

## **SPECIAL ALERT**

### **Confidentiality Under Attack at ABA's August Convention**

#### **Voice your opinion!**

The very foundation of the attorney-client relationship, confidentiality, is in imminent peril, as are the lawyers who must usually protect it at all costs. This summer, the ABA House of Delegates will consider a huge slate of proposed changes to the Model Rules of Professional Conduct put forward by the ABA's "Ethics 2000" Commission. While many of Ethics 2000's proposals are valuable, one is very troubling: a drastic expansion of situations in which a lawyer has discretion to disclose a client's confidential information, when the lawyer unilaterally determines that disclosure is necessary to protect a third party.

This proposal fundamentally changes the lawyer's role from confidential advisor and advocate to police officer and whistle-blower, thus discouraging clients from confiding in lawyers in the first place. In the long run, society at large will lose if clients are discouraged from consulting with lawyers because the clients are not confident that their confidentiality will be protected. Lawyers, for their part, will be required to resolve very difficult dilemmas and will probably face expanded liability.

***Unless the profession speaks out against this proposal, it may be adopted at the ABA's meeting in August in Chicago. At the end of this article, we provide information on how you can make your views known to ABA leaders.***

#### ***The proposal***

Ethics 2000 proposes to permit lawyers to disclose confidential information to protect the *financial* interests

of third parties. Under the proposal, a lawyer could disclose confidential information to "prevent, mitigate or rectify" a crime or fraud committed by the client "that is reasonably certain to result or has resulted" from the client's conduct. The only limitation on this power to disclose under the Ethics 2000 proposal is that the client whose confidential information is subject to disclosure must have used the lawyer's services to facilitate the client's crime or fraud.

This cure is worse than the problem it seeks to solve, because it will cause clients to lose confidence in lawyers and thus to stop confiding their secrets to lawyers. Even if a few frauds are prevented by the disclosure that Ethics 2000 proposes to authorize, the overall chilling effect on clients of speaking to their lawyers will mean that many more problematic transactions will not be scrutinized with the benefit of legal counsel.

#### ***How will this proposal affect civil lawyers?***

Suppose that you are writing a patent application for a new drug. The scientists employed by your company assure you that the drug's side effects are minimal or non-existent, yet you have reason to suspect otherwise. Should you disclose your suspicions? Is it ethical not to disclose without investigating your suspicions? Can you ethically disclose your suspicions to a neutral scientist, against your client's wishes, to determine if your suspicions are valid? If that neutral scientist makes a public announcement over your objection, have *you* violated a duty to your client? Are you under a continuing duty to consider disclosing as the years pass, given that the side effects may not materialize immediately? Should you disclose only if the FDA fails to identify the side effects? Don't look to the proposed Model Rule to answer these questions -- it leaves you on your own.

As another example, imagine that a lawyer is helping a company to obtain funding. The lawyer learns that the client is touting a new invention to venture capitalists by passing around descriptions of the invention which the lawyer helped to write. The lawyer also hears rumors that the client may be exaggerating the company's projected revenues. The lawyer becomes concerned that the investors have been lulled into complacency, partly by the lawyer's persuasive description of the invention. Since the client may be "misusing" the lawyer's work, may the lawyer disclose his suspicions about the client's conduct? What if the client denies any wrongdoing, but the lawyer doesn't believe the client? Should the lawyer's decision be different if the lawyer has only a nagging doubt about the client's denial? Does it matter that some of the investors are elderly and are placing dangerously large portions of their assets into the company? Here again, the proposed Model Rule leaves you on your own to sort out the details.

### ***More liability for lawyers?***

Ethics 2000's proposal attempts to protect lawyers from liability, both for disclosing and failing to disclose, but we question whether this "free pass" from liability will hold up. Let's look at the history of such efforts. When the ABA Model Rules were first adopted in 1983 as proposed *disciplinary* rules, they expressly disclaimed any intention to expand *civil* liability. Yet, as a practical matter, the disciplinary rules *have* often become the standard of care for civil liability and for disqualification motions. Recognizing this change, Ethics 2000's newly revised version of the Model Rules acknowledges that the rules "may" establish the standard of care for civil liability.

We can reasonably expect that liability for making the wrong decision about whether to disclose will follow this same trajectory and be formally codified by the ABA 10 or 20 years from now, if the House of Delegates adopts the Ethics 2000 version of Rule 1.6 this summer. When a lawyer makes a disclosure adverse to a client, the lawyer can expect to be sued by the client. If the lawyer fails to disclose, he or she can expect lawsuits from third parties who claim to have suffered harm that would have been avoided had the lawyer disclosed confidential client information. Clients will suffer if their lawyers must worry about whether they will face liability to third parties for failing to disclose the client's confidential information.

### ***What you can do***

California bar organizations are actively opposing the proposed changes to Rule 1.6, but they need support from other states and from national organizations to prevail. Let the leaders of such organizations to which you belong know your view on this question and ask

them to take action to oppose the ABA's proposed weakening of attorney-client confidentiality. You can also have a tremendous personal impact simply by making your views known *now* to ABA leaders in your field of practice. Send e-mails to the following ABA leaders: the Chair of the ABA Intellectual Property Law Section (Edward G. Fiorito: [ipconsulting@msn.com](mailto:ipconsulting@msn.com)), the Chair of the Business Law Section (Amelia Helen Boss: [aboss@vm.temple.edu](mailto:aboss@vm.temple.edu)), and/or the Chair of the Litigation Section (Ronald Jay Cohen: [rjcohen@cohenkennedylaw.com](mailto:rjcohen@cohenkennedylaw.com)).

If you want more information, contact Sean SeLegue at Rogers Joseph O'Donnell & Phillips, who is actively working on opposing the modifications to Rule 1.6. For more information about Ethics 2000, visit its web site at [www.abanet.org/cpr/ethics2k](http://www.abanet.org/cpr/ethics2k).