the secrets lawyers keep

a new world of client confidences

BY DAVID D. DODGE

This may come as a surprise to you: The public does not trust lawyers.

Now for some really bad news: An increasing number of lawyers and judges don't trust lawyers either.

Part of this perception comes from the sense that lawyers stand between bad people and the common good. The result is that there is a developing view that our existing ethical rules concerning client confidentiality[1] need to be changed to ensure that lawyers cannot contract away their ability to disclose known, discovered dangers to the public so that a single client may benefit.[2]

Let's take some examples of what everybody is talking about. The first, in chronological order, is the furor recently created by headlines such as appeared in the *New York Times:*

SUV Tire Defects Were Known in 1996 But Not Reported

Lawyers and Safety Consultant Opted To Protect Victims' Suits Against Firestone[3]

This was followed by a detailed story about how a group of personal injury lawyers had identified a pattern of failures for the Firestone ATX tires on Ford Explorer SUVs as early as 1996. However, they had decided not to disclose that pattern to safety regulators for four years out of concern that private lawsuits in which they represented the plaintiffs would be compromised.

The article continued with quotes from camps with obviously different views. A physician who served as head of the National Highway Traffic Safety Administration during the 1990s called the lawyers' behavior "outrageous," comparing it to a doctor remaining silent about what was killing his patients so as not to reduce the demand for his services. Professor Geoffrey Hazard, a leading expert on legal ethics, said the lawyers had broken no laws or ethical rules; Professor Hazard stated that although the lawyers had a civic responsibility, they had no legal duty to say anything.

Numerous editorials, generally uncomplimentary to the legal profession, followed. So did a *Sixty Minutes* hit piece, during which other examples of secret settlements, most of them involving lawyers, surfaced. Other examples were discussed, such as the prescription drugs Zomax and Halcion, the Shiley Heart Valve and the Dalcon Shield intrauterine device, all eventually taken off the market as too dangerous but not until hundreds of secret settlements had been effected, all while the public was being injured. And this was all before the recent revelations about the Catholic Church and the secret settlements that allowed priests to continue to sexually exploit children.

But it gets worse.

Consider what happened in the 1992 California case of *Neary v. Regents of University of California*.[4] In *Neary*, the California Supreme Court held that the parties could, by stipulation, "reverse" the trial court's judgment. This would, presumably, be done by stipulating to an order or judgment having the trial court find exactly the opposite from what actually happened.

The net effect is that the real result is hidden from the public. To the outside world, the real winner in *Neary* lost (and probably got a lot of money, presumably) and the loser actually won. Stated another way, the defendant found liable for wrongdoing purchased a change in the judgment to make it look like an exoneration.

In *Morrow v. Hood Communications, Inc.*,[5] a dissenting appellate judge refused to follow *Neary*, expressing his dismay at another "reversal" bought by the loser. The result? The judge was reported to the California Commission on Judicial Performance for refusing "to abide by precedent," a judicial offense warranting discipline.[6]

Perhaps we can justify these secret settlements as something we would expect from money-grubbing businessmen. But most of the agreements that were eventually discovered in the medical and drug settlements involved lawyers, on both sides. And they not only participated in these deals, but they also created and approved of the agreements, actively participating in subterfuges that, if revealed, might have saved lives.

Is this "zealous advocacy"? Are these examples of the hallowed tradition we lawyers have of "keeping client confidences"? We as lawyers seem to have developed our own belief system, not necessarily shared by the public, about what our role in the legal system is and the lengths to which we can go to act in our clients' best interests. Whatever has caused the problem, there has been enough grumbling within the legal profession so that some change appears to be inevitable.

- According to a survey done on client confidences by the Attorneys' Liability Assurance Society, Inc.,[7] every jurisdiction except California requires disclosure where a client intends to commit a crime likely to result in death or great bodily injury.
- Forty-one jurisdictions, including Arizona, either permit or require disclosure to prevent a client from perpetrating a fraud that constitutes a crime.[8]
- Eighteen jurisdictions permit or require disclosure to rectify substantial loss resulting from client crime or fraud in which the client used the lawyer's services.[9]
- The Arizona Ethical Rules Review Group has proposed a modification to present ER 1.6 so that Arizona would join this second group, thus expanding the type of disclosures allowed.[10]
- Both the American Law Institute's RESTATEMENT OF THE LAW GOVERNING LAWYERS and the ABA Ethics 2000 Commission's[11] report advocate a substantially liberalized ability for a lawyer to reveal client confidences under certain situations.

As Professor Richard Zitrin observes, the people making our ethical rules are moving substantially in the direction of allowing, and sometimes requiring, lawyers to disclose confidences in order to protect the interests of third parties.

secret settlements

Let's start with secret settlements. The following rule was proposed to the Ethics 2000 Commission:

> A lawyer shall not participate in offering or making an agreement among parties to a dispute, whether in connection with a lawsuit or otherwise, to prevent or restrict the availability to the public of information that a reasonable lawyer would believe directly concerns a substantial

danger to the public health or safety, or to the health or safety of any particular individual(s).

The Commission eventually rejected this proposal, apparently believing that a public policy issue such as secret settlements would be better dealt with by court rule or by legislation. The Commission then went on to make substantial public policy decisions in its proposed amendment to ER 1.6 (discussed later in this article).

The Commission overlooked the fact that secret deals in the litigation process often can result in lawyer discipline, when discovered, under the aegis of ER 3.3 (Candor Toward The Tribunal).[12] Moreover, it's a sure bet that keeping what appear to be ethical considerations out of the hands of a state legislature is something that every lawyer would agree should happen. And, in Arizona, our ethical standards are prescribed by court rule anyway.[13]

As a practical matter, the Ethics 2000 Commission's decision was made before the furor surrounding the Firestone/Ford and the Catholic Church revelations, and the advocates for the proposed rule quoted here are articulate, persuasive and persistent.

Whatever form the impetus for a change will take, you need to be aware that changes are in the wind, and that it is only a question of time before secret settlements involving issues of public health and safety will be a thing of the past. As of right now, however, only two states—Florida and Texas—forbid secret settlements, and even then only in cases involving products or activities that pose potential danger to the public. Attempts to outlaw secret settlements in several other states have gone nowhere, and Rhode Island is the only state where legislation to restrict secret settlements is being considered.[14]

client confidences

Now let's talk about ER 1.6 and client confidentiality. This is the ethical rule that states that a lawyer shall not reveal information relating to the representation of the client without client consent.

As with every rule, there are several exceptions:

- ER 1.6(b) states that a lawyer *shall* reveal any information the lawyer reasonably believes necessary to prevent the client from committing a criminal act that is likely to result in death or substantial bodily harm.
- ER 1.6(c) provides that a lawyer *may* reveal the intention of a client to commit a crime and the information necessary to prevent it.

These exceptions to the rule of confidentiality require in one case, and permit in another, a lawyer to "rat" on a client, a situation that goes against the grain of everything we hold dear about the lawyer–client relationship.

Arguably, this should have prevented at least some of the secret settlement agreements discussed previously. The persistence of drug companies to sell products to the public they knew were harmful could certainly be argued as a criminal act.[15] Because some of the drugs resulted in death or substantial bodily harm, the drug companies' lawyers were required to report this to some authority. So why haven't they been disciplined? The mantra of client confidentiality has been well ingrained, and, until recently, the duty of confidentiality to the client has trumped most of the notions about a lawyer's duty to the public.

First came the Ethics 2000 Commission and its proposal of a new provision permitting lawyers to disclose client confidential information to prevent, mitigate or rectify a client fraud in which the lawyer's services have been used, if that fraud seriously threatens financial injuries to third parties. The Commission has proposed *permissive* (i.e., non-mandatory) disclosure not only for the prevention of death or substantial bodily harm, but also

> (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services.
>
> (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services.[16]

The proposed change has been criticized as a rule that probably will not prevent fraud from occurring in the first place and that will create more opportunities for non-clients to sue lawyers. It is argued that liability will occur when lawyers, who no longer will have the shield of ER 1.6 and its prohibition against disclosure of confidential information, are accused of a failure to disclose the situation where client fraud was involved.[17] These lawyers will then risk becoming additional defendants in litigation, where it will be argued that they knew or should have known about their client's fraud and should have taken steps to save the victims before the fraud occurred. It has been pointed out that the client–lawyer relationship is fragile enough and that this additional impediment to trust should not be added to the mix.[18] This view is countered with the argument that a client who abuses the lawyer–client relationship to perpetuate a fraud should simply be deemed to forfeit the protections of ER 1.6.[19]

the rush to fix the problem

Enter Enron, Worldcom and Adelphia, as well as Congress and the American Bar Association's Task Force on Corporate Responsibility.

The ABA Task Force was appointed after the Enron and related crises called into question the integrity of the disclosure system applicable to publicly traded corporations. The Task Force hurriedly recommended several amendments to ERs 1.6 and 1.13 (Organization as Client).[20]

Briefly stated, the ABA is proposing to amend Rule 1.6 to conform to the recom-

mendations of the Ethics 2000 Commission, which it originally had rejected.[21] The Task Force also has recommended changing ER 1.13 to require lawyers to pursue remedial measures for misconduct, even though the problem may not be related to what they are doing for the client, and to communicate with higher corporate authority where other efforts fail to rectify the problem. Finally, the Task Force has recommended that the lawyer's duty of disclosure arises not only when he has actual knowledge but also when the lawyer reasonably should know of the crime or fraud.

And then there's Congress. New legislation, the Sarbanes–Oxley Act of 2002,[22] known as the "Corporate Responsibility Act," establishes a new oversight board to monitor the accounting industry. Among other things, it establishes a host of new reporting and disclosure requirements for publicly traded companies, with criminal penalties for infractions. It includes a direction to the Securities and Exchange Commission to draw up rules of professional responsibility for lawyers who practice before the SEC, specifically requiring them to report evidence of fraud or other serious wrongdoing within the corporation to senior managers or to directors.

One of the Act's sponsors, Sen. John Edwards (D–NC), has said that too many lawyers representing corporations have "forgotten who their client is" and act as if their responsibilities are owed to the CEO or CFO rather than to the corporation as an entity. The Act has been criticized as a legislative attempt to enact rules of professional responsibility and will probably be attacked on separation-of-powers grounds before it becomes part of our jurisprudence.

Complain as we may, these are the solutions that are going to be imposed upon us as long as lawyers continue to be perceived as facilitators of wrongdoing. A rule prohibiting secret settlements will help by allowing us as lawyers to tell clients that we are ethically prohibited from engaging in subterfuges and schemes to deceive the public and the courts.

But what if we are presented with the Hobson's choice of needing to know all the facts, good and bad, so we can properly advise a client while at the same time we are being asked to violate our client's expectation that what he tells us will be held in secrecy?

Perhaps the answer is that other forces are charged with protecting the public and that a private lawyer's first duty is to properly and competently advise the client. Apparently both the ABA and Congress believe this can still be done with modified ERs 1.6 and 1.13. In the meantime, the rest of us are left to contemplate the tensions between legal ethics, the law and the public good. ◣

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endnotes

1. *See, e.g.*, ER 1.6, Rule 42, ARIZ.R.S.CT.
2. This article was inspired by an excellent discussion of the subject by Professor Richard Zitrin appearing in 12 *The Professional Lawyer* (ABA Center for Professional Responsibility, Summer 2001).
3. NEW YORK TIMES, June 24, 2001, at 1.
4. 834 P.2d 119 (Cal. 1992).
5. 69 Cal. Rptr. 489 (Ct. App. 1997).
6. I am not making this up. The case ultimately was dismissed. *See Inquiry Concerning Justice J. Anthony Kline*, Case No. 151, California Commission and Judicial Performance (August 19, 1999).
7. Chart on Ethics Rules on Client Confidences (2001).
8. Alaska, Arizona, Arkansas, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming (permit); Florida, New Jersey, Virginia and Wisconsin (require).
9. Connecticut, Hawaii, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Texas, Utah, Virginia and Wisconsin (permit); Hawaii and Ohio (require).
10. The new ER 1.6 would add the following:
    (d) A lawyer may reveal such information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
        (1) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services.
11. Formally known as the ABA Commission on Evaluation of the Rules of Professional Conduct.
12. ER 3.3 prohibits a lawyer from failing to disclose facts to a tribunal when necessary to avoid assisting a client from doing a criminal or fraudulent act. *See In re Alcorn*, 41 P.3d 600 (Ariz. 2002) (secret agreement between parties and counsel not disclosed to court resulted in ethical violation); *Mustang Equip., Inc. v. Welch*, 564 P.2d 895 (Ariz. 1977) (covenant not to execute must be disclosed to court and counsel); *cf. State Farm Mut. Auto. Ins. Co. v. Paynter*, 593 P.2d 948 (Ariz. 1979) (secret agreement upheld as against insurance company).
13. Rule 42, ARIZ.R.S.CT.
14. Neil, *Confidential Settlements Scrutinized*, 88 ABA JOURNAL 20 (July 2002).
15. *See* The Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 352(j) and 21 U.S.C. §§ 331(a) and (b) and 333.
16. Arizona's Ethical Rules Review Group has recommended adoption of proposed subsection (2).
17. For another not very sanguine view of lawyers and disclosure of fraud, *see* Langervoort, *Where Were The Lawyers? A Behavioral Inquiry Into Lawyers' Responsibility for Clients' Fraud*, 46 VAND. L. REV. 75 (January 1993).
18. Harris, *The Professionalism Crisis,* 12 THE PROFESSIONAL LAWYER 1, at p. 19 (ABA Center for Professional Responsibility, Spring 2001).
19. Ethics 2000 Commission proposed Rule 1.6, at Commentary ¶ 7.
20. Preliminary Report of the American Bar Association Task Force on Corporate Responsibility (July 16, 2002), at pp. 45–46.
21. For an excellent discussion of the history of the ABA's vacillations on this issue and a good case for sustaining the proposed amendment, see Russell, *Client Confidences and Public Confidence in the Legal Profession: Observations on the ABA House of Delegates Deliberations on the Duty of Confidentiality*, 13 THE PROFESSIONAL LAWYER 19 (ABA Center for Professional Responsibility, Spring 2002).
22. *See* new subsection 307 to Section 10A of the Securities Exchange Act of 1934, 15 U.S.C.A. § 78(f).