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Client Fraud and the Lawyer--An Ethical Analysis

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Note: Client Fraud and the Lawyer— An Ethical Analysis

I. INTRODUCTION¹

As an officer of the court,² a lawyer is sworn not merely to represent his client but to promote the ends of justice. It is therefore incumbent upon the attorney to insure that his talents and skills are not used by his client to perpetrate a fraud upon another person.³ For a lawyer knowingly to assist his client's fraudulent intentions would,

1. This Note deals with the ethical problems that confront a lawyer when he discovers that his client has used the professional relationship to commit a fraud upon another person or private legal entity. As thus defined, the scope of the Note is subject to several significant limitations:

(a) "Fraud" as used herein is not necessarily limited to common law fraud. For a discussion of the scope of this term, see notes 70-73 *infra* and accompanying text.

(b) "Client fraud" will denote only situations where the client *uses* the professional relationship to commit a fraud—that is, where the professional relationship plays a material role in accomplishing the client's deception. Thus, if the fraud is perpetrated before the client retains the lawyer or in a matter wholly distinct from the subject of the representation, it is not "client fraud" as that term is used in this Note.

(c) This discussion is also limited to fraud that directly injures a person or legal entity. Excluded, therefore, are those situations where the fraud is only upon the court or other governmental entity. While the considerations underlying these two situations bear significantly upon each other, the absence, in the latter case, of an actual victim makes them susceptible to and worthy of separate analytical treatment. See note 17 *infra*.

(d) Finally, this discussion is limited to those situations where the defrauded person is unaware of the deception. The ultimate issue is the lawyer's duty to disclose the fraud. If the injured party is already aware of the injury, disclosure would be pointless.

2. The phrase "officer of the court" is generally used as a term of art to describe the lawyer as a functionary of the judicial system, thus justifying the judiciary's interest in regulating the practice of law. See generally Note, *The Inherent Power of the Judiciary to Regulate the Practice of Law—A Proposed Delineation*, 60 MINN. L. REV. 783 (1976). For the purposes of this discussion, however, the phrase will have a broader scope. 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. Certain kinds of fraud—for example, securities fraud—are only possible with an attorney's help. Other kinds of fraud—for example, a real estate swindle—while not strictly requiring a lawyer's skills, are much more likely to be successful if the perpetrator acts through an attorney.

of course, be unconscionable.⁴ Occasionally, however, the client may be sophisticated enough to conceal his designs from the lawyer until the deception has been consummated.⁵ Yet neither the fact that the fraud has been accomplished nor the fact that his role was unwitting can relieve the lawyer of the ethical responsibility for his participation in an injustice. In such a case, the lawyer should be obligated to take whatever steps are necessary to rectify the situation. Initially, of course, he must attempt to persuade the client to correct the fraud himself.⁶ If the client refuses, however, disclosure becomes the only means of remedying the injustice, and the lawyer must decide whether to reveal the facts to the injured party or to allow the injustice to go unremedied.

It should be evident that a lawyer in this situation faces a very difficult ethical decision. If he discloses the fraud, he necessarily breaches his general duty to maintain his client's secrets and confidences,⁷ a duty deemed essential to the adversary system of justice.⁸ If, on the other hand, he acquiesces in concealing the fraud by remaining silent, he perpetuates the unjust situation he has helped to create, a result that is intuitively repugnant.⁹ Given the difficulty of

4. A lawyer who realizes that his client intends to use the professional relationship to commit a fraud is obligated to withdraw from representation. See ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110(B)(1); DR 7-102(A)(7). See also *id.* DR 1-102(A)(4), (5); DR 2-110(C)(1)(a)-(c). To the extent that a lawyer is able to detect the client's improper intentions before they are put into effect, this requirement satisfactorily deals with the client fraud problem.

5. See, e.g., note 10 *infra*. At the point where the fraud becomes an accomplished fact, a mere withdrawal from representation can do nothing to rectify the damage done either to the injured party or to the lawyer's special office.

6. See ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B)(1).

7. See *id.* DR 4-101. A partial text of DR 4-101 appears in note 35 *infra*.

8. See text accompanying notes 107-08 *infra*.

9. Intuition may appear to be a weak basis for argument. But the fact is that all ethical judgments are ultimately rooted in intuitive notions concerning right and wrong. This fact is often obscured by attempts to justify such judgment through reference to precedent or to what Professor Williams refers to as "ancillary value claims." See Williams, *Subjectivity, Expression, and Privacy: Problems of Aesthetic Regulation*, 62 MINN. L. REV. 1, 9-11 (1977). But ultimately we cannot prove that a particular course of action is ethical; we must simply accept the fact. As Bernard Williams puts it: "Moral thinking feels as though it mirrored something, as though it were constrained to follow, rather than be freely creative. . . . For certainly the consciousness of a principle . . . freely decided upon is very unlike the consciousness of a moral principle, which is rather of something that has to be acknowledged." B. WILLIAMS, *MORALITY: AN INTRODUCTION TO ETHICS* 37-38 (1972). Writing about ethics is therefore necessarily reducible to something akin to an *ipse dixit*: "A is the preferred course of action because it is right." Thus, while this Note will attack the value judgments that underlie the Code of Professional Responsibility's disclosure rules, it should be recognized that it does so from an intuitive basis. Reason and precedent play a role in disputing the arguments used to support the Code's value judgment, but the

this ethical quandary,¹⁰ there is a need for the organized bar to pro-

utility of those tools is limited. The reader will therefore be asked to *accept*, by intuition rather than by reason, that it is *wrong* to allow clients to abuse the skills of their attorneys in an effort to defraud others. Remedying that wrong justifies a relatively minor limitation on the principle of lawyer-client confidentiality.

10. The dilemma can perhaps best be demonstrated by example:

Example 1

A probate lawyer represents the court-appointed guardian for the person and property of a young child whose parents died a year ago, leaving him a substantial estate in trust. The client admits to the lawyer that he has misappropriated a considerable portion of the ward's estate. A bonding company is obligated as surety to restore the misappropriated funds if a timely claim is brought to its attention. (This example is based on the facts in ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 1778 (1964) (Informal Opinion), *compiled in 1 AMERICAN BAR ASSOCIATION, INFORMAL ETHICS OPINIONS 373* (1975). See text accompanying notes 24-27 *infra*.)

Example 2

The facts are the same as Example 1, except that the lawyer learns of the misappropriated funds from his client's close friend, to whom the client admitted the fraud in confidence.

Example 3

A homeowner retains a lawyer to represent him in connection with the sale of his house. During preliminary negotiations with a prospective purchaser, the client represents that the electrical wiring is newly installed, that the basement is watertight, and that the house is generally in excellent condition. In apparent reliance upon these representations, the two parties agree to a purchase price. After the sale is consummated, the lawyer receives a phone call from his client's neighbor, who reports that the client recently told him that the roof of the house is in need of substantial repair, that the electrical wiring is old and in defective condition, and that the basement fills with several inches of water during heavy rains. The neighbor explains that he is conveying this information because he knows the lawyer was involved in the transaction and because he has good reason to believe that the client misrepresented these facts to the purchaser. The purchaser is unaware of the defects in his new home. (This example is discussed in Callan & David, *Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct in an Adversary System*, 29 *RUTGERS L. REV.* 332, 388-89 (1976).)

Example 4

The lawyer representing a corporation that has recently completed a large public stock offering discovers that much of the information he used in drafting the prospectus was misleading and that several of the company's officers and directors were fully aware of the deception from the beginning. Moreover, the financial information about the corporation disclosed in the prospectus was so far from the truth that the newly issued stock is grossly overvalued. Only the lawyer and the persons involved are aware of the fraud.

The client fraud dilemma presents unique problems in a securities law context since, in addition to any *ethical* duty to disclose mandated by the ABA Code of Professional Responsibility, securities lawyers may also find themselves subject to a *legal* duty to reveal information about their client's fraudulent actions. It is possible, for example, that a lawyer may be held civilly or criminally liable for aiding and abetting stock fraud if he fails to report a violation of the securities laws in which he has played a role. See, e.g., *SEC v. National Student Mktg.*, 402 F. Supp. 641 (D.D.C. 1975). Securities lawyers, understandably concerned about this new development in the law, have reacted critically to all mandatory disclosure rules for client fraud infor-

mulgate and enforce an understandable and ethically sound rule governing professional behavior in such situations. Unfortunately, the American Bar Association (ABA), after struggling for years with the client fraud dilemma, has been unable to draft such a rule. Instead, the current standard mandated by the Code of Professional Responsibility is confused, badly reasoned, and most important, ethically unsatisfying.¹¹ This Note will trace the evolution of the ABA's response to the problem of client fraud, analyze the current solution prescribed by the Code, and propose an alternative rule that would better reconcile the conflicting ethical requirements that confront a lawyer upon discovering his client's fraud.

II. HISTORY OF THE ABA'S ATTEMPTS TO DEAL WITH THE CLIENT FRAUD DILEMMA

A. THE CANONS OF PROFESSIONAL ETHICS

In 1908, the ABA adopted the Canons of Professional Ethics, the first attempt to prescribe nationally applicable rules of professional conduct for lawyers. The lawyer's responsibility upon learning of his client's fraud was set out in 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.¹²

mation. See AMERICAN BAR ASSOCIATION, SUMMARY OF ACTION OF THE HOUSE OF DELEGATES: ANNUAL MEETING 31 (1975) [hereinafter cited as ABA HOUSE ACTION]; Goldberg, *Ethical Dilemma: Attorney-Client Privilege v. The National Student Marketing Doctrine*, 1 SEC. REG. L.J. 297 (1974); Lipman, *The SEC's Reluctant Police Force: A New Role for Lawyers*, 49 N.Y.U.L. REV. 437 (1974). See generally note 53 *infra*.

11. According to DR 7-102(B)(1), the lawyer in each of the examples enumerated in note 10 *supra* would be ethically bound to keep secret any information about his client's fraud. Moreover, in nearly every realistic client fraud situation, the ABA Code, far from requiring the lawyer to correct the injustice by disclosing the deception, threatens him with disciplinary action if he attempts to inform the injured party of his client's fraud. See text accompanying notes 82 & 93-97 *infra*. It is the position of this Note that such a result is inconsistent with the Code's earlier insistence that lawyers are obligated "to maintain the highest standards of ethical conduct." See note 2 *supra*.

12. ABA CANONS OF PROFESSIONAL ETHICS No. 41. Canon 41 was added to the Canons in 1938. AMERICAN BAR ASSOCIATION, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS 181 (1967). Other Canons also applied to the client fraud problem, although tangentially. See, e.g., ABA CANONS OF PROFESSIONAL ETHICS No. 15 ("The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane."); No. 22 (lawyer's duty of candor and fairness); No. 29 (lawyer's duty to uphold the honor of the profession).

Standing alone, Canon 41 provided an unequivocal mandate to reveal a client's fraud to the injured party if the client refused to remedy the injustice himself. It was not, however, the only provision governing the lawyer's conduct in this situation. Other Canons recognized the importance of confidentiality in the lawyer-client relationship, and Canon 37 specifically directed the lawyer to preserve his client's confidences.¹³ Thus, in those situations where the lawyer learned of the client's deception from a confidential communication,¹⁴ he would have to choose between the two conflicting Canons. Far from resolving the client fraud dilemma, the Canons, literally interpreted, imposed directly contradictory requirements on the lawyer, in effect threatening him with possible disciplinary action no matter what he chose to do.

This unsatisfactory situation prompted several inquiries to the ABA Committee on Professional Ethics.¹⁵ Finally, in 1953, the

13. It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, and extends as well to his employees; and neither of them should accept employment which involves or may involve the disclosure or use of these confidences, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even though there are other available sources of such information. A lawyer should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client.

If a lawyer is accused by his client, he is not precluded from disclosing the truth in respect to the accusation. The announced intention of a client to commit a crime is not included within the confidences which he is bound to respect. He may properly make such disclosures as may be necessary to prevent the act or protect those against whom it is threatened.

ABA CANONS OF PROFESSIONAL ETHICS No. 37.

In addition, Canon 6 referred to "[the lawyer's] obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences . . ." *Id.* No. 6.

14. The Canons did not define the term "confidence." Presumably the word referred to information that would be protected by the attorney-client privilege under state law. *Cf.* ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (A) (so defining the term in the ABA Code of Professional Responsibility). The text of DR 4-101(A) appears in note 35 *infra*.

15. What is currently known as the ABA Committee on Ethics and Professional Responsibility, in existence since 1913, has also been known as the Standing Committee on Professional Ethics and the Committee on Professional Ethics and Grievances. The Ethics Committee has been charged, *inter alia*, with interpreting the Canons and rendering opinions as to proper professional conduct in given situations. The Ethics Committee issues both Formal and Informal Opinions. Formal Opinions involve questions that arise frequently and that are of general interest. Informal Opinions involve questions that arise comparatively infrequently and that are narrower in scope. Formal Opinions issued before 1967 are compiled in AMERICAN BAR ASSOCIATION, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS (1967) [hereinafter cited as ABA OPINIONS]. Those Formal Opinions issued after 1967 have not yet been officially compiled and in this Note will be cited to the slip opinions. Informal Opinions issued before 1975 are

Committee issued Opinion 287, its first attempt to deal with the client fraud dilemma.¹⁶ The Opinion involved a lawyer who had represented the husband in a divorce action in which a decree was granted on the ground of willful desertion and abandonment by the client's wife. Three months later, the client informed the lawyer that he had misrepresented the duration of the wife's desertion and thus had not been legally entitled to a divorce on that basis. The wife, who had colluded in the perjury, was now threatening to reveal the fraud to the court because the client was behind in his support payments. A state bar association requested the Ethics Committee's opinion concerning whether the lawyer had an obligation to reveal the perjury to the court.¹⁷

The Ethics Committee first determined that Canon 37 "embodied" the common law evidentiary privilege of nondisclosure for confidential communications between lawyer and client.¹⁸ Tracing the history of the privilege, the Committee reasoned that the lawyer's obligation to maintain confidentiality, part of the very foundation of the adversary system, was essential to the administration of justice.¹⁹ Since the client's communication to the lawyer did not come within any of the explicit exceptions to the general requirement of confiden-

compiled in the two volume AMERICAN BAR ASSOCIATION, INFORMAL ETHICS OPINIONS (1975) [hereinafter cited as ABA INFORMAL OPINIONS].

16. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 287 (1953), in ABA OPINIONS, *supra* note 15, at 633. There were prior opinions dealing with client misconduct, *see, e.g., id.*, No. 274 (1946), in ABA OPINIONS, *supra* note 15, at 608; No. 268 (1945), in ABA OPINIONS, *supra* note 15, at 596; No. 216 (1941), in ABA OPINIONS, *supra* note 15, at 503; No. 202 (1940), in ABA OPINIONS, *supra* note 15, at 486; No. 156 (1936), in ABA OPINIONS, *supra* note 15, at 427; No. 155 (1936), in ABA OPINIONS, *supra* note 15, at 426; No. 87 (1932), in ABA OPINIONS, *supra* note 15, at 335; but none addressed the type of client fraud with which this Note is concerned.

17. Since the wife colluded in the perjury, the client's fraud was perpetrated solely against the court. Therefore, the factual situation addressed in Formal Opinion 287 is *not* an example of the type of client fraud dealt with in this Note. *See* note 1 *supra*. Nevertheless, Opinion 287 has played an important role in the evolution of the ABA's position on client fraud and thus bears on the issues addressed herein.

Arguably, client fraud against a tribunal is qualitatively different from client fraud against a person. In both situations, the client's use of the lawyer to perpetrate a deception entails an abstract harm to the legal system. In the latter case, however, there is additional, palpable harm to an identifiable person. The moral imperative for disclosure by the lawyer is therefore necessarily stronger in the case of a fraud against a person. Only this more compelling situation is discussed in this Note. *See* note 113 *infra*.

18. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 287 (1953), in ABA OPINIONS, *supra* note 15, at 635. For a discussion of the impropriety of relying on the evidentiary privilege to support a rule of lawyer-client confidentiality in a client fraud context, *see* notes 99-106 *infra* and accompanying text.

19. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 287 (1953), in ABA OPINIONS, *supra* note 15, at 635.

tiality imposed by Canon 37,²⁰ the Committee concluded that the lawyer would have a duty to remain silent unless disclosure was specifically required by some other Canon or policy consideration.²¹ Turning to Canon 41, the Committee decided that Canon 37 should take precedence over the competing duty of disclosure there imposed,²² and that in any event: "We do not believe that *Canon 41* was directed at a case such as that here presented but rather at one in which, in a civil suit, the lawyer's client has secured an improper advantage over the other party through fraud or deception."²³

This interpretation of Canons 37 and 41 was followed eleven years later in Informal Opinion 778,²⁴ which concerned a lawyer who represented a court-appointed guardian of the person and property of a minor. The guardian revealed to the lawyer that he had misappropriated a substantial part of the ward's estate. The lawyer requested the Ethics Committee's opinion concerning his duty to report the fraud either to the court or to the bonding company that would make good the losses if informed. The Committee, expressly adopting the reasoning of Opinion 287, resolved the conflict between the Canons in favor of the confidentiality requirement. It held that the lawyer was not obligated to report the fraud and that to do so would constitute a violation of Canon 37.²⁵ Unfortunately, the Committee ignored a crucial factor distinguishing the situation before it from that presented in Opinion 287—the existence of a third party who had been injured by the client's fraud. In fact, the Committee treated the situation as if it were merely a conflict between the requirement of confidentiality and the need to avoid frauds upon the court:

True it is that the attorney, as an officer of the court, owes a duty to the court which appointed the guardian and that a minor child

20. See ABA CANONS OF PROFESSIONAL ETHICS No. 37. The text of Canon 37 appears in note 13 *supra*.

21. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 287 (1953), in ABA OPINIONS, *supra* note 15, at 636.

22. "We do not consider . . . [Canon 41] sufficient to override the purpose, policy, and express obligation under *Canon 37*." *Id.* at 637. Since the Committee held that Canon 41 did not apply to the fact situation before it, see note 23 *infra* and accompanying text, it was unfortunate that they made such a broad value judgment without attempting to justify it. It was even more unfortunate that this decision was followed without question in Informal Opinion 778, dealing with an entirely different factual situation. See notes 24-27 *infra* and accompanying text.

23. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 287 (1953), in ABA OPINIONS, *supra* note 15, at 636. As a further ground for its decision, the Committee held that neither the divorce court nor the state (as an interested party in all divorce actions) qualified as an injured party under Canon 41. *Id.* See generally note 17 *supra*.

24. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 1778 (1964) (Informal Opinion), in 1 ABA INFORMAL OPINIONS, *supra* note 15, at 373.

25. *Id.* at 374.

is under the special protection of the court, *but it was the guardian who employed the attorney and the guardian and not the ward is the client of the attorney.*²⁶

The Committee ruled that the lawyer should advise the client to rectify the fraud and that, if the client refused to do so, the lawyer should withdraw from representation.²⁷ In no event, however, was the lawyer to attempt to rectify the fraud by disclosing it to the court or the bonding company.

After Opinion 287 and Informal Opinion 778, a lawyer's duty when confronted with client fraud was relatively clear. It was only in those few situations in which the client had injured another person by perpetrating a fraud *in a civil suit* that the disclosure duty imposed by Canon 41 could even arguably take precedence over the duty of confidentiality.²⁸ Faced with any other client fraud, the lawyer was always to follow Canon 37's obligation of confidentiality. This was the ABA's position on client fraud until the 1969 adoption of the Code of Professional Responsibility.²⁹

B. THE CODE OF PROFESSIONAL RESPONSIBILITY

In 1964, the ABA created the Special Committee on Evaluation of Ethical Standards to investigate the need for revising the Canons. Because defects in the Canons could not be cured by minor revisions,³⁰ the Committee's work eventually led to the promulgation of a new standard of conduct for lawyers: the Code of Professional Responsibility. Surprisingly, although the Code generally integrated the provisions of the Canons, the Preliminary Draft of the Code did not contain a client fraud disclosure rule similar to Canon 41.³¹ After the Preliminary Draft was distributed to the legal community for com-

26. *Id.* (emphasis added).

27. *But see* note 5 *supra*.

28. Thus, if in a divorce action the client gained a more favorable property settlement by perjuring himself, Canon 41 may have compelled disclosure. The Ethics Committee, however, was never confronted with any situation in which they found Canon 41 to apply; after Informal Opinion 778, this is the *most* Canon 41 could have meant. It is not clear why a fraud perpetrated in the context of a civil suit should demand disclosure, while a fraud committed outside of court should not.

29. Informal Opinion 778 was the Ethics Committee's last attempt to deal with the client fraud dilemma until after the promulgation of the Code of Professional Responsibility in 1969.

30. *See* Wright, *The Code of Professional Responsibility: Its History and Objectives*, 24 ARK. L. REV. 1, 5-6 (1970).

31. The omission may have been intentional: "Perhaps the omission was due to the committee's consideration of the high fiduciary duty owed by lawyer to client and consideration of the firm support found in the law of evidence for the attorney-client privilege." ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 341, slip op. at 2, reprinted in 61 A.B.A.J. 1543, 1543 (1975).

ment, several lawyers objected that the substance of Canon 41 was not represented.³² In response, DR 7-102(B) was added to the Code before its adoption in August 1969. At that time, DR 7-102(B)(1) provided:

A lawyer who receives information clearly establishing that [h]is client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected party or tribunal.³³

Although the language of DR 7-102(B) did not differ greatly from that of Canon 41,³⁴ when interpreted in conjunction with DR 4-101, its impact was striking. DR 4-101, the successor to Canon 37, generally requires that a client's confidences and secrets be preserved by the lawyer.³⁵ DR 4-101(C), however, exempts the attorney from this confidentiality requirement when disclosure is "permitted under [other] Disciplinary Rules" Since DR 7-102(B)(1), as originally enacted, permitted—indeed, required—disclosure of information clearly establishing client fraud, a lawyer receiving such information was obligated to reveal it, notwithstanding the general duty of confidentiality imposed by DR 4-101. Thus, despite its facial similarity to Canon 41, DR 7-102(B) went much further in requiring disclosure of client fraud.³⁶

32. Telephone interview with Professor John Sutton, Reporter for the Special Committee on Evaluation of Ethical Standards (Dec. 22, 1976).

33. ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B)(1)(amended 1974). DR 7-102(B)(2) requires a lawyer to reveal information about frauds committed by persons other than his clients and thus is not within the scope of this Note.

34. There are a few minor differences. Whereas Canon 41 referred to fraud involving unjust enrichment ("if his client refuses to forego the advantage thus unjustly gained"), DR 7-102(B) applies to client fraud generally. Moreover, DR 7-102(B) applies only if the lawyer receives information "clearly establishing" the fraud, while Canon 41 only required that the lawyer "discover" the fraud. Finally, unlike Canon 41, DR 7-102(B) specifically provides for disclosure to a defrauded tribunal, thus expressly removing one of the bases for the holding in Opinion 287. See note 23 *supra*.

35. (A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(B) Except when permitted by DR 4-101(C), a lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client.

ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(A)-(B)(1). For the exceptions to the general rule of confidentiality, see *id.* DR 4-101(C). The text of DR 4-101(C) appears in note 56 *infra*.

36. "DR 7-102 represents a significant expansion of the limited duty to reveal formerly required under the A.B.A. Canons of Professional Ethics" Lipman,

The new standard was not, however, readily accepted by the legal community. In March 1971, the ABA indicated that the DR 7-102(B) duty to reveal should not apply to a lawyer whose client gave false testimony in a criminal case.³⁷ In 1972, following a referendum of the District of Columbia Bar, the District of Columbia Court of Appeals, wholly rejected the requirement that a lawyer should reveal his client's fraud.³⁸ Several states adopted different versions of DR 7-102(B), limiting its effect in various ways.³⁹ Finally, in February 1974, the ABA amended DR 7-102(B)(1) to exempt from mandatory disclosure any information "protected as a privileged communication."⁴⁰ In its first opinion interpreting the new amendment, the Ethics Committee acknowledged that the change reflected a conscious choice of

supra note 10, at 454. *But see* A. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 147 (1976), suggesting that "it seems more likely" that the drafters of the Code intended to maintain the tension between confidentiality and disclosure duties that had existed under the Canons, "leaving lawyers, ethics committees, and courts the problem of resolving the conflict in different factual situations." This analysis, of course, ignores the fact that the Code, unlike the Canons, expressly provides for an exception to the general duty of confidentiality when client fraud is involved. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(2), DR 7-102(B)(1).

37. AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION, Defense Function § 7.7, Commentary at 274-77 (Approved Draft 1971).

38. In the referendum 74% of the District of Columbia Bar voted to reject a duty to reveal a client's fraud. On April 1, 1972, the District of Columbia Court of Appeals emasculated DR 7-102(B)(1) as applied to District of Columbia attorneys by eliminating the clause requiring the lawyer to reveal his client's fraud "if his client refuses or is unable to do so." *See* M. FREEDMAN, LAWYER'S ETHICS IN AN ADVERSARY SYSTEM 28-29, 257-59 (1975). In the District of Columbia, therefore, a lawyer, upon learning of his client's fraud, has a duty to call upon the client to rectify the situation. Should the client refuse, the lawyer's duty is at an end. No revelation by the lawyer is permitted, much less required.

39. *See generally* Lipman, *supra* note 10, at 455 & n.89. For example, Washington requires disclosure when the client has defrauded a tribunal and permits disclosure when the client has defrauded another person. WASHINGTON CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B)(1) (adopted Dec. 7, 1971, effective Jan. 1, 1972), in WASH. CT. R. ANN. (Supp. 1974). Since the policies in favor of disclosure are necessarily stronger in the case of a fraud against a person, *see* note 17 *supra*, this rule is at least arguably anomalous.

40. AMERICAN BAR ASSOCIATION, SUMMARY OF ACTION TAKEN BY THE HOUSE OF DELEGATES: MIDYEAR MEETING 3 (1974). DR 7-102(B)(1) now provides:

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

ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B)(1) (emphasis added). The amended rule took effect March 1, 1974.

confidentiality over disclosure: "[T]he confidential privilege, in our opinion, must be upheld over any obligation of the lawyer to betray the client's confidence in seeking rectification of any fraud that may have been perpetrated by his client upon a person or tribunal."⁴¹

The adoption of the 1974 amendment seemed, then, to settle the client fraud controversy. The exception relieved the lawyer of any obligation to reveal information that would be protected by the attorney-client privilege. Where, however, the information was not so protected, it was commonly felt that the duty to disclose would govern.⁴² Thus read, the amended rule was thought to preserve the lawyer's general obligation to reveal client fraud, while at the same time protecting any privileged communication between the client and the lawyer.

C. OPINION 341

Notwithstanding the commentators' consistent interpretations of the 1974 amendment, there was still a measure of uncertainty in the legal community concerning the scope of the privileged communication exception. After receiving several inquiries, the ABA Ethics Committee, in Opinion 341, ruled that the clause should be extended to protect confidences and secrets from disclosure without regard to whether the particular information would be protected under the attorney-client privilege. This interpretation was based on the Committee's analysis of three interrelated topics: the legislative history of DR 7-102(B), the policy considerations behind the attorney-client privilege, and the practical problems inherent in defining the privileged communication clause in terms of the privilege.

As the Ethics Committee read the legislative history, the drafters had not realized the effect DR 7-102(B)(1) would have in conjunction

41. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 11314 (Informal Opinion), slip op. at 2 (1975).

42. See, e.g., Callan & David, *supra* note 10, at 361-62 (footnote omitted): The amended language resolves any pre-existing conflict by rendering DR 7-102(B)(1) inapplicable if the information disclosing the past fraud is protected by the attorney-client privilege. . . .

. . . .
 . . . [But if] the information evidencing the client's past fraud is imparted to the attorney by a third person or discovered by the attorney himself wholly outside the context of the attorney-client relationship [s]uch information will clearly not be privileged, and [the exception clause to] DR 7-102(B)(1) will not bar disclosure.

See generally Lipman, *supra* note 10, at 454: "The apparent purpose of the 1974 amendment was to avoid the quandary confronting a lawyer who receives knowledge of his client's fraud by virtue of a communication privileged under state law."

with DR 4-101(C)(2).⁴³ In the Committee's opinion, the privileged communications exception to DR 7-102(B)(1) was necessary to free a lawyer from the dilemma of being required, in certain instances, to disclose information that he also was required by the law of evidence not to reveal.⁴⁴ In other words, the exception for privileged communications was adopted in order to resolve what the Committee saw to be an irreconcilable conflict between the law of evidence and the original version of DR 7-102(B)(1).⁴⁵ The Committee felt that by explicitly excepting privileged communications from the duty imposed by DR 7-102(B)(1), the 1974 amendment represented a conscious policy choice by the ABA—a decision that the principle of lawyer-client confidentiality was more important than the lawyer's duty to rectify frauds perpetrated by his client.

The Ethics Committee recognized that Opinion 287 had dealt with the client fraud quandary in a similar manner:⁴⁶

One effect of the 1974 amendment to DR 7-102(B)(1) is to reinstate the essence of Opinion 287 which had prevailed from 1953 until 1969. It was as unthinkable then as now that a lawyer should be subject to disciplinary action for failing to reveal information which by law is not to be revealed without the consent of the client and the lawyer is not now in that untenable position. The lawyer no longer can be confronted with the necessity of either breaching his client's privilege at law or breaching a disciplinary rule.⁴⁷

In determining the scope of the privileged communication amendment to DR 7-102(B)(1), however, the Ethics Committee went well beyond "the essence of Opinion 287," which had only excused the lawyer from disclosure of client fraud when he learned of the fraud through a communication that would be protected under the attorney-client privilege. The Committee reasoned that a broader interpretation of the privileged communication clause was necessary in order to protect the important policies behind the tradition of lawyer-client confidentiality:

The tradition (which is backed by substantial policy considerations) that permits a lawyer to assure a client that information

43. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 341, slip op. at 2, reprinted in 61 A.B.A.J. 1543, 1543 (1975).

44. *Id.*

45. *But see* note 47 *infra*.

46. *See* text accompanying notes 18-23 *supra*.

47. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 341, slip op. at 3, reprinted in 61 A.B.A.J. 1543, 1543-44 (1975). Note that the very existence of any conflict depends on the assumption that disclosure of information about the client's fraud would breach the attorney-client privilege. This assumption is unwarranted. *See* notes 99-106 *infra* and accompanying text.

(whether a confidence or a secret) given to him will not be revealed to third parties is so important that it should take precedence, in all but the most serious cases, over the duty imposed by DR 7-102(B).⁴⁸

The Committee therefore felt that it would be undesirable to limit the application of the privileged communication exception to information protected by the attorney-client privilege. First, such a limitation would make the lawyer's ethical duty dependent upon the rules of evidence in each particular jurisdiction,⁴⁹ and the Committee apparently thought it somewhat incongruous to impose different standards of ethical behavior on attorneys in different states.⁵⁰ Second, the Committee submitted that such an interpretation would entail difficulties in determining which jurisdiction's evidentiary rule would be applied in a particular case.⁵¹ Finally, the Committee suggested that to define the exception clause in terms of the evidentiary privilege could raise problems as to the difference between a waiver of the privilege by the client and his consent to the lawyer's disclosure of a confidence.⁵² Because of these supposed practical problems, and

48. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 341, slip op. at 4, reprinted in 61 A.B.A.J. 1543, 1544 (1975). This sentence captures the essence of Opinion 341. Notwithstanding the Committee's resolute reliance on the attorney-client privilege elsewhere in the Opinion, see, e.g., text accompanying notes 44 & 47 *supra*, it here explicitly recognizes that it is a *tradition* that militates against disclosure and not a rule of law. Therefore, since the Committee is essentially making a value judgment that the "substantial policy considerations" supporting the tradition of attorney confidentiality should take precedence over the lawyer's duty to reveal his client's fraud even in those situations where such information would only be a secret and not a confidence, it might have been desirable to explain (1) what those policy considerations are, see, e.g., text accompanying note 108 *infra*, (2) why they are thought important enough to require the lawyer to acquiesce in concealing his client's deception, and (3) exactly what client fraud situations qualify as "the most serious cases."

49. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 341, slip op. at 4-5, reprinted in 61 A.B.A.J. 1543, 1544 (1975).

50. Since different standards of ethical conduct are already imposed in different states, see note 65 *infra* and accompanying text, the Committee's concern here seems unwarranted.

51. "There may be significant problems in knowing which jurisdiction's evidentiary rule would be applied in a given case and the scope of that privilege may vary widely among jurisdictions." ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 341, slip op. at 5, reprinted in 61 A.B.A.J. 1543, 1544 (1975). Here again the Committee's concern seems misplaced since lawyers are well accustomed to dealing with such conflict-of-law problems in other contexts.

52. *Id.* The attorney-client privilege can be *waived* by the client in various ways. "Waiver includes . . . not merely words or conduct expressing an intention to relinquish a known right, but conduct, such as a partial disclosure, which would make it unfair for the client to insist on the privilege thereafter." C. MCCORMICK, EVIDENCE § 93, at 194 (2d ed. 1972). What constitutes the client's *consent* to his lawyer's disclosure of a confidence or a secret is set forth in DR 4-101(C)(1): "A lawyer may reveal

because of the perceived importance of lawyer-client confidentiality, the Committee interpreted the 1974 exception clause in the broadest possible manner: "The balancing of the lawyer's duty to preserve confidences and to reveal frauds is best made by interpreting the phrase 'privileged communication' in the 1974 amendment to DR 7-102(B) as referring to *those confidences and secrets that are required to be preserved by DR 4-101*."⁵³

At first glance, this definition appears to settle the vexing question of when a lawyer should disclose a client's fraud by prescribing a simple test: if the information is required to be preserved by DR 4-101, it is not subject to the DR 7-102(B) disclosure duty. But a closer inspection of DR 4-101 and its exceptions reveals some significant ambiguities in this standard. DR 4-101(A) broadly defines "confidence" and "secret,"⁵⁴ and DR 4-101(B) imposes a general requirement that the lawyer not knowingly reveal information that fits within those definitions.⁵⁵ DR 4-101(C), however, sets out four exceptions to this general duty of confidentiality.⁵⁶ A confidence or secret is "re-

confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them." Thus, the client could waive the protection of the attorney-client privilege (for example, by telling the lawyer about the fraud in the presence of a third person) without consenting to disclosure by the lawyer. Nevertheless, it is unclear what problems the Committee felt would arise from this distinction. If the privileged communications clause is limited to that information that would be protected by the privilege, consent is never a factor in determining the disclosure duty. The duty to disclose would arise whenever the information was not protected by the privilege, regardless of whether the client has consented to its disclosure.

53. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 341, slip op. at 4, reprinted in 61 A.B.A.J. 1543, 1544 (1975) (emphasis added).

It may be of historical significance that the Ethics Committee apparently issued this broad interpretation in response to pressure from the securities bar. Securities lawyers at that time were extremely concerned because of the SEC's complaint in the *National Student Marketing* case, see discussion following Example 4, note 10 *supra*, which charged several lawyers with aiding and abetting their client's stock fraud by failing to report the deception when it came to their attention. It is not clear how the securities bar thought a change in the Code of Professional Responsibility would affect their legal duty to disclose under the securities laws. They may have intended to use the change in DR 7-102(B)(1) as a precedent in arguing against the imposition by the SEC of a legal duty to disclose. See ABA HOUSE ACTION, *supra* note 10, at 31 (ABA Corporation, Banking and Business Law Section asserting that SEC policy on client fraud should conform to amended DR 7-102(B)(1)).

54. ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(A). The text of DR 4-101(A) appears in note 35 *supra*. These definitions are so broad that virtually any information clearly establishing a fraud by the client would fit within one or the other of them. See text accompanying notes 83-92 *infra*.

55. See ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(B). The relevant portion of DR 4-101(B) appears in note 35 *supra*.

56. (C) A lawyer may reveal:

(1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.

quired to be preserved by DR 4-101," therefore, only when none of these four exceptions applies. Conversely, if one of the exceptions is applicable, the information may be disclosed. Thus, if information establishing a client fraud falls within one of the exceptions in DR 4-101(C), a lawyer who receives such information would be obliged under DR 7-102(B)(1) to reveal it, the privileged communication clause notwithstanding.⁵⁷

Construing the privileged communication clause in terms of DR 4-101, however, presents substantial definitional problems because DR 4-101(C)(2) specifically allows disclosure of confidences and secrets "when permitted under Disciplinary Rules" Consequently, a lawyer who consults the Code (as interpreted by Opinion 341) to determine whether he has a duty to reveal information establishing that his client has committed a fraud will obtain the following circular response. Under DR 7-102(B), he must disclose his client's fraud⁵⁸ unless he learned of it through a privileged communication. A privileged communication is any confidence or secret required to be preserved by DR 4-101. Confidences and secrets are not required to be preserved by DR 4-101—and hence by definition are not "privileged communications"—if another Disciplinary Rule permits disclosure. DR 7-102(B) permits—indeed, requires—disclosure of information establishing client fraud unless the information was received through a privileged communication. A privileged communication is any confidence or secret required to be preserved by DR 4-101—that is, any confidence or secret not subject to a DR 4-101(C) exception.

Evidently, a lawyer will never be able to determine his ethical duty regarding client fraud since, after Opinion 341, his obligation to reveal the fraud under DR 7-102 is contingent upon his duty of confi-

(2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.

(3) The intention of his client to commit a crime and the information necessary to prevent the crime.

(4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C).

57. The Committee explicitly recognizes this: "DR 4-102[sic](C) sets out several circumstances under which the revelation of a secret or confidence is permissible, and thus in cases where these exceptions apply, DR 7-102(B) may make the optional disclosure of information under DR 4-101 a mandatory one." ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 341, slip op. at 4, reprinted in 61 A.B.A.J. 1543, 1544 (1975).

58. This statement assumes, of course, that the other elements of DR 7-102(B) are satisfied: the client's conduct constituted "fraud"; the fraud took place "during the course of the representation"; the fraud was "clearly established." For a discussion of how these terms should be defined, see notes 69-78 *infra* and accompanying text.

dentiality under DR 4-101, while the scope of the confidentiality obligation imposed by DR 4-101 is contingent upon the DR 7-102 disclosure duty. This circularity results from the Committee's failure to state whether the DR 4-101(C)(2) exception for disclosure "permitted under [other] Disciplinary Rules" is still to be applied in interpreting DR 7-102(B)(1). If it is, of course, the privileged communication exception is meaningless. Any information otherwise satisfying DR 7-102(B) cannot be a privileged communication; if DR 7-102(B) permits disclosure, the information is by definition not "required to be preserved by DR 4-101."

It is difficult to understand how the Ethics Committee failed to recognize this problem since it was the interaction between DR 7-102(B) and DR 4-101(C)(2) that prompted adoption of the privileged communication clause in the first place.⁵⁹ Nevertheless, it is obvious that the Committee intended to broaden the privileged communication exception rather than render it meaningless. The Committee may have meant to exempt from mandatory disclosure *all* confidences and secrets as those terms are defined in DR 4-101(A).⁶⁰ This interpretation, however, would conflict with the explicit statement in Opinion 341 that certain confidences and secrets would still be subject to disclosure under the amended version of DR 7-102(B).⁶¹

Alternatively, the Opinion could be read as making only that part of DR 4-101(C)(2) that deals with other Disciplinary Rules⁶² inapplicable to the client fraud situation. In that case confidences and secrets would always be preserved *except* where disclosure is required by law or court order.⁶³ Under such a reading, of course, the privileged communication "exception" all but swallows the "rule" mandating disclosure. But since this is the only interpretation that is neither meaningless nor in direct conflict with other language in the Opinion, it must be the result the Committee intended to reach and thus represents the ABA's current position on the client fraud dilemma.

59. See text accompanying notes 43-45 *supra*.

60. The text of DR 4-101(A) appears in note 35 *supra*.

61. "For example, when disclosure is required by a law, the 'privileged communication' exception of DR 7-102(B) is not applicable and disclosure may be required." ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 341, slip op. at 4, reprinted in 61 A.B.A.J. 1543, 1544 (1975).

62. The text of DR 4-101(C)(2) appears in note 56 *supra*.

63. This statement assumes, of course, that none of the other DR 4-101(C) exceptions applied. The text of DR 4-101(C) appears in note 56 *supra*.

III. THE CURRENT RULE: WHEN MUST A LAWYER REVEAL HIS CLIENT'S FRAUD?

A lawyer's ethical responsibility is generally defined and enforced by the supreme court of the state in which he practices.⁶⁴ Although the ABA Code of Professional Responsibility is widely recognized, the exact language of the various Disciplinary Rules varies from state to state,⁶⁵ especially when the ABA has recently amended a rule. Therefore, the scope of a lawyer's obligation to reveal information concerning a fraud committed by his client will, in part, depend on whether the 1974 amendment exempting privileged communication from the DR 7-102(B)(1) disclosure duty has been adopted in his jurisdiction.⁶⁶

A. STATES THAT HAVE NOT ADOPTED THE 1974 AMENDMENT

A lawyer practicing in a state that has not adopted the 1974 amendment to DR 7-102(B)(1) must conform his conduct to the original version of that rule.⁶⁷ Under this standard, in order to determine whether he has a duty to disclose, the lawyer must first determine whether the information received clearly establishes that his client has committed a fraud upon a person (or a tribunal)⁶⁸ during the course of the representation. Such a determination will be hampered, however, by the Code's failure to define any of its terms.⁶⁹

64. See generally 7 AM. JUR. 2d *Attorneys at Law* § 16 (1963).

65. [The Code] is not effective in any state in which a lawyer practices, unless it is officially adopted in such state. While the ABA Code has been adopted in 49 states (California is the exception) and in the District of Columbia, there are substantial variations in the text of the codes adopted by many of the states.

R. WISE, *LEGAL ETHICS* xi (Supp. 1977).

66. Eight states have adopted the ABA's 1974 amendment to DR 7-102(B)(1): Colorado, Connecticut, Maine, Minnesota, Nebraska, New Jersey, South Dakota, and Tennessee. Telephone interview with Gary Green, Staff Assistant, ABA Committee on Professional Responsibility (Apr. 26, 1977). New York has adopted a slightly different exception clause: "except when the information is protected as a confidence or secret." Memo from Frederick C. Stimmel, Counsel, New York Bar Association, to author (Nov. 18, 1976) (on file at MINNESOTA LAW REVIEW). Since several states are currently considering adoption of the 1974 amendment, attorneys should contact their own state bar association to determine whether it has recently been adopted in their jurisdiction.

67. See ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B)(1)(amended 1974). The text of former DR 7-102(B)(1) appears in text accompanying note 33 *supra*.

68. Although the scope of this Note is limited to client fraud that injures another person, see note 1 *supra*, the practicing attorney should be aware that the ABA Code of Professional Responsibility also requires disclosure of client fraud perpetrated on a tribunal. See ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B)(1).

69. Several of the most important words and phrases in DR 7-102(B)(1) have been neither defined by the Code nor construed by the Ethics Committee. This Note

The word "fraud," for example, can have a variety of meanings, depending on the context in which it is used.⁷⁰ The Code does not define the term, and Opinion 341 indicates merely that an element of scienter is necessary to establish fraud within the meaning of DR 7-102(B).⁷¹ To this extent it would appear to parallel common law fraud.⁷² But whether DR 7-102(B) fraud is coextensive with or goes beyond common law fraud cannot be said with certainty.⁷³ Similarly, DR 7-102(B)(1) specifies that the fraud must have been committed during "the course of the representation," but fails to describe the limits such a requirement places on the disclosure duty. Presumably it requires that the fraud occur during the existence of the lawyer-client relationship and that the fraud relate to the subject matter of that relationship.⁷⁴ If so, the first requirement would exempt from mandatory disclosure information concerning a fraud committed by the client *before* he retained the lawyer,⁷⁵ while the subject-matter

attempts to interpret the questionable language in the most reasonable manner. Some of the interpretations have been suggested by other commentators, and some are original. None of them, however, is authoritative.

70. See, e.g., *Fishman v. Thompson*, 181 So. 2d 604, 608 (Fla. Dist. Ct. App. 1965) ("taking unfair advantage of another to his injury which amounts to unconscionable overreaching"); *Hildebrand v. Harrison*, 361 P.2d 498, 505 (Okla. 1961) ("all the multifarious means which human ingenuity can devise and are resorted to by one individual to get an advantage over another"). Prosser criticizes the "indiscriminate use of the word 'fraud,' a term so vague that it requires definition in nearly every case." W. PROSSER, *TORTS* § 105, at 684 (4th ed. 1971).

71. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 341, slip op. at 5, reprinted in 61 A.B.A.J. 1543, 1544 (1975) (dictum). The New York Bar Association recently added definition 9 to its version of the Code. Definition 9 states that, for DR 7-102 purposes, "fraud does not include conduct, although characterized as fraudulent by statute or administrative rule, which lacks an element of scienter, deceit, intent to mislead, or knowing failure to correct misrepresentations which can be reasonably expected to induce detrimental reliance by another." Memo from Frederick C. Stimmel, Counsel, New York Bar Association, to author (Nov. 18, 1976) (on file at MINNESOTA LAW REVIEW).

72. The essential elements of common law fraud are: (1) a false representation of fact; (2) knowledge or belief that the representation is false; (3) an intention to induce another to act or refrain from action in reliance on the representation; (4) justifiable reliance by such person; and (5) damage resulting from such reliance. W. PROSSER, *supra* note 70, § 105, at 685-86.

73. Since DR 7-102(B) does not specifically adopt the common law definition of fraud, it would not be unreasonable for a court to interpret the term to include egregious client misconduct that did not constitute common law fraud. For example, the facts in Example 1, note 10 *supra*, do not constitute common law fraud because there is no misrepresentation of fact by the guardian. Yet disclosure in this case has a stronger intuitive appeal than it does in the others. See generally note 9 *supra*. It is unclear why the lawyer's duty to disclose should be premised upon the injured party's ability to sue the client in tort. But see Callan & David, *supra* note 10, at 359 (arguing that DR 7-102(B)(1) should be construed narrowly to include only common law fraud).

74. See Callan & David, *supra* note 10, at 358 & n.113.

75. See generally note 1 *supra*.

requirement would relieve the lawyer from having to disclose a fraud that the client perpetrated outside of the professional relationship.⁷⁶ Finally, the Code does not define the term "clearly established." The ABA House of Delegates, however, has adopted a resolution that if the lawyer has a reasonable doubt whether a fraud was committed, DR 7-102(B)(1) does not require him to do anything.⁷⁷ A lawyer who merely suspects—or even thinks it probable—that his client has committed a fraud is under no obligation to investigate the situation and verify his suspicions.⁷⁸

If the lawyer's information does clearly establish that the client has committed a fraud in the course of the representation, the lawyer must call upon the client to right the injustice. If the client cannot or will not do so, the lawyer is obligated to reveal the fraud to the injured party, even if the lawyer's information is a confidence or secret within the meaning of DR 4-101.⁷⁹

B. STATES THAT HAVE ADOPTED THE 1974 AMENDMENT

A lawyer practicing in a state that has adopted the 1974 amendment to DR 7-102(B)(1)⁸⁰ must go one step further. He must first, of course, decide whether his information clearly establishes that the client has committed a fraud during the course of the representation.⁸¹ If it does not, he should not reveal anything.⁸² But if he determines that such a fraud has been committed, he must further decide whether his information is protected as a privileged communication.

76. If, for example, the client retained the lawyer to represent him in a divorce action and contemporaneously committed a contract fraud upon a third person, the lawyer, upon discovering the fraud, would not be obligated to disclose it under DR 7-102(B)(1) since it was not perpetrated in the course of the representation. To the extent that DR 7-102(B)(1) is designed to deal with situations in which the lawyer has been used to commit the fraud, see note 1 *supra*, these interpretations are consistent with the underlying policy of the rule.

77. ABA HOUSE ACTION, *supra* note 10, at 32.

78. Cf. Lipman, *supra* note 10, at 456 ("A strong suspicion based on limited documentary evidence would probably not be sufficient to justify disclosure . . . DR 7-102 would best be interpreted as not requiring lawyers to report fraud absent very persuasive evidence of a client's wrongdoing."); Note, *Attorney's Liability—Advising, Abetting, and the SEC's National Student Marketing Offensive*, 50 TEX. L. REV. 1265, 1271 (1972) ("In deference to the strong social policy favoring an attorney's allegiance to his client, even the strictest courts would likely impose the duty of disclosure only when the lawyer was absolutely certain his client was violating the law . . .").

79. See notes 34-36 *supra* and accompanying text.

80. See note 66 *supra*.

81. See text accompanying notes 68-78 *supra*.

82. It is significant that the Code allows the lawyer no discretion regarding disclosure of client fraud. If DR 7-102(B) does not require disclosure, then DR 4-101 requires nondisclosure.

As interpreted by Opinion 341, a privileged communication can be either a confidence or a secret. A confidence is information protected by the attorney-client privilege under applicable state law.⁸³ The scope of the privilege varies from state to state,⁸⁴ but it generally protects anything that the client communicates to the lawyer in confidence during the course of the professional relationship.⁸⁵ Thus, whenever the client himself admits or reveals the fraud to the lawyer, the information, if it bears some relation to the purpose of representation, would be a privileged communication under the 1974 amendment to DR 7-102(B)(1), and the lawyer would be forbidden to reveal it.⁸⁶ A secret is any "other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."⁸⁷ Presumably, disclosure of information clearly establishing that he has committed a fraud would always be either embarrassing or detrimental to the client. Therefore, the determination that such information is a secret hinges solely on whether it was "gained in the professional relationship."⁸⁸

Although this phrase is not defined by the Code, it apparently describes both *how* and *when* the lawyer learned of the fraud: information is presumably gained in the professional relationship if the lawyer discovered it while acting for his client. Under this definition, evidence clearly establishing client fraud would obviously be gained in the professional relationship—and hence a secret—if the client himself revealed it to the lawyer during a professional consultation,

83. ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(A). The text of DR 4-101(A) appears in note 35 *supra*.

84. See, e.g., MINN. STAT. § 595.02(2) (1976) ("An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him or his advice given thereon in the course of the professional duty . . .").

For a compilation of state attorney-client privilege rules, see 8 J. WIGMORE, EVIDENCE § 2292 & n.2. (McNaughton ed. 1971).

85. Wigmore's concise definition is an accurate representation of the general scope of the privilege:

Where legal advice of any kind is sought from a professional legal advisor in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal advisor, except the protection be waived.

8 J. WIGMORE, *supra* note 84, § 2292, at 554 (footnotes omitted). See generally C. MCCORMICK, *supra* note 52, §§ 87-97; 8 J. WIGMORE, *supra* note 84, §§ 2290-2329.

86. See, e.g., Example 1, note 10 *supra*.

87. ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(A). The text of DR 4-101(A) appears in note 35 *supra*.

88. Whereas the phrase "in the course of the representation" describes how and when the fraud was committed, see notes 74-76 *supra* and accompanying text, the phrase "gained in the professional relationship" describes how and when the lawyer learned of the fraud.

even if the communication did not qualify as a confidence.⁸⁹ Information acquired by the lawyer in investigating the subject of the representation would also be gained in the professional relationship.⁹⁰ Finally, if a third person, knowing that the lawyer was representing the client, voluntarily contacted the attorney and revealed information about the client's fraud,⁹¹ the information would be gained in the professional relationship⁹² and hence a secret.

Thus, in a state that has adopted the 1974 amendment to DR 7-102(B)(1), a lawyer must determine that he has received information clearly establishing a fraud by the client during the course of the representation *and* that he has received the information from outside the professional relationship. Only if both of these independent requirements are met would the attorney have an ethical obligation to reveal the fraud, and then only after ascertaining that the client would not remedy the situation himself.

C. PRACTICAL EFFECTS OF DR 7-102(B)(1)

It should be obvious from the foregoing discussion that after Opinion 341 the interaction between the "privileged communication" exception and the "clearly established" provision will leave DR 7-102(B)(1) with virtually no practical effect.⁹³ Under the current inter-

89. If the client admitted the fraud to the lawyer in the presence of another person, the attorney-client privilege would ordinarily not be applicable, *see* C. McCORMICK, *supra* note 52, § 91, at 187-91; thus the information would not be a "confidence" under DR 4-101. But, since the information was received in the professional relationship and would be embarrassing or detrimental to the client if disclosed, the information would be a "secret." *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101. A partial text of DR 4-101 appears in note 35 *supra*.

90. For example, information gained by a lawyer while interviewing a third person concerning the client's legal affairs would be a secret.

91. *See, e.g.*, Examples 2 and 3, note 10 *supra*.

92. The crucial consideration in such a situation would be the third person's purpose for contacting the lawyer. Since the informant contacted the lawyer *because he was the client's attorney*, *see, e.g.*, Example 2, note 10 *supra*, it follows that the information was received in the professional relationship. Had the lawyer not been representing the client, the informant would not have contacted him.

93. In order for the disclosure duty to arise, the information must clearly establish a fraud by the client *and* come to the lawyer's attention outside the professional relationship. *See* notes 77-78 & 88-92 *supra* and accompanying text.

There would appear to be only four situations in which the lawyer's information about his client's fraud could not reasonably be described as gained in the professional relationship:

- (1) a third party who was unaware of the attorney-client relationship happens to reveal the client's fraud to the lawyer; or
- (2) the lawyer learns of the fraud accidentally (while reading the newspaper, for example); or
- (3) a third person, knowing of the attorney-client relationship, reveals the

pretation, no disclosure duty arises if information received in the course of the representation is embarrassing or detrimental to the client. As noted earlier,⁹⁴ information that even tends to establish a client fraud will inevitably be embarrassing or potentially detrimental to the client and will almost always come to the lawyer's attention during the course of the representation. Thus the privileged communication clause alone will prevent disclosure in the vast majority of cases. In those few cases where information does come to the lawyer from outside the professional relationship and is therefore not a privileged communication, the requirement that the fraud be clearly established will usually prevent disclosure. Because the lawyer will be naturally inclined against revealing such information, he will undoubtedly view it with considerable skepticism in any event.⁹⁵ The "clearly established" requirement exacerbates that tendency by allowing the lawyer to avoid the unpleasant disclosure duty merely by disregarding any suspicions he may have about his client's misconduct.⁹⁶ Finally, it appears that the two requirements may supplement each other: the further the source of information is removed from the professional relationship, the less likely it is to be convincing.⁹⁷ Thus,

client's fraud to the lawyer *after* that relationship has ended; or

(4) the client himself reveals the fraud to the lawyer *after* the professional relationship has ended.

The reader may judge for himself how likely it is that information received in any but the fourth of these situations could ever "clearly establish" fraud on the part of a client. Moreover, the fourth situation entails a significant definitional problem: can it reasonably be said that the professional relationship has ended when the client is still revealing such sensitive information to the lawyer?

94. See text accompanying note 88 *supra*.

95. In order to make predictions about how DR 7-102(B)(1) works in practice, it is necessary to make certain behavioristic assumptions about how lawyers react to the client fraud quandary. It is obviously not in the lawyer's professional or pecuniary interest to confront his client with evidence of his fraud or to reveal such information to outsiders. Moreover, the lawyer is constrained against disclosure by the DR 4-101 duty of confidentiality: unless the DR 7-102(B)(1) duty clearly applies, the lawyer is not only relieved of any duty to reveal, he has an affirmative duty *not* to reveal. A lawyer who disclosed his client's fraud when he was not required to do so by DR 7-102(B)(1) could conceivably find himself subject to disciplinary proceedings for violating DR 4-101. For these reasons, a lawyer discovering evidence of his client's fraud would likely be inclined to avoid disclosure.

96. The "clearly established" language of DR 7-102(B) appears to contemplate an objective standard: is the information received by the lawyer sufficient to clearly establish that the client has committed a fraud? In view of the perplexing ethical problem facing a lawyer in a client fraud situation, however, query whether a disciplinary tribunal would not be inclined to accept the lawyer's claim of ignorance at face value, even if an objective inquiry would indicate that the client's fraud was clearly established. A lawyer recognizing this implicit subjective standard might be even more likely to disregard information indicating a fraud by his client.

97. In deciding whether his information clearly establishes fraud, the lawyer

in many cases exactly those factors that take it outside of one requirement will bring it within the other. Since the lawyer may not reveal information when either of these factors is present, it is difficult even to hypothesize a realistic situation in which the duty to report would arise.

Since 1928, the ABA's codes of professional conduct have included provisions that purport to impose upon lawyers an ethical duty to reveal certain information concerning a client's fraudulent actions. This history suggests that, at least in the abstract, lawyers feel that their professional ethics require a rule mandating disclosure of such information. On the other hand, the ABA has so limited the scope of that duty that today it retains little, if any, vitality. It is absurd for the Code to contain a rule wholly lacking in substantive effect. DR 7-102(B)(1) should be either repealed or revised so that it has some operative significance.

IV. ANALYSIS OF THE CONFLICTING POLICIES UNDERLYING THE CLIENT FRAUD DILEMMA—*SHOULD A LAWYER REVEAL CLIENT FRAUD?*

It is only by disclosure that a lawyer can effectively seek to remedy the harm done by his client's fraud.⁹⁸ It would appear, therefore, that in any situation in which countervailing legal or policy considerations do not dictate otherwise, a rule mandating disclosure of such frauds would be an ethical necessity. Indeed, that the legal profession has always recognized the truth of this proposition is evidenced by the inclusion of such rules in both the Canons of Ethics and the Code of Professional Responsibility. Yet, just as consistently, those rules have been weakened until they are little more than curiosities. This erosion has been justified by two principles which, though often conflated, are nevertheless distinct: the attorney-client privilege and the more general principle of confidentiality. In fact, neither of these principles prohibits disclosure in a client fraud context.

Although the attorney-client privilege is commonly believed to prohibit a lawyer from revealing information about his client's fraud,⁹⁹ a clear understanding of the privilege reveals that this view

must consider its source. The more reliable the information, the more likely it is that it will qualify as being received in the professional relationship. See note 93 *supra*.

98. See notes 4-6 *supra* and accompanying text.

99. According to Opinion 341, the adoption of the 1974 amendment to DR 7-102(B)(1) was based on this reasoning. See text accompanying notes 44-47 *supra*. The confusion in this regard is perhaps understandable, inasmuch as most commentators who have addressed the issue have made the same error. See, e.g., H. DRINKER, *LEGAL ETHICS*, 28 n.29, 132 n.25, 135 n.43 (1953); Callan & David, *supra* note 10, at 340 n.40, 360 & n.122; Goldberg, *supra* note 10, at 302-06. But see Note, *The Lawyer-Client Privilege: Its Application to Corporations, the Role of Ethics, and Its Possible Curtailment*, 56 Nw. U.L. Rev. 235, 249-56 (1961).

misconstrues both its purpose and its effect. Where applicable,¹⁰⁰ the attorney-client privilege allows the client to prevent the lawyer from answering a question, *in a judicial context*, that the lawyer would otherwise be compelled to answer. Like the other evidentiary privileges, the client's privilege, when asserted, acts "to shut off inquiry to pertinent facts *in court*"¹⁰¹ On the most literal level, therefore, the privilege does not apply where the lawyer proposes to reveal information about his client's fraud to *the injured party* since there is no tribunal compelling the lawyer to testify.¹⁰² More fundamentally, however, the privilege simply does not exist where the client has used the attorney to commit a fraud.

Since the policy of the privilege is that of promoting the administration of justice, it would be a perversion of the privilege to extend it to the client who seeks advice to aid him in carrying out . . . [a] fraudulent scheme. . . . Accordingly, it is settled under modern authority that the privilege does not extend to communications between attorney and client where the client's purpose is the furtherance of a future intended . . . fraud.¹⁰³

Thus, the privilege does not present a legal impediment to any proposed mandatory duty to disclose client fraud to the injured party.¹⁰⁴ Unfortunately, the irrelevance of the privilege to the client

100. See notes 84-85 *supra* and accompanying text.

101. C. McCORMICK, *supra* note 52, § 87, at 175 (emphasis added).

102. "As a rule of evidence, the lawyer-client privilege, whether in common-law or statutory form, operates only when the attorney is under compulsion to give testimony or produce documents." Note, *supra* note 99, at 249.

103. C. McCORMICK, *supra* note 52, § 95, at 199. See FED. R. EVID. 502(d)(1) (proposed but not adopted); MODEL CODE OF EVIDENCE rule 212 (1942); UNIFORM RULE OF EVIDENCE 502(d)(1).

104. Some commentators have argued that the attorney-client privilege extends to nontestimonial situations, based on a line of cases holding lawyers liable in tort (on a theory akin to deceit) for revealing confidential communications of the client to a third person. See, e.g., Callan & David, *supra* note 10, at 340 n.40. These cases, however, all involved deceitful conduct by the attorney, not the client. Courts have held lawyers liable for disclosing client confidences only in situations where the lawyer's conduct amounted to a gross breach of his fiduciary duty to the client. The leading case is *Taylor v. Blacklow*, 132 Eng. Rep. 401 (C.P. 1836). There, the defendant lawyer had been retained by the plaintiff to arrange financing secured by a certain tract of plaintiff's land. The lawyer, while inspecting the abstracts, discovered a minor defect in plaintiff's title, in favor of a third person, A. The lawyer went to A and suggested that A retain him to sue the plaintiff in ejectment. The plaintiff, after successfully defending the ejectment suit, brought a tort action against the lawyer. The court held the lawyer liable for damages to the plaintiff, reasoning that there had been a gross breach of the fiduciary duty owed the client by the lawyer. The court specifically declined to hold the lawyer liable for a violation of the attorney-client privilege, explaining that the privilege did not apply to a voluntary out of court disclosure. Accord, *In re Boone*, 83 F. 944 (C.C.N.D. Cal. 1897) (applying the gross breach of

fraud disclosure dilemma has rarely been recognized.¹⁰⁵ This may account for the difficulty the bar has experienced in attempting to deal with this issue.¹⁰⁶

Although the attorney-client privilege does not bar the lawyer's revelation of his client's fraud to the injured party, it can be argued that the related principle of lawyer-client confidentiality,¹⁰⁷ long recognized as an essential part of the lawyer's role in our adversary system of justice, should override the ethical imperative in favor of disclosure:

The lawyer can serve effectively as advocate, however, "only if he knows all that his client knows" concerning the facts of the case

. . . . Obviously, however, the client cannot be expected to reveal to the lawyer all information that is potentially relevant, including that which may well be incriminating, unless the client can be assured that the lawyer will maintain all such information in the strictest confidence. "The purposes and necessities of the relation between a client and his attorney" require "the fullest and freest disclosures" of the client's "objects, motives and acts". If the attorney were permitted to reveal such disclosures, it would be "not only a gross violation of a sacred trust upon his part", but it would "utterly destroy and prevent the usefulness and benefits to be derived from professional assistance". . . . Destroy that confidence, and "a man would not venture to consult any skillful person, or would only dare to tell his counselor half his case". The result would

duty standard to hold a lawyer liable for revealing his client's confidences).

These cases have been relied on for the proposition that a lawyer's disclosure of his client's misconduct could result in the lawyer being held liable for damages. It is difficult, however, to see how the gross breach of duty analysis in *Taylor and Boone* could be applied to the lawyer's revelation of his client's fraud to the injured party.

105. See note 99 *supra* and accompanying text. See also *Responsibility of Lawyers Advising Management—Panel Discussion*, BUS. LAW., March 1975, at 13, 20 (Vol. 30, Special Issue) ("[W]e ought not to put a lawyer in a position of being required by the Code to divulge confidential communications if the state law provided he couldn't do so.") But no state law provides that a lawyer cannot divulge to the injured party confidential communications concerning his client's fraud. One state statute does forbid a lawyer to testify *in court* concerning the content of confidential communications from his client. See TENN. CODE ANN. § 29-307 (1955). This, of course, does not prevent revelation of similar information to the injured party.

106. The evolution of the ABA's client fraud standards is discussed in Part II of this Note.

107. "The evidentiary privilege and the ethical duty not to disclose confidences both arise from the need to encourage clients to disclose all possibly pertinent information to their attorneys" *E.F. Hutton & Co. v. Brown*, 305 F. Supp. 371, 394 (S.D. Tex. 1969). The ethical duty not to disclose confidences is codified in ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101. A partial text of DR 4-101 appears in note 35 *supra*.

be impairment of the "perfect freedom of consultation by client with attorney", which is "essential to the administration of justice".¹⁰⁸

In the situation of a completed client fraud, however, these arguments miss the point. The client, after all, has already chosen *not* to tell the lawyer all he knows; he has disclaimed an interest in a full disclosure of his "objects, motives and acts" by hiding his fraudulent intent from the lawyer. Moreover, the purpose of encouraging full disclosure by the client is to assure that the lawyer can be fully effective in achieving all that his client is, in justice or law, entitled to receive. It is not intended to protect the client's effort to achieve an unjust or illegal advantage over a third party. That a lawyer who attempts to rectify a fraud his client has used him to commit could be castigated for "a gross violation of a sacred trust" is ludicrous. Although the policies behind the tradition of lawyer-client confidentiality are valid in general, they simply do not make sense when the client has used the professional relationship to perpetrate a fraud.

Moreover, the ABA Code recognizes that the principle of lawyer-client confidentiality is not absolute. The Code lists several situations in which a lawyer may reveal his client's confidences and secrets. These situations may be divided into two groups, each with its own rationale. First, a lawyer may disclose to the proper authorities his client's intention to commit a crime and any further information necessary to prevent its commission.¹⁰⁹ Apparently, the drafters of the Code thought that in such situations the danger to potential victims of the crime justified a breach of confidentiality. Second, a lawyer may reveal confidences or secrets necessary to collect his fee,¹¹⁰ or to defend himself or his employees or associates against accusations of wrongful conduct.¹¹¹ It would seem, in such cases, that the professional relationship has so deteriorated—or been so betrayed by the client—that the rule of confidentiality should no longer apply.

When a client has used his lawyer to perpetrate a fraud, both rationales justifying an exception to the general principle of confidentiality are applicable. In most client fraud situations, only the client and the lawyer will be aware of the fraud. Assuming the client will not voluntarily admit the deception to the injured party, the fraud will remain concealed and thus unremedied unless the lawyer reveals what he knows to the injured party. Thus, there is a strong need for

108. M. FREEDMAN, *supra* note 38, at 4-5 (footnotes omitted).

109. ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(3).

110. *Id.* DR 4-101(C)(4). It is curious that a lawyer is forbidden to reveal confidences in order to rectify a fraud he helped perpetrate, yet is allowed to disclose the same information in order to collect his fee.

111. *Id.* See also Comment, *ABA Code of Professional Responsibility: An Attorney's Right to Self Defense*, 40 Mo. L. REV. 327 (1975).

disclosure in this situation, just as there is when the client is about to commit a crime. Moreover, a client who conceals his fraudulent purposes from the lawyer until after the deception is completed has betrayed the professional relationship on which the principle of confidentiality is based. Therefore, like the situation where the client refuses to pay his bill or lodges an accusation against the lawyer, the client who has used the lawyer to commit a fraud has no right to rely on the confidentiality of the lawyer-client relationship.

The various arguments advanced against the disclosure of client fraud all fail on a central premise. The policy reasons offered for the proposition that lawyers should not disclose client misconduct all assume that the lawyer and the client are operating within a functional adversary system. In an adversary system, however, it is axiomatic that both sides, represented by competent counsel, come together before an impartial tribunal and follow the same rules. If both sides observe the rules, more often than not justice is done. In a client fraud situation, however, one party has intentionally used part of the system of justice against the system itself. He has chosen not to play by the established rules. He cannot then complain when, in order to rectify the fraud he has perpetrated, his lawyer is compelled to disregard the right to confidentiality he would ordinarily have.

V. CONCLUSION

The current ABA standard concerning client fraud allows the unscrupulous client to abuse the attorney-client relationship with impunity. If the lawyer discovers the fraud before it is consummated, he will, at most, withdraw from the representation. On the other hand, if the client is clever enough to conceal the fraud until after it is completed, he is assured that the lawyer can reveal the information only by subjecting himself to disciplinary proceedings under DR 4-101. This is an entirely unsatisfactory result.

A lawyer who has been used by his client to commit a fraud is under an ethical obligation to help rectify the injustice. Only by disclosing the fraud to the injured party will the lawyer be able to fulfill that obligation. DR 7-102(B) should, therefore, be amended to reflect that judgment by imposing upon the lawyer who discovers evidence of his client's fraud a mandatory duty to disclose the fraud to the injured person:

Proposed DR 7-102(B)

If a lawyer discovers that his client has perpetrated a fraud upon another person during the course of the representation, he shall promptly advise the client to rectify the situation. If the client does not immediately do so, the lawyer shall reveal the fraud to the injured person. In such a situation the duties prescribed in DR 4-101 shall not apply.

This proposal adapts the language of the current rule to alleviate several of the problems discussed in this Note. First, fraud upon a tribunal is excluded from mandatory disclosure. Inasmuch as fraud perpetrated upon a tribunal presents different ethical issues than does fraud upon a person,¹¹² it is perhaps inappropriate for one broad disclosure rule to deal with both situations.¹¹³ Second, the "clearly established" language of the current rule has been replaced by a less demanding standard. The tendency of the "clearly established" standard to provide a rationale for ignoring evidence of client fraud¹¹⁴ makes it inappropriate for the purposes of this rule. The "discovers" standard, because of its vagueness, will not allow a lawyer to dismiss so easily any qualms he may have about his client's apparent misconduct. The proposed rule purposely places a lawyer who suspects that his client may have committed a fraud in an uncomfortable position. It is hoped that this may prompt the attorney to investigate the situation further in order to alleviate his doubts about his client's conduct. There is, of course, a good reason for not imposing a disclosure duty on the lawyer who is not sure that his client has committed a fraud. If, notwithstanding the lawyer's suspicions, the client is in fact innocent of wrongdoing, disclosure would be inappropriate.¹¹⁵ This possibility, however, is negated by requiring the lawyer to discuss his suspicions with the client before disclosing anything. If the lawyer was mistaken about the client's culpability, the client himself will presumably be able to assuage the lawyer's doubts.¹¹⁶ Finally, the proposed rule eliminates the privileged communication exception and adds a provision making the disclosure duty controlling over the general principle of confidentiality. Since the policy considerations that generally underlie lawyer-client confidentiality are overborne by conflicting policies favoring disclosure of client fraud,¹¹⁷ the fact that certain information subject to the proposed duty to reveal may be a confidence or a secret under DR 4-101 becomes irrelevant.

Adoption of the proposed rule by the ABA and scrupulous adherence thereto by individual lawyers would likely have several salutary consequences. First, since the client will always be consulted first and

112. See note 17 *supra*.

113. This is not necessarily meant to suggest that a lawyer should not be required to reveal a fraud committed by his client upon a tribunal, but rather that such a situation deserves separate analytical treatment.

114. See notes 95-96 *supra* and accompanying text.

115. See notes 77-78 *supra* and accompanying text.

116. It is theoretically possible that a client, although innocent, might be unable to satisfactorily explain the facts underlying the lawyer's suspicions. This seems unlikely to occur. In such a situation, however, the lawyer would not, so long as his suspicions remain unconfirmed, be required to disclose any information.

117. See text accompanying notes 107-11 *supra*.

advised to correct the situation himself, a lawyer will rarely be forced to reveal anything. The client will realize that if he does not rectify the fraud, the lawyer will. It is likely, therefore, that the client, recognizing that the fraud will be revealed in any event, would prefer to remedy the matter privately rather than to subject himself to potential legal action arising from the lawyer's revelations to the injured party. Second, to the extent that the client is aware of the lawyer's duty to reveal any fraud he discovers, the client may be less likely to engage in such conduct in the first place.¹¹⁸ It may, in fact, be conducive to the establishment of a proper professional relationship for the lawyer, at the moment he first suspects that his professional skills are being misused, to tell the client frankly, "I am ethically bound to keep everything you tell me in the strictest confidence. But if you use this relationship to injure someone else, I am bound to reveal it." Finally, if the proposed rule is adopted, the importance of the lawyer's role as an officer of justice will be reaffirmed, both in the minds of clients and of lawyers themselves.

This last consideration is both important and timely, and it raises problems of which the client fraud dilemma is only a small part. The legal profession's claim to integrity is at best viewed with skepticism. If that claim is to be vindicated, the bar must convince the public that there are certain things a lawyer cannot and will not do, even for his client. Yet the profession's codification of its ethical duties—the Code of Professional Responsibility—is itself plagued with ethical anomalies. Commentators have attacked it as irrelevant, internally inconsistent, and conspiratorial;¹¹⁹ self-serving;¹²⁰ and am-

118. It has been argued, however, that a mandatory disclosure duty would be destructive of the delicate trust relationship which is essential between lawyer and client. A particular client, fearing disclosure, might fail to confide in his lawyer, thinking, perhaps erroneously, that an action or transaction he wishes to pursue might constitute fraud. Although this argument depends on several significant and perhaps unverifiable assumptions about the client's perception of the lawyer's ethical responsibilities, it raises a reasonable objection. The proposed disclosure rule admittedly could have a chilling effect on lawyer-client confidentiality in several situations. For example, if the client retained a lawyer to accomplish a certain objective, suspecting it may involve fraud, the client's presumed fear of disclosure may prompt him to conceal material information from the lawyer. The effectiveness of the professional relationship would thus be inhibited, and if the client's desired goal is actually *not* fraudulent, he may forfeit a deserved recovery or transaction. Similarly, assuming a continuing lawyer-client relationship, if the client had in the past used the lawyer to commit a fraud and the facts of that deception were crucial to his current legitimate transaction, the client would have to choose between foregoing a proper objective and giving the lawyer information he would be obligated to reveal. Such situations, however, are likely to occur so rarely in practice that they can and should be accepted as negligible costs of the ethically proper course of disclosure.

119. Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702, 702 & n.5 (1977).

biguous.¹²¹ The Supreme Court has recently declared one of its provisions unconstitutional.¹²² While deficiencies of this last kind can be remedied by the courts, most of the problems inherent in the Code can only be corrected by the bar itself. Disparities between the profession's ethical standards and the behavior of particular lawyers will undoubtedly continue to exist, but if the profession cannot even prescribe rules that accord with society's ethical perceptions, there is little hope that its activities will be viewed with anything but cynicism.

It is hoped that lawyers will recognize their responsibility to impose upon themselves standards of conduct that will "uphold the integrity and honor of [the] profession."¹²³ But those who find such arguments unconvincing may nevertheless be persuaded that reform is a political necessity:

The profession does not have much time remaining to reform its own disciplinary structure. Public dissatisfaction is increasing. Proposals for public participation in the disciplinary process already have been made and, in at least one instance, have been implemented. Unless the profession as a whole is itself prepared to initiate radical reforms promptly, fundamental changes in the disciplinary structure, imposed by those outside the profession, can be expected.¹²⁴

Adoption by the ABA of the client fraud disclosure rule proposed herein would be an important step in the process of ethical reform. With the enactment of proposals such as this, the Code would add substance to its claim that "so long as its practitioners are guided by these principles, the law will continue to be a noble profession."¹²⁵

120. *Id.* at 704.

121. Note, *Attorney-Client Confidentiality: A New Approach*, 4 HOFSTRA L. REV. 685, 688 (1976).

122. See *Bates v. State Bar*, 97 S. Ct. 2691, 2700 (1977) (holding that DR 2-101(B), as applied to newspaper publication of truthful advertisements concerning fees for routine legal services, violated the first amendment by inhibiting the free flow of commercial information).

123. ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 9-6.

124. AMERICAN BAR ASSOCIATION SPECIAL COMMITTEE ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 8-9 (Final Draft June 1970).

125. ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 9-6.