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SELF-INTEREST OR SELF-DEFENSE: LAWYER DISREGARD OF THE ATTORNEY-CLIENT PRIVILEGE FOR PROFIT AND PROTECTION

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I. INTRODUCTION

An exception to the attorney-client privilege permits an attorney to reveal otherwise protected confidences when necessary to protect his own interest. It is traditionally invoked by lawyers suing (or being sued by) former clients. For decades it lay virtually ignored by commentators and the public, but of late the venality of the American Bar Association and the cooperation of the Second Circuit have combined to bring it to the fore.

There are no fewer than three distinct formulations of the exception, varying in breadth and ambiguity. The earliest, developed at common law in the United States around 1850, permitted a lawyer to escape the bonds of the attorney-client privilege where “the attorney or counsel has an interest in the facts communicated to him, and when their disclosure becomes necessary to protect his own personal rights” or, in other words, where nondisclosure “would operate injuriously upon the attorney’s interests.” Narrow application followed broad statement, as disclosure at common law was generally permitted only by attorneys seeking compensation for services rendered, charged with mal-

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1. To set a fox to keep the geese.
2. The most widely quoted statement of the privilege is Wigmore’s:
   Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to the purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived.

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practice, or accused of wrongdoing in the course of litigation between other persons.\(^5\)

These court-imposed limits were codified in the exception's second formulation, Rule 213(2)(b) of the Model Code of Evidence, which renounced application of the privilege as to any relevant communication between a lawyer and his client "upon an issue of breach of duty by the lawyer to his client."\(^6\) This version suited attorneys accused of malpractice but was useless to counsel seeking compensation. The language was therefore amended in the Uniform Rules of Evidence to provide an exception to the privilege for communications "relevant to an issue of breach of duty by the lawyer to his client, or by the client to his lawyer."\(^7\) Proposed Federal Rule of Evidence 503 (d)(3)\(^8\) adopted that clause verbatim.

The third variation of the exception did not appear until 1969, and then it was as part of the American Bar Association's Code of Professional Responsibility rather than as an opinion or proposed statute.\(^9\) Under the Code a lawyer may reveal "[c]onfidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct."\(^10\)

On its face, the quoted rule is broader than the earlier codification because revelation is permitted in response to accusations by third parties as well as clients asserting a lawyer's breach of duty. The legal status of the Code is uncertain,\(^11\) but the ABA's rule has already figured prominently in important and controversial judicial decisions which have upheld its validity.

\(^5\) See text accompanying notes 26-39 infra.

\(^6\) MODEL CODE OF EVID. Rule 213(2)(b) (1942).

\(^7\) UNIFORM RULE OF EVID. 26(2)(c) (1953 version) (current version at UNIFORM RULE OF EVID. 502(d)(3) (1975)). This formulation is law in those jurisdictions which have adopted the Uniform Rules. See CAL. EVID. CODE § 958 (West 1966); KAN. CODE OF CIVIL PROC. § 426(b)(3) (1976); NEB. REV. STAT. §§ 27-101 to 27-104 (1976); N.J. STAT. 2a: 84A-20(2)(c) (West 1976).

\(^8\) Proposed Rule 503(d)(3) never became effective, for Congress refused to federalize the rules of evidentiary privilege when, on January 2, 1975, effective July 1, 1975, it enacted the Federal Rules of Evidence into law. Consistent with the treatment of the proposed rules of evidentiary privilege in Judge Jack Weinstein's work on evidence, the words "Rule" and "Standard" are used interchangeably throughout this paper. See 1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE, Preface at vii-xii (1976) [hereinafter cited as WEINSTEIN'S EVIDENCE].

\(^9\) THE ABA CODE OF PROFESSIONAL RESPONSIBILITY (1975) [hereinafter cited as ABA Code] is the successor to the ABA CANONS OF PROFESSIONAL ETHICS.

\(^10\) ABA CODE, DR 4-101(C)(4).

\(^11\) See text accompanying notes 109-124 infra.
and confirmed its breadth.\textsuperscript{12}

The temptation to consider the above, to note briefly that the most recent formulation favors attorneys more than did its predecessors, and to move on to a more interesting question should be resisted. While at one time the wording of the exception might have been merely an academic exercise, that is no longer the case. Today the exception is a focal issue in the struggle between those who maintain that an attorney has an obligation to "preserve the confidences and secrets of a client\textsuperscript{13}" and the SEC which demands that counsel disclose all arguable violations of the securities laws by corporate clients or face criminal and civil liability themselves.\textsuperscript{14} The reach given the exception will heavily influence the arguments and tactics of both the Commission and the bar.

Even absent the current altercation, the exception deserves scrutiny because it has been neglected by journals and commentators for more than sixty years\textsuperscript{15} and it is surrounded by an air

\begin{footnotesize}
\begin{enumerate}
\item ABA Code, Canon 4, of which DR 4-101(C)(4) is a part, states simply that "A Lawyer Should Preserve the Confidences and Secrets of a Client."
\item The literature in this area has multiplied exponentially within the past three years. A fairly recent and extensive bibliography may be found in Mathews, \textit{Liabilities of Lawyers Under the Federal Securities Laws}, 30 Bus. Law. 105 (Special Issue, March 1975). The definitive statement of the organized bar on this matter may be found in the "Statement of Policy" adopted by the ABA House of Delegates in August, 1976, \textit{reprinted in} 31 Bus. Law. 543, 547 (1975). The report accompanying the "Statement of Policy" summed up its position on this issue concisely:

\begin{quote}
We do not believe that the policy of disclosure as embodied in the SEC laws warrants an exception to the basic confidentiality of the attorney-client relationship. Such exceptions have to date been carefully reserved by the CPR for far more critical and limited situations. The statutes administered by the SEC give it no power to require disclosure by lawyers concerning their clients beyond what is provided in the CPR.
\end{quote}

\textit{31 Bus. Law} at 547.

The SEC's position in favor of lawyer disclosure of client fraud (as defined by the SEC) dates from the Commission's complaint in \textit{SEC v. National Student Marketing Corp.}, [1971-72 Transfer Binder] \textit{Fed. Sec. L. Rep.} (CCH) ¶ 93,360 (complaint filed Feb. 3, 1972), which charged, \textit{inter alia}, that the lawyers and defendants should have notified the SEC concerning the misleading nature of certain financial statements. Other SEC statements on the matter can be found in Mathews, \textit{supra}. For a recent, unofficial, response to the ABA "Statement of Policy," see Remarks of Paul Gonson at the Annual Convention of the Federal Bar Ass'n (Sept. 11, 1975) (Mr. Gonson is an Associate General Counsel of the SEC).
\item \textit{E. Weekes}, \textit{supra} note 3 were the last major
\end{enumerate}
\end{footnotesize}
of professional self-serving. It is difficult to feel comfortable when
the bar enthusiastically defends the attorney-client privilege, re-
sists efforts to weaken or modify it, and then condones and even
expands an exception to the privilege which benefits lawyers and
lawyers alone.

Public regard for the legal profession is at a low ebb. The
Supreme Court, responding in part to this sentiment, has struck
down special dispensations which have long set lawyers above the
law. We ought to reexamine such special privileges as remain,
including the right to reveal confidential attorney-client commu-
nications now accorded accused or unpaid attorneys.

This article analyzes the history and implications of each of
the formulations of the exception and finds none of them, particu-
larly the ABA’s recent effort, consistent with acceptable ethical
standards, sound public policy, or relevant principles of law. It
is suggested that the use of the exception in a given instance be
left to the discretion of the trial judge limited only by a few
guidelines. Such guidelines and the adoption of measures to dis-
courage excessive use of the exception by attorneys are probably
all that justice requires.

II. THE COMMON LAW EXCEPTION

A. The Setting

The attorney-client privilege has roots in Roman law, but
the need for it in English courts did not arise until the testimony
of witnesses was legally compelled late in the sixteenth century. To
English barristers of that time, an exception to the privilege
for maligned attorneys would have seemed absurd, because the
privilege belonged to attorneys, not clients; it was “a considera-
tion for the oath and honor of the attorney rather than the appre-
hension of his client,” and thus the attorney’s to waive. Legal
rules with respect to the collection of attorney’s fees were simi-
larly primitive, for “the original estate of the legal fraternity in

associations suggested a violation of the antitrust laws).
17. See Radin, The Privilege of Confidential Communication Between Lawyer and
Client, 16 CALIF. L. REV. 487, 488 (1928).
18. 8 J. WIGMORE, supra note 2, § 2290, at 542-43.
19. Id.
20. “Since only the attorney’s honor is involved, the court would not always attempt
to judge its standards or to enforce them if the attorney himself was willing to risk his
conscience and his reputation.” Id. § 2290, at 545.
England . . . was so elevated that they possessed no right to
demand compensation for their services." Being a gentleman
had its drawbacks as well as its advantages.

As the basis of the privilege changed in the century after
1750, however, the interests of the bar also shifted. By 1850, the
artificed basis of the privilege was the interest of the judicial
system in full disclosure between attorney and client, unsup-
ported by whatever remained of lawyers' honor. The change was
slow in evolving; only in 1833, for example, did Lord Brougham
establish that the privilege extends to confidential communica-
tions received without reference to existing or contemplated
litigation. Because of the slow pace of communications, impor-
tant American courts were unaware of the decision nearly twenty
years later.

Brougham's opinion also established that the privilege would
not extend to information concerning transactions to which an
attorney was party, because in such instances the lawyer's knowl-
edge was acquired through channels other than his employment
as an attorney. The courts in England, however, never created
a general exception to the privilege for unpaid or accused law-
yers.

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EVIDENCE §§ 584-605 (11th ed. 1970); 1 P. TAYLOR, TAYLOR ON EVIDENCE §§ 911-938 (12th
ed. 1931). Nevertheless, 19th century English cases were often cited in support of the
exception in American treatises and annotations of the late 19th and early 20th centuries.
The earliest, Chant v. Brown, 68 Eng. Rep. 32 (V.C. 1849), is not on point. It upheld an
attorney's claim that the attorney-client privilege did not end when the attorney (subse-
quently to the communication) became interested (as a devisee) in the property to the title
of which the communication related. The later case, In re Postlethwaite [1887] 35 Ch.
722, is also inapposite. There an attorney sought to invoke the privilege to protect himself
and avoid responding to questions, but was rebuffed on three grounds: a) the communica-
tions in question were between the attorney and client as trustees; b) the attorney and
client were charged with fraud; and c) they were acting as co-vendors of the property in
question, not as attorney and client. One of the few English cases actually involving the
potential use of the exception, Cleave v. Jones, 155 Eng. Rep. 1013 (Ex. 1852), held that
a client's account rendered to his attorney was privileged against the latter in an action
by the attorney for money advanced. Cleave thus appears to have rejected the exception
in toto. (Wigmore, incidentally, considered both Chant and Cleave "apparently unsound." 8 J. WIGMORE, supra note 2, § 2312, at 695 n.3.) See note 136 for a discussion of
other exceptions developed in England.
B. The Cases

The exception was created by *Rochester City Bank v. Suydam*,\(^26\) an extraordinary case which at once invented the doctrine, gave it broad application, and anticipated fifty years of further development. Alfred Ely had served as the general agent and attorney for Suydam, Sage & Co. The company went bankrupt, but not before the Rochester City Bank lent it more than $60,000 on notes endorsed by Ely. In its suit, the bank sought to reach property on which Ely had a lien or mortgage. The bank had learned of the property from papers shown to it by Ely to induce the bank to extend credit to Suydam. Ely cooperated with the bank, which wanted to affix to its complaint correspondence between Ely and Suydam, Sage & Co, relating to the latter’s property and to Ely’s authority with respect thereto. Defendant Suydam moved to suppress the correspondence, claiming attorney-client privilege.

Justice Selden’s opinion first denied the motion to suppress on the grounds that Ely was employed both as attorney and as business agent and acquired the evidence in both capacities. According to Justice Selden, in order to be privileged, attorney-client communication “should at least be made under cover of an employment strictly professional”; these were not, and therefore, were not privileged.\(^27\)

The judge might have stopped there but instead he denied the motion on “still another ground”: “[W]here the attorney or counsel has an interest in the facts communicated to him, and when their disclosure becomes necessary to protect his own personal rights, he must of necessity and in reason be exempted from the obligation of secrecy [sic].”\(^28\)

The modern exception is patterned after the approach taken in *Suydam* although this debt was not always acknowledged by citation in later cases. Since Ely was a defendant in the case, the breadth of the exception as announced in *Suydam* was almost

\(^{26}\) 5 How. Pr. 254 (N.Y. Sup. Ct. 1851).
\(^{27}\) Id. at 261.
\(^{28}\) Id. at 282. Justice Selden continued:

> It would be most harsh and unjust to place the attorney in a position in which he must act in view of the virtual instructions from his client, and yet deprive him of the only means of protecting himself. . . . His clients by giving him a direct interest in the facts, from time to time, communicated to him, and by dealing with him upon the footing of those facts have, as it strikes me, voluntarily waived their right to concealment as between themselves and the attorney.

*Id.*
unique; no case until 1974\textsuperscript{29} would again squarely hold that an attorney may offer his client's confidences in evidence to defend himself against a suit brought by a third party.

Other cases followed on the heels of \textit{Suydam} and refined its formulation of the doctrine. In 1859, in \textit{Nave v. Baird},\textsuperscript{30} one Mr. Nave refused to pay his attorney, Baird, whom he had retained to represent him in a suit later lost. Baird sued for his fee and Nave counterclaimed, alleging negligence and Baird's refusal to follow instructions. When Baird called Willson (an attorney who had worked with him on the original lawsuit) to rebut Nave's testimony concerning the content of consultations between Nave and Baird, Nave objected and sought refuge behind the attorney-client privilege. The Indiana Supreme Court held that the privilege did not apply where a client sues his attorney for disobeying instructions or "unskillfully managing a cause."\textsuperscript{31} In light of subsequent decisions, \textit{Nave v. Baird} is unexceptional in all respects save one: The lawyer permitted to testify was not the attorney accused of misconduct.\textsuperscript{32}

The third case to invoke and analyze the exception was \textit{Mitchell v. Bromberger}.\textsuperscript{33} Like \textit{Nave} it was an action to recover attorney's fees, but here there was no counterclaim against the attorney, and the attorney's testimony as to the nature and extent of advice given the defendant was thus wholly "offensive." Yet the testimony was admitted. The court stated: "It would be a manifest injustice to allow the client to take advantage of [the attorney-client privilege] to the prejudice of his attorney; or that it should be carried to the extent of depriving the attorney of the means of obtaining or defending his own rights."\textsuperscript{34}

Besides authorizing an attorney's testimony in a wholly offensive setting, \textit{Mitchell} also departed from the previous cases by explicitly limiting the attorney's right of revelation. The defendant in \textit{Mitchell} had argued that much of the attorney's testimony was unnecessary and had unfairly prejudiced the jury.

\textsuperscript{30} 12 Ind. 318 (1859).
\textsuperscript{31} Id. at 320.
\textsuperscript{32} The theory behind the ruling must have been that the client's attacks constituted an implicit waiver of the attorney-client privilege with respect to all communications relevant to the instructions given by the client in the earlier litigation.
\textsuperscript{34} Mitchell v. Bromberger, 2 Nev. 345, 349, 90 Am. Dec. 550, 552 (1866).
against the defendant. The court found no prejudice, but counselled attorneys in similar circumstances not to "disclose more than is necessary for [their] own protection."

Numerous cases followed the three discussed above. By the close of the nineteenth century the Supreme Court had recognized the exception, and it was accepted as black letter law by the leading commentators without material alteration from its statement in the earliest cases. The one significant change in the exception before the turn of the century emerged from a case holding that defensive disclosure is permissible even in a suit to which the attorney is not a named party, if during the course of the suit one who is a party (presumably a client or former client) accuses the attorney of misconduct. This extension was quickly applied to the case of the criminal defendant who assails the competence or integrity of his attorney while seeking a new trial or other postconviction relief. Since 1866 there have been no other material alterations in the common law exception or the conditions attending its use.

C. The Rationale

Beginning in the late 1800's scores of American cases have held that, in the proper circumstances, a lawyer may reveal privileged communications with his clients when necessary to protect his own interest. With some few exceptions "proper circumstances" have been found only:

1) When the attorney is suing to collect his fee;
2) When the client is suing the attorney for malpractice;
3) When, in a lawsuit to which the attorney is not party, a client or former client attacks his competence or integrity.

Most of the recent cases in the third category involve attacks on the competence of counsel made by criminal defendants in the course of motions for a new trial or petitions for postconviction relief.

Courts have permitted disclosure under the exception on three distinct grounds. First, it has been held that the client's

Norton, 82 Conn. 441, 74 A. 686 (1909); Daughtry v. Cobb, 189 Ga. 113, 5 S.E.2d 352 (1939) (interpleader by administrator of estate; attorney sought fees for work performed under a power of attorney which the client alleged to have been procured by fraud); Sokol v. Mortimer, 81 Ill. App. 2d 55, 226 N.E.2d 496 (1967); Nave v. Baird, 12 Ind. 318 (1859); Snow v. Gould, 74 Me. 540, 43 Am. Rep. 694 (1889); Weinschenk v. Sullivan, 100 S.W.2d 69 (Mo. App. 1937); Mitchell v. Bromberger, 2 Nev. 345, 90 Am. Dec. 550 (1866); Keck v. Bode, 29 Ohio C.C. 413 (1902) (revelation permitted in principle, but attorney-plaintiff's victory in lower court reversed on the grounds that communications revealed were unnecessary and prejudicial); Smith v. Guerre, 159 S.W. 417 (Tex. Civ. App. 1913); Stern v. Daniels, 47 Wash. 96, 91 P. 552 (1907).

42. Though this situation presents the strongest case for use of the exception, opinions discussing it are rare. Most of the cases in this area involve counterclaims by clients who have been sued by their former lawyers for compensation. E.g., Carlson, Collins, Gordon & Bold v. Banducci, 257 Cal. App. 2d 212, 64 Cal. Rptr. 915 (1967); Nave v. Baird, 12 Ind. 318 (1859). In other cases, the client does not counterclaim for damages, but merely offers the attorney's incompetence as an affirmative defense. See, e.g., Stern v. Daniel, 47 Wash. 96, 91 P. 552 (1907).


conduct or accusations constitute an implicit waiver of the privilege, hence operating to unseal his lawyer's lips. Though waiver traditionally is described as intentional relinquishment of a known right, a client does not have to know of the existence of the attorney-client privilege to be deemed to have waived it by bringing suit against his or her attorney. For obvious reasons waiver is rarely found in cases brought by attorneys to collect compensation for services rendered, except when the client alleges the defective quality of the services as part of his defense.

Second, it has been suggested that the exception is justified when "as between the participants in the conference [between attorney and client] the intention was to disclose and not to withhold the matters communicated . . . ." Wigmore championed this rationale, but it has been employed only sparingly in the cases. It was adopted by analogy from the rule that attorney-client communications made when two people jointly consult an attorney are not privileged in a later action between them. The

45. See, e.g., Laughner v. United States, 373 F.2d 326, 327 n.1 (5th Cir. 1967) ("The rule that a client waives his privilege by attacking the attorney's performance of his duties seems to have been adopted unanimously by those courts which have dealt with the question."). See 8 J. Wigmore, supra note 2, § 2327 (6), at 638. The theory may also be stated without the use of the term "waiver," as when it is said that "the conclusion of the courts appears clearly to be that it is the putting in issue of the fact of adequacy [of counsel] that permits the court to receive the attorney's testimony." Northrup v. State, 272 A.2d 747, 752 (Me. 1971). See also Farnsworth v. Sanford, 115 F.2d 375, 377 (5th Cir. 1940) ("He waives the privilege of the communication by himself making it an issue to be tried and testifying about it.").

46. "[V]oluntary disclosure, regardless of knowledge of the existence of the privilege, deprives a subsequent claim of privilege based on confidentiality of any significance." C. McCormick, supra note 2, § 91, at 194 n.14. Such unknowing action is often labelled an "implicit" waiver. 8 J. Wigmore, supra note 2, § 2327, at 634. The courts have been quick to find waiver of the attorney-client privilege which will permit invocation of the exception. Indeed, a number of cases have found a waiver even where the attack on the competence or integrity of counsel was highly attenuated and indirect. In such instances, a finding of implied waiver has been based on what amounts to an implied attack or accusation. See, e.g., Pruitt v. Peyton, 243 F. Supp. 907 (E.D. Va. 1965); United States v. Wiggins, 184 F. Supp. 673, 678 (D.D.C. 1960).

47. See note 42 supra.


49. 8 J. Wigmore, supra note 2, § 2312(2), at 607. Wigmore's scholarship on this point is shoddy: Three cases are cited in support of the point. Id. § 2312(2), at 608 n.4. The one American case, Nave v. Baird, 12 Ind. 318 (1859), does not state or support the doctrine for which it is cited. The two English cases (both referred to as "unsound" in footnote 3 on the same page) are also not on point. Both upheld the privilege.

two situations, however, are fundamentally inapposite.\footnote{31}

Third, courts and commentators have picked up the language of \textit{Mitchell} and proclaimed the “manifest injustice” of permitting a client to use the privilege to his attorney's disadvantage.\footnote{32} The language used often invokes an earlier age when the privilege rested upon the gentility of the lawyer's calling, and the right to reply to scurrilous charges was invoked to prevent a “dark stain” upon the public esteem of members of the bar.\footnote{33} McCormick gave this theory a utilitarian cast, arguing that “practical necessity” requires that if effective legal services are to exist at all the privilege must not “stand in the way of the lawyer's just enforcement of his rights to be paid a fee and to protect his reputation.”\footnote{34}

The principal limitation on the exception is that announced in \textit{Mitchell}: The attorney may not disclose more than is “necessary” to protect his rights or interest.\footnote{35} There is no rule,
however, requiring attorneys to clear their testimony with the judge before offering it, and the courts have been surprisingly lenient in admitting testimony or other evidence which is both highly prejudicial and only marginally relevant. One appellate court, reviewing a verdict in favor of an attorney seeking his fee, upheld the admission of letters from the defendant to the plaintiff revealing that the debtor defendant "was engaged in leasing buildings for immoral purposes." In the eyes of the reviewing court the letters were admissible "to show that respondent had rendered services to the appellant in the way of advice and consultation in regard thereto . . . . The mere fact that these letters reflected upon the business or character of appellant was not sufficient reason for excluding them." When a lawyer's fee is at stake, the quality of judicial mercy is not strained.

In discussions of the exception, a handful of cases are often cited which do not fit into one of the pigeonholes discussed above. Cummings v. Irwin and Koeber v. Somers, for example, are frequently cited for the proposition that attorney disclosure of confidential communications is permissible when revelation is "for the protection of those with whom he has had business trans-actions in the interests of his client." Both cases involved clients
whose attorneys were authorized to act as agents, but who later sought to prevent the attorneys from testifying (as to their authority qua agents) in suits brought by third parties with whom the attorneys had dealings on the clients' behalf.

In both cases the appellate courts upheld admission of the testimony over objection that the relevant communications were privileged. The holding in Cummings rested primarily on the ground that the alleged attorney-client relationship did not in fact exist. Koeber's holding rested on three distinct grounds, only the third of which is relevant here. "By a great number of authorities," said the court in Koeber, "it has been held that no privilege of secrecy exists over communications which the attorney, for his own protection or the protection of those with whom he deals, needs to divulge . . . ." The only authorities cited are the Suydam, Nave, and Mitchell cases, none of which says anything about protecting those with whom an attorney deals.

If Cummings and Koeber are sound, and they are, it is because communications made to an attorney with the knowledge and intent that they be relayed to third parties are not confidential, hence not privileged in the first place. Similarly, because the privilege does not extend to cases concerning transactions to

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62. Cummings v. Irwin, 59 S.W. 153 (Tenn. Ch. App. 1900). Other factors leading to the court's decision included the court's desire not to obstruct the easy passage of negotiable paper, or to defeat the ends of justice by eliminating the only witness who could prove the fact essential to its attainment.


64. The opinion in Koeber cites numerous cases in support of this rule. For example, in Burnside v. Terry, 51 Ga. 186 (1874), the court stated:

If a party holds out his attorney as one having authority from him to make a special contract respecting pending litigation and the attorney acts upon it, treats with his antagonist and thereby secures important rights to his client, he cannot deny the right of the attorney or of the opposite party to prove by the attorney the contract and the authority to make it. . . . We would not trench upon the sacredness of confidential communications of client to attorney, but that is not intended to be confidential or sacredly secret which the attorney is to propose to the other party as a foundation for bargains and contracts. . . .

Id. at 191. See Fleschler v. Strauss, 15 Cal. App. 2d 735, 60 P.2d 193 (1936); McClure v. Fall, 42 S.W.2d 821 (Tex. Civ. App. 1931); C. McCormick, supra note 2, § 90, at 186 n.65. McCormick further states: "Wherever the matters communicated to the attorney are intended by the client to be made public or revealed to third persons, obviously the element of confidentiality is wanting." Id. § 91, at 188 n.77.

The same rule, unrelated to the exception which is the subject of this article, may explain two other cases which hold that an attorney who retains another attorney on behalf of a client may testify as to his authority to take this action in the second attorney's suit against the client for his fee. See Henshall v. Coburn, 177 Cal. 50, 169 P. 1014 (1917); McDermont v. Bateman, 118 Wash. 230, 203 P. 66 (1922).
which an attorney was party, contracts governing attorney's fees are not privileged. The privilege is also inapplicable when an attorney and client are litigating a matter which arose outside of the professional relationship. In all such cases no exception to the privilege is necessary because the attorney's knowledge has not been acquired in the course of legal representation through confidential communication with his client.

Other than the kinds of cases just discussed, only Suydam does not fit within the framework of the exception provided above, for in Suydam the attorney's disclosures were permitted though he was defending against a third party rather than his client. The difference in that case, as the opinion makes clear, was one of form rather than substance because the real parties in opposition were the attorney and client. As endorser of his client's notes, the attorney in Suydam was liable only to the extent that the bank was unable to reach enough of the former client's property to cover the notes. The essence of the court's holding is that inasmuch as the attorney would have the right to use his knowledge in a suit between himself and his former clients, the plaintiff may do likewise as he is "in equity subrogated to [the attorney's] rights." Suydam, despite its peculiar facts, is consistent with the principle that the exception is available only to an attorney fighting the client or former client with whom the communication in issue was made.

D. Some Conclusions

On its face, the common law exception could have been given

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65. 1 S. GREENLEAF, supra note 37, § 242. See Greenough v. Gaskell, 39 Eng. Rep. 618 (Ch. 1833). See also text accompanying notes 16-18 supra.

66. See, e.g., Strickland v. Capital City Mill, 74 S.C. 16, 54 S.E. 220 (1906); Annot., 7 L.R.A. 426 (N.S. 1906). In recent years the basis for this rule may have changed somewhat. At least one court has recently based the nonconfidentiality of fee information not on the fact that the attorney is a party to the fee agreement, but on such diverse public policy grounds as the inherent power of courts to regulate the bar, the need to protect clients from excessive fees and assist attorneys in collecting fees, and the need to protect against suspected conflicts of interest. See In re Michaelson, 511 F.2d 882, 886 (9th Cir.), cert. denied, 421 U.S. 978 (1975).

67. See, e.g., Arbuthnot v. Brookfield Loan Bldg. Ass'n, 98 Mo. App. 382, 72 S.W. 132 (1903) (attorney sought to cancel usurious note and to pay out amount due as found by court).

68. As Justice Selden said of the attorney-defendant: "This suit is virtually for his benefit, as application of the property claimed to the payment of the drafts, discharges him pro tanto from responsibility." Rochester City Bank v. Suydam, 5 How. Pr. 254, 262 (N.Y. Sup. Ct. 1851).

69. Id. at 262.
a very broad application, but it is clear that the courts sharply limited its availability. The use of the exception has been authorized only in controversies between a lawyer and a present or former client; although it is not required that the attorney and client both be named parties to a lawsuit, they must be in actual opposition to one another before the attorney can disclose the client's confidences. This is an important limitation, the more so because it has been so blatantly flouted by the ABA in its Code of Professional Responsibility.70

Offensive use of the exception has also been limited in practice, if not in theory. Consider, for example, a situation in which an attorney who owns one thousand shares of Corporation A is also, by coincidence, representing the wife of a director of Corporation A in divorce proceedings. For evidentiary purposes, (to prove her husband's depraved moral state) the wife gives her attorney memoranda which she found at home indicating that her husband had represented Corporation A in bribing various foreign officials. The bribes have cost the Corporation millions of dollars and thus have cost the attorney, as shareholder of Corporation A, thousands of dollars. As a result, the attorney is contemplating a derivative action on behalf of Corporation A. Can he use the memoranda? While the action is undeniably "offensive," could it not be argued persuasively that the action is essentially a defensive one inasmuch as the attorney is seeking only to preserve his investment—"to protect his personal rights."

Whatever the argument's merits, it has not been accepted by the courts. On the theory that disclosure would protect the attorney's rights or interests, the common law exception might have been construed as both a complete shield and a complete sword, permitting attorney revelation of client confidences whenever relevant in a lawsuit brought by or against an attorney. Instead, it has been construed only as a partial shield and a partial sword, available solely in controversies between an attorney and a present or former client. Furthermore, even when available, the exception may be used to abrogate the privilege only as to the lawyer's communications with the opponent-client of the moment. Admittedly, the evidence that the courts have intended the exception to be this narrow is largely negative; judges have not

70. See ABA Code, DR 4-101(C)(4).
seen fit to extend the exception beyond narrow bounds, so this author presumes that they have intended to keep it within those bounds. There is also language in some cases, however, indicating that the exception applies only to litigation between attorney and client, and there is a great deal of discussion in the treatises to the same effect.

III. THE UNIFORM RULE AND THE FEDERAL STANDARD

Given the history and substance of the common law exception, the language of the Uniform Rule of Evidence 502(d)(3), and the Federal Standard of Evidence 503(d)(3), which deny the privilege to "a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer," is "in all accord with all the cases" and has neither the intention nor the effect of narrowing the scope of the exception.

It is also claimed that these letters were privileged, and that the court erroneously admitted them. They would have been privileged, no doubt as between either of the parties to this suit and third parties; but as between the attorney and client the rule of privilege will not be enforced where the client charges mismanagement of his cause by the attorney . . . .

Id. at 98, 91 P. at 553.

73. The following speak of the exception only in the context of litigation or other controversy between the attorney and client: 3 JONES ON EVIDENCE § 21:19 (6th ed. 1972); C. MCCORMICK supra note 2, § 91, at 191, 2 F. MECHEN, supra note 37, § 2312; 1 E. THORNTON, supra note 3, § 127; Annot., 7 L.R.A. 426 (N.S. 1907).

After an extensive search for authority in support of the proposition that "an attorney may reveal confidential information in order to answer allegations of wrongful conduct, even when such charges are forthcoming from accusers other than his client," one recent author was able to come up with only a single reference: B. JONES, EVIDENCE § 754 (3d ed. 1924). See Goldberg, Policing Responsibilities of the Securities Bar: The Attorney-Client Relationship and the Code of Professional Responsibility—Considerations for Expertizing Securities Attorneys, 19 N.Y.L.F. 221, 250 n.104 (1973). The early editions of the Jones treatise indicated that an attorney could protect himself either when he was charged with fraud by his client or when both were charged with fraud. In fact, the statement may be traced to Annot., 66 Am. St. Rep. 241 (1897), but the only case among those cited in either source which bears even slightly on the statement is In re Postlethwaite, [1887] 35 Ch. 722. As discussed in note 25 supra, that case compelled an attorney to testify over his objections, on the grounds that the communications in question were not between the attorney in his legal capacity and the client, and that the attorney and client had been charged with fraud, thus rendering the communications unprivileged as consultations in furtherance of crime or fraud. See C. MCCORMICK, supra note 2, § 95 at 199. Judge North quite properly did not mention the exception for an accused attorney, as it was not applicable—and does not exist in England. The frequent miscitation of the case may be traced to a misleading headnote accompanying it in the original reporter.


76. See notes 94-95 supra.

77. MODEL CODE OF EVID. Rule 213(2)(6), comment (1942).
Despite their apparent precision, though, the codifications are ambiguous in at least three respects. First, they do not specify that the alleged breach of duty must arise directly from the matter concerning which the attorney was engaged by his client. California may have been attempting to remedy this when it required that the alleged breach be one "arising out of the lawyer-client relationship." As written, however, the California requirement is superfluous; if an alleged breach of duty does not arise out of a lawyer-client relationship, communications concerning it are not privileged, and no exception is needed to sanction their disclosure. This ambiguity in the codifications might be cured by including a statement to the effect that the only communications disclosable under the exception are those between a lawyer and client which relate to the particular matter out of which the instant controversy arose.

Second, the codifications fail to limit explicitly the exception's use to communications between the attorney and the client actually involved in the alleged breach of duty. Privileged communications with other clients may only rarely be relevant, but situations in which they are relevant are by no means inconceivable. Suppose, for example, that client A sues his attorney for return of his fee, alleging that the attorney had represented A inadequately because of a conflict of interest. A claims that the conflict arose from the attorney's having represented both A and B in a matter in which A and B had mutually exclusive interests. A witness testifies on A's behalf that he was present at a meeting during which the attorney was representing both A and B. In order to prove the absence of a conflict of interest, the attorney seeks to introduce into evidence communications between himself and B to establish that although he had at one time represented B, it was with regard to an issue unrelated to the issue for which he had been retained by A. The common law exception would not permit the attorney to offer the communication with B into evidence without the consent of the clients to whom they were addressed, but the Uniform and Federal Rules, on their face, would admit such evidence.

Third, the codification may abrogate the rule that disclosures under the exception be limited to those necessary to the

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78. CAL. EVID. CODE § 958 (West 1966). At least one prominent commentator has suggested that this provision and the accompanying comment are "pertinent to the proper scope of Standard 503(d)(3)," despite the meaninglessness of the provision noted in the text. 2 WEINSTEIN'S EVIDENCE, supra note 8, ¶ 503(d)(3)(01).
protection of the attorney’s rights. Relevant evidence is any evidence having a tendency to prove a fact whose existence is of consequence to the outcome of the suit and whose existence is made more or less probable by the evidence.79 Clearly, there may be evidence which is relevant but not necessary, and the need to limit the scope of the exception warrants some effort to distinguish between the two and admit only the latter80 as the common law (albeit ineffectually) attempted to do. Recently, in Levin v. Ripple Twist Mills,81 the court discussed the reason for the distinction. Although the Levin court was addressing the issue within the context of ABA Disciplinary Rule DR 4-101(C)(4), its reasoning is applicable to the exception as codified in the Uniform Rule and the Federal Standard. The court explained:

In almost any case when an attorney and a former client are adversaries in the courtroom, there will be a credibility contest between them. This does not entitle the attorney to rummage through every file he has on that particular client (regardless of its relatedness to the subject matter of the present case) and to publicize any confidential communication he comes across which may tend to impeach his former client. At the very least, the word “necessary” in the disciplinary rule requires that the probative value of the disclosed material be great enough to outweigh the potential damage the disclosure will cause to the client and the legal profession.82

A final question raised by the codifications is whether, although intended to track the holdings of the cases, they might be used to expand the exception. It seems apparent that there may be breaches of a client’s duty to his attorney which go beyond nonpayment of fees. Suppose, for example, that in a case like Suydam83 the note holder won his lawsuit but found the note’s

80. In an attorney’s suit to recover his fee, for example, evidence as to the number of hours worked, tasks performed (e.g., legal research, negotiations) and expenses incurred is clearly both relevant and necessary, but evidence on the substance of the client’s problem (e.g., the details of a contract or settlement), though usually relevant to show the nature of the services performed, will often be unnecessary and should normally be excluded out of concern for the factors which underlie the privilege itself.
82. Id. at 886 (footnotes omitted).
maker judgment-proof. He could then proceed against the endorser (the maker's attorney in *Suydam*) who would have a right of indemnification from the maker once the judgment was satisfied. If the endorsing attorney brings his action against the maker, may he introduce correspondence with his client concerning the notes to prove his claim?

Under the codifications the answer would clearly be yes, because the lawyer is alleging a breach of his client's duty to hold him harmless as endorser of the notes and the correspondence is relevant to prove the breach. At common law, the letters could conceivably be found inadmissible because the exception is available to plaintiff attorneys only when suing to collect a fee. On the other hand, they could possibly be admitted on either of two grounds: (1) Ely endorsed the notes as a business agent rather than as a lawyer, so that no privilege protects communications surrounding them, or (2) the exception extends to all cases in which disclosure is necessary to protect or secure an attorney's rights, and this manifestly is such a case. Justice Selden would have admitted the correspondence on the second ground. Justice Selden's resolution of the question seems preferable to a decision which, in a wooden application of black letter law, would reject the evidence for failing to come within the exception's limits. In practice, though, the broadening effect of the codifications must be viewed as trivial for the simple reason that cases like *Suydam* are exceedingly rare; when a lawyer sues his client within the attorney-client relationship, it is almost always for his fee.

IV. DISCIPLINARY RULE 4-101(C)(4)

A. History and Contents

The Code of Professional Responsibility ("the Code") comprises the rules and guidelines through which the ABA seeks to "point the way to the aspiring and provide standards by which to judge the transgressor." In 1970 it replaced the Canons of Ethics and has since been subject to only minor amendments.

The Code consists of three separate but interrelated parts: Canons ("statements of axiomatic norms"), Ethical Considerations ("aspirational in character"), and Disciplinary Rules ("mandatory . . . the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action").

84. "Ely would have a right in a legal contest between himself and his clients, in regard to his indemnity against the responsibilities assumed, to make use of the facts within his knowledge." *Id.* at 262.
85. ABA Code, *Preamble.*
While the Code has often been considered an improvement over the Canons, it has been criticized on a variety of grounds, one of which is that it reflects the interests and desires of large, urban law firms rather than those of the sole practitioner of the public at large. The Code with occasional minor amendments, is in force in every state except California and it has been incorporated by reference into the rules of many federal district courts.

References to client confidences and an attorney's obligation to guard or, in some circumstances, to reveal them appeared in several of the old Canons. Of greatest importance for our purposes is Canon 37, entitled "Confidences of a Client," which noted the "duty of a lawyer to preserve his client's confidences," and which provided details concerning the scope and implications of that duty. Until the mid-1930's the second paragraph of the Canon provided: "If a lawyer is falsely accused by his client, he is not precluded from disclosing the truth in respect to the false accusation." In 1937, however, an amendment to the Canon deleted the words italicized in the quoted excerpt.

Canon 4 of the Code combines several old Canons under the general heading "A Lawyer Should Preserve the Confidences and Secrets of a Client." The new Canon includes six Ethical Con-

86. Id.
87. See, e.g., Note, Legal Ethics and Professionalism, 79 YALE L.J. 1179 (1970) ("In the Code of Professional Responsibility, as in the legal profession's previous code of practice, self-regulation seems inevitably to lead to the compromise or subordination of the public interest to the short-range interest of the dominant segments of the profession.") Id. at 1197); A. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 976 (Manuscript 1975). But see Sutton, The American Bar Association's Code of Professional Responsibility: An Introduction, 48 Tex. L. Rev. 255 (1970) (the author was the reporter for the Committee which drafted the Code).
88. See Note, Attorney's Conflict of Interests, 55 B.U.L. Rev. 61, 65 n.23 (1975). Adoption has been accomplished in diverse ways, e.g., promulgation by the State Supreme Court, enactment by the State Legislature, and this may affect the authority of the Code in particular states. California has its own Code of Ethics, enacted by the state legislature. CAL. BUS. & PROF. CODE § 6076 (West Supp. 1975). The California Code makes no reference to client confidences, but § 6068(e) lists among the duties of a lawyer, the duty "to maintain inviolate the confidence, and at every peril to himself to preserve the secrets, of his client." Presumably, this general principle yields to the exception, also adopted by statute in California. CAL. EVID. CODE § 958 (West 1966).
90. See ABA CANONS OF PROFESSIONAL ETHICS Nos. 6, 22, 29, 37 & 41.
91. Id. CANON 37.
92. Id. (emphasis added).
93. The public record is strangely silent; there was apparently no debate over, or explanation for, the amendment. See 62 ABA Rep. 352, 765 (1937).
94. ABA Code, Canon 4.
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considerations (EC's) but only one Disciplinary Rule (DR), DR 4-101. That lone rule has four subsections, the third of which lists exceptions to the rule of confidentiality:

[DR 4-101] (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.

(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. 55

It is not easy to divine the source of the language of DR 4-101(C)(4). While the Rule is footnoted, the ABA Special Committee on Evaluation of Ethical Standards, which wrote the Code, cautioned against viewing the notes as an annotation of the Committee's views. 56 It would appear, however, that the Committee believed DR 4-101(C)(4) to be a restatement of the exception as established at common law and in the Uniform Rules of Evidence. 57 This it manifestly is not.

There is nothing in DR 4-101(C)(4), for example, limiting its application to litigation in progress, though at common law the exception was available only during the course of a trial. The codifications make no mention of trial as opposed to nontrial use, but as evidence codes they are only applicable in court. 58 The ABA Code, by contrast, is intended to govern all areas of legal activity. The absence at common law of any requirement that attorneys planning to invoke the exception seek permission to do so in advance means little during litigation because the attorney's offer of evidence will ordinarily be challenged as a violation of the privilege and may then be discussed at sidebar. 59 Outside the courtroom, the absence of advance review by a judge of disclosures invites abuse by unscrupulous practitioners whose injured clients will have no remedy other than a lawsuit filed after the improper disclosure.

95. ABA Code, DR 4-101(C).
96. ABA Code, Preamble n.1.
97. ABA Code, Canon 4 n.19.
98. Fed. R. Evid. 1101.
99. See note 56 supra.
More significantly, the Code does not limit disclosure to communications with a client-opponent in litigation against that client-opponent; it seems to allow disclosure of client confidences in response to third-party accusations. The common law exception also could have been read this way, but it was not. Yet the Second Circuit, disregarding a century of rationally elaborated precedent, recently held in the case of Meyerhofer v. Empire Fire & Marine Insurance Co.\(^{100}\) that DR 4-101(C)(4) permits an attorney to reveal client confidences in answering a suit brought by a third party.

In that case attorney Stuart Goldberg had assisted in preparing a prospectus for a public offering by Empire Fire & Marine Insurance Company. He insisted on complete disclosure of the fees received by his law firm in connection with the offering, resigned when this was not forthcoming, and subsequently submitted a memorandum to the SEC concerning the matter. Empire and Goldberg were among several parties later sued in a stockholder's derivative action alleging fraud in connection with the prospectus, but Goldberg was dropped as a defendant when he turned over to the plaintiffs' attorney a copy of his earlier memo to the SEC. The remaining defendants then moved to bar Goldberg and the plaintiffs' firm from participating in the litigation or disclosing confidential information to others. Finding that Goldberg's actions violated both Canons 4 and 9 of the Code, the district court granted the motion in part.\(^{101}\)

The Second Circuit reversed in part, exonerating Goldberg as follows:

\[\text{DR 4-101(C) recognizes that a lawyer may reveal confidences or secrets necessary to defend himself against "an accusation of wrongful conduct." This is exactly what Goldberg had to face when, in their original complaint, plaintiffs named him as a defendant who wilfully violated the securities laws.}\]

\[\text{The charge . . . was a serious one. . . . The cost in money of simply defending such an action might be very substantial. The damage to his professional reputation which might be occasioned by the mere pendency of such a charge was an even greater cause for concern.}\]

\[\text{Under these circumstances Goldberg had the right to make}\]

\(^{100}\) 497 F.2d 1190 (2d Cir. 1974), cert. denied, 419 U.S. 998 (1975).

\(^{101}\) 497 F.2d at 1192-94.
an appropriate disclosure. . . . Concomitantly, he had the right to support his version of the facts with suitable evidence. 102

Within little more than a year, In re Friend 103 followed and expanded Meyerhofer. Friend held that an attorney need not wait to be indicted before disclosing client confidences as "it would be senseless to require the stigma of an indictment to attach prior to allowing Mr. Friend to invoke the exception of DR 4-101(C)(4) in his own defense." 104

The implications of the broad construction given the Code in these two cases are enormous and troublesome and set DR 4-101(C)(4) apart from previous formulations of the exception. Like the common law exception, the Code's formulation of the exception would not condone disclosure by the attorney suing Corporation A's Board on the basis of the memoranda given to him by the Board member's wife. Unlike the common law exception, however, the Code would apparently countenance the revelations of a lawyer being threatened with indictment for filing a fraudulent prospectus, even though he is not yet a defendant in any lawsuit and has not been attacked by his client. 105 Even more astonishing is that nothing in the Code would prevent the attorney who is being sued by client A from disclosing his confidential communications with client B, despite the fact that client

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102. Id. at 1194-95.
104. Id. Friend was an attorney for (and officer of) Amrep Corp. and both the corporation and Friend were being investigated by a United States grand jury. Friend appeared before the grand jury several times and was invited by the prosecutor to produce any documents which might exculpate him. Friend applied to the Southern District for New York for permission to submit certain papers. Amrep objected, asserting the attorney-client privilege with respect to the submission of some of the papers. The court granted Friend's application citing DR 4-101(C)(4) and the Meyerhofer case. In a footnote Judge Duffy acknowledged that "as yet, no formal accusation has been made against Mr. Friend," id., but he decided to grant the application notwithstanding. Despite his efforts, Mr. Friend, together with other Amrep officers, was later indicted for violation of the securities laws. (The indictment against Mr. Friend was dismissed by Judge Metzner on December 30, 1976 at the conclusion of the government's case.)

Construction of DR 4-101(C)(4) to permit disclosure in response to third-party accusations has been endorsed by at least one authority in the field of legal ethics. Judge Raymond Wise, author of Legal Ethics (2d ed. 1970), apparently agrees that "an attorney is free to reveal cliental information in his own defense provided only that the accusation arose out of or in connection with the professional services he rendered." Goldberg, supra note 73, at 250 n.104.

B is not involved in the litigation in which his confidences are to be revealed. The ABA at least seems to believe that it would be more unjust to require its members to protect their uninvolved clients than to force those clients to share their confidences with the world.

B. The Propriety of DR 4-101(C)(4)

As written and construed, the Code's version of the exception can be criticized on two grounds. First, the provision contradicts the letter and spirit of its foundation—the common law, codifications, Opinions of the ABA Committee on Ethics and Professional Responsibility, and even other portions of the Code. Second, the rule is unsound as a matter of public policy because it is inequitable, undermines the attorney-client privilege and public confidence in the profession, and (paradoxically, given its intent) will prove inimical to the security of individual lawyers.

The disagreement between DR 4-101(C)(4), as construed by the Second Circuit, and the common law is clear and needs little elaboration. Though on its face the common law exception was sufficiently broad to permit disclosure of client confidences in answer to third-party accusations, it was so applied only once, and even in that case de facto (if not de jure) opposition existed between the attorney and his former client. The exception was simply not available for use in disputes other than those between attorney and client.

Conflict between the law of the attorney-client privilege and the Code is complicated by the latter's uncertain legal status. On the one hand, "[e]thics [c]ommittees do not pass on questions of law." On the other hand, the Code does govern lawyer's conduct, supersedes statutes or regulations prescribing less stringent standards, and provides a basis for disciplinary action at which punishments up to and including disbarment may be im-

106. See text accompanying notes 100-105 supra.
108. See text accompanying notes 70-73 supra.
109. H. DRINKER, LEGAL ETHICS 32 (1953). See A. KAUFMAN, supra note 87, at 185: "Committees on professional ethics consistently proclaim that they exist to give advice on matters of professional responsibility and that they will not answer questions of law."
110. "[T]he application of the Canons is not affected by statutes or regulations governing certain activities of lawyers which may prescribe less stringent standards." ABA COMM. ON PROFESSIONAL ETHICS OPINIONS, No. 203, at 488 (1940).
Moreover, the Code at several points explicitly addresses questions of law; DR 4-101 itself, for example, permits disclosure of client confidences under certain conditions, after defining a "confidence" as "information protected by the attorney-client privilege under applicable law." Extraneous factors such as the method by which a jurisdiction has adopted the Code may also affect its legal status.

The courts are divided on the question of the Code's legal status. Some gave the Canons (and thus, presumably, give the Code) the force of statute in cases to which they apply. Others have evinced admiration and respect for the Canons and/or the Code but refuse to acknowledge either as binding. Still other judges reject out of hand the imputation of legal authority to the American Bar Association's various attempts at ethical guidance.

Confusion is compounded in the federal courts which are...
subject to the rule of *Erie Railroad v. Tompkins.* Questions of privilege are matters of state law on which a federal court must yield to the rule of the forum state, but ethical matters and disciplinary proceedings are not subject to the *Erie* rule. Federal courts are thus free to fashion their own rules as to the latter matters.

Inevitably, the line between law and ethics is a muddy and wavering one, and the confusion has encouraged ethics committees who have taken a position on some issue to cling to that stand tenaciously long after the courts have ruled the committee's view incorrect as a matter of law. Given such instances, we should not be shocked to discover that portions of the Code repudiate a century of common law with regard to the exception to the attorney-client privilege for accused or unpaid attorneys.

Perhaps most difficult to explain are contradictions between DR 4-101(C)(4) and other portions of the Code itself. For example, Ethical Consideration 4-4 states flatly that "[t]he attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client." As we have seen, however, DR 4-101(C)(4) permits an attorney to reveal confidences where the common law would not. The Eth-

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the taxpayer client may still have a legitimate expectation of privacy with regard to that material because of the attorney-client relationship, and expectation of privacy which helps to give substance to a Fifth Amendment privilege contention.

*Id.* at 453. The *Kasimir* holding, however, was expressly rejected in *Michaelson,* 511 F.2d 882, 893 (9th Cir. 1975).

117. 304 U.S. 64 (1938).
121. Consider, for example, the attorney's duty to disclose perjured testimony by his client if he discovers the falsehood before the end of the trial. The courts have consistently found a legal duty on the part of the lawyer to reveal the perjury while ABA Ethics Committees have advocated silence in the interest of the client and withdrawal from the case (but not disclosure) if the attorney will not correct his testimony. See *Note,* *The Lawyer-Client Privilege: Its Application to Corporations: the Role of Ethics, and its Possible Curtailment,* 56 Nw. U.L. Rev. 235, 251 n.88, 252 nn. 89-93 (1961). See *also* text accompanying notes 135-145 *infra.*
122. ABA CODE, EC 4-4. See ABA COMM. ON PROFESSIONAL ETHICS, Opinion No. 250 (1943), which states: "That portion of the canon dealing with employment which involves or might involve disclosure or use of a confidence is not as broad as the rule under the adjudicated cases. Likewise, the exceptions are not stated as broadly as in the adjudicated cases."
123. *See* text accompanying notes 105-108 *supra.*
cal Consideration implies that communications which are privileged are only a subset of those which an attorney is ethically bound to keep confidential, but the Disciplinary Rule implies the opposite. Similarly, EC 4-5 prohibits a lawyer from using information acquired in the course of representing a client to the client’s disadvantage, or for the lawyer’s own purposes except with the client’s consent after full disclosure. These sections of the Code, among others, do not foreclose an exception to the obligation of confidentiality in extreme cases, as, for example, when an attorney is sued for malpractice. Rather, they indicate, at a minimum, that the exception is disfavored, and they are violently at odds with DR 4-101(C)(4)’s radical step towards condoning disclosure whenever convenient for the lawyer.

Finally, the exception as presented in the Code is inconsistent with prior Formal Opinions of the ABA’s Committee on Professional Ethics and Grievances (the “Ethics Committee”). Formal Opinion 202, for example, held in part that an attorney might not “initiate, without consent of the [client], any proceeding to protect himself which would involve a disclosure of . . . confidential communications. He would be justified in making disclosure only if he should be subjected to false accusation by the [client].” The footnotes to DR 4-101(C)(4) consist of references to, and excerpts from, Formal Opinion 250 which states explicitly that: “We are of the opinion that the lawyer may disclose confidential communications in subsequent litigation between the attorney and client where it becomes necessary so to do to protect the lawyer’s rights.” Clearly, neither of these

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124. E.g., ABA Code, EC 1 which provides:

The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interest of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client. See United States v. Anonymous, 215 F. Supp. 111 (E.D. Tenn. 1963); “Attorneys must not allow their private interests to conflict with those of their clients... They owe their entire devotion to the interests of their clients.” Id. at 113 (citations omitted). See also ABA Code, EC’s 6-5, 7-1, 7-9, 9-6, and DR 7-101(A)(3).

125. ABA COMM. ON PROFESSIONAL ETHICS OPINIONS, No. 202 (1940). Opinions 19 and 250 are to the same effect, though less explicit. See Note, 40 Mo. L. Rev., supra note 12, at 329.

126. ABA COMM. ON PROFESSIONAL ETHICS OPINIONS, No. 250 (1943). Opinion 250 suggested other restrictions on the use of the exception which are reproduced in the footnote to DR 4-101(C)(4) but which cannot be found in the rule itself. For example, Opinion 250 limited disclosure to cases where it was “necessary to protect the attorney’s interests arising out of the relation of attorney and client in which disclosure was made.” ABA Code, Canon 4 n.19.
Opinions contemplated the disclosure of confidences in defense against third party accusations allowed by DR 4-101(C)(4) and approved in *Meyerhofer*[^1] and *Friend*.[^2]

There are also policy objections to DR 4-101(C)(4). First, it grants attorneys an unconscionable power to reveal confidential communications, with enormous potential for abuse in the hands of unscrupulous counsel. Second, it frustrates the basic policy of the privilege by discouraging candor within the attorney-client relationship. Third, it gives the appearance of inequity and self-serving behavior and thus will further undermine already minimal public confidence in the legal system and the integrity of lawyers. Fourth, it makes attorneys more vulnerable to attack than they had been at common law, and will undoubtedly increase the frequency with which lawyers are named as defendants in civil and criminal suits.

The first two criticisms follow directly from the liberality of DR 4-101(C)(4). It has been over 150 years since the courts of England and America established that the attorney-client privilege is the client's to claim or waive.[^3] The privilege and the rule barring attorneys from using information received from clients to the clients' disadvantage or the attorney's personal gain[^4] were developed by the courts to encourage the candor required for the proper functioning of the legal system. The exception to the privilege for an accused or unpaid attorney frustrates the policy underlying the privilege because it lessens the assurance that a client's confidences will remain undisclosed until the client decides otherwise. It thus may inhibit frankness between attorney and client.[^5] Extension of the exception can only further undermine


[^4]: See *ABA Comm. on Professional Ethics Opinions*, No. 250 (1943):

The provision . . . is in accord with the general rule announced in the adjudicated cases that a lawyer may not make use of knowledge or information acquired by him through his professional relations with his client, or in the conduct of his client's business, to his own advantage or profit. (Citations omitted.)

*See also Emile Indus., Inc. v. Patentex, Inc.*, 478 F.2d 562 (2d Cir. 1973); *Cannon v. United States Acoustics Corp.*, 398 F. Supp. 203, 222 (N.D. Ill. 1975); *ABA Code, Canons 4, 5, 7, 9.*

[^5]: *See Note, The Attorney-Client Privilege: The Remedy of Contempt*, 1968 Wis. L. Rev. 1192, 1199: "An attorney who discloses without client consultation may lose the trust of his client regardless of the significance of the information disclosed. The client
the privilege, especially as the client cannot know in advance which communications his or her attorney may later reveal. The effects and injustice are multiplied if the exception is construed to permit attorney revelation of client A’s confidences to defend against attacks from client B or a nonclient, for under such a construction even clients who are on good terms with their lawyer and in the habit of paying bills promptly may have their secrets aired in open court. Furthermore, the exception’s extension, and its availability without prior clearance are conducive to abuse; one can easily imagine a wealthy client paying inflated “fees” to prevent disclosure of particularly delicate confidences.

Public suspicion that the exception is unfair and self-serving cannot lightly be dismissed. A privilege similar to the lawyer-client privilege protects communications with physicians and clergymen; yet physicians have enjoyed an exception to the privilege only occasionally and clergymen have not enjoyed one

may thereafter become uncommunicative with resulting harm to the client’s entire case."
The only other recognized exception to the privilege whose application the client cannot readily foresee is that concerning legal services obtained to aid in the commission of a crime or fraud. That exception is premised on the argument that a privilege granted to improve the functioning of the legal system should not be used to defeat that system. See Uniform Rule of Evid. 502(d)(1) (1975) and Fed. Standard 503(d)(1); 2 Weinstein’s Evidence, supra note 8, ¶ 503(d)(1)(01). See also C. McCormick, supra note 2, § 95, at 199. It is both more fundamental than the exception for accused or unpaid attorneys and dependent upon a showing of fraud or crime in advance of the admission of possibly privileged evidence to justify the exception’s application. Clark v. United States, 289 U.S. 1 (1933). Note that the ABA has sought to limit the use and reach of this exception. ABA Comm. on Professional Ethics Opinions, No. 341 (1975), reprinted in 61 A.B.A.J. 1543 (1975).

132. There are isolated references to this problem in the literature. See, e.g., ABA Comm. on Professional Ethics Opinions, No. 19 (1930):

However, the line should be strictly drawn in determining the materiality and relevancy of what the lawyer may properly disclose, since the fear of his disclosure of confidential information, as to his client might easily be used to stifle disbarment or criminal proceedings against him.

More recently, a noted authority on the law of evidence has warned that:

The exception should be more carefully examined when the lawyer sues the client for a fee than when the client sues the lawyer. When the lawyer is the plaintiff, sound policy requires the court to insure that the divulgence is not held over the client’s head as a tactical weapon to compel the former client to pay up.

McLaughlin, The Treatment of Attorney-Client and Related Privileges in the Proposed Rules of Evidence for The United States District Courts, 26 The Record of the Ass’n of the Bar of the City of New York 30, 36 (1971). It is probably concern over this potential abuse which, at least in part, has motivated the restriction of the exception to “necessary” or “essential” disclosures. See text accompanying notes 98-105 supra. See also Gardner, A Re-evaluation of the Attorney-Client Privilege, 8 V Ill. L. Rev. 279, 290 n.35 (1963).


134. See, e.g., Fed. Standards 504, 506; 2 Weinstein’s Evidence, supra note 8. See
at all. More fundamentally, the rule that the privilege may be used to frustrate the attainment of justice in all instances save when the attorney is in danger is hardly a model of even-handedness. It is hard to justify the fact that an attorney may not reveal confidential communications without client permission when such disclosure would be useful to a falsely accused nonclient or to a tradesman seeking payment for his services, and yet that very same attorney may freely disclose client communications when he himself is the accused (even if the accusations are true) or when his own demands for compensation go unanswered.

The ABA has always been the leading proponent of a strong attorney-client privilege in American law. Since 1953, for example, the ABA has resolved the conflict between the obligation of confidentiality and the duty to disclose criminal or fraudulent

\begin{quote}
also Van Allen v. Gordon, 83 N.Y. (Hun.) 379, 31 N.Y.S. 907 (Sup. Ct. 1894), (in which a physician sued for his fee, and the patient's general denial held not a waiver of the physician-patient privilege so as to allow the physician at the time of the trial to question the patient on his illness or to testify as to the nature of the disease or his treatment of it.) But see Pruitt v. Peyton, 243 F. Supp. 907, 909 (E.D. Va. 1965) (dicta); U.S. v. Wiggins, 184 F. Supp. 673, 677 (D.D.C. 1960) (dicta); CAL. EVID. CODE § 1001 (West 1966). In England, of course, the lawyer-client privilege is unique, and there is no privilege at all for physicians or clergymen. "The suspicion arises that the legal profession has carved out for itself a privilege which it is reluctant to grant to other equally necessary and honorable men merely because the privilege is good for the legal business." Noonan, The Purposes of Advocacy and the Limits of Confidentiality, 64 Mich. L. Rev. 1485 (1966).

135. The attorney-client privilege has often been criticized as an obstacle in the path to truth. E.g., Wigmore's famous phrase: "Its benefits are all indirect and speculative; its obstruction is plain and concrete." 8 J. Wigmore, supra note 2, § 2291, at 554. See Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960). Recent codifications have dwelt at some length on the proposition that all relevant evidence should be admissible, and to the extent that this is a trend in the law, the attorney-client privilege has become at times an embarrassment. See, e.g., Fed. R. Evid. 101, 402, Advisory Comm. Notes.

136. Comparison with English law on this point is instructive. The exception to the attorney-client privilege for an accused or unpaid attorney does not exist in English law. See note 25 supra and accompanying text. There is, however, a rule in England that "at a criminal trial, no one should be able to refuse to produce documents which might establish the innocence of the accused," even if those documents are subject to a claim of attorney-client privilege. A. Cross, Evidence §§ 248-255 (4th ed. 1974): "If there are documents in the possession or control of a solicitor which, on production, help to further the defense of an accused man, then in my judgement no privilege attaches." R. v. Barton [1972] 2 All E.R. 1192, 1194 (Crown Ct.).

137. Edmund Morgan severely criticized the attorney-client privilege in the foreword to the Model Code of Evidence (1942) where he stated simply: "On the other hand, a proposal to abolish so ancient a privilege . . . arouses such strenuous opposition from the Bar that it would be futile to attempt its enactment. Hence the essential features of the Common Law privilege are preserved . . . ." Morgan, Foreword to Model Code of Evidence at 27-28 (1942). See also C. McCormick, supra note 2, § 87, at 176.
\end{quote}
Attorney-Client Privilege

client conduct in favor of nondisclosure: "[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." 138

This position is defended by allusion to the legal system's need for confidentiality, though it might also be said to rest on concern for the needs of attorneys.139 It is of interest in part because it has been steadfastly maintained in the face of nearly unanimous judicial opinion that it is wrong,140 and in part because of the unseemly haste with which it is abandoned by the ABA whenever the apparent interests of the profession so dictate.

DR 4-101(C)(4) is one manifestation of the latter phenomenon, but it is far from the only example which could be given. Consider the related problem of the lawyer who is ordered by a court to reveal information he believes privileged, and so finds himself torn between duty to his client and the threat of a contempt citation. This dilemma has troubled a number of commentators and they have proposed various reforms designed to protect

138. ABA Comm. on Professional Ethics, Informal Opinions, No. 1314 (1975). The position was first adopted in Formal Opinion 287 (1953) over the powerful dissent of two Committee members. It has since been reaffirmed on a number of occasions, most recently in Formal Opinion 341 (1975). As originally written, DR 7-102(B) could have been construed as reversing this position, and as a result that Disciplinary Rule was amended in 1974 to remove all doubts. The ABA recommends that an attorney whose client refuses to correct perjured testimony should withdraw from the case, but not reveal the wrongdoing to the court or the opposing party. See generally Note, 56 Nw. U.L. Rev., supra note 121, at 251 n.88; A. Kaufman, supra note 87, at 144-49, 182b-86. See also Note, 56 Nw. U.L. Rev., supra, at 252 nn. 89-93.

139. The amendment to DR 7-102(B) referred to in note 138 supra, has been described as "necessary in order to relieve lawyers of exposure to such diametrically opposed professional duties." ABA Comm. on Professional Ethics' Opinions, No. 341 (1975). Of course, a rule against disclosure creates more conflicts than it resolves by placing an attorney's ethical duty at odds with his legal obligations. See note 140 infra.

It goes without saying that legal business would fall off drastically if ne'er-do-wells (executive as well as working class) could not be assured that the lurid details of their exploits would remain within four walls of counsel's office.

140. We cannot permit a member of the bar to exonerate himself from failure to disclose known perjury by a self-serving statement that in his judgment he had a duty of non-disclosure so as to protect his client which is paramount to his duty to disclose the same to the court, of which he is an officer, and to which he, in fact, owes a primary duty under circumstances such as are evidenced in this case. In re King, 7 Utah 2d 258, 260, 322 P.2d 1095, 1097 (1958). See McKissick v. United States, 379 F.2d 754 (5th Cir. 1967); State v. Niklaus, 149 Neb. 859, 33 N.W.2d 145 (1948); A. Kaufman, supra note 87, at 225.
client rights without unduly burdening the judiciary. At one time the ABA Ethics Committee unequivocally admonished lawyers to go to prison rather than reveal communications they believed privileged, but since the Code became effective in 1970 attorneys have been permitted to reveal confidences when "required by . . . court order."

Finally, it is illuminating to note that in this century, the Association of the Bar of the City of New York and the New York County Lawyer's Association, in a series of opinions by their respective Committees on Professional Ethics, decided that "[i]t would certainly offend the sense of propriety" for an attorney in search of payment to attach property belonging to his client when the ownership of the property in question is strictly confidential and was discovered by the attorney in the course of representing the client. When the ABA Ethics Committee had occasion to pass on the same question some years later its sense of propriety was apparently less offended, for it held that a lawyer suing for his fee could ethically attach property belonging to the client though his knowledge thereof was acquired in the course of representing the client.

Other examples can be given of the Bar Association's tendency to subordinate the interests of the court and the client public to those of attorneys. In this respect at least, DR 4-101(C)(4)

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142. ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, No. 312 (unpublished).

143. ABA CODE, DR 4-101(C)(2). "[Q]uery whether the resolution of the attorney's dilemma has not [come] at the expense of the client now that express sanction has been given to the sacrifice of the client's possible right to nondisclosure under the attorney-client privilege." Note, 45 WASH. L. REV., supra note 141, at 190.

Attorneys should reassess their duties to their clients and the court. The affirmative duty of the attorney to guard his client's confidences requires more than a futile effort to obtain a predisclosure appeal. Since the privilege is basic to the lawyer-client relationship, attorneys should be vigilant in its defense.

Note, 1968 Wis. L. REV., supra note 131, at 1200.

144. ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, OPINIONS, No. 158 (1930).


146. The ABA has vociferously opposed the SEC's efforts to compel attorneys to disclose their clients' wrongful conduct (see note 14 supra) on the ground that such efforts
is not a new departure at all, but simply an extension of past practice.\footnote{147} The final policy argument against the Code's version of the exception is a pragmatic one. The provision was presumably intended in part to increase the security of lawyers by enhancing their ability to collect fees and discouraging client attacks. The logical consequences of DR 4-101(C)(4)’s liberalism, however, is more litigation against lawyers, not less. As ably stated in the petition for certiorari in \textit{Meyerhofer v. Empire Fire \\& Marine Insurance Co.},\footnote{148} “an adverse party may effectively strip the client of the protection of the attorney-client privilege and subject him to unsupervised disclosure of prejudicial information by the simple device of naming the client’s lawyer as codefendant.”\footnote{149} Because the lawyer as defendant is free to reveal the confidences of his client, a plaintiff will sue both the lawyer and the client in the hope that, in defending himself, the lawyer will reveal confidences and secrets which will strengthen plaintiff’s case against the client (the real adverse party in the litigation).\footnote{150} Thus, having secured the right to reveal client confidences, attorneys have left themselves vulnerable to suit.

Because the ABA has not officially responded to the \textit{Meyerhofer}\footnote{151} and \textit{Friend}\footnote{152} cases, there is no “official” justification for the broad reading which DR 4-101(C)(4) has invited and violate the attorney-client privilege. At the same time the Bar has attempted to weaken the privilege through DR 4-101(C)(4)’s dramatic liberalization of the exception for unpaid or accused attorneys.

\footnote{147} In DR 4-101(C)(4), the ABA has arguably contradicted even its own Canon 9 entitled “A Lawyer Should Avoid Even the Appearance of Professional Impropriety,” which urges attorneys to “promote public confidence in our system and in the legal profession.” In a gem of unintended irony, Sutton, the reporter to the committee which wrote the Code, has opined that the old ethical system needed revision because “several of the traditional canons seem more concerned with self-interests of lawyers than with the interests of the public.” Sutton, \textit{supra} note 87, at 258.

\footnote{148} 497 F.2d 1190 (2d Cir. 1974), \textit{cert. denied}, 419 U.S. 998 (1975).

\footnote{149} 273 SEC. REG. \\& L. REP. (BNA) A-9 (1974) (quoting petition for certiorari No. 74-292 (Sept. 18, 1974)).

\footnote{150} See R. Keeton, \textsc{Trial Tactics and Methods} § 10.2 (2d ed. 1973). Thomas Schelling has done important theoretical work on the relinquishment of freedom as a strategy in various conflict situations. Having no options can be an effective way to paralyze opposition, in which case increased freedom brings greater vulnerability to coercion. See T. Schelling, \textit{The Strategy of Conflict} 137-39 (1960). For an interesting but successful opposition effort to apply this strategy in a legal setting, see Board of Educ. v. Associated Teachers, 30 N.Y.2d 122, 282 N.E.2d 109, 331 N.Y.S.2d 17 (1972).


received. If the past is our guide, however, the bar can be expected to make at least two arguments in defense of its rule. First and foremost, it will be argued that fundamental fairness requires protection of an attorney's right to self-defense: "The general rule should not be carried to the extent of depriving the lawyer of the means of obtaining or defending his own rights." This argument, however, carries little weight when used against innocent clients whose secrets are revealed in the course of attorney litigation with third parties; only when the attorney and client are in direct opposition can the client be accused of attempting to take advantage of the privilege to deny the lawyer his rights and an implied waiver be found. Further, the argument fails to take account of the fact that an attorney is not permitted to disclose confidences in defense of the rights of a wronged defendant, however serious the trespass upon them. There is both irony and inequity in this last point: If a court knew what the attorney knows, the court might order disclosure. The court cannot know what the attorney knows, however, because the information is privileged. Furthermore, the court will not learn the relevant confidences until the attorney steps forward—an event which will ordinarily occur only when the lawyer's own interests are at stake.

In defense of its rule the ABA might also argue that the exception in its broadest form is necessary to insure effective legal representation because of the difficulty of attracting persons of high caliber to the profession absent assurances that they will be able to defend themselves against wrongful accusations and collect reasonable fees. It might also be argued that in the absence of a broad exception attorneys will refuse certain cases or remain intentionally ignorant of particular client activities because full and open dealings would leave them open to accusations which they would be handicapped in refuting. This last argument is premised on feared developments which, although not inconceivable, are highly unlikely because it is always difficult to predict which of an attorney's activities will ultimately give rise to controversy with a client, and because courts and agencies are unlikely to accept an attorney's plea of ignorance or noninvolvement unless it is both justified and absolute. Furthermore, the fears are

153. ABA COMM. ON PROFESSIONAL ETHICS OPINIONS, No. 250 (1943). That opinion concerned a controversy between attorney and client.

154. See C. McCormick, supra note 2, § 91, at 191. See also Gardner, supra note 132, at 308.
unfounded because selective ignorance may itself be negligent and leave an attorney open to charges of malpractice or other wrongdoing.\textsuperscript{155} In other words, there are powerful counterincentives to attorney "withdrawal" in response to a narrow exception. At most, some lawyers might demand payment in advance or the posting of a bond to secure legal fees due.

The deficiency of conventional arguments in support of a broad exception should not lead the reader to conclude immediately that a liberal exception is unwarranted. In its analyses of the exception, the bar assumes that the privilege is nearly absolute and that it is premised on the desirability of encouraging attorney-client candor. Neither of those assumptions is inevitable, however, and their modification or abandonment would permit a more coherent defense of a broadened exception for the accused attorney.

It is clear, in the first place, that whatever is done to limit the attorney-client privilege will increase the amount of probative evidence upon which legal findings of fact are based and thus improve the accuracy of those findings and the quality of the justice delivered by our legal system. As a crack in the wall of the privilege, the exception is a step in the right direction, to be applauded for what truths it exposes. Such reasoning is not likely to receive the endorsement of the bar, which has never offered the advancement of truth as a justification for the exception, but it will certainly find favor with the growing number who oppose an absolute privilege, and who favor flexibility and trial judge discretion in deciding upon its use.\textsuperscript{156}

A second foundation upon which the broad exception may rest is somewhat more subtle.\textsuperscript{157} While it is often said that the basis of the constitutional privilege against self-incrimination is the unreliability of coerced confessions,\textsuperscript{158} it has also been ac-

\textsuperscript{155} The SEC, for example, has so interpreted its famed Rule 10b-5. See SEC v. National Student Marketing Corp., [1976] FED. SEC. L. REP. (CCH) ¶ 95,784 (D.D.C. Dec. 6, 1976) (summary of pretrial brief for the SEC).

\textsuperscript{156} Bentham's was the most famous attack on the privilege; J. Bentham, Rationale of Judicial Evidence (1827), reprinted in 7 The Works of Jeremy Bentham 473-79 (Bowering ed. 1842). More recent commentators have generally shunned Bentham's frontal assault in favor of a call for flexibility in the use of the privilege. See note 180 infra.

\textsuperscript{157} The rationale developed below was first suggested to the author by Professor Monroe Freedman of the Hofstra University School of Law.

knowledged that the privilege rests at least in part upon fundamental considerations of fairness, human dignity, and the integrity of the individual. If an individual has potentially self-incriminating information, society will not refuse permission to withhold it. We are too civilized to compel any human being to commit legal suicide.

Conceivably then it can be argued by analogy that if an accused attorney has exculpatory evidence he or she should not be barred from using it in his or her own defense. It is simply too much to ask that an accused lawyer in possession of exculpatory evidence remain silent because of professional duty while another flays his or her competence or integrity. This factor alone provides a powerful rationalization for permitting self-serving conduct in extreme situations, and it has the added virtue of entirely sidestepping questions about the basis of the attorney-client privilege itself. As a justification for the broadened exception to the privilege it is consistent with recent commentary which finds the foundation for the privilege not in the need for candor but in the human dignity and individual integrity which, it is argued, underlies the exception. Interestingly, this rationale would support attorney disclosure of client confidences in defense against at least some third-party accusations, but it probably could not support disclosure by attorneys in suits to recover unpaid fees.

159. Rochin v. California, 342 U.S. 165, 173 (1952) (Frankfurter, J.): "Coerced confessions offend the community's sense of fair play and decency"; Lisenba v. California, 314 U.S. 219, 236 (1941); Brown v. Mississippi, 297 U.S. 278 (1936). McCormick aptly summarized this point as follows:

The privilege also, and perhaps most importantly, serves the function of assuring that even guilty individuals are treated in a manner consistent with basic respect for human dignity. Wholly apart from its function in assuring the accuracy of the guilty-determining process, the privilege demands that even those guilty of an offense not be compelled beyond a certain extent to participate in the establishment of their own guilt. This is based upon the feeling that to require participation would be simply too great a violation of the dignity of the individual, whether or not he is guilty of a criminal offense.

C. McCormick, supra note 2, § 118, at 252.

160. [W]e do not make even the most hardened criminal sign his own death warrant, or dig his own grave, or pull the lever that springs the trap on which he stands. We have through the course of history developed a considerable feeling of the dignity and intrinsic importance of the individual man. Even the evil man is a human being.

E. Griswold, The Fifth Amendment Today 7 (1955). The sentiment is not a new one: Griswold elsewhere quotes Justice Field ("that old tartar") as writing that "[t]he essential and inherent cruelty of compelling a man to expose his own guilt is obvious to every one, and needs no illustration." Id. at 8.

161. See Gardner, supra note 132, at 279, 308, 455-56.
V. The Future of the Exception

Retention of DR 4-101(C)(4) as construed in Meyerhofer\textsuperscript{162} and Friend\textsuperscript{163} is certainly not in the best interests of either the public or the legal profession. Abolition of the exception, on the other hand, is not likely given the bar’s influence over such matters. The problem is thus one of deciding how best to tame the exception to simultaneously preserve the rights of attorneys, protect clients against unwarranted disclosure of their confidences, discourage attorney abuse of and excessive reliance upon the exception, and improve the perceived fairness of the legal system.

Amending DR 4-101(C)(4) to conform to the Uniform Rule and Federal Standard is one obvious and attractive possibility which would effectively eliminate disclosure in defense against third-party accusations and reinstate the common law rule. By placing relatively clear limits on the exception and avoiding the ambiguity of the common law language, this approach promises an end to the vulnerability of uninvolved clients and clear guidance to attorneys concerning the situations in which client confidences may safely be disclosed. It is true that the codifications are not perfect,\textsuperscript{164} but their textual deficiencies are easily correctable.

In most instances prohibiting the exception’s use in response to third-party accusations, as is done in the codifications, is commendable. There are important cases, however, in which this may not be true. Consider, for example, a suit in which a third party charges a lawyer with serious wrongdoing, and disclosure of an unimportant client confidence might help to establish his innocence. In the Suydam case there was no allegation of a breach of duty by the client to his lawyer, yet the decision in favor of disclosure was undoubtedly a just one. Can DR 4-101(C)(4) be modified to permit disclosure where warranted without at the same time undermining the basis of the privilege and opening the door to abuse?

The possibilities for amendment are almost endless, but all of the conceivable changes take one of three forms: substantive alteration of the scope of the exception, reform of the exception’s administration and the consequences of invoking it, and modifi-


\textsuperscript{164} See text accompanying notes 85-105 supra.
cations of related law which may affect the exception's use and/or public perception of its inherent equity.

The scope of the exception might be altered, for example, by resurrecting the standard which prevailed under the original Canon 37 and permitting disclosure only in defense against false accusations or to aid in the collection of reasonable and justified compensation. The theory is that this would discourage resort to the exception in marginal cases by creating the risk that even good-faith disclosure of confidences would not shield an attorney from disciplinary action should accusations prove accurate or fees undeserved.

Substantive reform might also be achieved by limiting the class of cases in which the exception could be invoked. The relevant communications can be divided into four classes by use of a simple two-by-two matrix:

<table>
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<th>Made in reference to</th>
<th>Made in reference to</th>
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<tr>
<td>a matter now being</td>
<td>a matter other than</td>
</tr>
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<td>litigated.</td>
<td>that now litigated.</td>
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<tr>
<td>With Client-Opponent</td>
<td>1</td>
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<td></td>
<td>2</td>
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<tr>
<td>With Client other than</td>
<td></td>
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<tr>
<td>present Opponent</td>
<td>3</td>
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<td>4</td>
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Communications in the first "cell" of the matrix are those disclosable under the common law exception, as when a criminal defendant charges that his attorney told him he could not legally take the stand and the attorney is allowed to give his version of the disputed conversation. In such cases, the disclosed communications are between the lawyer and the particular client, now his adversary, and they concern the specific transaction or occurrence in dispute. The second cell also includes communications with the client-opponent, but in this class of cases the communications at issue were originally unrelated to the present dispute. A typical "cell 2" case exists where a client informs his lawyer of property which he secretly owns, and the attorney attempts to attach these holdings when the client later refuses to pay a bill for services rendered in a matter unrelated to the property.\(^{165}\)

\(^{165}\) See notes 91-93 supra and accompanying text.


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http://scholarlycommons.law.hofstra.edu/hlr/vol5/iss4/2
The third cell, by contrast, refers to communications with a client who is not the present opponent. The communication does deal directly, however, with the subject matter of the instant litigation. The standard third-party accuser case involves communications which fall within this class. *Meyerhofer v. Empire Fire & Marine Insurance Co.*,\(^{167}\) where the communications in issue concerned preparation of a prospectus later claimed fraudulent, is an example of such a case. Finally, communications in the fourth cell are between the attorney and an uninvolved client and concern a transaction or occurrence remote from that now in dispute. A “cell 4” case exists when the attorney sued by client A seeks to introduce his unrelated communications with client B to prove his innocence.\(^{168}\)

The matrix makes analysis of different variations of the exception easier by showing at a glance what each permits to be revealed. The common law exception would probably permit disclosure of all otherwise admissible conversations with a client-opponent (cells 1 and 2). The Uniform Rule and Federal Standard are ambiguous; California’s requirement that an alleged breach be one “arising out of the lawyer-client relationship” seems to be a partially successful effort to exclude from the exception communications with a client other than the present opponent (cells 3 and 4).\(^{169}\) DR 4-101(C)(4), on its face and as construed, would certainly permit disclosure of communications with a non-opponent client which concerned the transaction or event being litigated, for example, *Meyerhofer*, and would presumably reach communications in cell 4 as well.

The case for disclosure weakens as one advances from cell 1 to cell 4 and the involvement of the client whose communications are to be disclosed decreases; it seems unjust to permit disclosure in the absence of a close nexus between the litigation and the particular communication the attorney seeks to reveal. Arguably, a variable standard would be appropriate. Whereas it is discom-

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168. In this hypothetical situation it is assumed that the communications between the attorney and B concerned a transaction or occurrence other than that involved in advising A. See text accompanying notes 78-79 supra.
169. This approach was once endorsed by the ABA Ethics Committee: “The adjudicated cases recognize an exception . . . where disclosure is necessary to protect the attorney’s interest arising out of the relation of attorney and client in which disclosure was made.” ABA COMM. ON PROFESSIONAL ETHICS OPINIONS, No. 250 (1943). Opinion 250 and the quoted excerpt are cited at ABA CODE, DR 4-101(C)(4) n.1.
forting to allow disclosure of communications with the opposing client (let alone uninvolved clients) when the attorney is suing for his fee and the communication is unrelated in time or circumstance to the suit, no communication (except perhaps those on other subjects with other clients, cell 4) should be immune from revelation when a lawyer is charged with serious wrongdoing.

Procedural and administrative change can have as much impact on the exception's use and image as substantive alteration. It might be wise to depart from the decision in In re Friend[170] and deem a lawyer "accused" only after he is indicted or named as a defendant in a civil suit. The filing of a complaint or indictment is both a natural point at which to pronounce an accusation real rather than speculative, and the moment at which the courts become fully capable of intervening to protect the interests of the client public. Given "[t]he damage to . . . professional reputation which might be occasioned by the mere pendency of . . . a charge,"[171] it is not surprising that many lawyers are almost embarrassingly eager to bare their clients' souls at the first hint of trouble. A change such as that suggested would foreclose this possibility until the threat is a tangible one. Again, however, a varying standard might be in order to permit an attorney facing possible criminal charges to disclose confidences earlier than his or her colleague threatened only with a civil suit.

Unwarranted disclosure could also be discouraged through a requirement that the attorney seeking to invoke the exception make an initial showing that the communications to be offered are relevant, nonprejudicial, and necessary. Disclosure outside of a courtroom might be forbidden absent a court order issued after a similar showing. Prima facie evidence that a fraud or crime has been committed has always been required before the courts will permit disclosure of confidences under the exception to the privilege for communications in furtherance of a criminal purpose.[172]

A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told. . . . To drive the privilege away, there must be "something to give colour to the charge"; there must be "prima facie evidence that it has some foundation in fact."
Id. at 12 (citations omitted). Accord, United States v. Aldridge, 484 F.2d 655, 658 (7th Cir. 1973); C. McCormick, supra note 2, § 96, at 200 n.51.
Several commentators, including one who favors a broad construction of DR 4-101(C)(4), have suggested that a similar showing precede use of the exception for accused or unpaid attorneys to discourage abuse by foreclosing unilateral disclosure.

Judicial authority need not be limited to excluding or admitting the evidence offered; one might also permit judicial redaction of communications to mitigate the undesirable side effects of revelation. Deletion of names and unnecessary details after an in camera showing of the need to disclose may be of limited utility, however, because of the hearsay and best evidence problems thus created. Redaction will hide little in a case where it is obvious from the context that specific conduct of known individuals is involved, and in other cases deletion of identifying information may all but destroy the probative value of the evidence.

Beyond the reach of judges, automatic ethics committee review of the exception's use (with a presumption against the propriety of disclosure if followed by a decision or verdict against the attorney involved) would certainly create disincentives to casual disclosure in marginal cases, and would provide a formal mechanism for the protection of client interest. Whatever limits are placed on the exception, there will always be situations in which the question of disclosure is a close one. If the fact that the exception is disfavored (because inimical to the basic policy of the privilege) is to have any meaning at all, its use should be forewarned in marginal or doubtful cases. Automatic ethics committee review encourages self-discipline within the profession by placing lawyers on notice that no disclosure in the face of the privilege will escape scrutiny for possible inconsistency with the Code, and that disclosure in a case later lost will almost certainly lead to disciplinary action.

173. See Goldberg, supra note 73, at 250-51; Note, Mo. L. Rev., supra note 12, at 334. Such a rule would not be inconsistent with the holding and circumstances of the Meyerhofer or Friend decisions.
174. I am indebted to Judge Jack Weinstein for initially suggesting the possible utility of in camera redaction in connection with the exception. Doe v. A Corp., 330 F. Supp. 1352 (S.D.N.Y. 1971), is one case which illustrates the use of redaction and sealing of records to protect the identities of individuals involved in sensitive transactions of questionable ethics; the case is also interesting as an early example of the application of DR 4-101.
175. Omission of the names from a business record offered in evidence, for example, would give rise to an objection that opposing counsel can hardly call the individuals in the record to the stand and verify the accuracy of the record if he does not know who they are.
Modifications affecting the use and perception of the exception can also be made in other areas of the law. The United States could adopt the British rule abrogating the attorney-client privilege as to any communication which might help to establish the innocence of a criminal defendant. Such a rule would surely be more equitable than one allowing an exception for lawyers alone, and it soundly places the need to do justice in criminal cases ahead of the candor-encouraging policy behind the privilege. The English experience refutes the assertion that placing the interests of justice ahead of the privilege will destroy the frankness necessary to effective legal representation.

Similarly, an obligation could be imposed on lawyers to warn persons whose safety or welfare is threatened by the intended unlawful action of a client, even when knowledge of the danger has been gleaned through confidential communications. Such a duty to warn has already been adopted in California as an exception to the physician-patient privilege. Like the preceding proposal, this one might make the exception less objectionable because it compels lawyers to protect others in circumstances which are the same or analogous to those in which they can protect themselves.

Finally, clients whose communications are revealed through use of the exception could be protected (by statute, if necessary) against use of the disclosure in any subsequent action. Such "use immunity" is consistent with the holdings of two recent New York cases.

176. See note 136 supra for a description of the English Rule. For a discussion of this issue as it relates to the American system, see Note, Attorney-Client Confidentiality: A New Approach, 4 Hofstra L. Rev. 685 (1976).

177. See Tarasoff v. Regents of Univ. of California, 13 Cal. 3d 177, 529 P.2d 553, 118 Cal. Rptr. 129 (1974)(Psychotherapist treating a mentally ill patient owes a duty of reasonable care to give threatened persons a warning necessary to avert foreseeable danger arising from his patient's condition or treatment.). For further discussion of Tarasoff and its implications see Stone, The Tarasoff Decisions: Suing Psychotherapists to Safeguard Society, 90 Harv. L. Rev. 358 (1976); Note, 28 VAND. L. Rev. 631 (1975). The courts are more flexible in dealing with the physician-patient privilege than with its attorney-client analogue. See note 134 supra and accompanying text.

to cushion its impact, but it is unsatisfactory in several respects. First, use immunity would not mitigate the embarrassment and business losses which can accompany public disclosure and frequently overshadow the danger of unrelated future litigation. Second, by decreasing the costs of its use such a rule would encourage lawyers to resort to the exception; abuses paralleling those which have plagued use immunity laws in other contexts may result.

The principal disadvantage of modification through specific rules and limitations is that factors unique to a particular case may be persuasive or even determinative of the desirability of permitting attorney disclosure, and the process of writing a rule for each situation as it arises is self-defeating. In place of such particularization, why not abandon authoritative rules and vest discretion in trial judges to decide the admissibility of communications offered pursuant to the exception? 179

In other words, a disclosure which is essentially harmless to the client whose confidence is being violated ought to be admitted before a disclosure which will embarrass the client, expose him to legal liability, or interfere with his business interest. Similarly, disclosures necessary to the attorney—those providing unique or uniquely unimpeachable evidence—should be more hospitably received than those which are redundant or only marginally related to essential elements of the lawyer’s case. Whatever the substantive content of the governing law, the kind of balancing of interests called for here must be delegated to the trial judge or abandoned altogether.180

Proposals to delegate authority over all aspects of the attorney-client privilege to trial judges have generated much discussion of late.181 The major argument of those opposed to such

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1 The major argument of those opposed to such law was first suggested to this author by Prof. Monroe Freedman of the Hofstra University School of Law but he has not endorsed it and should not be blamed for its appearance here. For a more detailed discussion of such a proposal, see Note, supra note 176.

179. This position has been taken by U.S. District Judge Jack Weinstein. Interview with Judge Jack Weinstein, in Great Neck, N.Y. (Jan. 1, 1976).


181. See, e.g., C. McCORMICK, supra note 2, § 87, at 177, Gardner, supra note 132, at 315; Note, supra note 176; Note, 56 NW. U.L. REV., supra note 121, at 256-59.

North Carolina has introduced such a regime to govern the physician-patient privilege. N.C. GEN. STAT. § 8-53 (1969) reads in part:

No [physician] shall be required to disclose any information which he may
proposals is that only an absolute privilege will assure the necessary attorney-client candor. This argument is not relevant when only the exception is at issue. Indeed, insofar as judicial supervision would check faithless attorneys who now have a free hand, judicial discretion would encourage full and frank communication within the attorney-client relationship.

Judicial discretion, of course, is only as good as the individuals exercising it. To the extent that the judiciary is corrupt, incompetent or simply uninterested, bad law will be made and injustice done. The problem of human frailty and the inconsistent judgments which result therefrom can be minimized by providing clear guidelines which assure that all decisionmakers act within the same framework.

VI. CONCLUSION

In sum, the complexity of the factors to be weighed in deciding the admissibility of evidence under the exception precludes effective use of specific, rigid rules. Flexible standards should be formulated, therefore, to guide the exercise of judicial discretion.

The distinction between the law of the attorney-client privilege and the ethical precepts governing client confidences has not been faithfully observed in this paper. Such treatment, though confusing, accurately reflects the current state of affairs. Nevertheless, recommendations for change must be drafted separately for the Federal and Uniform Rules of Evidence, and for the ABA Code of Professional Responsibility. The common law, which is inherently flexible and ultimately tends to emulate progressive codifications, will take care of itself.

An initial recommendation is that the Federal Rules of Evidence be amended to include a provision based on the text of, and notes accompanying, Federal Standard 503(d)(3) and Uniform Rule 502(d)(3) to read as follows:

There is no privilege under this rule . . . as to a communication necessary to establish a breach of duty by a client to his lawyer, or to defend a lawyer against accusations of wrongful conduct, or to prove the innocence of any criminal defendant.

have acquired in attending a patient in a professional character. . . . Provided, that the court, either at the trial or prior thereto, may compel such disclosure, if in his opinion the same is necessary to a proper administration of justice.

This statute is discussed in Note, 41 N.C.L. Rev. 627 (1963). It was viewed with some enthusiasm by Wigmore. 8 J. Wigmore, supra note 2, § 2381, at 832.


provided that disclosure of a communication on these grounds shall be unlawful only after a judicial finding that such disclosure is necessary and in the interests of justice.

Note

This rule restates the common law with some modification, chiefly in the extension of the exception to benefit criminal defendants and the addition of a requirement of judicial prescreening of communications to be disclosed.

A decision that disclosure is necessary will normally rest on a finding that the communication in question is unique or uniquely unimpeachable evidence which is probative of an essential fact or element, e.g., one without proof of which a case cannot be made or the falsity of charges demonstrated.

A decision that disclosure is in the interests of justice may rest upon a finding of client waiver of the attorney-client privilege, as when the client attacks the integrity or competence of his attorney.

In the absence of an express or implied waiver, the following factors may be used to weigh the justice of a proposed disclosure:

1) Substantial adversity of interest between the attorney and the client whose communications he seeks to reveal.
2) The nexus between the communication in question and the transaction or occurrence upon which the instant lawsuit or prosecution is based.
3) The extent to which disclosure will adversely affect the individual or organization whose communications are to be revealed. Adverse effects include, but are not limited to, vulnerability to civil or criminal suits, disturbance of business or personal relations, and embarrassment.
4) The stake of the attorney or criminal defendant in the litigation, e.g., the gravity of the alleged crime, breach of duty or accusation of wrongful conduct.
5) Any other factor bearing on the justice of the proposed disclosure, including the possibility of redaction to remove extraneous material without substantial impairment of the communication's probative value and the public interest in both maximizing the evidence available to the trier of facts and encouraging full disclosure between attorney and client.

DR 4-101(C)(4),\(^{184}\) in keeping with the spirit of the Code's

\(^{184}\) ABA Code, DR 4-101(C)(4).
Ethical Consideration 4-4\textsuperscript{185} should be consistent with the law governing the privilege but more reluctant than the substantive law to permit disclosure of client confidences. Moreover, in the interest of the privilege’s integrity and public confidence in the profession, the bar should not shrink from creating disincentives to the use of the exception. Accordingly, the Code should be amended to read as follows:

DR 4-101 Preservation of Confidences and Secrets of a Client.

\ldots

(C) A lawyer may reveal:

\ldots

(4) Confidences or secrets necessary to establish or collect a reasonable fee, defend himself against a false accusation of wrongful conduct, or prevent the conviction of one wrongfully accused of a crime, when permitted by a court order confirming the justice and necessity of the disclosure.

\ldots

(E) Disclosure by an attorney on his own behalf under DR 4-101(C)(4) shall be reviewed by the bar association with jurisdiction over the disclosing attorney for a determination of the disclosure’s ethical propriety. A final judgment against an attorney’s claim for compensation or in favor of one accusing the attorney of wrongful conduct shall create a presumption that disclosures under DR 4-101(C)(4) made during the course of litigation preceding the judgment were unethical and in violation of this Code.

While the proposed revision of DR 4-101(C)(4) should create relatively few problems, the newly proposed DR 4-101(E) will undoubtedly face bitter opposition. To many lawyers it will seem unduly harsh because it subjects the attorney who uses DR 4-101(C)(4) on his own behalf to grave risks of disciplinary action. Moreover, it will strike some as redundant; the revised DR 4-

\textsuperscript{185} ABA Code, EC 4-4 provides:

The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge. A lawyer should endeavor to act in a manner which preserves the evidentiary privilege; for example, he should avoid professional discussions in the presence of persons to whom the privilege does not extend. A lawyer owes an obligation to advise the client of the attorney-client privilege and timely to assert the privilege unless it is waived by the client.
Attorney-Client Privilege

101(C)(4) permits disclosure only after a judge is satisfied that it is both necessary and just. Why require more?

DR 4-101(E) is harsh and unforgiving. The need for such a provision to discourage unscrupulous and indiscriminate use of the exception arises because the exception singles out lawyers for favorable treatment (though, as revised, criminal defendants will also benefit from it). The bar, therefore, must be vigilant in protecting against its abuse. Because the exception undermines the policy favoring attorney-client candor on which the privilege is based and threatens to make lawyers more (not less) vulnerable to attack, its use must be discouraged except in those cases where financial loss or disgrace is otherwise a near certainty.

DR 4-101(E) is not redundant. The judge's decision that disclosure is necessary and just is a determination of a question of law; it is not an ethical judgment. Legal ethics, to be meaningful, must demand more than the law requires.

A court order permitting disclosure will shield the attorney from subsequent liability for his revelations except in extreme cases of fraud or perjury, but it should not protect him from scrutiny by his peers.

These are troubled times for the image of the legal profession—many do seem to believe that one might as well trust a fox to guard geese as trust a lawyer to look out for the interests of his clients. In such an environment, it is vital that an attorney be allowed to defend himself when his livelihood or competence are under attack, and that the rules allowing him to do so not be perceived as self-serving.

186. For further discussion of the need for such a provision see text accompanying notes 184-185 supra.

187. The Code often imposes requirements beyond those mandated in the law. See, e.g., ABA Code, Canons 4 & 7. That Canon 4 aims higher than the law but may in fact fall short (see text accompanying notes 122-124 supra) does not repudiate this principle, but rather gives it a hitherto unneeded urgency.

ABA Code, EC 6-5 provides: "A lawyer should have pride in his professional endeavors. His obligation to act competently calls for higher motivation than that arising from fear of civil liability or disciplinary penalty."

188. "No appellate case has been found in which a client has recovered from his attorney for improper disclosure, under judicial order, of privileged information. Nor does there appear to be any instance of censure or disbarment for such conduct." Note, 45 WASH. L. Rev., supra note 141, at 185.

189. The incidence of claims against lawyers appears to be rising and will undoubtedly continue, spurred on by decisions such as Smith v. Lewis, 13 Cal. 3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975), which created new and stricter standards of care by which to judge attorneys accused of malpractice. See T. Goldstein, Lawyers' Malpractice Insurance Rising Steadily as Claims Increase, N.Y. Times, Feb. 28, 1977 at 1, cols. 5-6.