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Peter R. Jarvis

Trisha M. Rich

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## THE LAW OF UNINTENDED CONSEQUENCES: WHETHER AND WHEN MANDATORY DISCLOSURE UNDER MODEL RULE 4.1(b) TRUMPS DISCRETIONARY DISCLOSURE UNDER MODEL RULE 1.6(b)

*Peter R. Jarvis\* & Trisha M. Rich\*\**

### I. INTRODUCTION

In 1936, Harvard sociologist Robert K. Merton wrote an article entitled, *The Unanticipated Consequences of Purposive Social Action*,<sup>1</sup> which sought to explain how and why actions taken for ostensibly clear and desirable purposes may nonetheless lead to negative and unforeseen results. This Article is about one set of apparently, or at least arguably, unintended consequences of the development over time of the ABA *Model Rules of Professional Conduct* (“*Model Rules*”).

When the *Model Rules* were first adopted, the category of situations in which a lawyer either could or was required to reveal what would otherwise be considered confidential client information, protected by Model Rule 1.6(b), was quite limited. In the post-Enron “lawyer-as-gatekeeper” era, however, Model Rule 1.6(b) has been amended to give lawyers far broader discretion to disclose future, present, and even past client wrongdoing than had previously existed. Unfortunately, the proponents of these changes do not appear to have fully considered, and the ABA House of Delegates appears not to have debated, that there

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\* Partner, Holland & Knight, LLP, Portland, Oregon. Mr. Jarvis co-chairs Holland & Knight’s national Legal Profession Team. His practice includes advising lawyers, law firms, corporate legal departments, and government legal departments about the law governing lawyers. Mr. Jarvis can be reached at [peter.jarvis@hkclaw.com](mailto:peter.jarvis@hkclaw.com).

\*\* Associate, Holland & Knight, LLP, Chicago, Illinois. Ms. Rich is a professional responsibility lawyer. Her practice includes advising lawyers and law firms about a variety of professional responsibility matters, including fee disputes, conflicts, confidentiality, privilege, and professional disciplinary issues. Ms. Rich can be reached at [trisha.rich@hkclaw.com](mailto:trisha.rich@hkclaw.com).

1. Robert K. Merton, *The Unanticipated Consequences of Purposive Social Action*, 1 AM. SOC. REV. 894 (1936).

could be many instances in which the discretion given to lawyers to disclose confidential client information pursuant to expanded Model Rule 1.6(b) would be transformed into mandatory duties to disclose under Model Rule 4.1(b). Model Rule 4.1(b) provides, in part, that “[i]n the course of representing a client a lawyer shall not knowingly . . . fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.”<sup>2</sup> This possibility—that mandatory disclosure under Model Rule 4.1(b) “trumps” discretionary disclosure under Model Rule 1.6(b)—exists because mandatory disclosure is required under Model Rule 4.1(b) “unless disclosure is prohibited by Rule 1.6,” and Model Rule 4.1(b) does not expressly state whether that prohibition is to be assessed with or without consideration of discretionary disclosure under Model Rule 1.6(b).<sup>3</sup>

More is potentially at stake, however, than just the matter of lawyer discipline. A broad interpretation of the extent to which mandatory disclosure under Model Rule 4.1(b) trumps permissive disclosure under Model Rule 1.6(b) could considerably, and in our opinion unwisely, increase the range of circumstances in which lawyers would be held liable to non-clients.

In this Article, we explore how the language of Model Rules 1.6(b) and 4.1(b) are best synthesized. As explained below, it is our view that Model Rule 4.1(b) will, and should, only rarely, if ever, trump Model Rule 1.6(b).<sup>4</sup> We also note that the argument in favor of Model Rule 4.1(b) “trumping” the permissive disclosure options under Model Rule 1.6(b) becomes particularly difficult to justify in the many U.S. jurisdictions which have rejected the requirement under Model Rule 3.3(a)(3) that a lawyer affirmatively disclose to the court that a client or a witness called by the lawyer has testified falsely.<sup>5</sup>

The balance of this Article is divided into four parts. Part II contains a legislative history of the pertinent Model Rules from 1983 through 2014.<sup>6</sup> Part III discusses possible interpretations or reconciliations of the language in Model Rules 1.6 and 4.1 as a matter of lawyer discipline.<sup>7</sup> Part IV then discusses the related issues of lawyer civil liability.<sup>8</sup> Finally, Part V contains some concluding remarks.<sup>9</sup>

2. MODEL RULES OF PROF'L CONDUCT r. 4.1(b) (AM. BAR ASS'N 2013).

3. *See id.*

4. *See infra* Part III.C.

5. *See infra* note 79 and accompanying text; *see also* MODEL RULES OF PROF'L CONDUCT r. 3.3(a)(3).

6. *See infra* Part II.C.

7. *See infra* Part III.

8. *See infra* Part IV.

## II. MODEL RULES 1.6(b) AND 4.1(b): HOW WE GOT HERE

### A. *The ABA Canons*

The first attempt by the ABA to express normative and positive rules to govern lawyer conduct was the 1908 *Canons of Professional Ethics* (“*Canons*”).<sup>10</sup> Even at that time, which was over a century ago, the ABA explicitly recognized that “[n]o code or set of rules can be framed, which will particularize all the duties of the lawyer in the varying phases of litigation or in all the relations of professional life.”<sup>11</sup> The *Canons* were amended and supplemented from time to time through 1963.<sup>12</sup>

Interestingly enough, the *Canons* did not even include a confidentiality rule. The first appearance of this guideline was not until Canon 37 was adopted in 1928.<sup>13</sup>

### B. *The ABA Model Code*

In August 1969, the ABA House of Delegates adopted the *Model Code of Professional Responsibility* (“*Model Code*”), which attempted to provide more comprehensive guidelines regarding lawyer behavior and regulation.<sup>14</sup> The Disciplinary Rules within the *Model Code*, which were often referred to as the “DRs,” contained a rule that set forth the lawyer’s duties of confidentiality in some detail. DR 4-101 provided:

- (A) “Confidence” refers to information protected by the attorney-client privilege under applicable law, and “secret” refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.
- (B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:

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9. See *infra* Part V.

10. CANONS OF PROF’L ETHICS (AM. BAR ASS’N 1908).

11. *Id.* pmbl. Although some states had advisory codes of ethics that preceded the 1908 *Canons*, the *Canons* were the first attempt by the ABA at a national code of lawyer ethics. MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS’ ETHICS 3 (4th ed. 2010); James M. Altman, *Considering the A.B.A.’s 1908 Canons of Ethics*, 71 FORDHAM L. REV. 2395, 2402 (2003); *Canons of Professional Ethics Centennial*, ABA, [http://www.americanbar.org/groups/professional\\_responsibility/resources/canons\\_professional\\_ethics\\_centennial.html](http://www.americanbar.org/groups/professional_responsibility/resources/canons_professional_ethics_centennial.html) (last visited Feb. 15, 2016).

12. *ABA Model Rules of Professional Conduct*, ABA, [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html) (last visited Feb. 15, 2016).

13. Altman, *supra* note 11, at 2396 n.8; Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1, 12 (1998); see CANONS OF PROF’L ETHICS Canon 37 (AM. BAR ASS’N 1963).

14. MODEL CODE OF PROF’L RESPONSIBILITY Preface (AM. BAR ASS’N 1980).

- (1) Reveal a confidence or secret of his client.
- (2) Use a confidence or secret of his client to the disadvantage of the client.
- (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.
- (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.
- (D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee.<sup>15</sup>

These duties of confidentiality were limited by DR 7-102(A), which provided, in pertinent part, that:

- (A) In his representation of a client, a lawyer shall not:
  - ....
  - (3) Conceal or knowingly fail to disclose that which he is required by law to reveal.
  - ....
  - (7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.
  - (8) Knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule.<sup>16</sup>

As will be noted further below, the list of situations in which a lawyer was given discretion to disclose otherwise confidential information was different under the DRs than it is today under the *Model Rules*. In addition, the *Model Rules* effectively combine the prior terms of “confidence” and “secret” into what is now called “information relating to the representation of a client.”<sup>17</sup> For purposes of this Article, however, the key point is that the only situations in which a lawyer with

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15. *Id.* DR 4-101 (footnotes omitted).

16. *Id.* DR 7-102(A).

17. MODEL RULES OF PROF'L CONDUCT r. 1.6(b) (AM. BAR ASS'N 2013).

discretion to disclose confidential client information under DR 4-101 had to make disclosure under DR 7-102 were situations in which substantive law outside of the DRs required disclosure.<sup>18</sup>

### C. The ABA Model Rules

The *Model Code*, as amended from time to time, represented the ABA's best efforts at lawyer regulation until 1983 when the ABA House of Delegates adopted the *Model Rules* following their drafting by The Commission on Evaluation of Professional Standards, better known as the Kutak Commission.<sup>19</sup> Since then, the *Model Rules* have been amended and supplemented a number of times, including, notably, as the result of comprehensive reviews in 2002 and in 2012.<sup>20</sup> Today, the *Model Rules* serves as the model for the ethics rules in almost all states.<sup>21</sup>

#### 1. Model Rule 1.6

Model Rule 1.6 has historically been one of the most controversial of the *Model Rules*, not only in terms of drafting and adoption but also with respect to interpretation and application.<sup>22</sup> This is so even though Model Rule 1.6(a) has not been controversial. Model Rule 1.6(a) provides that: "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)."<sup>23</sup>

By contrast, Model Rule 1.6(b) bears the distinction of having the most significant departure from the original language suggested by the Kutak Commission's proposal.<sup>24</sup> The originally suggested version included two exceptions to confidentiality that were deleted prior to adoption: first, an exception "to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services had been used,"<sup>25</sup> and second, "to comply with

18. *Id.* DR 7-102(A)(3).

19. *Kutak Commission Drafts*, ABA, [http://www.americanbar.org/groups/professional\\_responsibility/resources/report\\_archive/kutakcommissiondrafts.html](http://www.americanbar.org/groups/professional_responsibility/resources/report_archive/kutakcommissiondrafts.html) (last visited Feb. 15, 2016).

20. AM. BAR ASS'N, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF CONDUCT, 1982-2013, at xii-xiii (Art Garwin ed., 2013).

21. *State Adoption of the ABA Model Rules of Professional Conduct*, ABA, [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/alpha\\_list\\_state\\_adopting\\_model\\_rules.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html) (last visited Feb. 15, 2016).

22. See 1 GEOFFREY C. HAZARD, JR. ET AL., *THE LAW OF LAWYERING* 10-7 (4th ed. 2015).

23. MODEL RULES OF PROF'L CONDUCT r. 1.6(a) (AM. BAR ASS'N, 2013).

24. See AM. BAR ASS'N, *supra* note 20, at 106-08.

25. *Id.* at 106. The legislative history indicates that this deletion was made as a result of

other law.”<sup>26</sup> As approved by the ABA House of Delegates in 1983, Model Rule 1.6(b) provided:

- (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
  - (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
  - (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client.<sup>27</sup>

Subsequent developments, including, but not limited to, the Enron scandal, have led to the present version of Model Rule 1.6(b), which now contains a broader series of seven exceptions to the general duty not to reveal confidential client information. Model Rule 1.6(b) currently reads:

- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
  - (1) to prevent reasonably certain death or substantial bodily harm;
  - (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services;
  - (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services;
  - (4) to secure legal advice about the lawyer’s compliance with these Rules;
  - (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the

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concerns that the exceptions’ adoption would “transform[] the lawyer into a ‘policeman’ over a client,” and that its omission would encourage “fuller and franker communication between a lawyer and client by narrowing the circumstances in which the lawyer could disclose client confidences.” *Id.* at 107.

26. *Id.* at 106.

27. *Id.* at 108.

- lawyer's representation of the client;
- (6) to comply with other law or a court order; or
- (7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.<sup>28</sup>

In 2002, subsection (b)(4) was added to the Rule, despite the fact that disclosures under it would arguably be already allowed under Model Rule 1.6(a)'s allowance for disclosures that are "impliedly authorized."<sup>29</sup> The inclusion of subsection (b)(4), however, recognized the importance of a lawyer's compliance with the *Model Rules* by removing any ambiguity.<sup>30</sup>

Model Rule 1.6(b)(6) was also added in 2002 and permits lawyers to disclose client confidences "to comply with other law or a court order."<sup>31</sup> In earlier versions, this issue was addressed only in the commentary; the 2002 amendment explicitly recognized this exception in the text of the rule itself.<sup>32</sup> As the current comments recognize, lawyers are often asked to provide otherwise confidential material by way of discovery requests or subpoenas.<sup>33</sup> In those instances, lawyers are required to make all non-frivolous arguments that the information is protected and (unless otherwise authorized by the client) must resist disclosing the information, unless and until ordered to do so by a court or other tribunal.<sup>34</sup>

In 2003, the ABA adopted what are now numbered as subsections (b)(2) and (b)(3) of Model Rule 1.6, which marked the first instance of the *Model Rules* permitting attorney disclosure of client information where the client is using or has used the lawyer's services to commit a crime or fraud that results in substantial injury to the property or financial interests of another person.<sup>35</sup> As will be seen below, it is primarily these subsections that give rise to the conflicts that we see

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28. MODEL RULES OF PROF'L CONDUCT r. 1.6(b).

29. See ELLEN J. BENNETT ET AL., ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 107 (7th ed. 2011).

30. MODEL RULES OF PROF'L CONDUCT r. 1.6 cmt. 9.

31. *Id.* r. 1.6(b)(6); BENNETT ET AL., *supra* note 29, at 111.

32. BENNETT ET AL., *supra* note 29, at 111. Because this exception already appeared in the commentary to Model Rule 1.6, the addition of subsection (b)(6) was not considered to be a substantive change to the Model Rule. *Id.*

33. MODEL RULES OF PROF'L CONDUCT r. 1.6 cmt. 15.

34. *Id.*

35. BENNETT ET AL., *supra* note 29, at 105.



between permissive disclosure under Model Rule 1.6(b) and mandatory disclosure under Model Rule 4.1(b).<sup>36</sup>

Finally, the most recent addition to the text of Model Rule 1.6 concerns subsection (b)(7), which was added in 2012.<sup>37</sup> Subsection (b)(7) recognized that, in order to comply with the other rules, lawyers and law firms must have some discretion to disclose limited confidential information to each other about current and former clients in order to determine whether a conflict would arise as a result of lawyers associating with new firms.<sup>38</sup> Nonetheless, prior to the adoption of subsection (b)(7), this exception was not clearly included in the then-existing exceptions or the text of the rule itself.<sup>39</sup>

## 2. Model Rule 4.1(b)

Put in, perhaps, its simplest form, Model Rule 4.1 is one of several rules that stand for the proposition that lawyers cannot lie about or conceal critical information.<sup>40</sup> While Model Rule 4.1(a) establishes the rather straightforward proposition that lawyers cannot knowingly make a false statement of material fact, Model Rule 4.1(b) is more complicated.

The text of Model Rule 4.1 today reads as follows:

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.<sup>41</sup>

Model Rule 4.1 was adopted in 1983 and has remained largely unchanged. One notable change, however, occurred in 2002. At that time, the House of Delegates expanded Official Comment [3] to more fully explain that the duty not to assist in a client's crime or fraud is a specific application of Model Rule 1.2(d), and that remedial measures a lawyer may have to take to avoid assisting in a crime or fraud may even

36. See *infra* Part III.

37. AM. BAR ASS'N, *supra* note 20, at 143.

38. MODEL RULES OF PROF'L CONDUCT r. 1.6(b)(7), cmt. 13; ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 455 (2009).

39. Comments to Model Rule 1.6 have also changed substantially over time, frequently as the result of extensive proposals and debate. See AM. BAR ASS'N, *supra* note 20, at 106-08. A complete history of those proposals and amendments is beyond the scope of this Article.

40. The truth-telling role of lawyers is also addressed in Model Rule 1.2(d), discussed below, and in Model Rule 8.4(c), which prohibits lawyers from engaging in "conduct involving dishonesty, fraud, deceit or misrepresentation." MODEL RULES OF PROF'L CONDUCT r. 8.4(c); see *infra* text accompanying notes 43-46.

41. MODEL RULES OF PROF'L CONDUCT r. 4.1.

include disclosing otherwise confidential information (to the extent permitted by Model Rule 1.6(b)).<sup>42</sup> Model Rule 1.2 is entitled “Scope of Representation and Allocation of Authority between Client and Lawyer.”<sup>43</sup> Model Rule 1.2(d) provides:

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.<sup>44</sup>

As amended in 2002, Official Comment [3] to Model Rule 4.1 provides, in full:

Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client’s crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client’s crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client’s crime or fraud. If the lawyer can avoid assisting a client’s crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6.<sup>45</sup>

This certainly goes some way in supporting the proposition that Model Rule 4.1(b) can trump the confidentiality requirements under Model Rule 1.6(b).<sup>46</sup> Nonetheless, the existence or addition of a single comment in 2002 need not control the interpretation of the *Model Rules*

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42. *Id.* r. 4.1 cmt. 3.

43. *Id.* r. 1.2.

44. *Id.* r. 1.2(d).

45. *Id.* r. 4.1 cmt. 3.

46. We do wish to emphasize, however, that the requirements in Model Rule 1.2(d) that the lawyer “know[]” that the conduct is criminal or fraudulent, and in Model Rule 4.1 that a lawyer “shall not knowingly” fail to disclose material facts when necessary to avoid assisting a client’s criminal or fraudulent acts, must refer in context not simply to a knowing decision not to disclose, but to a decision that the lawyer knows is “necessary to avoid assisting a criminal or fraudulent act by a client.” *Id.* r. 1.2, 4.1. In other words, a lawyer who thinks about disclosing a particular fact but decides not to should not be subject to discipline under Model Rule 4.1(b) unless the lawyer actually knows that his or her conduct has constituted or will constitute assistance to a client’s crime or fraud.

if, as noted below, it is not consistent with reason or common sense to do so.

### 3. Model Rule 3.3(a)(3)

Although it addresses a different set of problems relating to client crimes or frauds, it is also pertinent to look at Model Rule 3.3(a)(3), which provides, in pertinent part:

A lawyer shall not knowingly: . . . offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.<sup>47</sup>

With respect to what constitutes "reasonable remedial measures," Official Comment [10] provides, in part:

If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6.<sup>48</sup>

The justification for this position is provided, in part, in Official Comment [11]:

The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.<sup>49</sup>

Model Rule 3.3(a)(3) thus deals with situations in which "the lawyer's client[] intends to engage, is engaging or has engaged in criminal or fraudulent conduct."<sup>50</sup> The question addressed below is whether or when the specific override of confidentiality provided in

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47. *Id.* r. 3.3(a)(3).

48. *Id.* r. 3.3 cmt. 10.

49. *Id.* r. 3.3 cmt. 11.

50. *Id.* r. 3.3 cmt. 12.

Model Rule 3.3(a)(3) does or should inform whether or when Model Rule 4.1(b) is interpreted to require an equivalent override.<sup>51</sup>

### III. THE MODEL RULES AND THEIR RECONCILIATION

#### A. *The Need for Reasonable Interpretations and Common Sense*

As noted in Official Comment [14] to the Preamble and Scope section of the *Model Rules*, “[t]he Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself.”<sup>52</sup>

This makes sense. The interpretation of rules is much like the interpretation of statutes and, as the U.S. Supreme Court noted in *Abramski v. United States*, the construction of a statute requires a court to consider “the relevant words not in a vacuum, but with reference to the statutory context, ‘structure, history, and purpose.’”<sup>53</sup> Indeed, the *Abramski* Court went on to invoke “common sense,” which it described as “a fortunate (though not inevitable) side-benefit of construing statutory terms fairly.”<sup>54</sup>

We therefore turn first to what can be considered “harmonizing” or “limiting” constructions of Model Rule 1.6(b) and 4.1(b), which can reconcile and avoid apparent inconsistencies between these two rules, before considering situations in which the two Model Rules appear to point in very different directions.<sup>55</sup>

#### B. *Harmonizing Constructions and Limitations on Model Rule 1.6(b) and 4.1(b)*

In our opinion, there are six general—and we submit fairly noncontroversial—limitations on the interpretation and implementation of one or both of Model Rules 1.6(b) and 4.1(b).

First, several of the discretionary disclosure options under Model Rule 1.6(b) contain limiting language that reduces the permissible scope of lawyer discretion and thereby eliminates any argument that discretionary disclosure under Model Rule 1.6(b) becomes mandatory

51. See *infra* Part III.C.

52. MODEL RULES OF PROF'L CONDUCT pmbl. & scope cmt. 14.

53. 134 S. Ct. 2259, 2267 (2014) (quoting *Maracich v. Spears*, 133 S. Ct. 2191, 2209 (2013)).

54. *Id.*

55. It is worth noting that in other places of the *Model Rules*, this inconsistency is disposed of expeditiously. For instance, Model Rule 3.3(c) provides that the duties of candor to the tribunal “continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.” MODEL RULES OF PROF'L CONDUCT r. 3.3(c).

disclosure under Model Rule 4.1(b). For example, Model Rule 1.6(b)(2) only allows discretionary disclosure “to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interest or property of another and in furtherance of which the client has used or is using the lawyer’s services.”<sup>56</sup> If, for example, the crime or fraud is not reasonably certain to result in substantial financial injury or does not relate to a matter in which the client has used the lawyer’s services, there will be no discretion to disclose under Model Rule 1.6(b)(2) that can be transformed into a mandatory disclosure under Model Rule 4.1(b).

Similarly, Model Rule 1.6(b)(3) only allows discretionary disclosure “to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services.”<sup>57</sup> If disclosure would not prevent, mitigate or rectify a substantial financial injury (because, for example, the crime or fraud has already been completed and all the funds disbursed), or the client did not use the lawyer in connection with the crime or fraud, there will be no discretion to disclose under Model Rule 1.6(b)(3) that can be transformed into a mandatory disclosure under Model Rule 4.1(b).

Second, a lawyer only has the discretion to make disclosure under Model Rule 1.6(b) “to the extent the lawyer reasonably believes necessary” under one or more of the subsections of Model Rule 1.6(b).<sup>58</sup> This means that the lawyer must both subjectively and reasonably believe that the disclosure is necessary.<sup>59</sup> If, for example, the lawyer negligently or innocently believes that what the client is doing or wants to do is not a crime or fraud, there will be no mandatory disclosure obligation under Model Rule 4.1(b) because the lawyer will not have the requisite belief for discretionary disclosure.<sup>60</sup> Similarly, there would be

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56. *Id.* r. 1.6(b)(2).

57. *Id.* r. 1.6(b)(3).

58. *Id.* r. 1.6(b).

59. Pursuant to Model Rule 1.0(i): “‘Reasonable belief’ or ‘reasonably believes’ when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.” *Id.* r. 1.0(i).

60. This point is particularly significant in the context of non-client civil actions that may be premised in part on reasoning by analogy from Model Rule 4.1(b), a topic discussed in a subsequent section of this Article. See *infra* Part IV. Under this line of analysis, it is not sufficient to trigger a mandatory duty of disclosure under Model Rule 4.1(b) that the lawyer should have known about the crime or fraud. The lawyer must actually know this. Pursuant to Model Rule 1.0(f), “[k]nowingly,” ‘known,’ or ‘knows’ denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.” MODEL RULES OF PROF’L CONDUCT r. 1.0(f). For a discussion of Model Rule 1.0(f), see HAZARD, *supra* note 22, at 1-72 to -76.

no mandatory disclosure obligation if a reasonably prudent lawyer would not have seen the crime or fraud even though the lawyer in question did think it present.

Third, a mandatory duty of disclosure only exists under Model Rule 4.1(b) when disclosure is “necessary” to prevent the client’s crime or fraud, as distinct from the lesser standard under Model Rule 1.6(b), which allows disclosure when “the lawyer reasonably believes necessary.”<sup>61</sup> Thus, Model Rule 4.1(b) can only be triggered in the event of an actual necessity in fact, as distinct from a reasonable but incorrect belief that such a necessity exists.

Fourth, attention must be paid to the availability of “noisy withdrawals,” which allow a lawyer to go no further than to state that the lawyer is withdrawing and that no further reliance should be placed on what the lawyer has previously said or done, rather than expressly revealing the substance of the information about client wrongdoing.<sup>62</sup> Whenever a noisy withdrawal will be sufficient to avoid “assisting” a client wrong, there will be no duty to go further under Model Rule 4.1(b) because it will not be necessary to make any further disclosure.

Fifth, the *Model Rules* do not contain a definition of “assist” or “assisting.” We submit, however, that, at a minimum, “assisting” cannot mean merely letting something happen without stopping it. As at least one court noted, in the context of civil liability claims, “[a]ssisting[] and failure to prevent[] are not the same thing.”<sup>63</sup> This is also clear from the many references in civil damage actions against lawyers for aiding and abetting client frauds or breaches of fiduciary duty that the lawyer is not liable unless the lawyer has provided “substantial assistance.”<sup>64</sup> It would truly be anomalous to hold that a lawyer can only be liable for providing substantial assistance to a client’s crime or fraud but is subject to discipline for simply letting something occur or providing only de minimis assistance. The link between the word “assisting” and pertinent criminal, if not also civil, fraud requirements is also supported by Official Comment [3] to Model Rule 4.1, which is quoted earlier in this Article.<sup>65</sup>

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61. Compare MODEL RULES OF PROF’L CONDUCT r. 4.1(b), with *id.* r. 1.6(b).

62. With respect to noisy withdrawals, see ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 366, at 118-19 (1992); HAZARD, *supra* note 22, at 10-199 to -212. As the reader will note, Official Comment [3] makes at least an implicit reference to noisy withdrawals. See MODEL RULES OF PROF’L CONDUCT r. 4.1 cmt. 3.

63. *In re Greater Se. Cmty. Hosp. Corp. I*, 353 B.R. 324, 360 (Bankr. D.C. 2006) (quoting *EEOC v. Illinois*, 69 F.3d 167, 170 (7th Cir. 1995)).

64. See, e.g., *id.*

65. MODEL RULES OF PROF’L CONDUCT r. 4.1 cmt. 3; see *supra* text accompanying note 45. For a philosophical discussion of the somewhat related distinction between “killing” and “letting

Sixth, the current interplay of Model Rules 1.6(b), 3.3(a)(3) and 4.1(b) may lead reasonably prudent lawyers to believe—particularly in the absence of clear and unequivocal authority to the contrary—that the permissive exceptions to confidentiality contained in Model Rule 1.6(b) are not made mandatory by Model Rule 4.1(b) since the latter section does not contain the kind of express “trumping” language contained in Model Rule 3.3(a)(3).

### C. *Model Rule 4.1(b): To Trump or Not to Trump*

To the extent that harmonizing or limiting constructions placed on Model Rule 1.6(b) and Model Rule 4.1(b) in the prior section limit the extent to which ostensibly discretionary disclosure under Model Rule 1.6(b) becomes mandatory disclosure under Model Rule 4.1(b), we can truly say “so far, so good.” Nonetheless, it is still necessary to consider what to do when the mandatory disclosure language under Model Rule 4.1(b) would, by way of Official Comment [3] to that rule, turn what would otherwise be a discretionary disclosure under Model Rule 1.6(b) into a mandatory disclosure.

We agree that it is not frivolous to assert, as Professor Humbach and others have done, that “[b]y modifying Rule 1.6, the ABA has taken the lid off the pot in Rule 4.1(b).”<sup>66</sup> Nevertheless, this interpretation is not the only linguistically or logically permissible one. To begin with, the question of whether the amendments to Model Rule 1.6(b) would or should be construed to take “the lid off the pot in Rule 4.1(b)” does not appear to have been expressly debated or discussed during the course of the adoption of the post-Enron “gatekeeper” language contained in present Model Rule 1.6(b)(2) and (3), or at most, if not all, other times that Model Rule 1.6(b) was expanded.<sup>67</sup> In addition, and purely as a matter of linguistics, the reference in Model Rule 4.1(b) to situations in which “disclosure is prohibited by Rule 1.6” can reasonably be interpreted to mean either “prohibited by Rule 1.6 after including the optional exceptions” or “prohibited by Rule 1.6 without including the optional exceptions.”<sup>68</sup> There is also other language in the official comments that does not support “trumping.” Official Comment [14] to the Scope section of the *Model Rules* provides that:

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die,” see generally Judith Jarvis Thomson, *The Trolley Problem*, 94 YALE L.J. 1395 (1985).

66. John A. Humbach, *Shifting Paradigms of Lawyer Honesty*, 76 TENN. L. REV. 993, 1010 (2009).

67. *Id.* at 1009-10; see *supra* Part I.

68. MODEL RULES OF PROF'L CONDUCT r. 4.1(b).

Some of the Rules are imperatives, cast in the terms “shall” or “shall not.” These define proper conduct for purposes of professional discipline. Others, generally cast in the term “may,” are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. *No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion.*<sup>69</sup>

At a minimum, it would plainly be misleading—if not, in fact, “conduct involving dishonesty, fraud, deceit or misrepresentation”<sup>70</sup>—to construe the *Model Rules* as providing under Model Rule 1.6(b) that the lawyer has discretion for which “[n]o disciplinary action should be taken” while providing that the same conduct can and will in many, if not all, cases lead to discipline under Model Rule 4.1(b).<sup>71</sup> To paraphrase *In re Conduct of Hiller*,<sup>72</sup> a lawyer attempting in good faith to comply with the *Model Rules* and avoid discipline “must be able to trust” a state supreme court’s word in the form of duly adopted disciplinary rules “without having to search for equivocation, hidden meanings, deliberate half-truths or camouflaged escape hatches.”<sup>73</sup>

In addition, and insofar as we can determine, the proposition that mandatory disclosure under Model Rule 4.1(b) trumps discretionary disclosure under Model Rule 1.6(b) is typically advanced as an all or nothing proposition.<sup>74</sup> If this must be so, then the most significant of the discretionary disclosure obligations under Model Rule 1.6(b) is provision (4) under Model Rule 1.6(b), which provides that a lawyer may make discretionary disclosures “to secure legal advice about the lawyer’s compliance with these Rules.”<sup>75</sup> This language contains no exceptions as to the kind or nature of matters on which a lawyer can secure legal advice, and none appear to suggest themselves. It follows, however, that if one interprets Model Rule 4.1(b) to impose mandatory disclosure obligations whenever any exception to Model Rule 1.6(b) applies, the language, “unless disclosure is prohibited by Rule 1.6,” is meaningless because the lawyer always has the right to consult other counsel about the lawyer’s ethical obligations. This would violate the

69. *Id.* pmbl. & scope cmt. 14 (emphasis added).

70. *Id.* r. 8.4(c).

71. *Id.* pmbl. & scope cmt. 14.

72. 694 P.2d 540 (Or. 1985).

73. *Id.* at 544.

74. See, e.g., Humbach, *supra* note 66, at 1008 (“In other words, with certain qualifications, the newly modified Rule 1.6 now explicitly permits lawyers to reveal confidential client information in order to prevent, mitigate, or rectify financial or property injuries due to the client’s crime or fraud.”).

75. MODEL RULES OF PROF’L CONDUCT r. 1.6(b)(4).



basic principle of statutory construction that interpretations that give meaning to all the words of a statute, contract, or rule are to be preferred over those that do not.<sup>76</sup> And, if indeed such a result was the intent of the drafters of the *Model Rules*, they certainly chose a strange way to express it instead of saying, as in Model Rule 1.13(c), adopted in 2002, that disclosure is mandatory “whether or not Rule 1.6 permits such disclosure.”<sup>77</sup>

Other difficult, if not impossible, matters of interpretation are also raised if mandatory disclosure under Model Rule 4.1(b) must be regarded as trumping discretionary disclosure under Model Rule 1.6(b). For example, although generally prohibiting lawyers from assisting clients in the commission of crimes or frauds, Model Rule 1.2(d) expressly allows lawyers to “counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.”<sup>78</sup> It would, no doubt, come as an extreme surprise to a lawyer assisting a client in such an effort to learn that there may well be no discretion *not* to disclose. Similarly, a lawyer who could justify disclosure as part of the self-defense language in Model Rule 1.6(b)(4) would have no choice but not to make disclosure if Model Rule 4.1(b) applied.

This is not to say that there are no circumstances whatsoever under which, as a matter of public policy, mandatory disclosure is appropriate. It is to say that, even if all of our harmonizing and limiting constructions on Model Rule 1.6(b) and Model Rule 4.1(b) are fully observed, the simple “trumping” position proves too much. And, this is especially so

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76. See, e.g., *Kingdomware Techs., Inc. v. United States*, 754 F.3d 923, 933 (Fed. Cir. 2014) (“It is a bedrock principle of statutory interpretation that each word in a statute should be given effect.”); *Ariad Pharms., Inc. v. Eli Lilly & Co.*, 598 F.3d 1336, 1345 (Fed. Cir. 2010) (concluding that a party’s proposed statutory interpretation “violat[ed] the rule of statutory construction that Congress does not use unnecessary words”); *Qi-Zhuo v. Meissner*, 70 F.3d 136, 139 (D.C. Cir. 1995) (“An endlessly reiterated principle of statutory construction is that all words in a statute are to be assigned meaning, and that nothing therein is to be construed as surplusage.”).

77. Model Rule 1.13(c) provides:

Except as provided in paragraph (d)[, which is not pertinent hereto], if

- (1) despite the lawyer’s efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law; and
- (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

MODEL RULES OF PROF’L CONDUCT r. 1.13(c).

78. *Id.* r. 1.2(d).

not only in the case of lawyers seeking legal advice about their ethical obligations but also in the case of the post-Enron corrective disclosure options under Model Rule 1.6(b)(2) and (b)(3). At the end of the day, then, there is neither sense nor need to interpret the mandatory disclosure language in Model Rule 4.1(b) as automatically or inherently trumping the discretionary disclosure language in Model Rule 1.6(b).

The conclusion that Model Rule 4.1(b) does not expressly trump permissive disclosure under Model Rule 1.6(b) is also particularly strong in the many, if not in fact a clear majority of, jurisdictions that have rejected the approach taken in Model Rule 3.3(a)(3) to the effect that a lawyer must disclose client or witness perjury.<sup>79</sup> In those jurisdictions that have chosen not to follow this aspect of the *Model Rules* as to this kind of crime against the legal system itself, it is particularly difficult to see why other crimes should be differently treated.

#### IV. CIVIL LIABILITY ISSUES

We now turn to the potential effects of this question of interpretation on civil liability issues. Although the violation of a Model Rule does not create an automatic right to civil damages,<sup>80</sup> there is, and no doubt should be, significant overlap between the standards for disciplinary and civil liability when it comes to allegations of fraud or other alleged criminal conduct. Moreover, this seems particularly likely to be the case if a lawyer is obligated to perform certain acts rather than being given discretion to perform them or not as the lawyer chooses.

Suppose, then, that a non-client who is injured by a client's crime or fraud seeks to impose liability on the client's lawyer for failing to make a discretionary disclosure under Model Rule 1.6(b). In that instance, it seems likely that the state supreme court that made disclosure discretionary under Model Rule 1.6(b) would hold that this grant of discretion to lawyers requires that they not be subject to civil liability for

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79. See, e.g., Oregon State Bar Ass'n, Formal Op. 34, at 79-80 (2005) (stating that based upon the Oregon version of the rules in question, a lawyer faced with a client or witness perjury problem must seek leave to withdraw without saying anything about the specific reasons therefor).

Other jurisdictions have chosen not to adopt Model Rule 4.1(b) at all. See, e.g., IOWA RULES OF PROF'L CONDUCT r. 32:4:1 (IOWA BAR ASS'N 2012), <https://www.legis.iowa.gov/docs/ACO/CourtRulesChapter/12-31-2012.32.pdf> (last visited Feb. 15, 2016); MISSISSIPPI RULES OF PROF'L CONDUCT r. 4.1 (MISS. BAR ASS'N 1987), [https://courts.ms.gov/rules/msrulesofcourt/rules\\_of\\_professional\\_conduct.pdf](https://courts.ms.gov/rules/msrulesofcourt/rules_of_professional_conduct.pdf) (last visited Feb. 15, 2016). For a complete list of states and the various alterations to Model Rule 4.1, see *Variations of the ABA Model Rules of Professional Conduct*, ABA (Nov. 5, 2015), [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_3\\_8\\_g\\_h.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_8_g_h.authcheckdam.pdf).

80. See, e.g., MODEL RULES OF PROF'L CONDUCT, pmb. & scope cmt. 20; see HAZARD, *supra* note 22, at 5-6 to -9, 5-6 n.3.

nondisclosure. If, on the other hand, Model Rule 4.1(b) is broadly interpreted as turning discretionary disclosures into mandatory disclosures, then it would become very difficult not to hold lawyers liable in all such circumstances.

In a perfect world, in which we all know with certainty and in advance exactly what client conduct will constitute a crime or fraud by a client and exactly what conduct by a lawyer will constitute the provision of substantial or sufficiently material assistance, this might not pose any undue problems. Unfortunately, that is not the world in which we live. In the context of the third-party damage action, the plaintiff has at least the potential benefit of 20/20 hindsight, as well as the ability to seek to blur the line between what the lawyer-defendant arguably should have known and what the lawyer-defendant must have known. Moreover, the standard for civil liability may at times be a mere preponderance of the evidence, which is lower than the standard for disciplinary liability, which, in most states, requires the state bar association to prove its case by “clear and convincing evidence.”<sup>81</sup> Particularly, when coupled with the requirement that summary judgment not be granted if there is any genuine issue of material fact, the scales will tip heavily, and we submit, unduly, in favor of lawyer liability where none should exist—even where a lawyer can and does defeat a parallel disciplinary claim or where no such claim is filed.

## V. CONCLUSION

Although it involved no lawyer-defendants, the recent Oregon Court of Appeals decision in *State v. J.M.M.* presents another way of looking at the issues discussed in this Article.<sup>82</sup> The case was an appeal by a juvenile from a judgment finding him guilty of conduct that, if performed by an adult, would have constituted first-degree theft and second-degree burglary of a church.<sup>83</sup> The juvenile was present when his friends planned and committed these crimes, but did not participate either in the planning or commission of these crimes and did not, for example, encourage his friends or act as a lookout for them.<sup>84</sup> Although the court noted that very little collusion between accomplices is required for aiding-and-abetting liability, the conviction could not be sustained in

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81. MODEL RULES FOR LAWYER DISCIPLINARY ENF'T r. 18.3 (AM. BAR ASS'N 2002), [http://www.americanbar.org/groups/professional\\_responsibility/resources/lawyer\\_ethics\\_regulation/model\\_rules\\_for\\_lawyer\\_disciplinary\\_enforcement/rule\\_18.html](http://www.americanbar.org/groups/professional_responsibility/resources/lawyer_ethics_regulation/model_rules_for_lawyer_disciplinary_enforcement/rule_18.html).

82. 342 P.3d 1122 (Or. Ct. App. 2015).

83. *Id.* at 1123.

84. *Id.* at 1125.

the absence of evidence of collusion.<sup>85</sup> As the court wound up saying, “[t]he fact that [Y]outh was present establishes only that—his presence. Youth may be guilty of poor judgment, but the [S]tate did not prove him guilty of aiding and abetting a crime.”<sup>86</sup>

Lawyers are not, and of course should not behave like, children. And lawyers plainly owe duties to their clients, and even some duties to the legal system and to the public, that non-lawyers do not owe. At a minimum, a lawyer in the situation of the juvenile in *J.M.M.* would, if his friends were also clients, have a duty of competent representation to advise them of the illegality of their conduct. It also seems highly likely that a lawyer in that position would have a far more difficult time proving to the satisfaction of judge and jury that his or her presence did not constitute giving impermissible encouragement or assistance to the wrongdoing clients. Nonetheless, the profession of lawyering is risky enough without adding additional potential and never expressly intended duties of discipline and liability to non-clients. Alternatively, and at a bare minimum, the *Model Rules* and their state-adopted parallels should be amended to make explicit what, at least in most states, is now implicit.

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85. *Id.* at 1124-25.

86. *Id.* at 1125. *See generally* *State v. E.L.-A.S.*, 343 P.3d 1285 (Or. Ct. App. 2015).

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