

**THE SELF-DEFENSE EXCEPTION TO THE ATTORNEY'S  
ETHICAL OBLIGATION TO MAINTAIN CLIENT CONFIDENCES**

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Attorneys operate under a broad ethical mandate not to disclose client confidences. This ethical obligation can apply to communications made prior to the establishment of an attorney-client relationship and survives the death of the client. It is broader than the attorney-client evidentiary privilege. As incorporated into virtually all codes of professional responsibility, there is an exception to the rule allowing an attorney to disclose client confidences in "self-defense." The self-defense exception is the focus of this paper.

**A. Rule 1.6 of the ABA Model Rules of Professional Conduct**

Because the majority of states have adopted rules similar to the ABA Rules of Professional Conduct, examination of the rule and the jurisprudence regarding it will be useful to most practitioners.

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation and except as stated in paragraph (b). (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 proceedings concerning the lawyer's representation of the client.

Model Rules of Professional Conduct Rule 1.6 (1993) ("Model Rules").

Rule 1.6 of the Model Rules of Professional Conduct is broader than its predecessor, DR 4-101(A) of the Model Code of Professional Responsibility. DR 4-101 provides:

(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.

(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:

(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.

(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.

Model Code of Professional Responsibility DR 4-101 (1980) ("Model Code"). In contrast with the Model Code, Rule 1.6 applies to information relating to the representation of the client even if it is acquired before or after the relationship existed. Further, it does not require the client to specify the information to be kept confidential or allow the attorney to speculate as to whether the information might be embarrassing or detrimental. *See* Model Rules of Professional Conduct cmt. Because of the substantial difference in the scope of covered communications, applicable statutory and case law must be carefully examined in order to determine whether the Code or the Rules are in issue.

The ethical duty to maintain confidences and the attorney-client privilege, while often overlapping, are different in a number of respects. The attorney-client privilege in evidentiary privilege applicable primarily in judicial proceedings. The generally recognized purpose of the attorney-client privilege is to

encourage full and frank communication between attorney's and their clients and thereby promote broader public interests in the observance of law and the administration of justice. The privilege recognizes that sound legal advice or advocacy depends upon the lawyer's being fully informed by the client.

*Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). Generally, the attorney-client privilege is narrowly construed and applies "only to those situations in which the party invoking the privilege consulted an attorney for the purpose of securing a legal opinion or services and in connection with that consultation communicated information intended to be kept confidential." *In re Grand Jury Proceedings*, 727 F.2d 1352, 1355 (4<sup>th</sup> Cir. 1984); *X Corp. v. Doe*, 805 F. Supp. 1298, 1305 (E.D. Va. 1992). The attorney-client privilege protects only the communications themselves, not underlying facts, the disclosure of which may be compelled from those who communicated them to the attorney. *Upjohn Co.*, 449 U.S. at 395. This means that a client may be asked about the underlying facts of an occurrence or transaction (unless able to refuse under the Fifth Amendment, for example), but not whether those facts were related to the client's lawyer. *See Upjohn Co.*, 449 U.S. at 395.

The ethical obligation to preserve client confidences arises from broader policy and ethical considerations.

The obligation of an attorney not to misuse information acquired in the course of representation serves to vindicate the trust and reliance that clients place in their attorneys. A client would feel wronged if an opponent prevailed against him with the aid of an attorney who formerly represented the client in the same matter. . . . This would undermine public confidence in the legal system as a means for adjudicating disputes. We recognize that this consideration implicates the principle embodied in Canon 9 that attorneys "should avoid even the appearance of impropriety.

*Brennan's Inc. v. Brennan's Restaurants, Inc.*, 590 F.2d 168, 172 (5<sup>th</sup> Cir. 1979). The duty of confidentiality is directed toward attorney and provides that attorneys not to disclose, even voluntarily, what the attorney has learned about a client, no matter where or how it was learned. For example, if an attorney learns information about a client from a third party, that material is not within the attorney-client privilege (because it is not a communication from the client). However, such information, provided it is

related to representation of the client or is acquired in the course of representing the client, is covered by the duty of confidentiality. Model Rules of Professional Conduct cmt.

While the attorney-client privilege can be waived through disclosure to third parties, the duty of confidentiality is not waived under such circumstances. An attorney is still ethically obligated to maintain the confidences.

### **B. The Self-defense Exception**

Rule 1.6 "is not intended to disarm an attorney from protecting his rights and reputation as against a former client." *In re McLaren*, 115 B.R. 922, 927 (Bankr. N.D. Ohio 1990). The self-defense exception set forth in Rule 1.6(b)(2) applies in five principal situations: (1) in defense of lawsuits brought by clients; (2) in fee disputes with clients; (3) when an attorney may be implicated or accused of criminal misconduct relating to representation of a client; (4) to defend charges of professional misconduct, and (5) in habeas corpus proceedings where the client is asserting ineffective assistance of counsel. "The general ethical norm that information acquired in the course of representation of a client not be disclosed to the client's disadvantage nor revealed without the client's consent . . . should serve as a warning to lawyers that an exception founded upon self-defense ought to be invoked gingerly, after careful study and deliberation." *Morin v. Turpin*, 728 F. Supp. 952, 957 (S.D.N.Y. 1989) (interpreting the Model Code and holding that attorney breached his ethical obligations because the situation was not "urgent" enough to warrant disclosure of confidences without first seeking the consent of the client).

Any disclosures made under the aegis of Rule 1.6(b)(2) must be strictly limited so that (1) only necessary information or communications are disclosed and (2) the disclosure is to persons or entities that must have access to the information. Model Rules of Professional Responsibility Rule 1.6 cmt. To assure that attorney disclosures are as narrow and possible and reasonable, some courts have held that the party seeking the lawyer's testimony must submit their proposed questions and responses for in camera review. *See First Fed. Sav. & Loan Ass'n v. Oppenheim, Appel, Dixon & Co.*, 110 F.R.D. 557 (S.D.N.Y. 1986); *United States v. Omni Int'l Corp.*, 634 F. Supp. 1414 (D. Md. 1986). As an attorney makes such disclosures as his own peril, he would be well served by seeking court approval prior to disclosing confidences.

The comments to the Model Rules make it clear that an attorney need not wait for formal charges or a lawsuit be filed before he can disclose he confidences in self-defense.

The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(2) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish a defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

Model Rules of Professional Conduct cmt. The comment allows for prophylactic or "offensive" use of disclosure in order to protect the attorney's reputation and financial interests to the extent that extended litigation is expensive. An open question how offensively disclosure can be used. *See United States v. Monnat*, 853 F. Supp. 1301 (D. Kan. 1994) (discussing the ethical problems confronting an attorney by IRS Form 8300 and 26 U.S.C. § 6050I(a)). Another problematic situation arises when an attorney discovers that he has unknowingly assisted in an illegal transaction. Generally, disclosure could not be justified under Rule 1.6(b)(1) as it allows for disclosure only where death or serious bodily injury is in issue and where the offense has not yet been committed. However, to the extent that the lawyer believes that he could be

exposed to criminal or civil liability, he might be justified in offensively disclosing confidential information under Rule 1.6(b)(2).

### **Illustrative Cases**

One of the classic cases on offensive use of disclosure of client confidences is *Meyerhofer v. Empire Fire & Marine Ins. Co.*, 497 F. Supp. 1190 (2<sup>nd</sup> Cir. 1974). Goldberg was an associate working on a securities disclosure statement. He took the position that certain matters should be included in the disclosure statement. His superiors apparently disagreed. Goldberg left the firm as a result. Goldberg learned that "he was to be included as a defendant in the impending action." *Meyerhofer*, 497 F. Supp. at 1193. Investors brought a securities fraud claim and included Goldberg and Goldberg's former firm as defendants. Goldberg met with plaintiffs' counsel two times and provided them with evidence regarding his nonparticipation in the wrongful conduct. Goldberg provided plaintiffs' counsel with the affidavit and attachments he had given the Securities and Exchange Commission several months earlier.

He hoped that [the affidavit and attachments] would verify his nonparticipation in the finder's fee omission and convince the [plaintiffs'] firm that he should not be a defendant. The [plaintiffs'] firm was satisfied with Goldberg's explanations and, upon their motion, granted by the court, he was dropped as a defendant. After receiving Goldberg's affidavit, the [plaintiffs'] firm amended plaintiffs' complaint. The amendments added more specific facts but did not change the theory or substance of the original complaint.

*Meyerhofer*, 497 F. Supp. at 1193. The Court concluded that even though Goldberg's disclosure was arguably broader than necessary, he had not violated the applicable code of professional responsibility. *Meyerhofer*, 497 F. Supp. at 1196.

The United States District Court for the Eastern District of Virginia has held that a former in-house counsel could not disclose the confidences of his former employer in an effort to recover in a *qui tam* action. *United States v. X Corp.*, 862 F. Supp. 1502, 1507 (E.D. Va. 1994).

Nothing in the False Claims Act preempts state statutes and rules that regulate an attorney's disclosure of client confidences. The Act permits "a person" to file a *qui tam* suit; it does not require him to do so. Nor does the Act immunize a relator for actions taken that violate state law. Therefore, where an attorney's disclosure of client confidences is prohibited by state law in a given circumstance, that attorney risks subjecting himself to corresponding state disciplinary proceedings should he attempt to make the disclosure in a *qui tam* suit.

*X Corp.*, 862 F. Supp. At 1507. Ultimately, the district court held that the former employee could not recover as a relator because a previously entered permanent injunction prevented him from making the necessary disclosures of client confidences to satisfy the requirements of the False Claims Act. *X Corp.*, 862 F. Supp. at 1510 ("[The former employee] cannot be a relator in this action for the sole reason that he does not possess enough information that he may legally disclose to form the basis of a valid complaint against X Corp.").

A law firm which formerly represented a bankruptcy debtor and drafted a creditor plan did not violate the duty to maintain client confidences according to the dicta of a United States bankruptcy court. *In re Burton Securities, S.A.*, 148 B.R. 478, 480 (Bankr. S.D. Tex. 1992).

This Court finds that [the law firm] did not use client confidences to draft its Disclosure Statement or Plan of Reorganization. If it had however, the rules of ethics would not necessarily have been violated. To hold otherwise would prevent a law firm from ever collecting its fee in a former client's bankruptcy. Accordingly, the Creditor Plain has been proposed in good faith and should be confirmed.

*In re Burton Securities*, 148 B.R. at 480.

In *Eckhaus v. Alfa-Laval, Inc.*, the United States District Court for the Southern District of New York examined whether a former in-house counsel could disclose his former employer's confidences while pursuing a defamation claim against the employer. *Eckhaus v. Alfa-Laval, Inc.*, 764 F. Supp. 34 (S.D.N.Y. 1991). Eckhaus, the in-house counsel, asserted that he was defamed by false statements contained in a performance review. The performance review asserted that Eckhaus' performance was deficient with respect to a number of litigation matters. The employer moved for summary judgment arguing that Eckhaus would have to violate the applicable code of professional responsibility in order to maintain his claim. The district court agreed with the employer.

Although plaintiff's complaint states a cause of action for defamation, the law strikes the appropriate balance between the rights of an attorney to seek compensation for injuries suffered at the hand of a client and the right of the client not to be held hostage to an attorney's threat to reveal confidential information. \* \* \* Plaintiff justifies his revelations by relying on the exception to the general rule set forth in DR 4-101(C)(4). By raising wholly new issues plaintiff has exceeded the scope of DR 4-101(C)(4). Furthermore the cases applying DR 4-101(C)(4) are cases in which the client initiated the lawsuit and where the "accusation of wrongful conduct" is asserted as a formal claim against the attorney. . . . Informal charges made during a performance review of an in-house attorney specifically contemplated by his employment contract do not amount to an "accusation of wrongful conduct" [as that term is used in DR 4-101(C)(4)].

*Eckhaus*, 764 F. Supp. at 38. The *Eckhaus* court went on to note that Eckhaus could disclose the confidence to **defend** against his employer's claim of breach of fiduciary duty. *Eckhaus*, 764 F. Supp. at 38.

In *Browning v. AT & T Paradyne*, the question of whether it was a violation of the duty to maintain client confidences for an attorney to represent an employee in a suit against his former employer where the employee might have confidential information relevant to other lawsuits against the employer in which the attorney was participating. *Browning v. AT & T Paradyne*, 838 F. Supp. 1564 (M.D. Fla. 1993). Luedecke was an employee of AT & T Paradyne and participated in decision-making regarding reductions in AT & T Paradyne's workforce. Luedecke reviewed the terminations of a number of employees and assisted in evaluations of a number of other employees. Several of the terminated and demoted employees brought suit against AT & T Paradyne alleging age discrimination. Luedecke was also terminated. Luedecke filed a complaint with the EEOC and was later joined as a plaintiff in the suit brought by the other employees. AT & T Paradyne sought to disqualify Luedecke's attorney on a number of grounds. One of the grounds was that the attorney improperly induced Luedecke to divulge AT & T Paradyne's confidences in violation of Florida's version of Rule 1.6. The district court rejected AT & T Paradyne's argument.

Defendant's assertion that Plaintiffs' counsel have violated [Rule 1.6], is unfounded. [Rule 1.6] requires attorneys to maintain confidentiality and imposes upon attorneys a correlative duty to refrain from inducing others to disclose confidential matters. It is necessary that Plaintiff Luedecke disclose pertinent matters to his counsel in furtherance of the case in which he is a party. This does not fall within the realm of improperly inducing Plaintiff Luedecke to disclose confidential matters. In fact, Defendant has recognized that the information that Plaintiff Luedecke in privity to is not considered privileged and does not suggest that Plaintiffs may not obtain it through proper discovery. Defendant is concerned by the fact that Plaintiffs

will have access to this information outside the bounds of traditional discovery. This particular concern is not within the scope of [Rule 1.6].

*Browning*, 838 F. Supp. at 1568.

In *United States v. Cavin*, the Fifth Circuit examined the question of whether it was error to exclude an attorney's proffered evidence regarding the ethical constraints he operated under in rendering legal services to a client who "is using or has used his services to accomplish a fraud." *United States v. Cavin*, 39 F.3d 1299, 1309 (5<sup>th</sup> Cir. 1994). The court set forth an excellent analysis of the conflicting ethical norms an attorney must balance in such a situation.

The black-letter rule is that the lawyer must disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by the rule against revealing client confidences. Because such disclosure would consist of client confidences, it would seem that disclosure is prohibited, leaving the lawyer in the position of an accomplice. But that is not the rule; a lawyer may not commit a fraud. The parameters of his obligations, however, depend on the circumstances. How active a role does the lawyer play in the reporting process: is he a background advisor or the spokesperson? Is the content such that the agency likely would be misled without disclosure of the damaging fact? Would the omission mislead because of a statement by the lawyer or because of an oversight by the agency? Finally, what if the lawyer reasonably believes that the legal significance of the undisclosed information is such that the agency's reporting requirements do not call for disclosure, but the lawyer suspects that the agency would disagree. One authority holds that disclosure is not required. [citing ABA Formal Ethics Opinion 93-375] If disclosure is not required, arguably it is forbidden. These are some of the complex considerations facing a lawyer whose client is using or has used his services to accomplish a fraud. To the extent that they guide his conduct, they are directly relevant to his intent. We therefore join our Eleventh Circuit colleagues [*United States v. Kelley*, 888 F.2d 732 (11<sup>th</sup> Cir. 1989)] in holding that a lawyer accused of participating in his client's fraud is entitled to present evidence of his professional, including ethical, responsibilities, and the manner in which they influenced him. Exclusion of such evidence prevent the lawyer from effectively presenting his defense.

*Cavin*, 39 F.3d at 1308-09 (footnotes omitted). The Fifth Circuit also held that the attorney was entitled to instructions in the charge detailing the relevant ethical responsibilities. *Cavin*, 39 F.3d at 1310.