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Lawyer-Client Confidences: The Model Rules' Radical Assault on Tradition

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Lawyer-Client Confidences:

The Model Rules' Radical Assault on Tradition

The traditional relationship between lawyer and client should be retained in ethical rules.

By Monroe H. Freedman

THE provisions of the proposed Model Rules of Professional Conduct relating to confidentiality will seriously impair, if not destroy, the traditional relationship between lawyer and client. Let me explain why that is so by reviewing the status of confidentiality in the current American Bar Association ethical standards and in Supreme Court decisions, and by showing how the model rules would radically change our traditional standards and values.

Whether serving as counselor or as advocate, the lawyer must establish a relationship of trust and confidence with the client. Only through that relationship can the lawyer learn all the relevant facts, determine which are important and which are helpful or harmful, and give the client professional judgment and representation. If the client were to withhold information that might be relevant, the lawyer could not effectively serve the client's needs. Accordingly, the lawyer must be able to assure the client that confidences will be inviolate in all but the most unusual and extreme circumstances.

Although that statement of the lawyer-client relationship emphasizes the interests of the individual client, it is in fact the public interest that is thereby served in a free society. Even an intelligent and informed lay person is unable to cope with the complexities of the law without professional advice and assistance. The traditional lawyer-client relationship enhances individual autonomy by increasing the client's knowledge of the lawful choices available. In addition, the ideal of equality before the law is served by giving professional assistance to each person who needs it.

The public interest also is furthered by trust between lawyer and client because it puts the lawyer in a position to give advice that is socially desirable. As every lawyer knows, the client who may be tempted to commit a crime or fraud or other wrongful act often can be dissuaded by professional counsel, but only if the lawyer knows the facts on which to base that counsel.

No rule of law, no matter how fundamental, has ever been unwavering or free of ambiguities, and the protection of lawyer-client confidences is no exception. The professional ideal of confidentiality is clear, however, and the trend towards increasingly strict protection is manifest in professional standards and opinions.

At least as long ago as 1833 the English common law recognized that confidentiality is essential to enable clients to obtain professional advice. In 1914 Mechem in his work on agency expressed the same view, adding that divulgence of a confidence by a lawyer not only would be "a gross violation of a sacred trust" but would "utterly destroy and prevent the usefulness and benefits to be derived from professional assistance."

Early canons of ethics were ambiguous

The A.B.A.'s Canons of Professional Ethics, as adopted in 1908, expressly protected clients' "secrets or confidences" in Canon 6. In 1928 Canon 37 was added to explain the lawyer's "duty to preserve his clients confidences," and that provision was made even more emphatic in 1937.

The canons, however, were ambiguous, if not self-contradictory. In addition to express protection of confidences and secrets, they included a future crime exception (Canon 37), proscribed "any manner of fraud or chicane" (Canon 15), required candor to the court (Canon 22), and required the attorney to reveal fraud to the other party (Canon 41) and perjury to the prosecuting authorities (Canon 29). What, then, was the lawyer's obligation if a client was a fugitive from justice, jumped bail, violated parole, or committed perjury?

The formal opinions of the A.B.A Committee on Professional Ethics that attempted to resolve those issues (23, 155, 156, and 268) were in conflict until 1953. Then, in Opinion 287, the committee resolved the conflicts in favor of confidentiality, holding specifically that an attorney who learns that a client has committed perjury in securing a divorce should advise the client to inform the court but should not reveal the truth if the client fails to do so.

Referring expressly to "the duty of candor and fairness to the court" and the canons requiring disclosure of fraud and perjury, Opinion 287 found those canons to be "[insufficient] to override the purpose, policy, and express obligation [of confidentiality] under Canon 37." The opinion concluded: "We yield to none in our insistence on the lawyer's loyalty to the court of which he is an officer. Such loyalty does not, however, consist merely of respect for the judicial office and candor and frankness to the judge. It involves the steadfast maintenance of the principles which the courts themselves have evolved for the effective administration of justice, one of the most firmly established of which is the preservation undisclosed of the confidences communicated by his clients to the lawyer in his professional capacity."

As originally drafted, the Code of Professional Responsibility appeared to revive the ambiguities of the canons. The code recognizes in Ethical Consideration 4-1 that confidentiality is essential to the traditional lawyer-client relationship, but the 1969 version of Disciplinary Rule 7-102(B)(1) appears also to require disclosure of clients' fraud. That rule contains two clauses relating to fraud by a client on a person or tribunal. The first clause (presenting no problem) requires that the lawyer "promptly call upon his client to rectify the [fraud]." However, the second clause reads: "and if the client refuses or is unable to do so, [the lawyer] shall reveal the fraud to the affected person or tribunal."

The Bar Association of the District of Columbia immediately and overwhelmingly deleted the second clause, which appears to require disclosure of client fraud. The A.B.A. House of Delegates took similar action in 1974, by adding a third clause to D.R. 7-102 (B)(1). As a result of that amendment, the attorney is now called on to reveal

Illustration by Dick Miodock

the client's fraud "except when the information is protected as a privileged communication." If construed broadly, of course, the third clause, which forbids disclosure, swallows up the second clause, which appears to require disclosure.

That is just what happened. In Opinion 341 (1975) the A.B.A. Committee on Ethics and Professional Responsibility held that the amendment to D.R. 7-102(B)(1) protects not only "confidences" but also "secrets" of the client. "Secrets," according to D.R. 4-101(A), include "information . . . the disclosure of which will be embarrassing . . . to the client." In the words of Geoffrey C. Hazard, Jr., reporter for the commission that produced the Model Rules of Professional Conduct, the amendment to D.R. 7-102(B)(1) "eviscerated the duty to report fraud" (*Ethics in the Practice of Law*, page 27).

As explained in Opinion 341, the effect of the amendment of D.R. 7-102(B)(1) is to "reinstate the essence of Opinion 287"—that is, confidentiality "is so important that it should take precedence in all but the most serious cases." Opinion 341 acknowledges that "the conflicting duties to reveal fraud and to preserve confidences have existed side-by-side for some time" but adds that "it is clear that there has long been an accommodation in favor of preserving confidences." Opinion 341 relies on "tradition . . . backed by substantial policy considerations" to preserve the lawyer-client relationship of trust and confidence.

The bar's traditional position on lawyer-client confidences is an integral part of the Sixth Amendment right to counsel and of the Fifth Amendment privilege against self-incrimination. For example, in *Upjohn Company* v. *United States*, 449 U.S. 383 (1981), Justice Rehnquist, writing for a unanimous Supreme Court, quoted with approval the language of E.C. 4-1: "A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and the important from the irrelevant and unimportant. The observation of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance."

Note that the quoted language relates the ethical obligation of confidentiality to what is "essential to proper representation." Dissenting in *United States* v. *Henry*, 447 U.S. 264 (1980), Justice Rehnquist explicitly said that "the Sixth Amendment, of course, protects the confidentiality of communications between the accused and his attorney."

Chief Justice Burger observed in *Trammel* v. *United States*, 445 U.S. 40 (1980), that the lawyer-client privilege rests on the need for the lawyer—not only as advocate, but also as counselor—to know everything that relates to the client's reasons for seeking representation, and that the privilege is therefore rooted in "the imperative need" for confidence and trust between lawyer and client. Without that confidence and trust and the full communication that flows from it, the lawyer cannot provide effective assistance of counsel.

Model rules fail to "clearly differentiate right from wrong"

With regard to the Fifth Amendment, the Supreme Court held in *Fisher* v. *United States*, 425 U.S. 391 (1976), that the attorney-client privilege applies to documents in the hands of an attorney that would have been privileged in the hands of the client. As stated in Whitebread's treatise on criminal procedure, the Supreme Court has "extended Fifth Amendment protection to the attorney-client privilege for the express purpose of encouraging the uninhibited exchange of information between citizens and their attorneys."

The Model Rules of Professional Conduct nevertheless would require the lawyer to divulge a client's confidences to a tribunal (Rule 3.3) and to third parties (Rule 4.1) in order to correct deliberate falsehoods, unintentional falsehoods, and deliberately misleading omissions by the client. In addition, divulgence is permitted in a variety of circumstances under Rule 1.6. Those provisions are inconsistent with the traditional lawyer-client relationship and would reverse the trend of authority expressed in the old Canons of Professional Ethics, in A.B.A. Opinions 287 and 341, and in the 1974 amendment to D.R. 7-102(B)(1) of the Model Code of Professional Responsibility.

The obligations of disclosure would not simply prevent the lawyer from going forward with a client who is committing a fraud. Withdrawal from the representation is not sufficient to satisfy the express requirements of Rules 3.3(a)(2) and 4.1(b) that the lawyer "shall not knowingly fail to disclose the client's confidences to the tribunal and to third persons."

That conclusion is clouded by some inconsistent drafting in Rule 3.3(a). Subsection (2) of that rule unambiguously requires "disclosure of a fact necessary to prevent a fraud on a tribunal," while Subsection (4) of the same rule says only that the lawyer shall take "reasonable remedial measures." The comment explains "remedial measures" to mean that "ordinarily" the lawyer should make prompt disclosure to the court. Thus, Rule 3.3(a)(2) stipulates disclosure as the sole required course, while Subsection (4) of the same rule makes disclosure the ordinary course but not the exclusive one. Neither the rule nor its comment explains what other courses might be embraced by "reasonable remedial measures." In view of the mandatory language of Rule 3.3(a)(2), therefore, the lawyer who failed to violate a client's confidences would act at his or her peril.

The inconsistency between Subsections (2) and (4) of Rule 3.3(a) is only one illustration of the failure of the model rules to "clearly differentiate right from wrong" and to tell lawyers "exactly what they ought to do," as promised in 1979 by Robert J. Kutak, chairman of the Commission on Evaluation of Professional Standards. A more serious failure of that sort is the "caveat" to Rule 3.3, which cautions that constitutional law defining the right to assistance of counsel in criminal cases "may" supersede the obligations imposed by the rule. Thereby, the model rules leave the lawyer whipsawed between the threat of disciplinary action for failing to disclose confidences and a charge of ineffective assistance and malpractice for doing so.

Nor are the notes to Rule 3.3 either adequate or helpful. They suggest that "the general constitutional theory applied by the Supreme Court" favors divulgence of clients' confidences by the attorney. As shown above, however, that conclusion is wrong. In addition, the notes fail to cite the most important cases bearing on the Fifth Amendment privilege against self-incrimination and the Sixth Amendment right to counsel. The two Supreme Court cases that are cited are characterized in a misleading way and do not support a rule requiring

divulgence of confidences by the criminal defense lawyer.

The commission also fails to live up to its own standards of candor in other important respects. Writing in this *Journal* last September (page 1116), for example, Mr. Kutak has stated that D.R. 7-102(B) "requires disclosure of every unrectified fraud committed by a client in the course of representation." As explained in Opinion 341, however, that apparent requirement of disclosure was the result of an oversight in drafting that was corrected by the A.B.A's House of Delegates eight years ago. Mr. Kutak then says that "some jurisdictions" (omitting any reference to the A.B.A. itself) have amended the Code of Professional Responsibility to protect "privileged" information. "But," he adds, "'privilege' is undefined and the amendment has served largely to foster confusion." Mr. Kutak fails to inform the reader that Opinion 341 has long since resolved any confusion by defining "privileged" extremely broadly to include "secrets," thereby protecting even information that would be embarrassing to the client.

The comments and notes to the model rules are similarly misleading. Despite extensive citations of only marginally useful authorities, they contain no reference to Opinion 287 and only one to Opinion 341. That one reference is erroneous. It reads: "A.B.A. Formal Opinion 341 (1975) construed the term 'privilege' to include 'confidences' as defined in D.R. 4-101(A)." The essential point of Opinion 341, however, is that the 1974 amendment was not limited to "confidences" but went far beyond to protect "secrets" as well. Elsewhere the model rules simply omit reference to Opinion 341, even when it is highly material to the comment.

The most effective way to inhibit or destroy a relationship of trust and confidence would be to require the lawyer to admonish a client that any disclosures made to the lawyer might have to be disclosed to others despite injury to the client. That has been characterized by Professor Hazard as a "Miranda warning." He has noted that the legal effect of the Miranda warning may have far-reaching consequences, for to give it is to treat the client as a nonclient.

But Rule 1.2(e) of the model rules requires a lawyer-client Miranda warning. The rule is unclear and unsatisfactory as to when the warning should be given, but, laying that aside, the provision is wholly inconsistent with the traditional lawyer-client relationship of trust and confidence. At the same time, we must recognize that deletion of that provision would not solve the problem. In view of the broad disclosure provisions of the model rules, elemental fairness requires that the client be put on notice that the lawyer would be required or permitted to betray confidences. Indeed, there is, again, a constitutional aspect to the issue.

For example, in *United States* v. *Henry* a government informer was placed in a cell with Henry and established a "relationship of trust and confidence" with him. As a result, Henry revealed incriminating information to the informer. In an opinion by Chief Justice Burger, the Supreme Court held that because Henry's conviction was based in part on the admissions elicited through the false relationship of trust and confidence, it violated Henry's Sixth Amendment right to counsel.

Also significant is the recent decision in *Estelle* v. *Smith*, 451 U.S 454 (1981). There a psychiatrist examined the defendant regarding his competency to stand trial. The defendant was not advised of his privilege against self-incrimination, nor was his lawyer informed of the examination. After conviction and in a separate penalty phase of the trial, the psychiatrist testified that the defendant was dangerous. Chief Justice Burger again wrote the opinion for the Court. He noted that during the psychiatric evaluation, the defendant "assuredly . . . was 'not in the presence of [a person] acting solely in his interest.'" Rather, the psychiatrist's apparent role of neutrality changed, and he became at the sentencing trial "an agent of the state recounting unwarned statements" made in a postarrest custodial setting. Accordingly, the defendant's Fifth and Sixth Amendment rights had been violated, and the sentence was vacated.

Clearly, a lawyer cannot do what the cellmate in *Henry* and the psychiatrist in *Estelle* could not do—that is, establish an apparent relationship of trust and confidence, elicit harmful information, and then disclose the information contrary to the client's interests and desires.

Having required disclosure of client confidences, the model rules, of necessity, require a Miranda warning. But that admonition comes at the cost of treating the client as a "nonclient." In its 1980 discussion draft, the Kutak commission acknowledged that such a warning "may lead the client to withhold or falsify relevant facts, thereby making the lawyer's representation . . . less effective." That candid acknowledgment has been omitted from the present draft, but the omission only conceals the rule's effect without changing it.

The current fad for requiring lawyers to divulge confidences has received substantial impetus from consumer advocates. Concerned with scandals in-

House to Consider Model Rules of Professional Conduct

• In January the A.B.A. House of Delegates voted to accept the "restatement" format for the Model Rules of Professional Conduct proposed by the Commission on the Evaluation of Professional Standards. The commission now plans to submit its final draft for consideration by the House of Delegates in August at the 1982 annual meeting in San Francisco. The final draft was published as a special pullout section of the October, 1981, issue of the *American Bar Association Journal*.

The House Special Committee on Hearings has requested that all interested individuals and groups submit to it in writing any specific amendments or opposing positions that are proposed for presentation to the House in August. The Rules of Procedure of the House of Delegates require that "all motions to amend recommendations must be in writing, unless the amendment contains six or less words." All documents should be received at the American Bar Center in Chicago no later than June 9, and they should be addressed to Judith W. Smith, Office of Policy Administration, American Bar Association, 1155 East 60th Street, Chicago, Illinois 60637 (telephone 312/947-3932). As soon as possible after June 9, a compilation of all amendments and position statements submitted will be forwarded to all who submitted documents and to the Commission on Evaluation of Professional Standards.

The House Committee on Hearings has decided tentatively to hold hearings first in Chicago about June 25 and again in San Francisco on Friday, August 6, to gain information that may assist it and the House Committee on Rules and Calendar in an orderly presentation to the House by identifying controversial areas. In some instances different groups may propose amendments that seek to achieve the same goal, and these groups may be able to reach agreement on a coordinated presentation in advance of the two scheduled hearings.

volving unsafe automobiles, hazardous wastes, dangerous drugs, and corporate bribery, some of them have urged that an effective way to police abuses would be to require corporate lawyers to be "whistle-blowers." The proponents of whistle-blowing generally reject the argument that it would impair the basic rights of individuals. They insist that the whistle-blowing requirement should be imposed only on lawyers for corporations, as distinguished from lawyers representing individuals.

Ironically, the Kutak commission has turned that notion upside-down. While lawyers representing individuals are required to make disclosures in many instances and permitted to make them in many more, lawyers representing business organizations are absolutely forbidden under Rule 1.13(b) and (c), in virtually all circumstances, to reveal even ongoing and future crimes. Assume, for example, a case in which an automobile manufacturer is being sued for substantial damages for marketing a car with a gasoline tank that is allegedly defective in design and has frequently exploded, causing numerous deaths. The company's lawyer learns that tests had been performed by the company, prior to production of the car, showing that the gasoline tank was dangerous. After commencement of the litigation, however, the company's vice president for design destroyed all evidence of the tests and then testified that there had been none.

Rules 3.3(a) and 4.1 would require the attorney to reveal the truth to the court and to the other parties. Not so in this case, however, because Rules 3.3 and 4.1 are governed by Rule 1.13 when a corporate official is involved. As stated in the comment to Rule 1.13: "To guide his conduct under Rule . . . 3.3 or 4.1 . . . , the lawyer ordinarily should make inquiry within the organization as indicated in Rule 1.13(b)."

Professor Hazard said in a panel discussion at the meeting of the Association of American Law Schools last January that Rule 1.13 is not intended to govern in situations in which Rules 3.3 or 4.1 are involved. That informal oral explanation, however, is clearly inconsistent with the text of the rule and with the official written comment, which have not been amended or disavowed by the Kutak commission.

Under Rule 1.13 the attorney in our example must first "know" (not just "believe") that the vice president for design is acting unlawfully and also that his unlawful act is "likely to result in material injury to the organization." That is not likely in our case, but suppose the lawyer somehow knows that exposure of the obstruction of justice and perjury is likely, and that a substantial penalty against the company also is likely. The lawyer still must not reveal the truth but must proceed as is "reasonably necessary in the best interests of the organization," giving "due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, [and] the policies of the organization." The lawyer also must act so as to "minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization." Even with all that hedging, the lawyer is not permitted to reveal the truth but is limited to asking the vice president to reconsider his act, advising a separate legal opinion, and referring the matter to higher authority within the organization.

Model rules would seriously impair the lawyer-client relationship

Assume now that the matter is referred to the board of directors, which decides that the truth is not likely to come out and directs the lawyer to remain silent. The lawyer then must determine whether two more conditions have been met: first, that the board has "clearly" committed a violation of a legal obligation to the organization or a violation of law that reasonably might be imputed to the organization; and second, the board's action is likely to result in substantial injury to the company. In that event, the lawyer still may not reveal the truth unless he is reasonable in believing three more things: first, that divulgence is "necessary" in the best interest of the company; second, that the board has acted to further the personal or financial interests of the board members; and third, that those personal or financial interests of the board members are in conflict with the interests of the company.

Only after meeting all those extraordinarily unlikely conditions is the lawyer permitted, but never required, to divulge the truth to the court or the other parties about the vice president's obstruction of justice and perjury. A more direct and honest drafting of Rule 1.13 would say simply: "The provisions of these rules requiring or permitting divulgence of a client's confidences shall not apply to a lawyer representing a business organization."

The model rules' provisions on client confidences are radical, poorly drafted, misleading, inconsistent, and unconstitutional. They would seriously impair, if not destroy, the traditional lawyer-client relationship of trust and confidence, reversing the clear trend of A.B.A. ethical rules and formal opinions; they would require that a "Miranda warning" be given by the lawyer to the client, in violation of tradition, common sense, and constitutional law; they would carve out an inconsistent exception for lawyers representing business organizations; and they are based on seriously flawed and misleading scholarship, including misstatements and omissions of important authorities.

The disclosure provisions are based on the fact that lawyers know a good deal of relevant truth and on the notion that the legal system will produce more truth if lawyers are required to divulge it. The fatal fallacy of that notion is that as soon as clients learn that their confidences are not safe with their lawyers, the lawyers will no longer have many truths worth divulging.

In sum, clients would come to understand that any truths that might be harmful to them could not be entrusted to their lawyers. The result would be what is known as "intentional" or "selective ignorance" on the part of the lawyer. As recently as 1979 that approach was denounced by the A.B.A. House of Delegates as "most egregious" and as constituting a "professional impropriety" advocated by "unscrupulous lawyers" when it approved the Standards Relating to the Prosecution Function and the Defense Function.

The provisions of the Model Rules of Professional Conduct relating to client confidences—Rules 1.2(e), 1.6, 1.12(b) and (c), 2.3, and 4.1(b)—should be rejected and the traditional relationship between lawyer and client should be maintained. *Journal*

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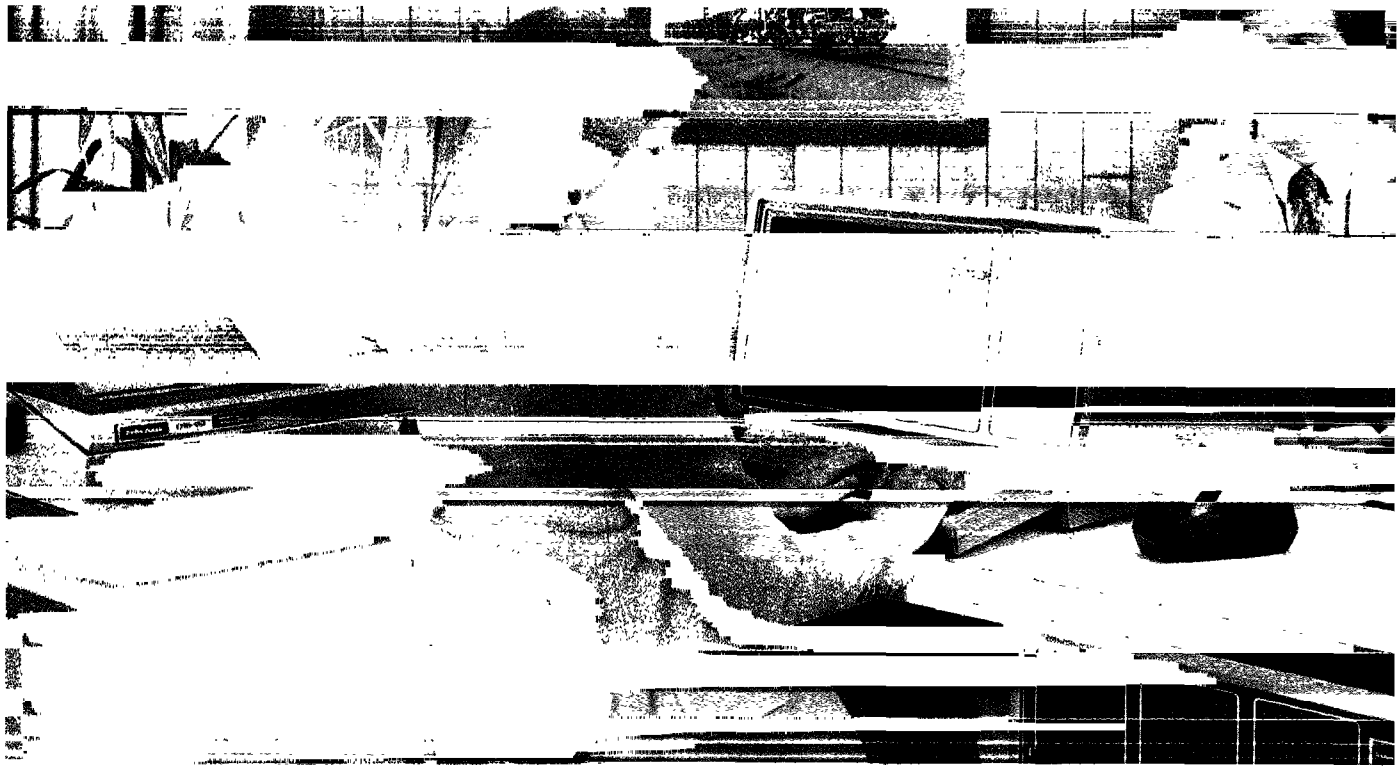

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