Professional Norm*, 33 EMORY L.J. 271 (1984) (arguing that lawyers must be allowed a "self-defense" exception to the confidentiality rule).

³⁷ See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, *supra* note 3, § 133.

³⁸ For discussions of "adequacy," see Fred. C. Zacharias, *Waiving Conflicts of Interest*, 108 YALE L.J. 407 (1998); Kevin McMunigal, *Rethinking Attorney Conflict of Interest Doctrine*, 5 GEO. J. LEGAL ETHICS 823 (1992); Nancy J. Moore, *Conflicts of Interest in the Simultaneous Representation of Multiple Clients: A Proposed Solution to the Current Confusion and Controversy*, 61 TEX. L. REV. 211 (1982). For a formulation of the rule as to adequacy, see RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, *supra* note 3, § 202 (stating the California rule for "Client Consent to a Conflict of Interest"). In California, the consent must be in writing. See CALIFORNIA RULES OF PROFESSIONAL CONDUCT RULE 3-310 (stating that disclosure and consent must be in writing).

existence and nature of all the claims or pleas involved of the participation of each person in the settlement.³⁹

The problem of settlement of claims of clients in multiple representation engaged the attention of the Supreme Court in the attempted "global settlements" in some of the asbestos litigation.⁴⁰ Although the scale of the multiple representation obviously is much greater in these and other class action cases, analytically the problem is similar to that in any multiple representation.

In all of these situations, particularly in fee negotiation and a "consentable conflict," the shelter of confidentiality poses the unavoidable danger that clients may be exploited by lawyers, because a lawyer necessarily has personal incentive in the transaction. Yet there is no way of eliminating the danger of exploitation without breaching the confidential relationship. More fundamentally, the concept of consentable conflicts is predicated on an assumption that clients are generally to be considered, in the colloquial phrase, "consenting adults." All contractual relationships are based on such a predicate. Situations where the client cannot confidently be considered *sui juris* are unavoidably difficult for the law to deal with—clients who are children, for example, in juvenile court proceedings, or mentally incapacitated or suffering the encroachments of aging. There is a rule on the subject, Rule 1.14 of the Model Rules, but it is designedly and unavoidably ambiguous.⁴¹ Except at ends of the spectrum, the problem of a client's mental competence is one of more or less.

Another "internal" provision is Rule 1.16, which governs withdrawal, permissive and mandatory. A normal "withdrawal" occurs at completion of an engagement. Otherwise, a withdrawal indicates

³⁹ MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8 (1998); *see also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-106 (1981) (containing substantially similar language).

⁴⁰ *See* *Amchem v. Windsor*, 521 U.S. 591, 598 (1997) (upholding an appeals court ruling that certification as a class was inappropriate under Fed. R. Civ. P. 23); *In re Asbestos Litigation*, 134 F.3d 668, 670 (5th Cir. 1998), *cert. granted*, 118 S. Ct. 2339 (1998) (approving class action settlements in asbestos-related claims).

⁴¹ MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14 (1998) (stating:

(a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.)

Id.; *see also* Jan Ellen Rein, *Client's Destructive and Socially Harmful Choices -- What's an Attorney to Do?: Within and Beyond the Competency Construct*, 62 Fordham L. Rev. 1101 (1994) (questioning when it is appropriate to regulate or override the decisions made by a client); Paul R. Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client*, 1987 UTAH L. REV. 515, 516 (1987) (discussing the role of an attorney when representing an impaired client). The critics are long on disparagement of the rule but short on proposals for making it more concrete.

some kind of breakdown in the client-lawyer relationship, typically a client's failure to pay accrued fees or a serious disagreement between client and lawyer about strategy in the engagement, notably differences over settlement. The conversations between client and lawyer over these issues can be very acrimonious, but they usually are protected from external inquiry unless the client wishes to challenge the withdrawal. Even when withdrawal becomes necessary or permissible, however, the lawyer is obliged to make no disclosure broader than reasonably necessary for extrication.⁴²

This catalogue of "internal" rules does not exhaust the situations in which lawyers' discussions with clients are shrouded in secrecy. Another salient and much debated situation is where the lawyer surmises that a client wants to give knowingly false testimony.⁴³ A less discussed but equally important situation concerns the appropriate protocol for a corporate lawyer dealing with corporate officials engaged in conduct legally deleterious to the corporation.⁴⁴ However, the foregoing review is more than sufficient to frame the basic ethical problem confronting a lawyer in these situations: what should the lawyer say, in words or by body language and other means, to a client whose proposed course of action is at variance with what the lawyer considers appropriate?

The Rules do not say much about this. As noted above, Rule 1.2(d) requires a lawyer to wave off a client who wants to conscript the lawyer into an illegal or fraudulent transaction. A lawyer's self-interest strongly supports this duty, because a lawyer who assists in such a transaction becomes complicit in civil liability and perhaps

⁴² The formula in the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS is: "[u]pon termination of a representation, a lawyer shall take reasonable steps to protect a client's interests A lawyer shall: (a) Follow requirements stated in other provisions of this Restatement concerning former clients such as those dealing with client confidences" RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, *supra* note 3, § 45. Cf. MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.16, cmt. 3 (1998) (stating procedure for withdrawal when a lawyer has been appointed by court).

⁴³ See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(4) (1998); MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 109-41 (1990) (analyzing whether it is ever proper for a lawyer to present testimony the lawyer knows is perjurious); Philip J. Grib, *A Lawyer's Ethically Justified "Cooperation" in Client Perjury*, 18 J. Legal Prof. 145 (1993) (discussing various positions on the ethical responsibilities in the perjurious client context); Jay Sterling Silver, *Truth, Justice, and the American Way: The Case Against the Client Perjury Rules*, 47 VAND. L. REV. 339, 343-352 (1994) (discussing the history and scope of the client perjury rules); see also *Nix v. Whiteside*, 475 U.S. 157, 166-171 (1986) (discussing the acceptable range of responses to threatened client perjury for a lawyer under the Sixth Amendment).

⁴⁴ See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13(b), (d) (1998); Geoffrey C. Hazard, Jr., *Ethical Dilemmas of Corporate Counsel*, 46 EMORY L.J. 1011, 1013-16 (1997) (discussing Model Rule 1.13). Cf. *FDIC v. O'Melveny & Meyers*, 969 F.2d 744, 748-49 (9th Cir. 1992), *rev'd on other grounds*, 512 U.S. 79 (1994) (holding that California Law requires a lawyer to act competently to avoid public harm when the lawyer is aware that the client is dishonest).

also criminal responsibility.⁴⁵ Concerning the much-discussed dilemma of client perjury, the Comment to Rule 3.3(a) states that a lawyer is to admonish the client about the duty to be truthful in giving testimony.⁴⁶ Discharge of that duty rarely can implicate a lawyer in legal difficulty, but such an eventuality is not impossible.⁴⁷

These are limited instructions to lawyers concerning their discussions with clients. On the other side, concerning what a lawyer *may* say to a client, Rule 2.1 authorizes a lawyer to go beyond "strictly legal" considerations in advising a client. That rule provides: "In rendering advice, a lawyer may refer not only to law but also to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."⁴⁸

Rule 2.1 is merely permissive or "empowering." It simply means that a lawyer is not being officious in going beyond "strictly legal" advice, not that a lawyer is obliged to reach in that direction. Nor, in my opinion, should a rule of professional conduct go further and require that lawyers become ethical counselors or, in the disparaging phrase, "social workers." In my opinion, any such requirement would have little positive effect and could well be counterproductive. The point is not that a lawyer should disregard such "non-legal" considerations, let alone disparage their significance. Rather, the point is that the objective of broadening the scope of a lawyer's conversation with a client, like many objectives in life, cannot be well fulfilled by mandatory regulation.

IV. HOW TO TALK WITH A CLIENT?

In professional lore the problem of discussions with clients is *terra incognita*—very important terrain about which little is known. For obvious reasons, there are few systematic studies of the confidential discourse between clients and lawyers. The study by Austin Sarat and William Felstiner is the most recent and most penetrating, but even that study was limited to a specific locale and type of subject

⁴⁵ See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, *supra* note 3, §77 (discussing liability under general law) (Tentative Draft No. 8, 1997).

⁴⁶ See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 cmt. 5 ("[T]he lawyer should seek to persuade the client that the [false] evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed."); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, *supra* note 3, § 180 (Tentative Draft No. 8, 1997) (providing limitations on a lawyer's behavior when confronted with evidence that is false and evidence that is believed by the lawyer to be false).

⁴⁷ See *Subway Restaurants, Inc. v. Kessler*, 970 P.2d 526 (Kan. 1998) (upholding sanctions against attorney who presented in court a falsified federal income tax return filed by his client), *cert. denied*, 119 S. Ct. 1756 (1999). Cf. *John Doe v. The Federal Grievance Comm.*, 847 F.2d 57 (2d Cir. 1988) (evaluating the case of an attorney charged with violating the Code of Professional Responsibility on the basis that the attorney suspected a witness lied at deposition but did not so inform the court).

⁴⁸ Model Rules of Professional Conduct Rule 2.1 (1998).

matter—divorce litigation.⁴⁹ Many years ago there was a study of small firm practitioners in Wisconsin.⁵⁰ Beyond this, as far as I am aware, there are no studies that would pass muster as reliable on a similar quantitative basis.

There is of course some anecdotal evidence. It can be fairly said that the difference between a law student and an experienced lawyer consists of information that can be encapsulated in anecdotes—the exposures as a lawyer to the complexities and subtleties of real world practice, not the least of which are the problems in dealing with clients. As one of my law students recently observed:

The experiences of lawyers who have been practicing for some time are beneficial to those that may face similar situations in the future. Young lawyers . . . can develop a sense of how to deal with a situation and communicate with a client in a way that is ethical and maintains the professionalism expected of a lawyer.

There is much that could be learned from careful attention to anecdotes, but that kind of investigation has also been unusual. The studies along this line by Kenneth Mann of lawyers who defend white-collar crime, by Jerome Carlin of small firm practitioners, by Joel Handler of lawyers in middle sized cities, and a few similar undertakings are exemplary in effort but not comprehensive.⁵¹ Even among these, the studies by Kenneth Mann and the work by Austin Sarat and William Felstiner are unique in their focus on the interchanges between client and lawyer as distinct from the lawyer's general orientation to practice. As another student observed:

The context of the situation, the sophistication of the client, the duration of the lawyer-client relationship, and the lawyer's personality influences a lawyer's communication with a client For example, if the client is a juvenile with little education, the lawyer should structure his or her discussions using elementary terms to explain the legal process. On the other hand, if a client is general counsel for

⁴⁹ See AUSTIN SARAT & WILLIAM L. F. FELSTINER, *DIVORCE LAWYERS AND THEIR CLIENTS: POWER AND MEANING IN THE LEGAL PROCESS* (1995).

⁵⁰ See Lloyd K. Garrison, *A Survey of the Wisconsin Bar*, 10 WIS. L. REV. 131 (1935).

⁵¹ See generally MANN, *supra* note 29; see also E. JEROME CARLIN, *LAWYERS ON THEIR OWN: A STUDY OF INDIVIDUAL PRACTITIONERS IN CHICAGO* (1962); JOEL F. HANDLER, *THE LAWYER AND HIS COMMUNITY: THE PRACTICING BAR IN A MIDDLE-SIZED CITY* (1967); HERBERT KRITZER, *LAWYERS WHO LITIGATE: BACKGROUND, WORK SETTING AND ATTITUDES* (1988) (studying lawyers who handle "ordinary litigation"); KEVIN T. MCGUIRE, *THE SUPREME COURT BAR: LEGAL ELITES IN THE WASHINGTON COMMUNITY* (1993) (studying the elite circle of Washington D.C. lawyers who are in constant demand by parties seeking to access the Supreme Court).

a major corporation, the lawyer may choose to use legal terminology and may focus on the legal conclusion. As a result, a [single] model for adequate client communications is not feasible

It seems no accident that the systematic studies have addressed lawyers in solo or small firm practice, as distinct from lawyers in elite or corporate practice.⁵² I expect that it will be impossible to get candid discussions of the issues from many lawyers in the latter category. Without going into the sociology of law, the point is simply that lawyers in elite practice have fewer psychological and professional needs to explain the problems in their practice, and stronger incentives, in terms of peer pressure and client sensitivity, not to do so. This estimate is supported by the experience of the researcher who has done the one study of business ethics that I have found truly illuminating. The author of that study, Professor Jackall of Williams College, found that he could engage candid discussion of similar problems inside corporate management only if the discussion was characterized as dealing with something other than "ethics."⁵³ Some materials for teaching ethics in law school now address these and other delicate matters of law practice.⁵⁴ However, experience with teaching ethics in Continuing Legal Education indicates that lawyers generally are allergic to serious discussion of such issues in that setting. There is fiction, which can be true to life but which often is simplistic and exaggerated.⁵⁵ There are the real life stories that come out of legal malpractice litigation, but these transactions are by definition unusual or even pathological, and virtually always involve dispute as to the facts.

Hence, we are unlikely to find much reliable evidence about how lawyers really discuss confidential matters with their clients. In default of such evidence, we can proceed—although cautiously—with a normative analysis. That is, if we cannot establish through systematic inquiry how lawyers in fact talk with their clients, in confidential communications, we could postulate how they *ought* to talk with their clients. But it may be that the variousness of law practice is now such that even a skeletal model is beyond description.

⁵² On the stratifications of the bar according to type of practice, see JOHN P. HEINZ & EDWARD O. LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* (1982).

⁵³ See ROBERT JACKALL, *MORAL MAZES: THE WORLD OF CORPORATE MANAGERS* (1988); see also Geoffrey C. Hazard, Jr., *Ethics and Politics in the Corporate World*, 6 YALE J. REG. 155 (1989) (providing a detailed account of the author's views on Jackall's book).

⁵⁴ I refer specifically to the "video vignettes" produced in recent years, for example those produced by the University of Pennsylvania Law School and New York University, e.g., "Matt's Case" and "Albinex" by Pennsylvania and "Dinner at Sharswood Café" by N.Y.U.

⁵⁵ For example, John Grisham's enormously successful novels. A classic is *Anatomy of a Murder*. See ROBERT TRAVER, *ANATOMY OF A MURDER* (1958).

V. A MODEL FOR CONFIDENTIAL COMMUNICATIONS?

A beginning place for a model is to recognize the great differences among clients in their orientation, incentives, and receptivity with regard to information and counseling. These variables are conventionally summarized in the term "sophistication" of the client. Thus, there are great differences, for example, between an experienced business executive and a first-time home buyer, between a first-time juvenile offender and a criminal accused who has been through the criminal justice system before, and between a typical blue-collar industrial worker and a typical industrial engineer. Considering a different set of characteristics, there are great differences between a person accused of a felony and one inquiring about the patentability of a new idea. The range of citizen types who avail themselves of lawyers' services in this country is probably wider than in any other community. At the same time, our political ethos, with its emphasis on equality, makes it awkward or impossible to address differences among our population in legal terms. Hence, we can refer to this factor only in the vague concept of "sophistication" and even then have difficulty in saying anything meaningful about its significance.⁵⁶

Correlatively, we must recognize that there are great differences among lawyers and law firms. Every lawyer has a self-conception that he projects more or less consciously.⁵⁷ We would not confuse a typical bond lawyer or probate counsel with a member of the plaintiff's personal injury bar, for example, or even a typical plaintiff's lawyer and a typical member of the insurance defense bar. The professional persona projected in this way provides signals about the psychological framework of discussions with clients, as well as with opposing counsel, other parties, and with the courts.

Within these parameters, the most important variable is the subject matter of the representation. Representation of a litigant presents problems different from those in transaction matters because, once locked in litigation, a party has limited freedom. Litigation is coercive on both sides and one cannot disengage in the same way as in a typical transaction matter. Representation of a criminal accused presents these problems in the most extreme form. Just as it is difficult to hold a criminal accused to the same standard of truthfulness as a party to civil litigation, it is difficult to expect the same level of candor in the interchange between client and lawyer.⁵⁸

⁵⁶ See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, *supra* note 3, § 31 cmt. B (addressing the "sophistication" of clients in connection with disclosure and consultation).

⁵⁷ The process of self-projection is beautifully captured in the title of the book by Erving Goffman, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (1959).

⁵⁸ Experienced criminal defense counsel do not expect their clients to "level" with them. One lawyer expressed the point by observing that he never asks a client what the facts "were,"

Another important variable is the duration and scope of the relationship between the client and the lawyer. A classic long-term relationship is not the same as a one-time engagement. Long-term relationships between a client and a lawyer make possible more searching communication, perhaps with fewer words, than what might be called "one day stands." As we have become well aware, long-term client-lawyer relationships are less often encountered these days. Indeed, the most common long-term relationship these days is likely to be between inside counsel and corporate management. That circumstance puts into different light the conception of independence in practice of law. These days, a lawyer in independent practice may have greater formal independence but simply be a stranger to the client.

Other variables can be brought to mind: The age and experience of the lawyer, the relative age of the client, the size and relative intimacy of the community in which they live, the region of the country (New York and Los Angeles are different), and others.

We must also remember that communications with the client serve functions beyond conveying information. These communications must not only be technically accurate but understandable to a lay person. They must be objective but also compassionate, coldly realistic but warmly humane. As indicated in the study by Professors Sarat and Felstiner, they must also express a complex balance between encouragement to the client, in the face of legal uncertainty and resistance from the other side, and "cooling out" unrealistic hopes.⁵⁹ At the same time, they must also serve to maintain the client's confidence but not convey a sense that the lawyer can perform magic.

VI. CONCLUSION

If this analysis is correct, we cannot make accurate generalized descriptions of the confidential communications between clients and lawyers. Nor can we prescribe a model for such communications except in the broadest terms, indeed nearly vacuous ones. This conclusion suggests that academic discussions of proper communication between lawyer and client have limited foundation and usefulness. It probably also explains why it is difficult to address the subject in such settings as law school and Continuing Legal Education. This is because the manner of these communications is a matter personal to each lawyer and dependent on each lawyer's moral predisposition and personal concept of professionalism. Realization of these limiting

but instead asks what the police will say the facts are. See GEOFFREY C. HAZARD, JR., ET AL., *THE LAW AND ETHICS OF LAWYERING* 375 & n.39 (2d ed. 1994). The truth usually would interfere with the relationship between client and defense counsel.

⁵⁹ See SARAT & FELSTINER, *supra* note 49, at 56-57.

considerations is chastening from a viewpoint of social control and regulation. We must accept that adequate and suitable communication with clients is largely beyond regulation in the mode of a consumer's protection law or securities laws disclosure requirements. It therefore turns out to be a matter of personal and professional morals and ethics.