CHANGE AND CONTINUITY IN ATTORNEY-CLIENT CONFIDENTIALITY: THE NEW IOWA RULES OF PROFESSIONAL CONDUCT*

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I. INTRODUCTION TO THE NEW IOWA RULES OF PROFESSIONAL CONDUCT AND RECENT CHANGES REGARDING CONFIDENTIALITY

A. *The Transition to the Iowa Rules of Professional Conduct*

On July 1, 2005, the new Iowa Rules of Professional Conduct went into effect,[1] completing a transition to a new ethical regime for lawyers in Iowa that had begun six years previously.[2] By the 1990s, Iowa had become

1. In re Iowa Court Rules Chapter 32 (Iowa Sup. Ct., Apr. 20, 2005).

2. On the history of legal ethics in Iowa, see generally GREGORY C. SISK & MARK S. CADY, 16 IOWA PRACTICE SERIES: IOWA LAWYER AND JUDICIAL ETHICS (forthcoming, Thomson West, 2007).

part of a dwindling cadre of states that still adhered to rules based upon the Model Code of Professional Responsibility,[3] the former ethical system that had been superseded in 1983 by the American Bar Association's Model Rules of Professional Conduct,[4] which subsequently had been adopted in the overwhelming majority of states. In most respects, the Iowa legal profession remained healthy and its disciplinary rules and process appeared adequate to the task. But, despite the valiant efforts of the Iowa bench and bar to shore up an aging ethics regime, that stability was precarious and endangered. If Iowa were to stubbornly cling to a Code that had become obsolete in the nation at large, Iowa lawyers would lose the opportunity to fully share in the experiences and ethical advancements of the profession at large and to benefit from the constant reevaluation and evolution of ethical standards. Moreover, the decline in attention to the Code in law schools (particularly outside of Iowa) and on the bar examination presaged a generation of new admittees to the Iowa bar who would be unfamiliar with the Code, other than as history.

In 1999, in articles published in both an academic legal journal (namely, the *Drake Law Review*) and in Iowa's bar journal (the *Iowa Lawyer*),[5] the author of this Article laid out the case for a transition in Iowa to the Model Rules format. While popularity should not be the touchstone of a decision on which ethical rules to adopt, the widespread adoption of the Model Rules does reflect a broad consensus in the legal profession as to the appropriate norms of behavior and rules governing misconduct and the general effectiveness of the Model Rules in capturing this consensus.[6] Accordingly, I argued that Iowa must come on board with the Model Rules—and soon—to avoid being left behind in ethical developments and left out of national ethics discussions, which would have meaningful and detrimental consequences for the legal profession in our state. While one ought not flatter oneself too much that he accurately measured which way the wind was blowing, the Iowa Supreme Court later that same year issued an order, with prominent citations to my articles, stating that the court was considering adoption of the Model Rules and asking for comment by the

3. MODEL CODE OF PROF'L RESPONSIBILITY (American Bar Association 1969).

4. MODEL RULES OF PROF'L CONDUCT (American Bar Association 1983).

5. Gregory C. Sisk, *Iowa's Legal Ethics Rules—It's Time to Join the Crowd*, 47 DRAKE L. REV. 279 (1999) [hereinafter Sisk I]; Gregory C. Sisk, *Iowa's Legal Ethics Rules—It's Time to Join the Crowd*, IOWA LAW., May 1999, at 6 [hereinafter Sisk II].

6. *See* Carl A. Pierce & Lucian T. Pera, *Time for a Change?: The Proposed Tennessee Rules of Professional Conduct*, TENN. BAR J., Mar.-Apr. 1998, at 23, 27.

bar.[7] The Iowa State Bar Association appointed a Model Rules/Code Study Committee, which cast a vote of 13 to 1 in favor of a transition to the Model Rules format.[8] That recommendation was endorsed by the Iowa bar's Board of Governors at its November 1999 meeting.

In March 2000, the Iowa Supreme Court issued an order directing that "a new ethics framework should be adopted in Iowa, and the Model Rules of Professional Conduct should be the primary source of that framework."[9] While reserving to itself the final decision on the text of the rules and accompanying comments, the court appointed the Iowa Rules of Professional Conduct Drafting Committee to undertake the initial drafting work.[10] After nearly two years of regular meetings and deliberation, the drafting committee (on which I served as reporter) prepared its final report and proposed new Iowa Rules of Professional Conduct,[11] which were delivered to the Iowa Supreme Court on July 8, 2002.[12] The Iowa Supreme Court had retained the right to make a final determination of all issues and to give final approval to the proposed rules. Over the next two years, the justices met frequently and carefully evaluated each of the proposed rules in some detail. After submitting a proposed set of rules,[13] and considering comments from the bar, the court adopted a final set of rules that became effective in July 2005.

B. *The Changes in the Confidentiality Rules*

Because the recent transition in Iowa was from one set of legal ethics rules to a different format that is arranged differently and expresses

7. *See* In re Adoption of the Model Rules of Professional Conduct (Iowa Sup. Ct., July 6, 1999). The Iowa Supreme Court order also cited to Michael Huston's article in the state bar journal which had presented the case against adopting new rules in the Model Rules format. *See* Michael L. Huston, *We are Head and Shoulders Above the Crowd*, IOWA LAW., May 1999, at 7.

8. Iowa State Bar Association, Model Rules/Code Study Committee: Report to the Board of Governors (Nov. 12, 1999) [hereinafter ISBA Study Committee Report].

9. In re Proposed Adoption of the ABA Model Rules of Professional Conduct (Iowa Sup. Ct., Mar. 8, 2000).

10. *Id.*

11. Proposed Iowa Rules of Prof'l Conduct, Final Report to the Supreme Court of Iowa (Iowa Rules of Prof'l Conduct Drafting Committee, May 15, 2002) [hereinafter Iowa Drafting Committee Final Report].

12. *Ethics Rules Proposal Delivered to Iowa Supreme Court: "The Ball is in the Court's Court,"* IOWA LAW., Aug. 2002, at 16, 17.

13. In the Proposed Adoption of the Iowa Rules of Prof'l Conduct (Iowa Sup. Ct., Sept. 13, 2004).

disciplinary rules through new textual directives, the scope of the change was all-encompassing. During the course of the process, the agenda was open for consideration of many fundamental questions of policy regarding professional ethics. However, while expressed in new language, most of the principles underlying professional responsibility found in the new Iowa Rules of Professional Conduct are consistent with the old Iowa Code of Professional Responsibility. While the new rules provide greater direction to Iowa lawyers and address situations that had not been anticipated or were not addressed by the drafters of the Code decades earlier, Iowa lawyers will find the new standards more familiar than not, at least in practice, if not always in terminology.

Moreover, at each stage of the transition process, the Iowa Supreme Court moved further in the direction of uniformity, that is, adhering more closely to the Model Rules proposed by the American Bar Association. The court gradually came to the considered conclusion that the legal profession in Iowa should have the advantage of drawing directly from the experiences in other states with the same rules and accompanying comments that are numbered in the same format. Looking back over the series of orders from and actions by the court over the five-year period of drafting and transition, the pattern becomes clear. The court increasingly demonstrated a clear preference for greater rather than lesser consistency.[14] As a consequence, the set of ethical rules adopted in Iowa tracks the American Bar Association's Model Rules of Professional Conduct quite closely and includes fewer deviations than in many states, with the notable exception of the advertising rules.[15]

That is not to say, of course, that the transition was without controversy, and indeed the occasions for healthy debate about the course to take on various topics of professional ethics were many, although centering upon a relatively small subset of the rules. Among these points of controversy, the most prominent and the most significant concerned changes in the provisions governing attorney-client confidentiality,[16] which

14. In the Proposed Adoption of the Iowa Rules of Prof'l Conduct (Iowa Sup. Ct., Sept. 13, 2004) (explaining that the proposed rules closely follow the Model Rules).

15. On the advertising rules, see SISK & CADY, *supra* note 2, ch. 11.

16. The Iowa Rules of Professional Conduct Drafting Committee had not included within its final report any proposal to change the confidentiality rules. *See* Iowa Drafting Committee Final Report, *supra* note 11. In its orders inviting consideration of the Model Rules format for Iowa and then appointing the drafting committee, the Iowa Supreme Court had directed that those portions of the rules regarding confidentiality and advertising/information about legal services were not under consideration. In re Adoption of the Model Rules of Prof'l Conduct (Iowa Sup.

are the focus of this Article.

Prior to July 2005, Iowa's ethical regime was one of the most protective in the nation with respect to attorney confidentiality. Under Disciplinary Rule 4-101 of the Iowa Code of Professional Responsibility,[17] the only exceptions to confidentiality were for such traditional purposes as preventing a future crime and for attorney self-defense, and these exceptions were permissive in nature. Even if the lawyer discovered that the client had engaged in fraud upon a tribunal in an adjudicative matter, such as by perjured testimony, the lawyer's primary duty was to remonstrate with the client and withdraw from the representation if possible. But the lawyer was precluded from disclosing the client's completed misconduct if it had been discovered by the lawyer through a privileged client communication.[18]

As part of the new Iowa Rules of Professional Conduct that became effective on July 1, 2005, the Iowa Supreme Court adopted language in Rules 1.6[19] and 3.3 that enlarged the circumstances for permissive

Ct., July 6, 1999); In re Proposed Adoption of the ABA Model Rules of Prof'l Conduct (Iowa Sup. Ct., Mar. 8, 2000). However, the original plan contemplated a fast-track transition to the Model Rules format, to be followed by appointment of an additional committee or continuation of the drafting committee to consider the confidentiality matter and consider the substantial series of proposed amendments to the Model Rules of Professional Conduct that were being considered by the ABA as part of the "Ethics 2000" project. *See* ISBA Study Committee Report, *supra* note 8, at 16. Indeed, the court's order appointing the drafting committee called for a final report to the court by September 1, 2000. Instead, as the drafting process proceeded, first within the drafting committee and later within the Iowa Supreme Court, expedition was set aside in favor of more comprehensive deliberation and simultaneous consideration of the most recent revisions by the ABA to the Model Rules. With extensions of time granted by the court, the drafting committee's final report was not completed until 2002, with the court's proposed rules being circulated for comment in 2004 and then adopted in final form in 2005. Although the drafting committee had continued to regard the confidentiality subject (and lawyer advertising) as beyond its authority, the final report otherwise was comprehensive and up-to-date. Rather than further delaying full transition to the new rules by another drafting process, the Iowa Supreme Court included revisions to the confidentiality provisions as well in its proposed rules circulated in 2004 and the final rules adopted in 2005.

17. Disciplinary Rule 4-101, Iowa Code of Prof'l Responsibility (superseded).

18. Disciplinary Rule 7-102(B)(1), Iowa Code of Prof'l Responsibility (superseded). *See infra* Part XIII.A.

19. Rule 1.6, Iowa R. Prof'l Conduct. The Iowa Rules of Professional Conduct are codified in Chapter 32 of the Iowa Court Rules. For readability and to focus discussion more directly and literally on a particular rule, references in the text and citations in the footnotes to the rules are made in this Article without including the rules chapter and without inserting a colon in the citation (i.e., citing as "Rule 1.6"

disclosure by lawyers of attorney-client confidential information, but also established a mandatory requirement of disclosure in three contexts. First, under Rule 1.6(b)(2) and (3), lawyers have been granted expanded discretion to disclose confidential information for the purpose of preventing, mitigating, or rectifying financial or property harm caused by a client's commission of a crime or fraud when the lawyer's services were used in furtherance of that conduct.[20] Second, Rule 1.6(c) requires the lawyer to reveal information if the lawyer believes it reasonably necessary to prevent imminent death or substantial bodily harm.[21] Third, Rule 4.1(b), which forbids a lawyer from knowingly "fail[ing] to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client,"[22] when read together with the exceptions in Rule 1.6(b)(2) and (3) permitting disclosure to prevent or rectify substantial financial harm caused by client criminal or fraudulent behavior, effectively requires disclosure of confidential information in certain circumstances.[23] Fourth, under Rule 3.3, a lawyer who discovers that a client has committed fraud upon a tribunal in a proceeding that is not yet concluded is obliged to take reasonable remedial measures, including disclosure to the tribunal if necessary.[24] Unlike the standard under the prior Code, the fact that the lawyer's knowledge of the client's perjury or other fraud on the court was obtained through a confidential communication does not excuse nondisclosure of the information.[25]

At the same time, Rule 1.6 also enhances confidentiality and confirms and continues existing understandings in many respects. By covering all information relating to the representation, Rule 1.6(a) creates a more forceful presumption in favor of confidentiality and expands the scope of the protection.[26] Many of the exceptions to confidentiality that are now found in Rule 1.6 are either the same or substantially similar to those previously recognized in Iowa ethical practice. The well-justified authorization in Rule 1.6(b)(1) to reveal confidential information when reasonably believed necessary to prevent death or substantial bodily harm[27] was foreshadowed in part by the longstanding permission to reveal client

rather than "Rule 32:1.6").

20. Rule 1.6(b)(2), (3), Iowa R. Prof'l Conduct; *see infra* Part VIII.
21. Rule 1.6(c), Iowa R. Prof'l Conduct; *see infra* Part VII.
22. Rule 4.1(b), Iowa R. Prof'l Conduct.
23. *See infra* Part VIII.C.
24. Rule 3.3, Iowa R. Prof'l Conduct; *see infra* Part XIII.
25. *See infra* Parts XIII.A, C.
26. Rule 1.6(a), Iowa R. Prof'l Conduct; s*ee infra* Part III.
27. Rule 1.6(b)(1), Iowa R. Prof'l Conduct; *see infra* Part VII.

confidences as necessary to prevent a future crime. Even the new provision for release of information to rectify past economic harm caused by client wrongdoing is not wholly unprecedented in Iowa, as it runs parallel to the crime-fraud exception to the attorney-client privilege,[28] an alignment further confirmed by the careful limitation of the authorization to disclose in Rule 1.6(b)(2) and (3) to those situations in which the lawyer's services were or are being used in furtherance of the client's crime or fraud.[29] The allowance in Rule 1.6(b)(5) for disclosure in the lawyer's own self-defense or to collect a fee[30] has been a traditional exception in Iowa both to confidentiality and the attorney-client privilege.[31] The new provision in Rule 1.6(b)(4) allowing the lawyer to share confidential information to obtain legal advice from another lawyer about compliance with the ethics rules[32] expressly confirms what has long been understood informally as permissible, and is a welcome addition that encourages lawyers to seek counsel from colleagues about ethical obligations.[33] In the end, the heart of attorney-client confidentiality—and the attorney-client privilege[34]—beats vibrantly in Iowa.

While the changes are meaningful, and in certain limited respects strike a different balance than under previous ethical standards between upholding confidentiality and affirming other professional or public-regarding obligations, the effect of these changes should not be overstated nor should the extent of the change be exaggerated. Rule 1.6 provides more in the way of continuity, than an introduction of change, in attorney-client confidentiality in Iowa. This Article is designed to assist Iowa lawyers in becoming more informed about confidentiality and familiar with the new rules, while placing the subject within the context of Iowa history and expectations.

II. THE PRINCIPLE OF CONFIDENTIALITY

A. *The Fundamental Principle of Confidentiality*

When teaching law students in my professional responsibility class each year, I always emphasize that the first duty of the lawyer is to protect

28. *See infra* Part IV.D.1.
29. *See infra* Part VIII.B.
30. Rule 1.6(b)(5), Iowa R. Prof'l Conduct.
31. *See infra* Parts IV.D.4, X.
32. Rule 1.6(b)(4), Iowa R. Prof'l Conduct.
33. *See infra* Part IX.
34. For a discussion of the attorney-client privilege in Iowa, see *infra* Part IV.

the client's confidences. Perhaps no other element of the attorney-client relationship is as fundamental as the sacred obligation of the lawyer to keep the confidences of his or her client. As attorneys, we serve as agents and advocates seeking to advance the legal objectives of our clients, but we also serve as confidants in whom our clients may repose trust. Because our clients are guaranteed confidentiality, they are willing to share their most private thoughts and relate the most sensitive and embarrassing information, secure in the knowledge that what has been shared will be safeguarded and will never be used against them by the lawyer.

The confidential nature of the attorney-client relationship is the foundation for everything that the lawyer does. If the lawyer is to effectively and fairly represent the client—rich or poor, confident or vulnerable, well-educated or working class, sophisticated in legal affairs or unfamiliar with the legal system—the lawyer must be able to instill trust. Confidentiality is the cornerstone of that trust. If the lawyer is to be able to counsel clients to do the right thing, legally and morally, the lawyer must have full access to information from the client, and this free flow of information depends on the assurance of confidentiality. Thus, the traditional ethical directive to the lawyer to maintain the client's confidences, and the additional security given to attorney-client communications through the testimonial/evidentiary attorney-client privilege, fortifies the vital professional purposes of building a strong attorney-client relationship and ensuring that the lawyer obtains the information necessary to serve the client well. As the Iowa Supreme Court said in the classic attorney-client privilege case of *Bailey v. Chicago, Burlington & Quincy Railroad Co.*, the protection of confidentiality "is premised on a recognition of the inherent right of every person to consult with legal counsel and secure the benefit of his advice free from any fear of disclosure."[35]

Confidentiality is also a matter of venerable moral principle, long established in the moral, philosophical, and theological, as well as legal, traditions of the Western world.[36] Placing the matter in moral and religious context, Abbe Smith and William Montross observe:

> Confidentiality is also an essential component of the virtue of fidelity. To serve a client faithfully, one must provide a refuge for the client by steadfastly maintaining his or her confidences and secrets,

35. Bailey v. Chi., Burlington & Quincy R.R. Co., 179 N.W.2d 560, 563 (Iowa 1970).

36. *See id.* (stating the attorney-client privilege "is of ancient origin").

> regardless of the circumstances. Of course, the centrality of confidentiality in ministering to another in need has roots in Judeo-Christian teachings.[37]

In the Jewish tradition, the Torah admonishes each person not to be a "talebearer" among the community.[38] The great Rabbi Maimonides, who codified Jewish law during the twelfth century, further elucidated the moral grievance of sharing confidential communications, even when the account is truthful: "Who is a tale bearer? He who collects tales and goes from one person to another saying, 'so and so said this, and I heard of another,' although it may be true, [the tale bearer] makes the world desolate."[39] Under Jewish teaching, the principle of confidentiality may be set aside only when a commandment of greater importance intervenes, such as the imperative duty to uphold "[t]he absolute spiritual value of life."[40] Indeed, under extreme circumstances, a Jewish lawyer might argue that an unduly strict confidentiality rule that precluded disclosure of information necessary to prevent serious harm to others would constitute an "impermissibl[e] burden [on the] free exercise of his religion by creating an unnecessary conflict between his professional obligations and his religious beliefs."[41]

In the Christian tradition, confidentiality very early was given a prominent place among the special responsibilities of those called to the professions. Considering the clergy, which along with the law became one of the original professions, most readers will be familiar with the "seal of confession," by which a priest in the Catholic, Eastern Orthodox, or Anglican traditions is barred from revealing a sacramental confession under any circumstances. Betrayal by a priest of the sanctity of

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37. Abbe Smith & William Montross, *The Calling of Criminal Defense*, 50 MERCER L. REV. 443, 525–26 (1999).

38. *Leviticus* 19:16 ("Thou shalt not go up and down as a talebearer among thy people.").

39. *Hilkhot De'ot* ch. 7:2, *in* THE BOOK OF KNOWLEDGE 47 (H.M. Russell & Rabbi J. Weinberg trans., 1981).

40. Arthur Gross Schaefer & Peter S. Levi, *Resolving the Conflict Between the Ethical Values of Confidentiality and Saving a Life: A Jewish View*, 29 LOY. L.A. L. REV. 1761, 1767 (1996); *see also* Russell G. Pearce, *To Save a Life: Why a Rabbi and a Jewish Lawyer Must Disclose a Client Confidence*, 29 LOY. L.A. L. REV. 1771, 1776–77 (1996). Indeed, the second half of the same verse from the Torah that forbids being a talebearer also states: "[N]either shalt thou stand idly by the blood of thy neighbor: I am the Lord." *Leviticus* 19:16.

41. Alex Kozinski & Leslie A. Hakala, *Keeping Secrets: Religious Duty vs. Professional Obligation*, 38 WASHBURN L.J. 747, 748 (1999).

communications during the Sacrament of Reconciliation remains one of the few transgressions that results in automatic excommunication from the Catholic Church.[42] Catholic teaching also affirms the weight of confidentiality in other professional settings:

> *Professional secrets*—for example, those of political office holders, soldiers, physicians, and lawyers—or confidential information given under the seal of secrecy must be kept, save in exceptional cases where keeping the secret is bound to cause very grave harm to the one who confided it, to the one who received it or to a third party, and where the very grave harm can be avoided only by divulging the truth. Even if not confided under the seal of secrecy, private information prejudicial to another is not to be divulged without a grave and proportionate reason.[43]

In addition to personal morality and religious principle, Professors Geoffrey Hazard and William Hodes establish that confidentiality has a solid moral base in the nature of a free society. Confidentiality, they explain, "creates a zone of privacy that cannot be breached by a too-inquisitive government, and thus enhances the autonomy and individual liberty of citizens."[44] Professor Maura Strassberg adds that "[t]he promise of confidentiality further enhances individual autonomy by permitting effective use of legal expertise in determining a lawful means to individual ends."[45]

The primordial moral canon of confidentiality has set itself deep into the foundational bedrock of our culture. While the law does not extend formal protection to every relationship, we nonetheless accept as a basic expectation that we ought not freely share the dreams or regrets that our family members and friends share with us in private. Even when an individual has participated in a criminal conspiracy, and thus obviously has

42. *See* CODEX IURIS CANONICI (Code of Canon Law) c.1398 (Canon Law Society of America trans., 1983). On the seal of confession, see generally Anthony Cardinal Bevilacqua, *Confidentiality Obligation of Clergy from the Perspective of Roman Catholic Priests*, 29 LOY. L.A. L. REV. 1733 (1996).

43. CATECHISM OF THE CATHOLIC CHURCH ¶ 2491 (2d ed. 1997).

44. GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 9.2, at 9-10 (3d ed. 2001 & Supp. 2005); *see also* SISSELA BOK, SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION 120 (1982) (stating that "[t]he first and fundamental premise [for confidentiality] is that of individual autonomy over personal information," thus respecting individuals and maintaining privacy).

45. Maura Strassberg, *Taking Ethics Seriously: Beyond Positivist Jurisprudence in Legal Ethics*, 80 IOWA L. REV. 901, 947 (1995).

no moral or legal expectation that the wrongful communications will be held secure (and instead has a moral duty to reveal the planned misconduct), a social stigma tends to attach to the person who is viewed as a "snitch." How much more so, then, do we regard with deserved opprobrium those such as lawyers and physicians who have a professional obligation to protect confidential information and who yet violate that trust by trading upon valuable secrets for private gain or by sharing embarrassing stories about others for personal amusement. Indeed, the lawyer who appropriates the confidential information of the client toward improper ends has not only violated the rules of professional conduct, but also may be civilly liable for breach of fiduciary duty.[46]

B. *The Necessarily Narrow Nature of Exceptions to Confidentiality*

For the professional and moral reasons addressed above,[47] the legal profession has always jealously guarded the sacred principle of confidentiality. Yet confidentiality has never been absolute. When the client abuses the attorney-client relationship by seeking legal advice for the purpose of defrauding another or violating the law, for example, the privilege otherwise attaching to client communications is lost and the lawyer may be required to reveal those discussions by court order or subpoena (whether or not the lawyer is permitted to voluntarily disclose that information).[48] In addition, simple fairness or imperative reasons of public interest may justify disclosure of client information as necessary, for example, so that a lawyer may defend him or herself against a charge of wrongdoing[49] or may take action to prevent a client from causing serious harm to another.[50]

While a vigorous debate continues within the legal profession as to exactly which exigent circumstances justify disclosure of client confidences and how the balance between public interest and fiduciary trust should be struck, nearly everyone agrees that exceptions to confidentiality should be few in number and narrow in application. Unless carefully calibrated to address a serious and otherwise irreparable harm, a proviso that loosens the obligation of confidence might cause far more harm to the attorney-

46. On breach of fiduciary duty as a civil cause of action against a lawyer, see SISK & CADY, *supra* note 2, § 13:07.

47. *See supra* Part II.A.

48. On the inapplicability of the attorney-client privilege when legal services are sought in furtherance of a crime, see *infra* Part IV.D.1.

49. *See infra* Parts IV.D.4, X.

50. *See infra* Parts VII, VIII.

client relationship than could be justified by any projected public benefit resulting from disclosure. In general, allowing the free flow of information between a lawyer and a client, protected by confidence, is more likely to produce socially desirable benefits than would be achieved by placing the lawyer in a whistle-blowing role against his or her own client. As United States Supreme Court Justice Byron White once observed:

> As a practical matter, if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice.[51]

When clients are able to share information in a confidential setting, the lawyer is more likely to learn about unwise actions taken in the past or contemplated for the future and thus be able to advise the client to take the morally appropriate, as well as legally justified, course.[52] On what are probably thousands of occasions each day in this country, wise legal advisors counsel their clients to avoid going down a questionable path, to put right past wrongs, to tell the truth, etc. Because those communications are confidential, we never hear about most of them. Yet if we too readily subordinate the principle of confidentiality and too frequently allow or even require lawyers to reveal what their clients tell them or what the lawyers have learned through the representation, the flow of information will dry up, and so then will the opportunity for lawyers to serve their professional role as counselors.[53]

III. THE SCOPE OF CONFIDENTIALITY

Paragraph (a) of Iowa Rule 1.6 articulates the general rule that the lawyer must safeguard confidential information by stating a prohibition on disclosure of such information without consent or other authorization and by defining what constitutes confidential information that receives the protection.[54] As Professor Peter Rofes well summarizes, the scope of confidential information under the rule is quite broad:

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51. Fisher v. United States, 425 U.S. 391, 403 (1976).

52. On the lawyer's duty to provide candid advice to the client, see Rule 2.1, Iowa R. Prof'l Conduct. *See generally* SISK & CADY, *supra* note 2, § 6:01(b).

53. On moral deliberation in the attorney-client relationship, see SISK & CADY, *supra* note 2, § 1:03.

54. Rule 1.6(a), Iowa R. Prof'l Conduct.

> Rule 1.6(a) makes clear that . . . lawyers have an obligation to refrain from revealing *all* "information relating to representation of a client" that their clients have not consented to have revealed. The comments and comparison sections to Rule 1.6 underscore the remarkable breadth of the confidentiality notion, explicitly noting, among other things, that the confidentiality label attaches irrespective of the source of the information, irrespective of whether the client has requested the lawyer to respect the privacy of the information, and irrespective of whether dissemination of the information would cause harm to the client.[55]

Accordingly, as Comment 3 to Rule 1.6 emphasizes, "[t]he confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source."[56] The duty to protect confidential information is perpetual, as Comment 18 confirms, continuing after the attorney-client relationship has ended.[57] Indeed, Rule 1.9(c)(1) generally prohibits disclosure or use of confidential information to the disadvantage of a former client.[58]

In contrast with Disciplinary Rule 4-101(A) of the former Iowa Code of Professional Responsibility,[59] information is classified as confidential under Rule 1.6(a) whether or not the client has requested that the information be kept secret, whether or not the lawyer in his or her own judgment might regard the information as embarrassing or detrimental to the client, and whether or not the information was gained during the course of (as opposed to before or after) the attorney-client relationship. In setting the parameters of confidentiality, then, Rule 1.6(a) establishes a more forceful presumption in favor of confidentiality than did the former Iowa Disciplinary Rule 4-101(A), which extended protection only to information that the client requested be held inviolate or that would be

55. Peter K. Rofes, *Another Misunderstood Relation: Confidentiality and the Duty to Report*, 14 GEO. J. LEGAL ETHICS 621, 627–28 (2001) (footnotes omitted).

56. Rule 1.6, cmt. 3, Iowa R. Prof'l Conduct. On the attorney-client privilege protecting communications, see *infra* Part IV.

57. Rule 1.6, cmt. 18, Iowa R. Prof'l Conduct.

58. Rule 1.9(c)(1), Iowa R. Prof'l Conduct.

59. Disciplinary Rule 4-101(A), Iowa Code of Prof'l Responsibility (superseded) (defining non-privileged "secrets" as "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").

"embarrassing" or "likely to be detrimental" if revealed.[60] Under Rule 1.6(a), if the information relates to the representation,[61] which covers everything that the lawyer learns about the client that has even a tangential connection to the objectives of the representation, then the lawyer is obliged to guarantee its protection.[62]

Under paragraph (a) of Rule 1.6, the lawyer is permitted to disclose confidential information only if 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) or required by paragraph (c)."[63] (The exceptions to confidentiality in paragraphs (b) and (c) are discussed separately below in Parts VII to XI.) The primary and typical basis for disclosure of confidential information is permission of the client, either directly or impliedly. Before a client is asked to permit disclosure of information, the attorney should make certain that the client has granted informed consent. As directed by Rule 1.0(e), the client must be afforded "adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."[64] When disclosure appears innocuous and the client well understands the nature of the information and effect of revelation, little explanation may be required. When the information is of greater value or the consequences of its release are likely to be more significant, the explanation to be given by the lawyer appropriately will be more extensive.

In addition, unless the client instructs otherwise or special circumstances indicate to the contrary, the client will be presumed to have authorized those disclosures of information that are necessary for the lawyer in pursuing the objectives of the representation. As Comment 5 explains, "a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter."[65] The *Restatement of the Law Governing Lawyers* similarly speaks of such impliedly authorized disclosures as those that the lawyer "reasonably believes" will "advance the interests of the client in the

60. On the contrast between Disciplinary Rule 4-101 and Rule 1.6(a), see generally HAZARD & HODES, *supra* note 44, § 9:15, at 9-59 to 9-60.

61. Rule 1.6(a), Iowa R. Prof'l Conduct.

62. On the lawyer's duty to take appropriate measures to protect confidential information, see *infra* Part VI.

63. Rule 1.6(a), Iowa R. Prof'l Conduct.

64. On "informed consent," see Rule 1.0(e), Iowa R. Prof'l Conduct, and see generally SISK & CADY, *supra* note 2, § 4:03(d).

65. Rule 1.6, cmt. 5, Iowa R. Prof'l Conduct.

representation."[66] Still, the lawyer should remain in regular communication with the client[67] so as not to overstep the bounds here. Unless the client has indicated that only designated lawyers within a law firm may have access to information, a lawyer also is impliedly authorized to share client confidential information with other persons in the law firm as necessary to perform the representation and to ensure that the firm complies with other obligations, such as maintaining a process to check for potential conflicts of interest.

IV. THE ATTORNEY-CLIENT PRIVILEGE

A. *The Special Immunity Given to Attorney-Client Communications*

The attorney-client privilege attaches to a special subset of confidential information, consisting of communications between the lawyer and the client that are entitled to be held immune from legal process.[68] While the lawyer generally is obliged to protect all information relating to the representation and not voluntarily disclose such information,[69] the lawyer nonetheless is required to respond to a lawful subpoena or court order that seeks information outside the parameters of a legally recognized privilege.[70] By sharp contrast, the lawyer should not be forced to divulge the substance of communications falling within a privilege, and, indeed, must take appropriate steps to assert and competently advance a privilege in response to any request.[71] Thus, the contents of direct communications between an attorney and a client constitute a specially protected category of confidential information.

"The attorney-client privilege is one of the oldest recognized privileges for confidential communications."[72] To protect the honor of the legal advisor in providing confidential counsel to a client, the attorney-client privilege as a matter of the law of evidence arose in the English

66. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 61 (2000).

67. On the duty to keep the client informed, see Rule 1.4, Iowa R. Prof'l Conduct and see generally SISK & CADY, *supra* note 2, § 5:04(b)–(d).

68. On the attorney-client privilege in Iowa, see generally 7 JAMES A. ADAMS & JOSEPH P. WEEG, IOWA PRACTICE SERIES: EVIDENCE §§ 5:504:10–12 (2006 ed.).

69. *See supra* Part III.

70. On the lawyer's duty to disclose information when required by law, see Rule 1.6(b)(6), Iowa R. Prof'l Conduct, and *infra* Part XI.

71. On the lawyer's duty to act competently to protect confidential information, see *infra* Part VI.

72. Swidler & Berlin v. United States, 524 U.S. 399, 403 (1998).

common law in the sixteenth and seventeenth centuries.[73] When the United States became an independent nation, early caselaw confirms "that the privilege transferred relatively unchanged to the new republic."[74] As the Iowa Supreme Court affirmed in *Wemark v. State*, "the attorney-client privilege has always been a foundational part of our own American system of justice. It was a part of the original codification of our Iowa laws, as well as our own common law." [75] In the present day, the privilege remains one of the most universally recognized, frequently asserted, and carefully protected means of preserving the trust between a lawyer and a client, whether the client be a natural person or an organization.[76]

B. *The Statutory Codification of the Testimonial Privilege and Its Relation to the Common-Law Privilege*

In Iowa, the attorney-client privilege is not only grounded in the common law, it has also been codified by statute. Section 622.10 of the Iowa Code provides, in pertinent part:

> A practicing attorney . . . who obtains information by reason of the person's employment, . . . shall not be allowed, in giving testimony, to disclose any confidential communication properly entrusted to the person in the person's professional capacity, and necessary and proper to enable the person to discharge the functions of the person's office according to the usual course of practice or discipline.[77]

Given an overly literal reading, Section 622.10 would prohibit the disclosure of privileged communications by the lawyer only if accomplished through oral testimony in a proceeding. By practical application and common-law augmentation, the attorney-client privilege in Iowa more generally prohibits the lawyer from being required to respond to legal compulsion that seeks to uncover the contents of attorney-client communications (absent an exception to the privilege),[78] such as through discovery attendant to litigation or by administrative or legislative subpoena, particularly when the information is sought for use against the

73. PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 1.3 (2d ed. 1999).

74. *Id.* § 1.12.

75. Wemark v. State, 602 N.W.2d 810, 815 (Iowa 1999).

76. On the attorney-client privilege for corporations and other organizations, see *infra* Part IV.E.

77. IOWA CODE § 622.10(1) (2005).

78. On exceptions to the privilege, see *infra* Part IV.D.

client in litigation, a prosecution, or other proceeding.

The Iowa Supreme Court has explained that when direct revelations by a professional would undermine protection of a confidential relationship, the information may not be revealed by indirect means.[79] In *Squealer Feeds v. Pickering*, the court held that under the common law privilege "[a]ny confidential communication between an attorney and the attorney's client is absolutely privileged from disclosure against the will of the client."[80] The court described this broad common-law protection as being supplemented by the statutory testimonial privilege,[81] thus confirming that the protection of the attorney-client privilege in Iowa extends beyond prohibiting testimony or its equivalent about the contents of attorney-client communications. Thus, in Iowa, the common-law privilege presumably protects communications between the attorney and client from outside intrusion by legal compulsion (such as a discovery request or a subpoena), even if the attorney is not called to testify and even if the communicative information sought will not be directly introduced into evidence in a litigation proceeding.

C. *The Elements of the Attorney-Client Privilege*

The traditional formulation of the attorney-client privilege contained eight elements:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his insistence permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.[82]

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79. *See* Newman v. Blom, 89 N.W.2d 349, 354–55 (Iowa 1958) (holding that information gathered from communication of patient to physician and placed in hospital records is privileged against being used in litigation to the same extent as knowledge and information of examining or treating physician is privileged for purposes of oral testimony).

80. Squealer Feeds v. Pickering, 530 N.W.2d 678, 684 (Iowa 1995) (quoting Shook v. City of Davenport, 497 N.W.2d 883, 886 (Iowa 1993)), *abrogated in part on other grounds by* Wells Dairy, Inc. v. Am. Indus. Refrigeration, Inc., 690 N.W.2d 38, 47–48 (Iowa 2004); *see also* Brandon v. W. Bend Mut. Ins. Co., 681 N.W.2d 633, 639 (Iowa 2004).

81. *Squealer Feeds*, 530 N.W.2d at 684.

82. 8 JOHN HENRY WIGMORE, EVIDENCE § 2292 (McNaughton rev. 1961) (emphasis in original omitted). On the elements of the attorney-client privilege in Iowa, see also ADAMS & WEEG, *supra* note 68, § 5:504:10.

While satisfaction of all eight elements traditionally was necessary to invoke the privilege, these elements are somewhat overlapping and partially redundant.[83] Moreover, the law has evolved to modify some of the elements, for example, including prospective as well as actual clients within the protection[84] and extending coverage not only to communications by a client to a lawyer, but also the lawyer's communications to the client.[85]

1. *Seeking Legal Advice*

As the Iowa Court of Appeals held in *Young v. Gibson*, "[t]he privilege is established so clients can communicate concerns about their legal problems without fear the communication might subsequently be used as evidence against them."[86] Thus, it is the client's pursuit of legal advice that triggers the privilege. When a person contacts a lawyer with the purpose of obtaining legal counsel, the communications that follow are privileged.

By contrast, when a person contacts a lawyer for extra-legal purposes or communicates with a lawyer for reasons other than seeking legal advice to a legitimate end, the privilege does not attach or may be lost. Conversations with people who happen to be lawyers do not come under the shield of confidentiality, unless those conversations are a prelude to or part and parcel of a legal representation. Thus, chewing the fat with a friend or fishing buddy or chatting with a business acquaintance or neighbor will not be afforded the privilege, unless that person also is seeking the lawyer's legal advice. Moreover, if rather than seeking legitimate legal advice, the client intends to pervert the legal representation toward an illicit end, the attorney-client privilege is forfeited.[87]

Despite these exceptions and limitations, when a client or prospective client talks with a lawyer, the substance of those communications is presumptively privileged. After all, the types of matters that today come within the scope of legal representation may be very broad indeed because the expansion of legal standards and the growth of government regulation has left very few aspects of human activity and relationships untouched by

83. The Restatement describes the attorney-client privilege as having four elements: "(1) a communication (2) made between privileged persons (3) in confidence (4) for the purpose of obtaining or providing legal assistance for the client." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 (2000).

84. *See infra* Part IV.C.2.

85. *See infra* Part IV.C.5.

86. Young v. Gibson, 423 N.W.2d 208, 210 (Iowa Ct. App. 1988).

87. *See infra* Part IV.D.

law. Even persons not contemplating litigation, considering a transaction, or seeking preparation of a legal document, nonetheless may seek the advice of a lawyer about the legal implications of various dimensions of human behavior.

Even certain services that may be performed by nonlawyers nonetheless constitute the practice of law when performed by lawyers, at least in Iowa. Although this is still an evolving area, and a lawyer cannot be certain that the privilege will be upheld in each instance when communications with the client are attendant to services beyond those traditionally regarded as legal in nature, Iowa has been a leader in recognizing the expanding scope of the practice of law and in emphasizing that a lawyer is bound by professional obligations (including confidentiality) when providing such services as part of a law practice.

In the past, for example, communications made to a lawyer for the purpose of preparing a tax return, rather than obtaining tax planning advice, were not always regarded as sufficiently related to the practice of law to come within the privilege.[88] However, the simple preparation of a tax return may readily become the occasion for providing valuable legal advice, because that tax return work is being performed by a diligent lawyer (rather than an accountant or other nonlawyer), who by reason of legal expertise and experience may identify legal issues that others would not appreciate.[89] Precisely because of the legal implications inchoate in that activity, preparation of a tax return is among those matters specifically forbidden to a lawyer who has been suspended from practice under Iowa rules.[90] Moreover, in language unique to Iowa, Comment 12 to Rule 5.7 of the new Iowa Rules of Professional Conduct observes that "[c]ertain services that may be performed by nonlawyers nonetheless are treated as the practice of law in Iowa when performed by lawyers, including

88. *See* United States v. Willis, 565 F. Supp. 1186, 1189–90 (S.D. Iowa 1983); *see also* RICE, *supra* note 73, § 7.24 (finding that courts are divided on whether tax return preparation, as contrasted with tax planning, is legal assistance entitled to the protection of the privilege); Maura I. Strassberg, *Privilege Can Be Abused: Exploring the Ethical Obligation to Avoid Frivolous Claims of Attorney-Client Privilege*, 37 SETON HALL L. REV. 413, 473 n.268 (2007) (noting disagreement among courts on whether communications involving a lawyer's preparation of a tax return are protected by the privilege).

89. The specific information related to the lawyer for the very purpose of being included in the tax return would not be privileged, of course, because the lawyer was intended to be a conduit in transmitting that information to the government tax agency. RICE, *supra* note 73, § 7.25; *see also infra* Part IV.C.5 (discussing whether client intended information to be kept confidential).

90. Iowa Ct. R. 35.12(3); *see* SISK & CADY, *supra* note 2, § 2:09(e).

consummation of real estate transactions, preparation of tax returns, legislative lobbying, and estate planning."[91]

When a matter with any legal dimension is brought to a lawyer and subjected to the lawyer's professional examination, even in the process of performing services that could be performed by nonlawyers, the animating purpose of the privilege may well be realized by encouraging the client to freely share all relevant information so that the lawyer may explore any legal implications. When a client specifically chooses a lawyer to provide services, for example, the preparation of tax returns, rather than another service provider, such as an accountant, the client appropriately expects and is entitled to receive the benefits of the professional relationship. As Comment 12 to Iowa Rule 5.7 states, for those services that are treated as the practice of law when performed by a lawyer, "the lawyer providing such services must at all times and under all circumstances comply fully with the Iowa Rules of Professional Conduct."[92] Accordingly, in your author's opinion, the privilege should follow the dynamic changes in the practice of law. As the parameters of what constitutes the practice of law (at least when undertaken by lawyers) expands, the scope of the attorney-client privilege should expand proportionally.

Accordingly, if a lawyer has performed services for a client in the context of a legal practice (as distinguished from a separate business, even if law-related),[93] the presumption should be that the client genuinely was seeking legal advice, and that any communications with the attorney are within the privilege. When a lawyer undertakes to assist a client in a matter that may have legal implications, the introduction of an attorney-client relationship changes the environment in a manner that invites the protection of the privilege. The lawyer is able to bring to bear his or her legal training to provide legal advice as appropriate, or even to confirm that the law does not exact any additional obligations, and the client naturally expects that a confidential and fiduciary relationship has been created with a member of the legal profession.

2. *From a Professional Legal Adviser in that Capacity*

The attorney-client privilege ordinarily attaches to the attorney-client relationship, that is, when the lawyer as a duly-licensed legal practitioner

91. Rule 5.7, cmt. 12, Iowa R. Prof'l Conduct.

92. *Id.*

93. On law-related activities performed by a lawyer, see SISK & CADY, *supra* note 2, § 9:07(b)(2).

has been retained to perform legal services. Thus, when a person seeks or obtains legal or quasi-legal advice from someone that the person knows or should know is not admitted to the practice of law (such as a real estate broker or an accountant), the protection of the attorney-client privilege does not attach.

In a pre-Civil War decision, the Iowa Supreme Court held that the privilege never came into being when a putative client consulted a person he supposed to be an attorney, but who was not in fact admitted to practice.[94] In the ensuing century and a half, however, the court has never suggested, when addressing for example the misconduct of suspended attorneys in continuing to practice law, that the unsuspecting clients of those miscreant lawyers were not entitled to the protections of the professional relationship. If a client seeks the legal advice of a person that the client reasonably believes to be duly admitted to the practice of law, but who deceives the client about that status and instead is a suspended or disbarred lawyer or perhaps even someone who had never been admitted to the bar, the client defrauded by that counterfeit lawyer should not suffer the further injury of losing the attorney-client privilege.[95]

The privilege traditionally attached only when the client actually had retained the lawyer and thereby created an attorney-client relationship.[96] Today, a lawyer is forthrightly obliged to extend certain professional considerations to a prospective client, including, most notably, protection of confidential information, even if retention of the lawyer by that client is never consummated.[97] Moreover, it should be remembered that a formal contract or even the payment of a retainer is not necessary to create an attorney-client relationship, as the relationship may be implied from the parties' conduct and even established by evidence of the client's detrimental reliance on the attorney.[98] If a layperson relies on an

94. Sample v. Frost, 10 Iowa 266, 1859 WL 384, at *1 (Iowa Dec. 31, 1859).

95. *See* RICE, *supra* note 73, § 3.13 (addressing attachment of privilege when legal advice is given by an imposter consulted by a person with a reasonably mistaken belief that he was a lawyer).

96. Bailey v. Chi., Burlington & Quincy R.R. Co., 179 N.W.2d 560, 564 (Iowa 1970) (holding "there must exist an attorney-client relationship").

97. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 15, 70 (2000) (discussing lawyer's duties to prospective clients and including communications with prospective clients as privileged). On the duty of confidentiality owed to a prospective client under the new rules, see Rule 1.18, Iowa R. Prof'l Conduct, and SISK & CADY, *supra* note 2, § 5:18(d).

98. Kurtenbach v. TeKippe, 260 N.W.2d 53, 56 (Iowa 1977). On creation of the attorney-client relationship, see SISK & CADY, *supra* note 2, § 13.03(a).

attorney's professional status by entrusting the attorney with confidential information or by obtaining counsel on legal matters, and the attorney fails to affirmatively dissuade that person from confiding or placing trust in the attorney, then the attorney should not be heard later to deny the existence of an attorney-client relationship nor should the client be denied the benefit of the privilege.

3. *Communications Relating to the Purpose of Legal Advice*

The attorney-client privilege attaches to the contents of communications between a lawyer and a client, not to the underlying facts as to which those communications relate, not to the lawyer's mere observations of the client's appearance or mannerisms in a non-communicative sense, and not to documents or materials that did not record or otherwise refer to the substance of such communications. Unless the privilege is lost or waived, the lawyer must never be called as a witness to testify to the substance of a communication with a client, nor may the client be compelled to relate the nature of his or her reports to the lawyer. However, the client is not excused from responding to a lawful request for information about the client's conduct or for information within the client's knowledge or control by the mere fact that the client had communicated that information to a lawyer. While the client may not be asked what the client told his or her lawyer about an event, the client may appropriately be examined concerning the underlying event, unless of course the client has another legitimate objection to the question (such as the constitutional privilege against self-incrimination). Similarly, while written communications between a lawyer and client of course may be privileged in nature, "preexisting documents or documents which were not created as communications to the attorney . . . do not become privileged merely by virtue of being forwarded to the lawyer."[99]

In addition, as addressed above, it is the client's intent to obtain legal advice that animates the privilege.[100] Thus, communications that in their content are unrelated to the proper procurement of legal advice fall outside the protection afforded by the privilege. As discussed below, the privilege of course is forfeited when communications are made for an illegitimate

99. ADAMS & WEEG, *supra* note 68, § 5:504:10, at 380; *see also* Recker v. Gustafson, 279 N.W.2d 744, 746 n.1 (Iowa 1979) (holding that writings which are not privileged do not become privileged by turning them over to an attorney); Allen v. Lindeman, 148 N.W.2d 610, 615 (Iowa 1967) (holding that not every communication to a lawyer is privileged).

100. *See supra* Part IV.C.1.

purpose.[101] Likewise, communications between a lawyer and client that are clearly extraneous to any legal representation do not obtain the shield of the privilege.

However, unless the conversation is wholly unrelated to the representation and would not naturally occur within the relationship, a lawyer and client ought not be required to segregate those particular elements of a set of communications that relate directly to the legal objective of the representation from those that do not. The client cannot develop a trusting relationship with the lawyer if the client lives in fear that any apparent digression during a meeting with the lawyer may no longer be secret. And the lawyer cannot effectively obtain the information necessary to the representation if the lawyer must constantly interrupt to warn that the conversation is moving outside the strict boundaries of the representation and thus could fall outside the privilege. Indeed, as every practicing lawyer learns from experience, what may seem tangential to the client often provides important and legally significant context to the evaluation by a trained legal professional. Thus, the lawyer must be able to draw the client out and fully explore the matter, including going down what turn out to be some conversational dead-ends, in order to provide an informed legal representation. Moreover, the privilege may effectively be destroyed if a lawyer and a client are forced to explain why and how particular words or sentences uttered or written during the course of the representation are sufficiently connected to the objectives of the representation. In sum, lawyers and clients rarely ought to be put in the position of having to extract supposedly nonprivileged elements from an otherwise privileged set of communications.

4. *Made in Confidence*

The privilege is lost, or really never comes into being, if the communications are not made in secret. When the communication is made in a setting where no reasonable expectation of privacy exists or where unnecessary third persons are present, the communication simply is not confidential in nature and the privilege does not attach. Thus, for example, if the lawyer and the client exchange sensitive information while sitting in the public area of a crowded restaurant, where anyone could overhear the conversation, the necessary expectation of confidentiality is missing. Likewise, the privilege is vitiated by the presence of an unnecessary third person, again because privacy is absent.[102] However, the presence of a

101. *See infra* Part IV.D.1.

102. *See, e.g.*, State v. Craney, 347 N.W.2d 668, 678–79 (Iowa 1984) (homicide

third person who is reasonably necessary for the provision of the legal services does not destroy the privilege. Members of the lawyer's staff assisting in the matter share the lawyer's confidentiality.[103] While the presence of the client's family members ordinarily may not be regarded as necessary, the supportive attendance of the parent of a minor child or a relative or friend of a person with diminished capacity at the lawyer interview should not vitiate the privilege.[104]

Whether the presence of an expert during a communication removes the privilege from the conversation depends upon whether the expert is associated with the representation and whether the expert is expected to testify in a proceeding. Thus, for example, "because the presence of an accountant or financial advisor can be essential for the rendition of a legal opinion, the presence of such persons at attorney-client conferences does not destroy privilege otherwise existing."[105] Accordingly, when an expert of any nature is retained as a consultant to assist in the preparation of a case or to provide background to ensure more informed legal advice, that expert is within the lawyer's circle and otherwise protected communications made in the expert's presence remain entitled to the full protection of the privilege. However, if the expert is expected to testify, whether that person will be called on behalf of the client or the opposing side, then an expectation of confidentiality never arises.[106] Accordingly, when that person testifies as an expert witness, the attorney-client privilege

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defendant's telephone confession to his lawyer was made in presence of police officer); State v. Mickle, 202 N.W. 549, 551 (Iowa 1925) (homicide defendant gave a statement to the lawyer in the presence of the decedent's brother and railroad employees).

103. *See* IOWA CODE § 622.10(1) (2005) (including within the statutory privilege "the stenographer or confidential clerk" of the lawyer).

104. *See* Rule 1.14, cmt. 3, Iowa R. Prof'l Conduct ("The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege."); Jeffrey A. Parness, *The Presence of Family Members and Others During Attorney-Client Communications:* Himmel*'s Other Dilemma*, 25 LOY. U. CHI. L.J. 481, 492 (1994) (arguing that "'[c]ommon sense' suggests that individual clients of attorneys often face 'particularly trying' times and may require the presence of family members or friends during attorney-client communications so that professional legal services can be rendered effectively"(footnote omitted)).

105. Tausz v. Clarion-Goldfield Cmty. Sch. Dist., 569 N.W.2d 125, 127 (Iowa 1997).

106. *See, e.g.*, *Craney*, 347 N.W.2d at 673–78 (holding, however, that incriminating statements by criminal defendant to examining psychiatrist were inadmissible under the privilege against self-incrimination); State v. Tensley, 249 N.W.2d 659, 661–62 (Iowa 1977).

does not preclude asking the witness to relate conversations with the lawyer or the client or between the lawyer and the client while in the presence of the expert.

5. *By the Client (or the Lawyer)*

Under the traditional formulation, communication by the client to the lawyer, rather than by the lawyer to the client, realized the protection of the privilege. To be sure, the privilege most obviously applies to "information given sua sponte by a trusting client to her retained counsel."[107] For practical reasons, however, the supposed limitation of the privilege to the client's half of the conversation appears to have withered away. Even under the traditional understanding, if revelation of the lawyer's advice would have indirectly revealed the client's communications, the privilege attached. Given that the lawyer's advice almost invariably is responsive to the requests and explanations of the client, and thus revelation of that advice necessarily discloses the client's thoughts and understandings as conveyed to the lawyer, the privilege should be straightforwardly recognized as adhering to both sides of the conversation between the lawyer and the client.

Professors Geoffrey Hazard and William Hodes confirm the modern understanding that privilege "include[s] both up and downstream communications."[108] Professor James Adams and Iowa attorney Joseph Weeg in their treatise on evidence in Iowa, which is a companion volume to this present work, agree that "it seems unlikely that the Iowa appellate courts would conclude that [communications from the attorney to the client] do not come within the privilege."[109] And, indeed, nothing in Iowa decisions hints at such a crabbed approach that would allow listening in on one-half of the two-sided conversation between the attorney and the client.

6. *At the Client's Insistence Are Permanently Protected*

As discussed further below with respect to waiver,[110] the client controls the privilege. If the client does not wish certain matters that are communicated to the lawyer to be held in confidence, then the privilege

107. Bailey v. Chi., Burlington & Quincy R.R. Co., 179 N.W.2d 560, 565 (Iowa 1970).

108. HAZARD & HODES, *supra* note 44, § 9.7, at 9-26; *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 69, cmt. i (2000).

109. ADAMS & WEEG, *supra* note 68, § 5:504:10, at 382.

110. *See infra* Part IV.C.8.

either never comes into being or is waived. Still, in Iowa, "no express injunction of secrecy is essential" for the privilege to take effect.[111] When the client communicates with the lawyer in a setting in which privacy reasonably would be expected, the privilege presumably attaches, whether or not the client or the lawyer interrupts the conversation to specifically confirm the expectation that the communications will be kept secret. By contrast, if the lawyer acts as a mere conduit for transmitting information to another or is directed to place the information into the public record, such as by a court filing, then the client's communication to the lawyer or vice-versa was never intended to be held in confidence.[112]

Importantly, absent client consent or waiver, the privilege has no expiration date. As the Iowa Supreme Court stated in *Bailey v. Chicago, Burlington & Quincy Railroad Co.*, "the protective shield . . . generally survives the client's death, termination of the relationship, or dismissal of a case in litigation."[113]

7. *Protected from Disclosure by the Client or the Lawyer*

Absent voluntarily granted and informed consent by the client or waiver, the privilege protects the communication from disclosure whether the request for the information is directed to the client or to the lawyer. While, again, the client's knowledge about the facts or circumstances underlying the matter is not immunized by the attorney-client privilege, the client must be asked directly about those matters and not asked to relate what the client said to his or her lawyer about those facts or circumstances. If the client is present when arguably privileged communications are introduced into evidence, and neither the client nor the lawyer enters an objection, the privilege is deemed waived. If the client is not present, "the right of an attorney [to raise an objection] amounts to a duty."[114]

8. *Except the Protection Be Waived*

Even if all the necessary requisites for invoking the special protection

111. *Bailey*, 179 N.W.2d at 564.

112. *Id*. (holding that a communication is not intended to be confidential if the client intends information to be transmitted to others or if the communication would become a matter of public record, such as a pleading). *See generally* HAZARD & HODES, *supra* note 44, § 9.7, at 9-28 (discussing the scope of the attorney-client privilege).

113. *Bailey*, 179 N.W.2d at 564.

114. State v. Bean, 239 N.W.2d 556, 560 (Iowa 1976). On the duty of the lawyer to competently protect confidentiality, see *infra* Part VI.

of the attorney-client privilege are present, the privilege may be lost by waiver, either because the client voluntarily and knowingly surrenders the privilege or because the client takes an action that effectively surrenders the shield of confidentiality. If, for example, the client takes the stand and testifies about communications with a lawyer "in an attempt to secure some advantage by reason of transactions between himself and his counsel," then the lawyer may be "called by the other side to give his account of the matter."[115] Likewise, if the client intends to call his or her own lawyer as an expert witness to testify in litigation about the matter of the representation, the privilege is waived for discovery and trial purposes.[116] The client, however, may reestablish the privilege by withdrawing the designation of the lawyer as a witness before the disclosure of any confidential information.[117] A privilege is lost when a party "put[s] the sought-after information into issue in the litigation and then attempt[s] to prevent its disclosure by invoking the shield of privilege."[118]

Voluntary disclosure by a client of the contents of a privileged communication constitutes a waiver as to all other communications on that same subject. If part of the information is disclosed, thereby placing it in issue, the client may not withhold the remainder which may be necessary to place the whole in proper context. As the Iowa Supreme Court held in *State v. Tensley*, "it would be unfair to permit [a party] to elicit favorable aspects of the communications without permitting the [other party] an opportunity to elicit unfavorable aspects."[119] However, a waiver as to one subject does not constitute a waiver as to another subject.[120]

115. Knigge v. Dencker, 72 N.W.2d 494, 499 (Iowa 1955) (quoting Kelly v. Cummens, 121 N.W. 540, 541 (Iowa 1909)).

116. Squealer Feeds v. Pickering, 530 N.W.2d 678, 684–85 (Iowa 1995), *abrogated in part on other grounds by* Wells Dairy, Inc. v. Am. Indus. Refrigeration, Inc., 690 N.W.2d 38, 47–48 (Iowa 2004).

117. *Id.* at 685.

118. Waterloo/Cedar Falls Courier v. Hawkeye Cmty. Coll., 646 N.W.2d 97, 102 (Iowa 2002) (discussing journalist privilege).

119. State v. Tensley, 249 N.W.2d 659, 662 (Iowa 1977) (involving a psychiatric expert who examined the defendant at the request of a lawyer for purposes of testifying to his mental condition at a criminal trial).

120. Miller v. Cont'l Ins. Co., 392 N.W.2d 500, 504–05 (Iowa 1986) (holding that client affidavits discussing communications with the lawyer about statute of limitations, offered to support claim for damages for emotional distress experienced when their lawyer informed them the limitations period might bar their claim, thereby waived their attorney-client privilege, but only as to that matter).

D. *Exceptions to the Attorney-Client Privilege*

Whether viewed as the failure to establish a necessary element or instead as an exception, communications by persons with those who are not lawyers, communications made for purposes other than properly seeking legal advice (whether non-legal or criminal or fraudulent in nature), or communications conducted in circumstances where confidentiality could not reasonably be expected, do not obtain the protection of the attorney-client privilege.[121] Importantly, however, the privilege "is *not* subject to an exception simply because a private litigant, government agency, or other third party claims an important need to know what the client discussed with an attorney."[122]

1. *Crime-Fraud Exception*

If rather than seeking legitimate legal advice, the client solicits information and services from the lawyer in order to facilitate criminal or fraudulent conduct,[123] the attorney-client privilege is forfeited. As the Iowa Supreme Court said seventy years ago in *State v. Kirkpatrick*,

> It is a mistaken notion to think that an attorney has the right to assist in the perpetration of a fraud, and a mistaken notion to think that one having in mind the perpetration of a fraud or a crime can safely intrust this knowledge to an attorney any more than to anybody else.[124]

When the client is engaged in criminal or fraudulent conduct, and is using legal services in an effort to advance or conceal that behavior (with or without the attorney's knowledge), the illegitimacy of the objective prevents formation of an authentic attorney-client relationship with the attendant protection of the privilege. Importantly, for the privilege to be

121. *See supra* Part IV.C.

122. ABA Task Force on the Attorney-Client Privilege, *Report of the American Bar Association's Task Force on the Attorney-Client Privilege*, 60 Bus. Law. 1029, 1032 (2005).

123. For further discussion of the elements of fraud in the context of lawyer liability for fraud, see SISK & CADY, *supra* note 2, § 13:08.

124. State v. Kirkpatrick, 263 N.W. 52, 55 (Iowa 1935) (involving communications between an attorney and client regarding counterfeit city bonds); *cf.* State v. Romeo, 542 N.W.2d 543, 548 (Iowa 1996) (upholding conviction of attorney for preparation of two false receipts to document his client's supposed purchase of two stolen skid loaders and finding information regarding preparation of receipts was not privileged because of presence of third persons).

lost, the client must pervert the attorney-client relationship toward the proscribed end.

As Professors Hazard and Hodes emphasize, "the exception only applies where the communication is intended to or actually advances the client's illicit purpose; providing after-the-fact evidence of the crime or fraud is insufficient."[125] Of course, a person who retains legal counsel to provide a defense to past crimes or fraud is entitled to the protection of the privilege. Nor does revelation by the client of an intent to commit a future crime, assuming the communication does not in itself exploit the legal representation to advance the criminal intent, remove the privilege.[126] Although the lawyer may have discretion or even be required to disclose to law enforcement or other persons the client's intent to cause criminal harm to another person, through an exception to confidentiality under Rule 1.6,[127] the persistence of the privilege would preclude the lawyer from being called to testify against the client regarding that communication.[128]

The deliberate misuse of legal services by a client in furtherance of a crime or fraud, which thereby vitiates the privilege, should be carefully differentiated from the pursuit of legal advice by a client regarding the legality of a proposed course of action that the lawyer then determines would be criminal or fraudulent. The latter is covered by the privilege so that persons are encouraged to obtain the assistance of lawyers in an effort to conform their behavior to the requirements of the law. The mark of distinction between the perversion of legal services to an illicit end and the commendable seeking of legal counsel about the boundaries of the law may be found in how the client responds to the legal advice, whether with appropriate acceptance of the legal limitations or intransigent insistence upon realizing an illegal end. Another important indicator of legitimacy is whether the client has been forthright in seeking legal counsel about the matter, as contrasted with deceiving the lawyer about the client's conduct while using the legal representation to avoid detection of misconduct. For this reason, the *Restatement of the Law Governing Lawyers* maintains that the attorney-client privilege is lost only if the client, after obtaining the lawyer's advice, actually accomplishes the unlawful purpose, that is,

125. HAZARD & HODES, *supra* note 44, § 9.10, at 9-41.

126. *See* Newman v. State, 863 A.2d 321, 335–36 (Md. 2004) (citing numerous federal and state cases).

127. *See infra* Part VII (discussing the exceptions in Rules 1.6(b)(1) and 1.6(c) regarding disclosure to prevent death or substantial bodily harm).

128. On the relationship between exceptions to confidentiality under the rule and the independent protection of the attorney-client privilege, see *infra* Part IV.D.5.

commits the crime or engages in a criminal attempt.[129]

2. *Joint-Client Privilege*

Under the so-called "joint client exception" to the attorney-client privilege, when two or more persons jointly consult with the same lawyer (or law firm) to represent them on a matter of common interest, neither person may invoke the privilege to prevent disclosure by the lawyer of communications to the other person.[130] "Thus, when the same attorney acts for two parties, the communications are privileged from third persons in the controversy, but not in a subsequent controversy between the two parties."[131] The joint-client privilege rule is not really an exception to the privilege, because the communications remain fully privileged as to the outside world. Rather, this rule reflects the practical understanding that the lawyer's common duty to zealously represent both clients necessarily means that all material information relating to the representation must be fully shared by the lawyer with both clients, including communications made by one client to the lawyer outside the presence of the other client.[132] Because both clients are entitled to be kept fully informed by the lawyer,[133] the lawyer may not keep a secret on behalf of one client that would be contrary to the interest of the other client. And one client may not invoke the privilege against the other, should they become adversaries as to this matter in the future.

Importantly, the privilege in the joint-client scenario remains robust as applied to strangers to the attorney-client relationship. In *State v.*

129. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 82(a) (2000) (providing that the client's unlawful purpose must be "later accomplished" for the privilege not to apply). Comment c to Section 82 of the Restatement explains that "accomplished" includes not only taking actions that result in criminal harm but also actions taken that constitute a criminal attempt even if the criminal end is frustrated. *Id.*

130. Brandon v. W. Bend Mut. Ins. Co., 681 N.W.2d 633, 639 (Iowa 2004); City of Coralville v. Iowa Dist. Ct. for Johnson County, 634 N.W.2d 675, 677 (Iowa 2001). On joint representation and conflicts of interest, see SISK & CADY, *supra* note 2, § 5:07(d)(3)–(5) (quoting 1 JOHN W. STRONG, MCCORMICK ON EVIDENCE § 91, at 365–66 (5th ed. 1999)).

131. *Brandon*, 681 N.W.2d at 639.

132. *See* Henke v. Iowa Home Mut. Cas. Co., 87 N.W.2d 920, 924 (Iowa 1958).

133. *See* Rule 1.4, Iowa R. Prof'l Conduct; Rule 1.7, cmt. 31, Iowa R. Prof'l Conduct ("[T]he lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit.").

Hollins, the Iowa Supreme Court considered an episode in which the same lawyer had initially represented both criminal defendants in a joint defense, but then one co-defendant chose to plead guilty and testify as a witness for the prosecution about the facts of the charged offense (but not as to confidential communications with his lawyer).[134] The court held that the testifying co-defendant had not thereby waived the privilege and thus the lawyer could not take the stand to testify for the remaining co-defendant by attacking the credibility of the testifying co-defendant.[135] Similarly, in a joint-client scenario, one client cannot waive the privilege of the other client as against third persons.

3. *Identity of Client and Payment of Fees Exceptions*

Traditionally, the attorney-client privilege did not extend to the identity of the client or the payment of fees by the client, under the reasoning that these were facts that the lawyer observed rather than communications made by the client to the lawyer. However, as the Iowa Supreme Court has recognized, if "reveal[ing] a client's name would be to disclose the whole relationship and confidential communications," then a trial court would have the discretion to preserve the privilege.[136] If disclosing that a particular person sought legal advice would allow others, such as law enforcement, to combine knowledge of that now-revealed identity with other information and thereby construct a basis for pursuing adverse action against the client, such as criminal prosecution, then the presumption that mere identity is not privileged has been overcome. In such instances, the essential purpose of the privilege of encouraging persons to seek legal advice would be promoted by preserving anonymity. In theory, if the mere existence of a fee arrangement likewise would have the effect of revealing the very nature of the representation in a manner that redounded to the detriment of the client, the privilege might extend to the payment of the fee. However, the courts have rejected the argument that this theory excuses a lawyer who receives payment from a client of more than $10,000 in cash from making the required report to the Internal Revenue Service.[137]

134. State v. Hollins, 184 N.W.2d 676, 677–78 (Iowa 1971).

135. *Id.* at 678–79.

136. State v. Bean, 239 N.W.2d 556, 561 (Iowa 1976) (quoting 81 AM. JUR. 2D *Witnesses* § 213 (1971)).

137. *See generally* HAZARD & HODES, *supra* note 44, § 9.11, at 9-47 to -49.

4. *Lawyer Self-Defense*

In *State v. Bastedo*, the Iowa Supreme Court held that

> A relevant communication between lawyer and client is not privileged when offered on the issue of a breach of duty by lawyer to client, and the attorney is no longer bound by his obligation of secrecy when his client charges him with fraud or other improper or unprofessional conduct, and in such circumstances he may testify as to the facts.[138]

Thus, when the legal services provided by the lawyer become a matter of controversy with the client, the lawyer is permitted to defend the quality and nature of his or her work, including relating the content of communications with the client as necessary to that defense.

5. *Exceptions to Confidentiality Under the Rules and the Independent Protection of the Attorney-Client Privilege*

As will be the subject of much of the rest of this Article,[139] paragraphs (b) and (c) of Rule 1.6 of the Iowa Rules of Professional Conduct articulate certain exceptions to confidentiality, permitting, and in one circumstance (preventing imminent death or substantial bodily harm) requiring, disclosure of information that the lawyer otherwise is ethically bound to hold as confidential.[140] In narrow circumstances, Rules 3.3[141] and 4.1[142] also require the lawyer to reveal information, again including information that otherwise would be confidential under Rule 1.6, when necessary to prevent or correct client fraud against a tribunal or another person. By their terms, these exceptions apply to disclosure by the lawyer of that general category of ethically-protected confidential information, which is broadly defined in paragraph (a) of Rule 1.6.[143] While this nearly all-encompassing category of ethically-protected confidential information certainly includes the lawyer's communications with the client, it more broadly covers all

138. State v. Bastedo, 111 N.W.2d 255, 260 (Iowa 1961) (holding the testimony by former attorney about client statements during plea bargain negotiation in response to charge by client that he had not voluntarily entered a plea to a criminal charge after proper advice by his attorney was not barred by privilege) (quoting 97 C.J.S. *Witnesses* § 283 (1957)).

139. *See infra* Parts VII–XI.

140. Rule 1.6(b)–(c), Iowa R. Prof'l Conduct.

141. *See* Rule 3.3(a)(3), (c), Iowa R. Prof'l Conduct; *infra* Part XIII.

142. *See* Rule 4.1(b), Iowa R. Prof'l Conduct; *infra* Part VIII.C.

143. Rule 1.6(a), Iowa R. Prof'l Conduct.

information held by the lawyer that is related to the representation.[144] By contrast, as explained above,[145] the attorney-client privilege attaches to a special subset of that confidential information, protecting only those communications between the lawyer and the client that are entitled to be held immune from legal process and that may not be adduced as evidence against the client.[146] Confidential material thus is broadly defined, but subject to several exceptions, and may not be entitled to any immunity from legal process, while privileged information is more narrowly classified (attaching only to certain communications between the lawyer and client), but is subject to fewer exceptions and does provide immunity from legally compelled disclosure. Because privileged communications fall within the broader category of ethically-protected confidential information, the question naturally arises as to whether an exception under the rules for disclosure of confidential information should also be understood to permit or require the lawyer to disclose information falling within the subset of privileged material, and if so, how this authorization squares with the purpose of the privilege.

For the limited purposes and nonevidentiary means for and by which disclosure is allowed under the rules, the exceptions to confidentiality in Rules 1.6, 3.3, and 4.1 certainly do apply with equal force to the subset of confidential information that consists of communications between the lawyer and client. Given that the most important information concerning a representation ordinarily is obtained by the lawyer through communications with the client or is inextricably intertwined with such communications, the exceptions to confidentiality in the rules would have little effect if such information were regarded, not only as being privileged against evidentiary use, but also as shielded from ethically-permitted or ethically-required disclosure. Thus, for example, a lawyer's knowledge about the risk of serious harm to another typically will have been generated from the client's statements to the lawyer, meaning that any disclosure of that information to save a person from death or substantial bodily harm or substantial economic injury necessarily requires sharing information that was received from what may be a privileged attorney-client communication. However, as explained below, unless an exception to confidentiality in the ethics rules aligns with an exception to the attorney-client privilege, any disclosure by the lawyer is limited to nontestimonial revelation for an extra-evidentiary purpose.

144. *See supra* Part III.
145. *See supra* Part IV.A.
146. *See supra* Part IV.B–C.

Understanding that the attorney-client privilege is designed to provide absolute immunity from legally compelled process to provide evidence or testimony,[147] the exceptions to confidentiality set forth in the Iowa Rules of Professional Conduct that allow sharing of certain information are *not* exceptions to the attorney-client privilege.[148] As the Maryland Court of Appeals ruled in *Newman v. State*, "[t]o permit a Rule 1.6 disclosure to destroy the attorney-client privilege and empower the attorney to essentially waive his client's privilege without the client's consent is repugnant to the entire purpose of the attorney-client privilege in promoting candor between attorney and client." [149] That a lawyer may be permitted or even required under the rules to divulge client confidences, including sharing information obtained through communications with a client, for the limited purposes of preventing or correcting a serious harm or advancing some other important interest, does not necessarily mean that the lawyer may be called as a witness in a legal proceeding or otherwise be required to provide evidence that would be admissible against the client. The exceptions in the ethics rules do not and cannot direct introduction of attorney-client communications into evidence in any proceeding, or inquiry about such communications through any legally compelled process. Unless an exception to confidentiality under the rules is coextensive with a recognized exception to the attorney-client privilege, the lawyer is authorized by a confidentiality exception in the rules to disclose information only in the manner and to the extent necessary to prevent or correct the harm or achieve the other purpose, but not to testify or give evidence against the client. If, however, the attorney-client privilege does not attach or has been vitiated, as for example when the lawyer's advice has been abused by the client in furtherance of fraudulent or criminal conduct, then an exception to confidentiality under the rules may prove to be parallel with an exception to the statutory and common-law privilege. When the privilege fails, the lawyer not only may be allowed or required by the ethics rules to disclose information to prevent harm, but the attorney may be called to give testimony or other evidence regarding the substance

147. *See* RICE, *supra* note 73, § 2.2, at 10 (explaining that, when the elements of the privilege have been satisfied and no exception to the privilege applies, "communications between the attorney and client will be protected," and further, that "this protection is absolute").

148. *Cf. In re* Marriage of Hutchinson, 588 N.W.2d 442, 446 (Iowa 1999) (stating that while a physician is prohibited by the physician-patient privilege from providing evidence, the privilege does not prohibit disclosures of confidential communication in a nontestimonial context, which instead is governed by the physician's ethical obligation of confidentiality).

149. Newman v. State, 863 A.2d 321, 333 (Md. 2004).

of those nonprivileged attorney-client communications.

Two not-so-hypothetical scenarios serve to illustrate the point that the exceptions to confidentiality in the rules (allowing sharing of confidential client information) do not necessarily correspond to exceptions to the attorney-client privilege (allowing testimony or evidence about lawyer-client communications). First, suppose that a lawyer were to learn from a confidential dialogue with his or her client that the client intends to commit a violent attack on the opposing party, but the client has not used legal advice in furtherance of that unlawful objective so as to vitiate the privilege. In this situation, under paragraph (b) of Rule 1.6, the lawyer would be permitted to disclose the information if the anticipated attack were reasonably certain to result in death or substantial bodily harm, and, under paragraph (c) of Rule 1.6, the lawyer would be required to disclose the information if the harm were imminent.[150] However, after revealing the planned attack in a manner designed to prevent the harm, the lawyer would not be free nor could he or she be compelled to testify as a witness against the client in a subsequent criminal prosecution. The testimonial/evidentiary privilege would remain intact. The lawyer might be permitted (and perhaps required) to share information gleaned from attorney-client communications with the target of the planned attack or with law enforcement, but the privilege against introduction of the lawyer's revelation into evidence would not be abrogated.[151]

Second, and by contrast, if a lawyer were to learn that his or her client had used the lawyer's legal advice in furtherance of a fraudulent scheme that if undisclosed would cause substantial injury to another person's financial interests, the lawyer would be permitted (and perhaps required) under Rules 1.6(b)(2) and (3) and 4.1(b) to disclose the information as

150. *See* Rule 1.6(c), Iowa R. Prof'l Conduct; *infra* Part VII.

151. *See, e.g.*, *Newman*, 863 A.2d at 328–37 (ruling that lawyer's disclosure under ethics rules of client's intent to kill former husband and their children did not defeat defendant's assertion of attorney-client privilege at trial for conspiracy to commit murder and other felonies, that the crime-fraud exception did not apply, and that lawyer should not have been required to testify, thus requiring reversal of conviction and remand for a new trial); Purcell v. Dist. Attorney, 676 N.E.2d 436, 437–41 (Mass. 1997) (ruling that, while the lawyer under ethics rules properly revealed to law enforcement threats made by the client while consulting the lawyer that the client would burn down his apartment building, the trial court erroneously denied the lawyer's motion to quash a subpoena to testify regarding those incriminating statements in a prosecution of the client for attempted arson because the crime-fraud exception to the attorney-client privilege did not apply as the communications were not for the purpose of assisting or furthering the threatened criminal conduct).

necessary to prevent the harm from being realized.[152] And because the client had used legal advice in furtherance of fraud or crime, the privilege would be lost and the lawyer could choose to or be compelled to be a witness against the client.[153]

E. *Attorney-Client Privilege for Entities*

No less than any other client, the organization client is entitled to the lawyer's fiduciary protection of confidential information.[154] Under Rule 1.6(a), the lawyer's duty to maintain confidentiality is broadly extended to all information relating to the representation of the client.[155] Thus, whether the lawyer for the organization has gathered information through communications with organization personnel or instead has discovered information from other sources, the broad scope of confidentiality under the rules applies with full force here. Accordingly, in most respects, the lawyer's responsibility to safeguard information relating to representation of an organization client is the same as that for a client who is a natural person.

In three important ways, however, the lawyer's responsibility to protect confidential information requires an evaluation peculiar to the nature of the organization client: (1) identifying the "client" for purposes of the attorney-client privilege; (2) determining who within the organization may consent to disclosure of confidential information; and (3) establishing when the lawyer is authorized to reveal confidential information as reasonably believed necessary to prevent substantial injury to the organization by the misconduct of someone within the entity.

First, the lawyer must identify who is the "client" for purposes of the special sub-species of confidential information that falls within the nigh-absolute attorney-client privilege.[156] While the lawyer generally is obliged to protect all information relating to the representation and not voluntarily disclose such information,[157] the lawyer nonetheless is required to respond to a lawful subpoena or court order seeking information outside the parameters of the privilege. By contrast, the lawyer may not be compelled

152. *See infra* Part VIII.

153. *See supra* Part IV.D.1.

154. *See* Tausz v. Clarion-Goldfield Cmty. Sch. Dist., 569 N.W.2d 125, 128 (Iowa 1997) ("recogniz[ing] an attorney-client privilege with respect to some communications between public agencies or public officials and their lawyers").

155. Rule 1.6(a), Iowa R. of Prof'l Conduct; *supra* Part III.

156. On the attorney-client privilege generally, see *supra* Part IV.

157. *See* Rule 1.6(a), Iowa R. of Prof'l Conduct; *supra* Parts III, VI.

through legal process to divulge the substance of communications falling within the privilege. Thus, the contents of communications between an attorney and a client constitute a specially-protected subset of confidential information.[158]

The Iowa Supreme Court has long recognized that the attorney-client privilege protects communications between a lawyer and a client organization.[159] However, prior to adoption of the Iowa Rules of Professional Conduct, the court did not have occasion to consider which person or persons associated with the organization constitute the alter ego of the entity for purposes of confidential communications, such that their exchanges with organization counsel fall within the attorney-client privilege. The attorney-client privilege certainly encompasses communications between organization counsel and those constituents of the organization who have decision-making power regarding the legal representation (the so-called "control group"), those who constitute speaking agents for the entity (and thus whose statements would constitute an evidentiary admission against the organization), and those who have taken actions that might be imputed to the organization (and thus whose conduct directly implicates the organization's need for legal counsel and representation). To encourage constituents of the organization to freely seek legal counsel with respect to any matter that might affect the organization, the privilege should also extend to anyone associated with the organization who approaches the lawyer for legal advice respecting the entity, that is, when communication is initiated by an organization constituent rather than the lawyer.

Thus, the only question in Iowa that might remain somewhat open is whether the privilege also extends to organization employees who are without authority to decide or speak on behalf of the entity or otherwise bind the entity, who are not alleged to have engaged in any conduct that may be imputed to the organization, and who thus are merely witnesses to a matter about which the organization lawyer initiates communication. The particular question concerns the coverage of the privilege when a lawyer for the organization conducts an investigation of an episode (such as an accident) or a pattern of behavior (such as suspected wrongdoing), for which purpose the lawyer conducts interviews with employees who, while

158. *See supra* Part IV.

159. *See, e.g.*, Brandon v. W. Bend Mut. Ins. Co., 681 N.W.2d 633, 639 (Iowa 2004); Squealer Feeds v. Pickering, 530 N.W.2d 678, 683–84 (Iowa 1995), *abrogated in part on other grounds by* Wells Dairy, Inc. v. Am. Indus. Refrigeration, Inc., 690 N.W.2d 38, 47–48 (Iowa 2004).

not themselves being involved in or having taken action with respect to the matter, may have information as observers of what occurred.

For purposes of the federal attorney-client privilege, the United States Supreme Court, in *Upjohn Co. v. United States*, held broadly that when employees are directed by corporate superiors to talk with corporate counsel about topics falling generally within the subject matter of their employment and the information is being gathered to assist corporate counsel in devising appropriate legal advice to the corporation, those communications are privileged.[160] As Professor Michael Paulsen explains, "[t]he reason a broad band of communications to counsel are treated as privileged is because it will enable counsel to give legal advice to the corporation concerning possible courses of conduct to pursue, in light of the information gathered."[161] The *Upjohn* approach, which is the majority view, is also reflected in section 73 of the *Restatement of the Law Governing Lawyers*.[162]

A distinct minority of courts, notably including the Arizona Supreme Court in *Samaritan Foundation v. Goodfarb*,[163] have concluded that this "subject matter" test for entity attorney-client privilege sweeps too broadly, covering employees who do not stand as alter egos of the entity. In *Samaritan Foundation*, the court held that:

> [W]here someone other than the employee initiates the communication, a factual communication by a corporate employee to corporate counsel is within the corporation's privilege if it concerns the employee's own conduct within the scope of his or her employment and is made to assist the lawyer in assessing or responding to the legal consequences of that conduct for the corporate client. This excludes from the privilege communications from those who, but for their status as officers, agents or employees, are witnesses.[164]

While a definitive answer to this narrow and discrete remaining

160. Upjohn Co. v. United States, 449 U.S. 383, 389–97 (1981).

161. Michael Stokes Paulsen, *Who "Owns" the Government's Attorney-Client Privilege?*, 83 MINN. L. REV. 473, 496 (1998).

162. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 73 (2000).

163. Samaritan Found. v. Goodfarb, 862 P.2d 870 (Ariz. 1993), *superseded by statute*, ARIZ. REV. STAT. ANN. § 12-2234 (2003).

164. *Id.* at 880; *see also* Martin v. Workers' Comp. Appeals Bd., 69 Cal. Rptr. 2d 138, 147 (Cal. Ct. App. 1997) ("We conclude that when an employee's only connection is as an independent witness, not as a co-defendant or as the natural person to speak for the employer, such statements do not become privileged just because they are given for transmittal to the employer's attorney in preparation for litigation.").

question regarding the scope of entity attorney-client privilege has not yet been reached in Iowa, Comment 2 to Iowa Rule 1.13 articulates a remarkably broad understanding of confidentiality for communications by a lawyer with the constituents and employees of the organization:

> When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by rule 32:1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by rule 32:1.6.[165]

Although this comment refers to information protected as confidential under Rule 1.6, rather than under the attorney-client privilege as such, the specific reference to an investigation by a lawyer, which entails direct communications with a variety of persons within the organization, favorably regards the lawyer's efforts to obtain information from organization constituents for purposes of providing legal advice and is consistent with an understanding that the protection of privilege extends to these interviews as well.[166]

In any event, the occasions on which an answer to this privilege coverage question would have to be reached are so rare that the need to resolve the issue may never arise in Iowa. The attorney-client privilege immunizes only the substance of the communications between the attorney and client and ordinarily does not permit concealing the underlying facts. When law enforcement, prosecutors, or opposing parties seek information from organization employees or agents who were merely witnesses, these persons may be questioned directly, either through informal interviews, if permitted,[167] or by means of legal processes such as an oral deposition or court testimony. Only in the exceptional situation where, as was the case in *Samaritan Foundation*,[168] the organization employee no longer recalls the

165. Rule 1.13, cmt. 2, Iowa R. Prof'l Conduct.

166. *See id.*; *see also* ADAMS & WEEG, *supra* note 68, § 5.504:10, at 386 (predicting "that Iowa's courts will follow the 'subject matter' approach used in *Upjohn*") (italics added).

167. On contacts with organization employees without the consent of the lawyer for the organization, see Rule 4.2, Iowa R. Prof'l Conduct and SISK & CADY, *supra* note 2, § 8:02.

168. *Samaritan Found.*, 862 P.2d at 873, 880–81 (holding that when, after child's heart stopped during surgery, nurses and scrub technician employed by the hospital were interviewed at direction of hospital counsel investigating the incident, but

material elements of the event or matter in question when it later becomes the subject of litigation, would there even arguably be a basis for requesting access to organization counsel's contemporaneous notes about inquiries directed to those employees as part of a preliminary investigation by the lawyer.

Second, because rights respecting confidential information, including the substance of privileged communications, belong to the client, the organization client is entitled to waive confidentiality and share information or to authorize the lawyer to share information, as the organization so chooses. Thus, the lawyer must determine who within the organization has the authority to decide whether to maintain or waive confidentiality, which in turn requires that the lawyer develop a working understanding of the organization's nature and structure. This, of course, is the level of understanding that the lawyer must secure in any event to properly follow his or her general duty to respond to the duly authorized constituents of the entity. The determination may be a little more complicated when the disclosure of the information, although arguably in the best interests of the organization, would be contrary to the interests of the constituent to whom the lawyer ordinarily reports. In that circumstance, the lawyer may need to procure a decision on disclosure from a higher authority within the organization. Whenever necessary to avoid confusion, the lawyer should emphasize to the constituents and employees of the entity that the confidential nature of communications made to the lawyer is within the sole control of the organization. Statements made by those within the organization may be secreted or openly revealed at the option of the organization.

Third, as discussed below,[169] paragraph (c) of Rule 1.13 grants the lawyer for an entity carefully circumscribed authority to disclose confidential information when necessary to protect the best interests of the organization client against serious harm by reason of the misconduct of a

when deposed two years later, those interviewed could no longer remember what happened in the operating room, the contemporaneous summaries of those interviews were discoverable in medical malpractice suit against hospital and were not privileged because the interviewed employees were merely fact witnesses). The Arizona Legislature subsequently overturned *Samaritan Foundation*, essentially adopting the *Upjohn* approach and extending the privilege to a communication by an employee or agent of the organization to the organization's legal counsel "[f]or the purpose of obtaining information in order to provide legal advice to the entity or employer or to the employee, agent or member." ARIZ. REV. STAT. ANN. § 12-2234(B)(2) (2003).

169. *See infra* Part XII.

person within the organization.[170] Importantly, this permissive exception to the lawyer's duty to protect confidential information is, from the perspective of the organization, self-regarding only and not other-regarding. While Rule 1.6 contains exceptions that authorize (and even mandate) the lawyer to disclose confidential information as necessary to prevent or mitigate harm to someone other than the client,[171] paragraph (c) of Rule 1.13 permits disclosure only as designed to benefit the organization.[172]

F. *Attorney-Client Privilege and Government Lawyers*

During criminal investigations of the Clinton Administration by separate independent counsels, two federal Courts of Appeals upheld the basic principle that the government lawyer's responsibility goes beyond the person of the office-holder and attaches to higher government authority charged with protecting the public interest. In separate cases, these courts ruled that the attorney-client privilege could not be invoked to prevent official White House lawyers (as contrasted with President Clinton's personal legal counsel) from being called to testify or to produce documents involving communications with the President about his alleged criminal wrongdoing.[173] When a government lawyer learns through communications with a government official of possible criminal misconduct, neither the lawyer nor the government official may rely on the attorney-client privilege to shield such information from disclosure to a grand jury.

While these two decisions may be faulted for framing the issue primarily as whether a government attorney-client privilege existed at all in the context of a criminal investigation, the outcome may be better understood as simply confirming that the government entity itself, as the lawyer's ultimate client, is entitled to control the attorney-client privilege. Given the basic rule that the attorney-client privilege is held by the client, the government lawyer may be compelled to disclose otherwise privileged information if called upon to do so by that government client, when acting through a legally authorized constituent, whether or not such disclosure is in the personal interest of the government officer to whom the lawyer ordinarily reports. In other words, the conclusion for the government

170. Rule 1.13(c), Iowa R. Prof'l Conduct.

171. *See infra* Parts VII, VIII.

172. Rule 1.13(c), Iowa R. Prof'l Conduct.

173. *In re* Lindsey, 158 F.3d 1263, 1267–78 (D.C. Cir. 1998); *In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 915–21 (8th Cir. 1997).

lawyer is the same as it would be for the corporate lawyer who is directed by a board of directors to waive the attorney-client privilege and disclose to a government regulator or other outside parties the substance of communications with a corporate officer, whether or not that individual officer would so desire that revelation.[174]

By contrast, when someone outside the government seeks access to confidential communications between a government lawyer relating to representation of a government client, the attorney-client privilege protects the substance of that communication from outside interference. In *Tausz v. Clarion-Goldfield Community School District*, the Iowa Supreme Court "recognize[d] an attorney-client privilege with respect to some communications between public agencies or public officials and their lawyers."[175] However, when the communication with government legal counsel occurs during a meeting of a government body subject to public meeting laws (as contrasted with a government lawyer's confidential counsel to a government official or within a government legal office), the court explained "that the privilege must be carefully circumscribed so as to prevent an abuse of utilizing closed sessions when public sessions are required by statute."[176] Adopting a case-by-case approach to evaluating a conflict between the privilege and public meeting laws, the court in *Tausz* affirmed the protection of the privilege for communications in which a school board sought legal advice from its lawyer on pending litigation, while suggesting that the privilege may not have applied to a colloquy about a resolution that was to be offered for a vote in public session.[177]

V. ATTORNEY WORK-PRODUCT

When an opposing party in litigation seeks information related to the lawyer's representation of a client, certain materials sought may be protected by the work-product doctrine, as well as or instead of the attorney-client privilege. In contrast with communications between a client and lawyer, which are privileged, the rules of civil procedure provide a high

174. For a detailed examination and critique of the *Lindsey* and *Grand Jury Subpoena* cases, and an argument that the government attorney-client privilege should be analogized to that which exists for a corporation, see generally Paulsen, *supra* note 161.

175. Tausz v. Clarion-Goldfield Cmty. Sch. Dist., 569 N.W.2d 125, 128 (Iowa 1997). On the attorney-client privilege for municipalities, see generally Jeffrey L. Goodman & Jason Zabokrtsky, *The Attorney-Client Privilege and the Municipal Lawyer*, 48 DRAKE L. REV. 655 (2000).

176. *Tausz*, 569 N.W.2d at 128.

177. *Id.* at 128–29.

but not absolute measure of protection to the attorney's work-product; that is, the attorney's preparation of notes and reports and accumulation of materials in anticipation of litigation.

Strictly speaking, the work-product doctrine is a protection or immunity against discovery and not a privilege. The work-product protection may be pierced when the opposing party shows sufficient need for the information, while the attorney-client privilege may not be breached simply because someone else asserts a compelling need for the information. Thus, in this respect, the work-product doctrine is less powerful than the attorney-client privilege. However, the work-product doctrine is more encompassing than the attorney-client privilege. As one federal appellate court has explained: "Unlike the attorney-client privilege, which protects all communication whether written or oral, work-product immunity protects documents and tangible things, such as memorandums, letters, and e-mails."[178]

The work-product doctrine is designed to protect "the mental processes of the attorney."[179] To serve that purpose, the doctrine necessarily applies not only to those documents that directly reveal the lawyer's opinions (although this element receives the highest protection), but also to the lawyer's preparation and assembly of other documents and materials, recording of or referring to factual observations, interviewing of witnesses, inquiries made, etc. The examination of these materials might provide clues about the lawyer's evaluation of matters and strategy. Moreover, this collected body of materials constitutes the tangible result of the lawyer's efforts, upon which an opponent should not be permitted to piggy-back. The pertinent discovery rule extends a nearly insuperable level of "protect[ion] against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation" (what is sometimes called "opinion work-product").[180] The rule also bars access without a showing of substantial need to other "documents and tangible things" that have been "prepared in anticipation of litigation" (which are sometimes called factual work-product).[181]

178. *In re* Echostar Commc'ns Corp., 448 F.3d 1294, 1301 (Fed. Cir. 2006).

179. United States v. Nobles, 422 U.S. 225, 238 (1975).

180. Iowa R. Civ. P. 1.503(3).

181. *Id.*; *see, e.g.*, SEC v. Treadway, 229 F.R.D. 454, 456 (S.D.N.Y. 2005) (ruling that "[e]ven if elements of notes could be considered 'factual work product' from which the 'mental impressions, conclusions, opinions, or legal theories of an attorney' could be redacted," the party seeking the notes still had not made the required showing to obtain discovery); Shook v. City of Davenport, 497 N.W.2d 883,

In the seminal decision of *Hickman v. Taylor*, the United States Supreme Court explained:

> In performing his various duties . . . it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed . . . as the "work product of the lawyer." Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.[182]

Under Rule 1.503(3) of the Iowa Rules of Civil Procedure, materials prepared "in anticipation of litigation" are protected from discovery, unless the party seeking the information demonstrates a "substantial need of the materials in the preparation of the [party's case] and that the party . . . is unable without undue hardship to obtain the substantial equivalent of the materials by other means."[183]

889 (Iowa 1993) (holding that, even if the party seeking discovery had made a substantial need showing, the trial court should separate out opinion from factual work-product and permit disclosure only of the factual material), *overruled on other grounds* by Wells Dairy, Inc. v. Am. Indus. Refrigeration, Inc., 690 N.W.2d 38, 48–49 (Iowa 2004); State *ex rel.* Erie Ins. Property & Cas. Co. v. Mazzone, 625 S.E.2d 355, 361 (W. Va. 2005) (ruling that opinion work has near absolute immunity from discovery while factual work product may be obtained by the still high showing of substantial need).

182. Hickman v. Taylor, 329 U.S. 495, 510–11 (1947).

183. Iowa R. Civ. P. 1.503(3).

VI. ACTING COMPETENTLY TO PRESERVE CONFIDENTIALITY

A. *General Duty to Safeguard Confidential Information*

Because information related to the representation is broadly protected as confidential,[184] every lawyer must institute appropriate measures within his or her law practice to safeguard client information. The lawyer must ensure that venues for confidential communications are available and maintained as private when necessary, that both traditional hard-copy and electronic information are well-secured within the office, that access to information by those not so entitled is precluded, that information-gathering activities are designed with preservation of confidentiality in mind, and that the lawyer responds vigorously and promptly to assert client confidentiality whenever information is sought by others to which a colorable objection may be made. As Comment 17 to Rule 1.6 anticipates, when information is of greater sensitivity, a confidentiality agreement so requires, or the client demands additional measures, special security measures may need to be implemented.[185]

As an essential part of the lawyer's supervisory responsibility over nonlawyer assistants under Rule 5.3 of the Iowa Rules of Professional Conduct,[186] the lawyer must give appropriate instructions to employees about professional obligations, specifically and especially including the duty to safeguard protected information about clients.[187]

B. *Use of Modern Communications Technology*

Modern communications technology certainly does introduce a greater risk of inadvertent disclosure of confidential information through erroneous transmission to unintended recipients, as addressed below.[188] However, the prudent use of such means of communication, including cellular telephones and electronic mail (e-mail), ordinarily is sufficiently secure that extraordinary precautions need not be made beyond the usual office procedures designed to ensure that access is limited to those permitted access to confidential information. Comment 17 to Iowa Rule 1.6 provides that the lawyer's duty to "take reasonable precautions to prevent the information from coming into the hands of unintended

184. Rule 1.6(a), Iowa R. Prof'l Conduct; *see also supra* Part III.
185. Rule 1.6, cmt. 17, Iowa R. Prof'l Conduct.
186. Rule 5.3, Iowa R. Prof'l Conduct.
187. *See generally* SISK & CADY, *supra* note 2, § 9:03(b).
188. *See infra* Part VI.C.

recipients . . . does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy."[189] Thus, just as the lawyer must take reasonable measures to prevent others in the office from eavesdropping upon a telephone conversation, so should the lawyer ensure that password protection is used to prevent intrusion into electronic documents and transmissions. Wireless internet access should include use of firewalls and passwords to deter hacking into computers or interception of wireless communications. Likewise, the lawyer should use a reputable internet service provider who maintains appropriate security over e-mail servers. When disposing of computer disks and drives containing confidential information, including records of electronic transmissions, the lawyer should see that disks are properly destroyed and drives are wiped clean, using readily available and relatively inexpensive software that permanently overwrites data.

Prior to adoption of Iowa Rule 1.6, and accompanying Comment 17, the Iowa Board of Professional Ethics and Conduct had issued several opinions advising that lawyers may not use e-mail to transmit "sensitive material" to clients without obtaining "written acknowledgment by client of the risk of violation" of confidentiality supposedly posed by the e-mail medium and consent by the client to the use of e-mail.[190] Although the precise directive in these opinions was subject to interpretation, they appeared to suggest that "sensitive material" broadly included all confidential information as defined in former Iowa Disciplinary Rule 4-101(A),[191] and at least one opinion counseled lawyers to use "the most strict standards" for exchange of such information.[192] If understood to have established a general rule requiring extraordinary measures for any communication about factual matters between a lawyer and client, the Iowa approach was more restrictive about the use of inexpensive e-mail for regular and confidential communications with clients than other jurisdictions. Moreover, although the board surely did not so intend and such an outcome would have been unwarranted, because these opinions

189. Rule 1.6, cmt. 17, Iowa R. Prof'l Conduct.

190. Iowa Sup. Ct. Bd. of Prof'l Ethics & Conduct, Ops. 95-30 (1995), 96-01 (1996), 96-33 (1996), and 97-01 (1997).

191. Disciplinary Rule 4-101(A), Iowa Code of Prof'l Responsibility (superseded) ("'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.").

192. Iowa Sup. Ct. Bd. of Prof'l Ethics & Conduct, Op. 96-33 (1996).

questioned the security of ordinary e-mail transmissions, an adverse party might have been able to argue that use of this supposed vulnerable technology by an opposing party and counsel constituted a waiver of the attorney-client privilege.

With the adoption of Rule 1.6 and Comment 17, Iowa has now endorsed the reasonable precaution and reasonable expectation of privacy approach to proper transmission of confidential communications, superseding the prior and arguably more demanding standard of special security measures suggested by the Iowa ethics opinions. The ABA's Standing Committee on Ethics and Professional Responsibility and most states addressing this matter have concluded that because the expectation of privacy for e-mail is no less reasonable than the expectation of privacy for ordinary telephone calls, and because the unauthorized interception of an electronic message is a violation of federal criminal law, a lawyer would not violate Rule 1.6 by communicating with a client using e-mail services over the Internet, without encryption or specific client consent.[193] Enhanced security measures are appropriate for extraordinarily sensitive matters for which ordinary telephones and other normal means of communication also would be deemed inadequate.

Similarly, now that most cellular telephones use digital technology, which is harder to intercept than ordinary wired or "land-line" telephones, the use of such technology for attorney-client conversations should be understood to comport with reasonable expectations of privacy to preserve confidences.[194] Moreover, interception of cellular telephone communications is also a violation of federal criminal law, thus enhancing the expectation of privacy.

C. *Inadvertent Disclosure*

While modern communications technology ordinarily is adequately

193. *See, e.g.*, ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 99-413 (1999); Ala. Bar Ass'n Ethics Op. 98-2 (1998); Ill. State Bar Ass'n Advisory Op. on Prof'l Conduct 96-10 (1997); Mass. Bar Ass'n Ethics Op. 00-1 (2000); Minn. Lawyers Prof'l Responsibility Bd. Op. 19 (1999); N.D. State Bar Ass'n Ethics Comm. Op. 97-09 (1997); *see also* ABA Resolution 98A119A (Aug. 4, 1998) (affirming that lawyer-client e-mail communications should be accorded the same expectations of privacy and confidentiality as those accorded traditional means of communication). *See generally* David Hricik, *Lawyers Worry Too Much About Transmitting Client Confidences by Internet E-mail*, 11 GEO. J. LEGAL ETHICS 459 (1998).

194. *See* RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, PROFESSIONAL RESPONSIBILITY: A STUDENT'S GUIDE § 1.6-2(c), at 209 (2005).

secure for confidential communications between a lawyer and client,[195] such means do pose a greater risk of accidental transmission to an unintended recipient. While this problem is nothing new, as witnessed by past episodes involving inadvertent mailing or faxing of confidential or privileged documents to opposing counsel, electronic communications make it possible to send a message or document containing confidential information to the wrong person by a simple push of a button. Nearly every user of e-mail has had the unpleasant experience at some point of sending a personal message to a friend only to discover, sometimes to great embarrassment, that it had also been mistakenly transmitted to a larger group. When the same accidental dissemination occurs with respect to a confidential communication intended only for a client, and especially when the unintended recipient is an adversary of the client, questions arise as to whether the disclosure effectively waives the attorney-client privilege and as to the professional responsibilities of the recipient of the misdirected communication.

While a few courts regard any voluntary disclosure of confidential communications, even if inadvertent and without consideration of the precautions taken by the lawyer, as a waiver of the attorney-client privilege,[196] Professors Ronald Rotunda and John Dzienkowski find that "[t]he general trend in the law is to hold that the attorney-client privilege is not waived by inadvertent disclosure if the lawyer and client take *reasonable* precautions to guard against inadvertent disclosure."[197] As confirmation of this trend, the Advisory Committee on Evidence Rules of the United States Judicial Conference is considering a new Rule 502, which the committee understood to reflect the majority view in the courts and which would provide that—

> A disclosure of a communication or information covered by the attorney-client privilege or work product protection does not operate as a waiver in a state or federal proceeding if the disclosure is inadvertent and is made in connection with federal litigation or federal administrative proceedings—and if the holder of the privilege or work product protection took reasonable precautions to prevent disclosure and took reasonably prompt measures, once the holder knew or should have known of the disclosure, to rectify the error . . . .[198]

195. *See supra* Part VI.B.

196. *See, e.g.*, *In re* Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989).

197. ROTUNDA & DZIENKOWSKI, *supra* note 194, § 1.6-2(b), at 206. *See generally* Hopson v. City of Baltimore, 232 F.R.D. 228 (D. Md. 2005).

198. COMM. ON RULES OF PRACTICE AND PROCEDURE, JUD. CONFERENCE OF

In Iowa, attorney-client privilege decisions emphasize that the client controls the privilege and focus upon the voluntary and affirmative actions of the client in terms of waiver,[199] which suggest that an isolated episode of erroneous transmission to an unintended recipient would not strip away the privilege.

The fact is that even the most diligent of lawyers, or their assistants, will make mistakes. No ethical regime or sensible approach to confidentiality could expect each lawyer to personally and carefully screen every e-mail address used in every e-mail message in the office, together with the content of each message and electronic document to ensure that every confidential element has been eliminated, any more than we would expect the lawyer to inspect the addressed envelopes of every piece of mail leaving the office or the telephone numbers dialed when a legal assistant is sending a facsimile message. If the lawyer has established a reasonable system for protecting information in the office and has instructed others in the office on the importance of maintaining confidences (including taking precautions against inadvertent disclosure), the occasional error ought not be treated in a manner that is harmful to clients or punitive toward their lawyers. To be sure, the unintended recipient of a misdirected communication cannot be expected to wipe his or her memory upon discovering the confidential information had mistakenly been sent nor should that innocent recipient be punished for another lawyer's mistake by being disqualified. However, in your author's view, the inadvertent disclosure of information generally should not be regarded as a waiver of the attorney-client privilege so as to permit further use of that information or its introduction into evidence.

VII. EXCEPTIONS TO CONFIDENTIALITY TO PREVENT DEATH OR SUBSTANTIAL BODILY HARM

Professor Monroe Freedman, who is a nationally-recognized and zealous advocate of the principle of confidentiality and a strong opponent of most proposals to carve out exceptions to confidentiality, nonetheless

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THE UNITED STATES, REPORT OF THE ADVISORY COMM. ON EVIDENCE RULES 1, 6–7 (2006), http://www.uscourts.gov/rules/Reports/EV05-2006.pdf. (Proposed Rule 502(b) of the Federal Rules of Evidence). The advisory committee anticipates that Congress would enact the rule directly, using its Commerce Clause powers, so that it would bind state courts as well. *Id.* at 9.

199. Bailey v. Chi., Burlington & Quincy R.R. Co., 179 N.W.2d 560, 563 (Iowa 1970) (stating that the attorney-client privilege "protects and belongs to the client alone"); *see supra* Part IV.C.6. *See generally* ADAMS & WEEG, *supra* note 68, § 5:504:12.

has long argued for broad discretion by a lawyer to reveal confidential information when necessary to prevent a person's death or serious bodily harm:

> The most compelling reason for a lawyer to divulge a client's confidence is to save a human life. There are two reasons to require divulgence in such a case. First, the value at stake, human life, is of unique importance. Second, the occasions on which a lawyer's divulgence of a client's confidence is the only thing that stands between human life and death are so rare that a requirement of divulgence would pose no threat to the systemic value of lawyer-client trust.[200]

In an article advocating that Iowa adopt new ethics rules in the Model Rules format, your author also wrote that "[c]onfidentiality cannot be justified when the life or substantial health of another is at serious and imminent risk,"[201] a position which also had been espoused in Iowa by Professor Maura Strassberg of Drake Law School.[202] With the adoption of the new Iowa Rules of Professional Conduct, the Iowa Supreme Court has now taken what your author once described as "the more enlightened approach of actually *mandating* disclosure when necessary to prevent death or serious bodily harm, whether by criminal means or otherwise."[203]

Under both subparagraph (b)(1) and paragraph (c) of Iowa Rule 1.6, the lawyer is authorized to reveal confidential information "to the extent the lawyer reasonably believes necessary" to prevent "death or substantial bodily harm."[204] In contrast with Disciplinary Rule 4-101(C)(3) of the former Iowa Code of Professional Responsibility, which permitted the lawyer's disclosure only of "[t]he intention of the client to commit a crime and the information necessary to prevent the crime,"[205] the provisions in new Iowa Rule 1.6 for disclosure to preserve life and physical integrity apply whether or not the anticipated harm would constitute a crime. Thus, for example, "[b]y removing the need to have a client crime, a client suicide will always fit within the rule, even if the state does not treat suicide as a

200. MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 102–03 (1990); *see also* Schaefer & Levi, *supra* note 40, at 1767 (stating that "saving a life takes precedence over preserving a confidential communication").

201. Sisk I, *supra* note 5, at 309.

202. Strassberg, *supra* note 45, at 940–48.

203. Sisk I, *supra* note 5, at 308.

204. Rule 1.6(b)(1), (c), Iowa R. Prof'l Conduct.

205. Disciplinary Rule 4-101(C)(3), Iowa Code of Prof'l Responsibility (superseded by Iowa R. Prof'l Conduct).

crime."[206] In fact, the threat of death or substantial bodily injury need not be attributable to the client at all. Instead, the trigger for the exception is the risk of harm, not its source.

Under subparagraph (b)(1), if the anticipated "death or substantial bodily harm" is "reasonably certain," the lawyer is allowed discretion on whether to act, at least immediately, to reveal client confidences to prevent the harm.[207] Under paragraph (c), if "death or substantial bodily harm" is "imminent," then discretion is withdrawn and the lawyer is required to reveal information as necessary to prevent the harm.[208] Comment 19 to Iowa Rule 1.6, in language unique to Iowa, defines the difference between reasonable certainty and imminence and explains why the lawyer is granted permission to disclose in the event of the former, but is mandated to disclose in the event of the latter:

> "[R]easonably certain" includes situations where the lawyer knows or reasonably believes the harm will occur, but there is still time for independent discovery and prevention of the harm without the lawyer's disclosure. For purposes of this rule, death or substantial bodily harm is "imminent" if the lawyer knows or reasonably believes it is unlikely that the death or harm can be prevented unless the lawyer immediately discloses the information.[209]

With the adoption of paragraph (c) to Iowa Rule 1.6, Iowa joins a small, but growing, number of other states that impose a duty to disclose confidential information for the singular purpose of preserving human life or bodily integrity.[210] It does not appear, however, that any state thus far has actually enforced this rule in a disciplinary action against an attorney who failed to so disclose. This may confirm that the occasions truly are rare when a lawyer's disclosure is all that stands between another person and an appointment with death. Or disciplinary authorities may appropriately hesitate to second-guess difficult judgments made by lawyers in complex human dramas in which certainty both as to the facts and the degree of risk is frequently elusive.

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206. ROTUNDA & DZIENKOWSKI, *supra* note 194, § 1.6-12(e)(2), at 240.

207. Rule 1.6(b)(1), Iowa R. Prof'l Conduct.

208. Rule 1.6(c), Iowa R. Prof'l Conduct.

209. Rule 1.6, cmt. 19, Iowa R. Prof'l Conduct.

210. *See, e.g.*, Rule 1.6(b), Ariz. R. Prof'l Conduct; Rule 1.6(b), Conn. R. Prof'l Conduct; Rule 4-1.6(b)(2), Fla. Bar R.; Rule 1.6(b), Ill. R. Prof'l Conduct; Rule 156(2), Nev. R. Prof'l Conduct; Rule 8, Tenn. Sup. Ct. Rules; Rule 1.6(c)(1), Tenn. R. Prof'l Conduct; Rule 1.6(b)(1), Vt. R. Prof'l Conduct.

That protection of human life and essential health is an imperative that cannot be sacrificed to the principle of client secrecy, is plainly and nobly advanced by subparagraph (b)(1) and paragraph (c) of Iowa Rule 1.6. The lawyer who disregards a manifest and imminent threat to the life or substantial bodily well-being of any person, when by simple sharing of information that lawyer could have prevented the harm, should expect disciplinary sanction and professional disgrace. At the same time, the duty established in paragraph (c) should be applied and enforced by disciplinary authorities with appreciation for the often sensitive nature of such situations and with a substantial degree of deference to the lawyer's evaluation of the facts and circumstances at the time. By adopting the standard of the lawyer's "reasonable belief" as to whether disclosure is necessary to prevent imminent death or substantial bodily harm, the Iowa Supreme Court directed that the circumstances be evaluated from the perspective of the lawyer at the time and not through hindsight distorted by the unfortunate tragedy that death or substantial bodily harm did subsequently occur. As Professors Hazard and Hodes comment with respect to the definitions of states of mind in Rule 1.0,[211] "there are gradations in the firmness and clarity with which a lawyer, like anyone else, can perceive relevant facts in a kaleidoscope of events."[212]

When a client makes threatening statements about a third party to his or her lawyer—comments typically made in a burst of anger or to vent stress—the lawyer in most circumstances should not file a report with law enforcement, which would create burdens on law enforcement, impose unnecessary concerns or fears on others, and undermine the lawyer-client relationship. While the lawyer should not let any threat of violence pass without cautioning the client and receiving reassurance from the client that no actual harm is intended, the duty to report in paragraph (c) is reserved for those situations in which a reasonable lawyer would believe, based upon familiarity with the client and knowledge of the circumstances, that this threat is something more than the common episode of client frustration being vehemently expressed.

Perhaps the most common scenario implicating subparagraph (b)(1) and paragraph (c) will not be when a client genuinely threatens physical harm to another person, but rather when the client may be a danger to him or herself. Lawyers in such situations should be given ample room to make judgments about how best to evaluate the person, how to involve other professionals better able to judge the mental state of the client, and how to

211. Rule 1.0, Iowa R. Prof'l Conduct.

212. HAZARD & HODES, *supra* note 44, § 1.22, at 1-42 to -43.

preserve the lawyer-client relationship if possible. Moreover, mental health professionals report that it is notoriously difficult to predict whether an individual actually will follow through on a threat of self-harm. Unduly aggressive responses by disciplinary authorities in a case where a client commits suicide after threatening self-harm to his or her lawyer could have devastating consequences for future legal representation of troubled and vulnerable clients. It is already difficult to encourage lawyers to undertake representation of persons with diminished capacity or who are emotionally vulnerable,[213] even though they may be the ones who most desperately need legal assistance. Those heroic lawyers, often in legal-aid offices, who represent the most emotionally troubled and disadvantaged in our society, should not be second-guessed by disciplinary authorities for what in hindsight might appear to be a less than perfect handling of a thorny client representation.

VIII. EXCEPTIONS TO CONFIDENTIALITY TO PREVENT OR RECTIFY SUBSTANTIAL FINANCIAL OR PROPERTY INJURY BY CRIME OR FRAUD

A. *History, Controversy Surrounding, and Overview of Client Crime-Fraud Economic Harm Exceptions*

Subparagraphs (b)(2) and (b)(3) of Rule 1.6[214] are the most recent and have been among the more controversial of the exceptions to confidentiality. These two overlapping provisions authorize the disclosure of confidential information—including information learned from privileged client communications[215]—when the lawyer reasonably believes such revelation is necessary, not only to prevent, but also to mitigate or rectify reasonably certain and substantial injury to the financial or property interests of others caused by the client's fraud or crime and in furtherance of which the lawyer's services were used. These straightforwardly are "whistle-blower" provisions. In the narrow circumstances of client crime or fraud to which these provisions apply, the lawyer's authority to disclose the information necessary to prevent economic harm generally runs directly adverse to the client's interest and in favor of third persons outside the attorney-client relationship. Because lawyers naturally resist being

213. On representation of clients with diminished capacity, see Rule 1.14, Iowa R. Prof'l Conduct and SISK & CADY, *supra* note 2, § 5:14.

214. Rule 1.6(b)(2)–(3), Iowa R. Prof'l Conduct.

215. On the relationship between the exceptions to confidentiality in the ethics rules and the independent evidentiary immunity of the attorney-client privilege, see *supra* Part IV.D.5.

placed in the position of adjudging their clients guilty of misconduct and then turning the clients in to the authorities or another party, any provision that appears to introduce such an expectation naturally will meet with resistance from large segments of the practicing bar.

The controversy surrounding these provisions was illustrated by their tenuous reception by the ABA. In 2001, proposed paragraph (b)(2) was soundly rejected by a substantial margin by the ABA's House of Delegates, in the wake of which, proposed paragraph (b)(3) was withdrawn.[216] At the August 2003 meeting of the House of Delegates, paragraphs (b)(2) and (b)(3) were reconsidered and then adopted by the slim margin of 218 to 201.[217] In fact, before the narrow approval of paragraph (b)(3) in 2003 after its withdrawal in the face of certain defeat only two years before, the ABA had twice previously (in 1983 and 1991) turned away similar proposals to authorize disclosure of confidential information to rectify financial injury from past wrongdoing.[218] The impetus for the reversal of position by the ABA in 2003 lay in the corporate scandals of Enron, WorldCom, and Tyco, in which lawyers failed to prevent and even facilitated financial irregularities. Even before the ABA adoption of subparagraph (b)(3) in 2003, seventeen states permitted disclosure and one required disclosure of client confidences to correct past fraudulent or criminal harm.[219] As of 2006, it appears that slightly more than half of the states have incorporated subparagraph (b)(3), or something like it, into their respective ethical regimes,[220] meaning that Iowa has now joined the majority approach to this question.

Subparagraph (b)(2) of Iowa Rule 1.6 is the *prevent-future-economic-harm exception* to confidentiality, authorizing the lawyer to disclose confidential information when the lawyer reasonably believes it necessary "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

216. *See* HAZARD & HODES, *supra* note 44, § 1.18, at 1-35 to -38.

217. *Model Rules: ABA Amends Ethics Rules on Confidentiality, Corporate Clients, to Allow More Disclosure*, Current Reports 19 ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT 467 (Aug. 13, 2003).

218. *See* Strassberg, *supra* note 45, at 939–40.

219. E. Norman Veasey, *The Ethical and Professional Responsibilities of the Lawyer for the Corporation in Responding to Fraudulent Conduct by Corporate Officers or Agents*, 70 TENN. L. REV. 1, 18 (2002).

220. *See* JOHN S. DZIENKOWSKI, PROFESSIONAL RESPONSIBILITY STANDARDS, RULES, AND STATUTES 108–15 (2006) ("A Chart Comparing the Language of the State Confidentiality Rules").

lawyer's services."[221] As a future-oriented measure, subparagraph (b)(2) is not a meaningful departure from past Iowa expectations.[222] Disciplinary Rule 4-101(C)(3) of the former Iowa Code of Professional Responsibility provided that "[a] lawyer may reveal . . . [t]he intention of the client to commit a crime and the information necessary to prevent the crime."[223] Although subparagraph (b)(2) permits disclosure to prevent fraudulent, as well as criminal, conduct, the kind of deliberate misrepresentation that constitutes fraud almost invariably constitutes criminal behavior. Importantly, because subparagraph (b)(2)[224] permits disclosure only when the lawyer's services have been used "in furtherance" of the crime of fraud, this provision is somewhat narrower than former Disciplinary Rule 4-101(C)(3),[225] which appeared to permit disclosure to prevent a future crime whether or not the attorney-client relationship had been abused.

Subparagraph (b)(3) of Iowa Rule 1.6 is the *rectify-past-economic-harm exception* to confidentiality, authorizing the lawyer to disclose confidential information when the lawyer reasonably believes it necessary "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."[226] By authorizing a lawyer to reveal confidential information not only to prevent future financial harm by fraud or crime, but also to uncover past wrongdoing by the client during the course of the representation, subparagraph (b)(3) is a new entry into the exceptions to confidentiality that are recognized in Iowa. Under the Code of Professional Responsibility, Iowa did not permit a lawyer to (voluntarily) disclose confidential information about a client's past wrongdoing, economic or otherwise, criminal or civil. Indeed, when a client confessed to a lawyer that he had committed a past wrong, criminal or civil, the protection of confidentiality had been at its zenith (and still today remains absolute in most circumstances where the client has not also made actual use of the attorney-client relationship to advance the illegitimate scheme).

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221. Rule 1.6(b)(2), Iowa R. Prof'l Conduct.

222. *Id.*

223. Disciplinary Rule 4-101(C)(3), Iowa Code of Prof'l Responsibility (superseded).

224. Rule 1.6(b)(2), Iowa R. Prof'l Conduct.

225. Disciplinary Rule 4-101(c)(3), Iowa Code of Prof'l Responsibility (superseded).

226. Rule 1.6(b)(3), Iowa R. Prof'l Conduct.

Yet subparagraph (b)(3) is not wholly unprecedented, even in Iowa, because its authorization of disclosure runs parallel to the longstanding crime-fraud exception to the attorney-client privilege,[227] an alignment further confirmed by the careful restriction of the permission to disclose in both subparagraphs (b)(2) and (3) to those situations in which the lawyer's services were or are being used "in furtherance" of the client's crime or fraud. Still, the crime-fraud exception to the attorney-client privilege removed the protection of the privilege when invoked as an objection to an inquiry from others (such as parties in civil litigation or law enforcement and prosecutors in criminal cases), but did not in itself allow or impose any duty on the lawyer to blow the whistle on the client. Furthermore, as discussed below,[228] when paragraphs (b)(2) and (3) are read together with Rule 4.1(b), the prevent and rectify economic harm disclosure provisions may be elevated from the permissive into the mandatory category, thus introducing a new obligation in Iowa for the lawyer to voluntarily disclose client confidences, even without being asked.

B. *Strict Standards for Application of Client Crime-Fraud Economic Harm Exceptions*

Whether perceived to be new and unfamiliar or accepted as a natural evolutionary development from the crime-fraud exception to the attorney-client privilege, the provisions in subparagraphs (b)(2) and (3) allowing lawyer disclosure to prevent or rectify economic harm caused by client wrongdoing are reserved for extraordinary circumstances. The standards for application of subparagraphs (b)(2) and (3) are stringent, involving multiple layers of constraint before confidentiality may be subordinated by the lawyer. Disclosure is permitted only if—

(1) the lawyer believes it *reasonably necessary*

(2) to *prevent, mitigate, or rectify*

(3) *substantial injury* to the financial or property interests of another

(4) that is *reasonably certain* to result

(5) from the planned or past commission by the client of a *crime or fraud*

(6) in *furtherance* of which the client has or is using the *lawyer's*

227. *See supra* Part IV.D.1.

228. *See infra* Part VIII.C.

services.[229]

Under these exacting prerequisites, the lawyer is empowered to act only when harm is reasonably certain to occur and the lawyer finds it reasonably necessary to disclose confidential information to prevent that harm. The lawyer must further conclude that the injury to economic interests would be substantial in degree. The harm that is to be prevented or rectified must be attributable to the client's criminal or fraudulent, that is, deliberate, misconduct and not reflect mere negligence or error.[230] Finally, as perhaps the "most important feature" of these subparagraphs, [231] the lawyer must have discovered that the legal services he or she is or has been providing to the client were perverted to an illicit end, that is, the client actually has abused the attorney-client relationship to advance the crime or fraud, as contrasted with the client merely telling the lawyer of past misconduct or unlawful future plans. As Professors Hazard and Hodes caution, "unless there is initially unwitting lawyer involvement in the client's wrongdoing, the lawyer is bound to maintain silence."[232]

In sum, while the circumstances contemplated for application of subparagraphs (b)(2) and (3) are by no means abstract or theoretical, as revealed by unfortunate recent episodes receiving public attention in which all the elements of these provisions have been present, the emphasis on reasonable certainty and reasonably-believed necessity, as well as the restrictive application to circumstances of fraud and crime to which the lawyer's services have been misappropriated, affirms a continuing and general presumption in favor of continued confidentiality absent extraordinary circumstances.

C. *Interaction of Rule 1.6(b)(2) and (3) with Rule 4.1(b): When Permission to Disclose Becomes a Mandatory Duty*

Read and applied separately, the exceptions to confidentiality set forth in paragraph (b) of Rule 1.6 are entirely permissive in nature, as indicated by the deliberate use of the word "may." Thus, subparagraphs (b)(2) and (3), which were recently added to Rule 1.6 by the American Bar Association and adopted by the Iowa Supreme Court,[233] permit, but do not

229. *See* Rule 1.6(b)(2)–(3), Iowa R. Prof'l Conduct (emphasis added).

230. *See* Rule 1.0(d), Iowa R. Prof'l Conduct (defining "fraud" as that conduct which is fraudulent under the law of the applicable jurisdiction "and has a purpose to deceive").

231. HAZARD & HODES, *supra* note 44, § 9.21A, at 9-90.

232. *Id*. § 9.21A, at 9-91.

233. *See supra* Part VIII.A.

themselves require, the lawyer to reveal information 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 or is using the lawyer's services. However, those permissive provisions in Rule 1.6 must now be read together with Rule 4.1(b) of the Iowa Rules of Professional Conduct, which forbids a lawyer from knowingly "fail[ing] to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client."[234] The duty imposed in Rule 4.1(b) is expressly mandatory in nature, but the scope of that duty has been limited by confidentiality. Rule 4.1(b) states that revelation is not required when "disclosure is prohibited by rule 32:1.6."[235] Yet precisely because subparagraphs (b)(2) and (3) of Rule 1.6 now *do* authorize revelation of confidential information to prevent or rectify economic harm caused by fraud or crime, disclosure is no longer "prohibited" by Rule 1.6 when those exceptions to confidentiality are triggered.

In other words, with the amendments to Rule 1.6(b) that were approved by the American Bar Association in 2002 and adopted by Iowa in 2005, confidentiality no longer stands as an obstacle to the duty to disclose under Rule 4.1(b), at least under certain (perhaps most) circumstances. As Professors Ronald Rotunda and John Dzienkowski explain: "When Rule 4.1(b) is mandatory unless limited by Rule 1.6, the expansion of permissive disclosure in Rule 1.6 will lead to mandatory disclosure under Rule 4.1 to third persons in the context of financial crimes likely to cause substantial injury."[236] Accordingly, when the stringent requisites for *both* Rule 1.6(b)(2) or (3) *and* Rule 4.1(b) are present in a case,[237] the lawyer is required, not merely authorized, to make the disclosure. Somewhere in the combined operation of subparagraphs (b)(2) and (3) of Rule 1.6 and of Rule 4.1(b) is to be found a newly vitalized and mandatory duty to disclose information about client fraud or crime, although this remains an area of professional responsibility that is still evolving and the parameters of that duty consequently remain uncertain.

Because these rules were adopted by the American Bar Association at different times and their potential interaction may have not been fully appreciated, subparagraphs (b)(2) and (3) of Rule 1.6 are not fully

234. Rule 4.1(b), Iowa R. Prof'l Conduct.
235. *Id.*
236. ROTUNDA & DZIENKOWSKI, *supra* note 194, § 4.1-3, at 754.
237. *See supra* Part VIII.B.

integrated in language and style with Rule 4.1(b).[238] Subparagraphs (b)(2) and (3) of Rule 1.6 remove the constraints of confidentiality when the client has committed or is committing a crime or fraud, that is reasonably certain to or already has resulted in substantial injury to the financial or property interests of another, and the client has been or is using the lawyer's services "in furtherance" of that fraud.[239] Rule 4.1(b) operates to require the lawyer to disclose a material fact to another when "necessary to avoid assisting a criminal or fraudulent act by the client."[240] Thus the former exceptions to confidentiality apply when the lawyer's legal services have been used or are being used by the client to promote fraud, while the latter duty to disclose applies when the lawyer's failure to reveal a material fact would amount to assistance of the client in fraud or crime.

Given that both rules are triggered by lawyer involvement (presumably unwitting, at least at the start) with the client's wrongdoing—Rule 1.6(b)(2) and (3) being invoked only when the lawyer's services were used "in furtherance" of the client's crime or fraud, while Rule 4.1(b) applies only when the lawyer's silence about a material fact would amount to "assisting a criminal or fraudulent act by a client"[241]—these provisions would appear to operate in tandem under many circumstances, although they are not perfectly congruent. Whether Rule 1.6(b) will prove in practical application to be the opposite side of the same coin from Rule 4.1(b) is not yet certain. Nonetheless, as developed further below, because of the uncertain parameters of the mandatory duty to disclose in Rule 4.1(b), together with the practical need for a lawyer whose services have been perverted toward illicit ends to extricate him or herself from the situation and avoid even an accusation of complicity, the prudent lawyer may well decide to exercise the discretion granted in Rule 1.6(b)(2) and (3) to disclose, even if an argument may be made against mandatory disclosure under Rule 4.1(b).

Because the American Bar Association thus far has failed to coordinate the two rules and clarify the extent of interrelationship, one may postulate circumstances under which one rule would appear to operate separately from the other, although whether such a difference in application was intended by the rules drafters is not stated in the rules or comments. For example, subparagraphs (b)(2) and (3) of Rule 1.6 grant permission to disclose a client's confidence only when the economic harm

238. *See generally* HAZARD & HODES, *supra* note 44, § 37.2, at 37-4.
239. Rule 1.6(b)(2)–(3), Iowa R. Prof'l Conduct.
240. Rule 4.1(b), Iowa R. Prof'l Conduct.
241. *Id.*

to result from the client's fraud or crime is both "reasonably certain" in terms of likelihood and "substantial" in terms of degree. By contrast, Rule 4.1(b) imposes no harm measurement limitations on the lawyer's duty to reveal information when necessary to avoid assisting a client's crime or fraud. Thus, if the harm anticipated to the other person is not "substantial" or if it is not pecuniary in nature, then subparagraphs (b)(2) and (3) of Rule 1.6 do not authorize disclosure. Even then, however, because a lawyer is obliged by Rule 1.2(d) not to assist the client in conduct known to the lawyer to be criminal or fraudulent[242] and because the substantive law of the jurisdiction may demand that the lawyer take steps necessary to avoid being an accomplice in the client's fraud or crime, the lawyer arguably would be obliged to reveal confidential information in order "to comply with other law," for which disclosure is now authorized under subparagraph (b)(6) of Rule 1.6.[243] Thus, while a roundabout analysis is required to arrive at the conclusion, it now may be that the supposed confidentiality limitation in Rule 4.1(b) will rarely if ever apply to excuse a lawyer from making a disclosure that is necessary to avoid assisting the client's fraud. Even if a textual argument could be made for avoiding compelled disclosure, lawyers may be reluctant to take the chance of being found complicit in client wrongdoing, by virtue of having concealed information necessary to correct a client misrepresentation that the lawyer previously had transmitted or had endorsed expressly or implicitly by participation in the matter.

One also may postulate a scenario under which permission to disclose information would be granted under subparagraphs (b)(2) and (3) of Rule 1.6, but the mandatory duty to disclose under Rule 4.1(b) would not be triggered, thus leaving the exceptions to confidentiality entirely discretionary in nature. Suppose that a lawyer had provided background advice to a client, who subsequently misused that information to facilitate criminal or fraudulent conduct that may or already has caused reasonably certain and substantial injury to the financial or property interests of another. In other words, the client's misconduct has unfolded in such a way that the lawyer's purely advisory role is unknown to the injured party and thus the lawyer has not sufficiently participated in the matter so as to even be accused of having made or endorsed a false or misleading representation or otherwise having assisted in the client's fraud. As Comment 6 to Rule 1.2 states, "that a client uses advice in a course of action that is criminal or fraudulent of itself [does not] make a lawyer a

242. Rule 1.2(d), Iowa R. Prof'l Conduct.

243. Rule 1.6(b)(6), Iowa R. Prof'l Conduct; *see infra* Part XI.

party to the course of action."[244] In such an instance, the lawyer's passive counseling role would not appear to rise to the level of involvement necessary to constitute the kind of complicity in a crime or fraud that would implicate Rule 4.1(b) and its mandatory duty of disclosure. Still, because the lawyer's advice in this scenario would have been used by the client in furtherance of the fraud or crime, and assuming again that economic harm to another is reasonably certain and substantial, subparagraphs (b)(2) and (3) of Rule 1.6 would permit (but not require) disclosure.

Although one can imagine hypothetical situations in which Rule 1.6(b)(2) and (3) would operate independently of Rule 4.1(b), and vice-versa, the foregoing analysis could fairly be criticized as overly formalistic. When a lawyer does discover that a client has used the legal representation to carry out a fraudulent or criminal scheme, the requisite elements of both Rule 1.6(b)(2) and (3) and Rule 4.1(b) will often be present. The wise lawyer should be wary of relying upon too fine a distinction about degree of lawyer participation to justify a refusal to disclose client wrongdoing, even though the lawyer's own counsel (contrary to the lawyer's design) has materially advanced the client's illicit purposes. To ensure compliance with the duty of disclosure imposed by Rule 4.1(b), and with sober appreciation of the force of the substantive civil law of fraud and criminal law regarding accomplices, the lawyer may be well-advised "to reveal the fraud at an earlier point" so as to avoid the later "necessity of a formal defense, which may be costly in terms of both money and reputation."[245]

To be sure, both Rule 1.6(b)(2) and (3) and Rule 4.1(b) are reserved for the extraordinary circumstance when the lawyer becomes aware of manifest client misconduct to which the lawyer has unwittingly contributed.[246] If the client has sought the lawyer's advice regarding past wrongdoing, in which the lawyer's legal services played no facilitating role, then the lawyer's duty of confidentiality remains intact and neither Rule 1.6(b)(2) and (3) nor Rule 4.1(b) are implicated. Indeed, a client securing representation from a lawyer to defend against charges of such past wrongdoing is one of the classic situations for which confidentiality is designed and should be zealously guarded. Likewise, if the client reveals plans for future misconduct, but the lawyer's advice has not and will not be diverted to facilitate that behavior (and thus the lawyer simply has no participation in the illicit scheme), then the lawyer has no duty under Rule

244. Rule 1.2, cmt. 6, Iowa R. Prof'l Conduct.
245. HAZARD & HODES, *supra* note 44, § 37.6, at 37-15.
246. *See supra* Part VIII.B.

4.1(b) to disclose the client's misconduct because the lawyer has remained separate from it. At that point, the "lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation."[247] For the same reason, subparagraphs (b)(2) and (3) of Rule 1.6 would not permit disclosure. Thus, as Professors Hazard and Hodes suggest, "[a] lawyer may properly and safely maintain total confidentiality only when he has not yet drafted any offending papers and has not advanced the client's scheme by his silence," because in that event, "the lawyer has knowledge only of a possible future fraud, and may not warn the potential victim under any version of Rule 1.6."[248]

But the closer the lawyer has been drawn into the client's illegitimate scheme through perversion of the attorney-client relationship by the client, whether the lawyer discovers the client's misuse of legal counsel before or after the fact, and the further the crime or fraud has progressed toward its illicit objectives, the more the lawyer should be motivated to aggressively disengage himself or herself from the matter and disassociate himself or herself from any perception of complicity. In this respect, Rules 1.6(b)(2) and (3) and 4.1(b) dovetail with the lawyer self-defense exception to confidentiality in subparagraph (b)(5) of Rule 1.6, which is discussed below.[249] As Professors Hazard and Hodes suggest, "the lawyer's right to make disclosure [of client fraud or crime] *at the outset* is the lawyer's best protection" from later being accused of complicity in the fraudulent or criminal scheme.[250]

Unfortunately, as the foregoing discussion demonstrates, the complicated and uncertain interplay between Rule 1.6(b)(2) and (3) and Rule 4.1 has not yet been coordinated by the ethics rules drafters in the American Bar Association. When an affirmative duty is imposed upon the lawyer, at the risk of a disciplinary penalty for failure to uphold it, discovery of that duty should not depend upon a careful inter-textual analysis of uncoordinated provisions and the scope of that duty should not be ambiguous. Even worse, describing Rule 1.6(b)(2) and (3) as permissive exceptions to confidentiality is somewhat misleading to the casual reader, given the sometimes mandatory nature of these disclosures when integrated with Rule 4.1(b). Likewise, the supposed confidentiality condition on the application of Rule 4.1(b) is increasingly misleading, given that the expansion of exceptions to confidentiality in Rule 1.6(b) has left

247. Rule 4.1, cmt. 3, Iowa R. Prof'l Conduct.
248. HAZARD & HODES, *supra* note 44, § 37.6, at 37-15.
249. *See infra* Part X.
250. HAZARD & HODES, *supra* note 44, § 9.21A, at 9-97.

that condition with diminished effect. Accordingly, renewed attention by the American Bar Association to clarify and reconcile these provisions is essential.

D. *Counseling the Client Before Disclosure*

Under both subparagraphs 1.6(b)(2) and (3), the lawyer's discretion or obligation to reveal the confidential information should be exercised only after discussion with and counseling of the client, at least when possible and absent exigent circumstances. If the economic harm has not yet been imposed, then as Comment 7 to Iowa Rule 1.6 observes, "[t]he client can, of course, prevent such disclosure by refraining from the wrongful conduct."[251] If the lawyer does not discover the fraud or crime until after it has been accomplished by the client, then as Comment 8 explains, "[a]lthough the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified, or mitigated."[252] Still, disclosure by the lawyer may be avoided if the client is willing to come clean and attempt to resolve the matter. Indeed, when the lawyer explains that he or she is authorized to disclose the information in any event, and thus, that the truth will be revealed, the client may see the practical benefit, if not the moral responsibility, of having that truth be heard from the client's own mouth.

IX. EXCEPTION TO CONFIDENTIALITY TO OBTAIN LEGAL ADVICE ABOUT LAWYER COMPLIANCE WITH ETHICS RULES

One of the most welcome additions to the Iowa Rules of Professional Conduct is the explicit invitation in subparagraph (b)(4) of Rule 1.6 to the lawyer "to secure legal advice about the lawyer's compliance with these rules" when appropriate, including the express grant of permission to share confidential information as reasonably believed necessary to obtain well-informed advice.[253] In truth, this exception to confidentiality for purposes of obtaining legal advice from another lawyer was understood to exist implicitly and was regularly invoked under the former Iowa Code of Professional Responsibility. Given that the lawyer so consulted was under the same duty to maintain confidentiality, disclosing client confidences to that lawyer not only posed little risk of a wider disclosure adverse to the

251. Rule 1.6, cmt. 7, Iowa R. Prof'l Conduct.
252. Rule 1.6, cmt. 8, Iowa R. Prof'l Conduct.
253. Rule 1.6(b)(4), Iowa R. Prof'l Conduct.

client, but also could be justified as simply adding yet another lawyer to the client's legal team (although the lawyer consulted may have regarded only the lawyer seeking advice as the actual client). In any event, what was implicit is now explicit.

By expressly authorizing a lawyer to disclose confidential information in seeking legal advice on compliance with the ethics rules, subparagraph (b)(4) encourages each lawyer to recall that he or she is part of a community of practitioners. Lawyers too need counsel. Inexperienced lawyers need mentors. Even veteran attorneys benefit from drawing upon the experiences and wisdom of other lawyers in our profession. Disclosing confidential information that could identify a client, even for the salutary purpose of ensuring ethical professional behavior, should be done only under circumstances in which there is an expectation of privacy (and thus not through open discussion at a bar convention or casual conversation during a cocktail party) and where the lawyer offering the legal advice accepts the responsibility to maintain the confidences. Of course, when so formally consulted, the lawyer being consulted assumes the same broad duty to protect the confidences of the lawyer seeking the advice (including underlying confidential information about that lawyer's client) as does any other lawyer representing a client.

X. LAWYER SELF-DEFENSE AND FEE COLLECTION EXCEPTIONS TO CONFIDENTIALITY

Under subparagraph (b)(5) of Rule 1.6, a lawyer may disclose confidential information as the lawyer reasonably believes necessary "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."[254] Whenever the lawyer's conduct is the subject of a pending or anticipated charge of professional misconduct in a disciplinary proceeding, civil liability arising from the representation of a client, criminal prosecution based upon conduct involving a client, or a claim of ineffective assistance of counsel by a criminal defendant, the lawyer is permitted to respond, including making use of confidential information as necessary to do so. As Professors Monroe Freedman and Abbe Smith state: "By analogy to the privilege against self-incrimination, it is too much to demand self-destruction by

254. Rule 1.6(b)(5), Iowa R. Prof'l Conduct.

remaining silent in the face of false accusations."[255]

This "lawyer self-defense" provision has been a traditional exception to confidentiality, and is parallel to the similar exception to the attorney-client privilege.[256] The self-defense exception to privilege in Iowa was explained by the Iowa Supreme Court in *State v. Bastedo*: "'A relevant communication between lawyer and client is not privileged when offered on the issue of a breach of duty by lawyer to client, and the attorney is no longer bound by his obligation of secrecy when his client charges him with fraud or other improper or unprofessional conduct, and in such circumstances he may testify as to the facts.'"[257]

Under Comment 10 to Iowa Rule 1.6, the lawyer is not required to wait until actual commencement of a civil lawsuit, criminal prosecution, or disciplinary proceeding.[258] The lawyer may respond "when an assertion" of the lawyer's complicity in wrongdoing is made.[259] Professors Freedman and Smith have criticized this commentary gloss as suggesting that a lawyer could reveal confidential information whenever a prosecutor or reporter asserts possible wrongdoing by the lawyer.[260] To preclude such an abuse of the exception by a nervous or unduly risk-averse lawyer, any preemptive exercise of lawyer self-defense should be restricted to the situation where the third person making the "assertion" is in a position to and is seriously contemplating formal litigation, prosecution, or professional disciplinary action. The lawyer may seek to preempt a reasonably anticipated lawsuit, criminal prosecution, or disciplinary hearing by presenting exculpatory evidence in advance to those persons who have the power to institute such proceedings.

The lawyer may use confidential information only when necessary to respond to actual or anticipated formal charges of wrongdoing, that is, accusations of misconduct presented in the form of civil litigation, criminal prosecution, or another legal proceeding (such as a disciplinary investigation). The lawyer may not betray client confidences to respond to newspaper reports, television and radio commentators, or cocktail party gossip, even if the lawyer's reputation unfairly suffers thereby. As an

255. MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS § 5.10[4], at 148 (2d ed. 2002).

256. *See supra* Part IV.D.4.

257. State v. Bastedo, 111 N.W.2d 255, 260 (Iowa 1961) (quoting 97 C.J.S. *Witnesses* § 283 (1957)).

258. Rule 1.6, cmt. 10, Iowa R. Prof'l Conduct.

259. *Id.*

260. FREEDMAN & SMITH, *supra* note 255, § 5.10[4], at 148.

element of the fiduciary relationship that lawyers assume on behalf of their clients, silently suffering "[t]he slings and arrows of outrageous fortune"[261]—when injured within the informal venues of society—is a professional obligation. Even if the client proves to be the source of the negative chatter in media or social circles, the lawyer may not retaliate with use of client confidences, unless the lawyer is prepared to file a suit for defamation against the client (and even then the lawyer would be constrained to use only such confidential information as is directly pertinent to and necessary for that litigation).

Subparagraph (b)(5) of Rule 1.6 also permits a lawyer to use confidential information as the lawyer reasonably believes necessary "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client,"[262] which includes not only responding defensively to a claim of malpractice by the client, but also presenting an affirmative claim by the lawyer to collect attorney's fees. Comment 11 to Rule 1.6 justifies this aspect of the rule as "express[ing] the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary."[263] Although this permissive exception raises the potential of blackmail by the lawyer, by threatening to expose the client's affairs as a means of extorting payment of a sincerely disputed fee,[264] the permission to disclose confidential information is limited to that which demonstrates that a fee is owed for work performed. Furthermore, information disclosed to obtain payment of a fee should be revealed by the lawyer in the form and venue least likely to bring broader attention to the client matter. One would hope that any true episode of blackmail by the lawyer would receive the most severe sanction in the disciplinary process.

XI. EXCEPTION TO CONFIDENTIALITY FOR COMPLIANCE WITH OTHER LAW OR COURT ORDER

Rule 1.6 as an ethical standard may be superseded by other law and, if it is, the lawyer may be obliged to reveal information. Indeed, because confidential client information that falls outside of the attorney-client privilege[265] is not protected against compelled disclosure, even though the lawyer may not voluntarily reveal it, the lawyer may be required to respond to lawful discovery requests, prosecutorial subpoenas, and other forms of

261. WILLIAM SHAKESPEARE, HAMLET act 3, sc. 1.
262. Rule 1.6(b)(5), Iowa R. Prof'l Conduct.
263. Rule 1.6, cmt. 11, Iowa R. Prof'l Conduct.
264. FREEDMAN & SMITH, *supra* note 255, § 5.10[3], at 148.
265. On the attorney-client privilege, see *supra* Part IV.

legal process that do not intrude upon privileged communications.

If the request directed to a lawyer seeks access to a privileged attorney-client communication, the lawyer must resist it. Even when the information sought is not privileged, the lawyer may be justified in raising objections based upon the work-product doctrine;[266] constitutional limitations on law enforcement intrusion into the attorney-client relationship; court rules, holdings, or other standards limiting the issuance of prosecutorial subpoenas to criminal defense lawyers;[267] or simply because the requests should be directed to the client rather than the lawyer. When a colorable objection can be made to a request or demand for confidential information, the lawyer should raise it and competently advocate it. If, however, the objection is overruled and a court order is issued requiring divulgence of the information, subparagraph (b)(6) confirms that the lawyer acts in conformity with ethical responsibilities when complying with that court order.[268] Even when the court order compelling disclosure is being appealed, if the order is not stayed, the lawyer is not obliged to risk a contempt citation to protect a client confidence.

XII. DISCLOSING CONFIDENTIAL INFORMATION AS CORRECTIVE MEASURE WHEN CONSTITUENT MISCONDUCT THREATENS HARM TO AN ENTITY

As is true with any human enterprise, the persons who make up an organization may not always agree on the course of action to take, may battle for control of the entity, or may even find themselves in fundamental disagreement on matters crucial to the survival of the entity. While the lawyer's responsibilities as counsel to the entity certainly are made more difficult in such circumstances, [269] the fundamental principle remains that the lawyer must respond to the organization's decisions as expressed through its duly authorized constituents.

In contrast to ordinary instances of disagreement or conflict among entity constituents, when a lawyer encounters the extreme scenario of a person within the organization who is planning or has engaged in misconduct that is likely to cause serious harm to the organization,

266. *See supra* Part V.

267. *See generally* HAZARD & HODES, *supra* note 44, § 9.34, at 9-147 to -151.

268. *See* Rule 1.6(b)(6), Iowa R. Prof'l Conduct.

269. *See* Rule 1.13, Iowa R. Prof'l Conduct. *See generally* SISK & CADY, *supra* note 2, § 5:13.

paragraphs (b) through (d) of Rule 1.13 direct the lawyer to take such counteractive measures as the lawyer concludes are reasonably necessary to protect the "best interest of the organization."[270] Even under such acute circumstances, however, Rule 1.13(b) presumes that the lawyer will act within the ordinary chain of command to seek resolution of the problem. Only if the highest authority within the organization defaults in its responsibilities to protect the entity from serious harm by a miscreant constituent is the lawyer authorized to disclose confidential information if reasonably necessary to prevent the injury. In all events, Rule 1.13 directs the lawyer to be responsive to and guided by the "best interest of the organization," rather than the interests of any individual constituents within the organization or persons outside the organization (although the interests of others, especially if they may be injured by fraudulent behavior, may require certain professional actions under the provisions of other rules).[271]

Paragraph (b) of Iowa Rule 1.13 provides:

> If a lawyer for an organization knows that an officer, employee, or other person associated with the organization is engaged in action, intends to act, or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization.[272]

Each part of this complex sentence must be unpacked to reveal the extraordinary nature of the problem being addressed.

First, paragraph (b)'s directive that the lawyer must choose how to proceed in the best interests of the organization is triggered only if the lawyer knows that a person within the organization has engaged or intends to engage in what amounts to illegal misconduct. Under Rule 1.0,[273] the

270. Rule 1.13(b)–(d), Iowa R. Prof'l Conduct.

271. *See* Rule 1.6(b)(2)–(3), Iowa R. Prof'l Conduct (authorizing disclosure of confidential information to prevent or correct substantial injury to the financial interests or property of another resulting from the client's commission of a crime or fraud); Rule 4.1(b), Iowa R. Prof'l Conduct (requiring the lawyer to disclose a material fact when necessary to avoid assisting a criminal or fraudulent act, unless protected as confidential information); *supra* Part VIII.

272. Rule 1.13(b), Iowa R. Prof'l Conduct.

273. Rule 1.0(f), Iowa R. Prof'l Conduct.

word "knows" means that the person has "actual knowledge of the fact in question," which here would be the past or anticipated misconduct. The lawyer's mere suspicion of illegal behavior by another is not sufficient to trigger the lawyer's duty to act, although a concrete basis for suspicion presumably would prompt the diligent lawyer[274] to investigate further, which in turn may produce actual knowledge. The lawyer may not act in willful disregard of the clues that he or she finds or the direction in which such evidence leads.

Second, before the special duty of paragraph (b) takes effect, the lawyer must learn that someone associated with the organization has acted, is acting, or will act in a manner relating to the organization "that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization."[275] That the lawyer questions the wisdom of a constituent's course of action, or even believes such a measure is likely to result in injury to the organization, gives no warrant to the lawyer to take extraordinary steps to preempt that action (although, to the extent that the matter falls within the lawyer's province as legally-related, a good lawyer might counsel a contrary course or perhaps bring the matter to the attention and seek the advice of higher authority within the corporation). Nor does paragraph (b) necessarily apply to the situation discussed below in which constituents of the organization have fallen into such serious discord that the survival of the entity is in doubt. Again, only if the lawyer knows that the conduct of the person or persons at issue contravenes the directives of the law—that is, rises to the level of law-breaking behavior—is paragraph (b) implicated.

Third, the lawyer's duty to proceed as is reasonably necessary in the best interest of the organization comes into play only if the lawyer believes the misconduct is "likely to result in substantial injury to the organization."[276] Minor or technical violations of the law that are unlikely to have much, if any, consequence to the organization do not justify extraordinary measures. Of course, the lawyer should offer appropriate legal advice designed to arrest any legal delinquency and should appreciate that a pattern of lawlessness in small things may add up to something more significant and thus may eventually set in motion the duties of paragraph (b).

Even if all the foregoing prerequisites are present, and the lawyer

274. On the lawyer's duty of diligence, see Rule 1.3, Iowa R. Prof'l Conduct.
275. Rule 1.13(b), Iowa R. Prof'l Conduct.
276. Rule 1.13(b), Iowa R. Prof'l Conduct.

thus has an ethical duty to take appropriate corrective action, the lawyer's authority to proceed in the best interest of the organization is circumscribed. In particular, the lawyer is directed to work within the organizational structure and its chain of command to address the problem of constituent misconduct. Paragraph (b) of Rule 1.13 provides in its second sentence:

> Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.[277]

Reporting up the chain ordinarily should be sufficient to secure the necessary corrective action—and achieve that correction within the organization structure. As Professors Geoffrey Hazard and William Hodes anticipate:

> This is because people at the top of most corporations or unions or other organizations have no interest in shielding fraud by lower echelon personnel, and a strong interest to avoid doing so. Most high-ranking officials are law-abiding, and require the same of their subordinates, a few spectacular recent examples to the contrary notwithstanding. These officials do not want the legal grief involved in responding to investigations of wrongdoing, let alone the pain of actual litigation or prosecution. And if top management is typically risk averse, independent directors are even more so.[278]

If, however, the lawyer fails in the effort to provoke corrective action by higher authority within the organization, then paragraph (c) of Rule 1.13 authorizes, but does not command, the lawyer to take the additional step of disclosing confidential information to prevent injury to the entity.[279] In other words, if "reporting up" within the organization to higher authority proves unsuccessful, the lawyer has circumscribed authority to "report out" from the organization to outsiders. If after receiving the lawyer's report of law-breaking by a constituent and the risk of substantial injury to the organization, the "highest authority" within the organization endorses the reported misconduct by the offending constituent, fails to address it in a timely and appropriate manner, or refuses to address or even

277. *Id.*
278. HAZARD & HODES, *supra* note 44, § 17.11, at 17-38.
279. *See* Rule 1.13(c), Iowa R. Prof'l Conduct.

acknowledge the problem, then that "highest authority" will have been proven fatally defective on this crucial matter. In light of the governing body's abysmal failure to uphold its duty to protect the organization, the lawyer is granted the exceptional discretion to go beyond the organization structure and seek the assistance of outsiders in resolving the problem. Paragraph (c) of Rule 1.13 permits the lawyer to disclose confidential information "but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization."[280] The lawyer might report the intramural misconduct to an outside law enforcement or regulatory body that would force the entity to comply with the law. Or, in the case of a corporation, the lawyer might report the matter to shareholders who might be able to intervene and save the organization from itself.

It must be emphasized that the lawyer's permissive authority to disclose confidential information, for the purpose of provoking an outside intervention, is only for the benefit of the entity. This is *not* a "whistle-blower" provision. Instead, to use the label coined by Professor George Harris, paragraph (c) contemplates a "loyal disclosure" in the interest of the entity.[281] As confirmation of "the inward looking and client-protecting nature" of Rule 1.13, Professors Hazard and Hodes characterize the extramural disclosures authorized under paragraph (c) "as a last-ditch effort to rescue *the client* from suffering substantial injury due to lawbreaking activities ratified (or ignored) even by the highest authority in the organization."[282] Indeed, given the failure of the organization's governing body to take curative action on its own—which is an abdication of that body's fundamental responsibilities—the lawyer's disclosure of confidential information under the extreme circumstances contemplated in paragraph (c) might be regarded, less as an exception to the confidentiality principle, than as a waiver by the organization itself acting through its lawyer as a substitute agent for the defective governing body.

However, while Rule 1.13 does not oblige the lawyer to disclose confidential information other than to assist the organization, other provisions in the rules do permit and may even require disclosure of confidential information to prevent or rectify fraudulent or criminal behavior by a client, whether an organization or an individual, that may

280. *Id.*

281. George C. Harris, *Taking Entity Theory Seriously: Lawyer Liability for Failure to Prevent Harm to Organization Clients Through Disclosure of Constituent Wrongdoing*, 11 GEO. J. LEGAL ETHICS 597, 599 (1988).

282. HAZARD & HODES, *supra* note 44, § 17.2, at 17-8.

cause serious financial harm to another. Rule 4.1(b) of the Iowa Rules of Professional Conduct, which forbids a lawyer from knowingly "fail[ing] to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client,"[283] when read together with the exceptions in Rule 1.6(b)(2) and (3), that permit disclosure to prevent or rectify substantial financial harm caused by client criminal or fraudulent behavior, effectively requires disclosure of confidential information in narrow circumstances.[284]

The permission granted to the lawyer under paragraph (c) of Rule 1.13 to disclose confidential information to those outside the organization for the purpose of protecting the organization is withdrawn under paragraph (d) if the lawyer involved was retained by the "organization to investigate an alleged violation of law, or to defend the organization or an officer, employee, or other constituent associated with the organization against a claim arising out of an alleged violation of law."[285] Thus, when the representational role is limited to conducting a fact-finding investigation within the organization or is for the specific purpose of defending the organization or its constituents against a charge of unlawful misconduct,[286] the lawyer does not have permission to bypass the organization's chain-of-command and disclose confidential information outside the organization. As Comment 7 to Rule 1.13 explains, "[t]his is necessary in order to enable organizational clients to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim."[287] Note that the lawyer hired to investigate or defend the organization is not relieved of the responsibilities outlined in paragraph (b) to report findings about misconduct to those in higher authority within the entity.

283. Rule 4.1(b), Iowa R. Prof'l Conduct.

284. *See supra* Part VIII.C.

285. Rule 1.13(d), Iowa R. Prof'l Conduct.

286. On limitations on the scope of representation generally, see Rule 1.2(c), Iowa R. Prof'l Conduct and SISK & CADY, *supra* note 2, § 5:02(c).

287. Rule 1.13, cmt. 7, Iowa R. Prof'l Conduct.

XIII. DUTY TO DISCLOSE CONFIDENTIAL INFORMATION AS A REMEDIAL MEASURE FOR FALSE EVIDENCE OR CRIMINAL OR FRAUDULENT CONDUCT TOWARD A TRIBUNAL

A. *Reasonable Remedial Measures, Confidentiality, and the Recent Change in Iowa Expectations*

In addition to enjoining the lawyer to speak the truth before tribunals and not to knowingly offer false evidence, Rule 3.3 further imposes the responsibility on the lawyer to correct false statements or false evidence presented to the tribunal by the lawyer, the lawyer's client, or a witness called by the lawyer. Importantly, the lawyer's obligation under Rule 3.3, to take reasonable remedial measures with respect to statements or evidence that the lawyer comes to know is false, is mandatory, even when the only effective remedy is disclosure of confidential or privileged information to the tribunal.[288] That the lawyer him or herself is obliged to be candid with the court and that the lawyer must encourage the client to be truthful and not deliberately deceptive in representations in the proceedings are neither new nor controversial precepts in Iowa. However, because Rule 3.3 reverses (at least in part) the prior expectation in Iowa—under which the principle of confidentiality was elevated above the duty to correct client untruths—this particular aspect of Rule 3.3 has been one of the more controversial elements of the new ethical regime in Iowa.

As part of the new Iowa Rules of Professional Conduct that became effective on July 1, 2005, the Iowa Supreme Court adopted language in Rules 1.6 and 3.3 that has not only enlarged the circumstances for permissive disclosure by lawyers of confidential information, but has established a mandatory requirement of disclosure in three contexts.[289] First, Rule 1.6(c) requires the lawyer to reveal information if the lawyer believes it reasonably necessary to prevent imminent death or substantial bodily harm to another.[290] Second, Rule 4.1(b), which forbids a lawyer from knowingly "fail[ing] to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client,"[291] when read together with the exceptions in Rule 1.6(b)(2) and (3) permitting disclosure to prevent or rectify substantial financial harm caused by client criminal or fraudulent behavior, effectively requires disclosure of

288. Rule 3.3, Iowa R. Prof'l Conduct.
289. *See supra* notes 19–25 and accompanying text.
290. Rule 1.6(c), Iowa R. Prof'l Conduct; *supra* Part VII.
291. Rule 4.1(b), Iowa R. Prof'l Conduct.

confidential information in certain circumstances.[292] Third, and the subject of our present attention in this part of the Article, Rule 3.3 directs that a lawyer who discovers that a client has committed fraud upon a tribunal in a proceeding that is not yet concluded must take reasonable remedial measures, including, if necessary, disclosure to the tribunal.[293] Unlike the standard under the prior Iowa Code of Professional Responsibility, even when the lawyer's knowledge of a client's perjury or other fraud on the court has been obtained through a privileged communication, the lawyer is not excused from the duty to disclose the information.

The problem of client perjury (as the classic example of false evidence being submitted to a tribunal) has been an intractable one for the legal profession and has led people of wisdom and good faith to reach diametrically opposed conclusions.[294] The client perjury dilemma, especially in criminal cases, displays in a most poignant manner the ever-present tension in the legal profession between the ideal of the attorney as an officer of the court and the role of the attorney as a zealous advocate for the client.[295] As common ground, nearly all agree that a lawyer may not knowingly elicit false testimony, that a client should be dissuaded from committing perjury, and that a client who has falsely testified should be urged to rectify the perjury.[296] However, there is no consensus on how to

292. Rule 1.6(b)(2)–(3), Iowa R. Prof'l Conduct; *see supra* Part VIII.C.

293. Rule 3.3(a)(3), (c), Iowa R. Prof'l Conduct.

294. *Compare* ROTUNDA & DZIENKOWSKI, *supra* note 194, § 3.3-5, at 656–63 (defending duty to disclose client perjury in Model Rule 3.3), *and* Jeffrey L. Dunetz, *Surprise Client Perjury: Some Questions and Proposed Solutions to an Old Problem*, 29 N.Y.L. SCH. L. REV. 407 (1984) (advocating duty to disclose client perjury) *with* FREEDMAN & SMITH, *supra* note 255, ch. 6 (opposing duty of disclosure), *and* Ernest F. Lidge, III, *Client Perjury in Tennessee: A Misguided Ethics Opinion, an Amended Rule, and a Call for Further Action by the Tennessee Supreme Court*, 63 TENN. L. REV. 1 (1995) (same). For additional information, see HAZARD & HODES, *supra* note 44, § 29.15, at 29-25 (generally supporting the duty of disclosure of false evidence or fraud on the tribunal, but stating that Professor Hazard has "concluded that requiring a criminal defense lawyer to disclose *client* perjury is an excessive and unrealistic expectation"); Geoffrey C. Hazard, Jr., *The Client Fraud Problem as a Justinian Quartet: An Extended Analysis*, 25 HOFSTRA L. REV. 1041 (1997) (same).

295. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 12.5.1, at 653 (1986) ("A lawyer faced with perjurious testimony by a client or friendly witness confronts the choice between client interest and social interest in a most poignant form."); Brent R. Appel, *The Limited Impact of* Nix v. Whiteside *on Attorney-Client Relations*, 136 U. PA. L. REV. 1913, 1916–17 (1988) (describing the client perjury problem as implicating the contrasting models of the attorney as "officer of the court" and as the client's "alter ego"). On this classic tension between the officer of the court and the zealous advocate ideals, see SISK & CADY, *supra* note 2, § 1:02.

296. Lidge, *supra* note 294, at 6 (describing "general, although not unanimous,

respond when the lawyer is surprised by the client's false testimony or when the client confesses afterward that he or she prevaricated on the witness stand.

On the "officer of the court" side of the debate, advocates of mandatory disclosure by the attorney to the tribunal "have argued that non-disclosure of perjury is a taint on a lawyer's character and an affront to the court's dignity."[297] Arguing that "the truth-seeking elements of a trial must remain paramount in order to preserve the integrity of our adversary system of justice," proponents compare the duty to reveal client perjury to the lawyer's responsibility to prevent threats or bribes to witnesses or jurors.[298] The failure to disclose, it is suggested, would mean that the lawyer essentially "cooperate[s] in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement."[299]

On the zealous advocacy side, opponents contend that forcing revelation of client confidences "transform[s] the attorney from an advocate to a whistleblower."[300] A mandatory disclosure rule discourages clients from entrusting their lawyers with confidential information; it also tempts the lawyer to avoid the problem by remaining deliberately ignorant and avoiding investigation so that he or she will never actually "know" that a client has given false testimony, thereby impairing effective representation performed after thorough investigation and with full understanding of the client's story.[301] Some further argue that the lawyer's appropriation of incriminating statements by the client, to be used in disclosing client perjury to the tribunal, especially when the client was not warned in advance that his or her statements to the lawyer might be used against the client, would violate the Fifth Amendment privilege against self-incrimination.[302]

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agreement on a few points").

297. *Id.* at 9 (describing position of advocates of mandatory disclosure) (footnote omitted).

298. Dunetz, *supra* note 294, at 426–27; *see also* Nix v. Whiteside, 475 U.S. 157, 174–75 (1986) (comparing, in dicta, the duty to prevent or reveal client perjury to the duty to rectify bribes or threats to witnesses or jurors).

299. Rule 3.3, cmt. 11, Model R. of Prof'l Conduct (2002).

300. Lidge, *supra* note 294, at 3.

301. *See* FREEDMAN & SMITH, *supra* note 255, § 6.01–6.04, at 153–58, § 6.07, at 163, § 6.20–6.21, at 185–88; Wayne D. Brazil, *Unanticipated Client Perjury and the Collision of Rules of Ethics, Evidence, and Constitutional Law*, 44 MO. L. REV. 601, 641–42 (1979); Lidge, *supra* note 294, at 9–11.

302. FREEDMAN & SMITH, *supra* note 255, § 6.17, at 178–80; *see also* Nathan M.

The client perjury dilemma could not be side-stepped in the recent transition to new ethical rules in Iowa, because the proper resolution of that problem was a point of explicit divergence between the Model Rules of Professional Conduct and the former Iowa Code of Professional Responsibility. Iowa Disciplinary Rule 7-102(B)(1) prohibited the lawyer from disclosing a client's confessed perjury to the court when the lawyer had learned of the untruthful testimony through a privileged communication.[303] The Iowa lawyer, of course, could not knowingly offer or use perjured testimony or other false evidence,[304] but the lawyer who learned of the client's perjury after the fact or was surprised by it during the trial was bound to uphold the attorney-client privilege in the same manner as the lawyer's privileged knowledge of other past wrongdoing by a client.[305] Although the Iowa attorney was not to reveal a client's admission to the lawyer of perjury or other fraud on the tribunal, by reason of the attorney-client privilege, the attorney was directed to withdraw if the client

Crystal, *False Testimony by Criminal Defendants: Still Unanswered Ethical and Constitutional Questions*, 2003 U. ILL. L. REV. 1529, 1565–71 (noting the constitutional questions, especially under due process and the privilege against self-incrimination, that remain unanswered regarding defense counsel action to prevent or rectify false testimony by a criminal defendant).

303. *See* Disciplinary Rule 7-102(B)(1), Iowa Code Prof'l Responsibility (superseded) (providing that "the lawyer shall reveal the fraud to the affected person or tribunal in all circumstances except when barred from doing so by Iowa Code section 622.10," which is the statutory attorney-client privilege provision); *see also* Iowa Supreme Court Bd. Prof'l Ethics & Conduct, Opinion 93-18 (1993) (interpreting Disciplinary Rule 7-102(B) to broadly preclude attorney revelation of privileged client information, including an episode involving discovery of fraud in a real estate transaction, not a court proceeding, although the opinion insists that the lawyer take all steps to avoid assisting the client in the wrongful transaction).

304. *See* Disciplinary Rule 7-102(A)(4), Iowa Code Prof'l Responsibility (superseded).

305. During the period in which the American Bar Association's Model Code of Professional Responsibility was in effect in most jurisdictions, the ABA Standing Committee on Ethics and Professional Responsibility had interpreted Disciplinary Rule 7-102(B)(1) as precluding the lawyer's disclosure of client fraud, not only when learned in a privileged communication, but whenever the information was confidential—that is, information gained during the course of the representation other than through a client communication. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 341 (1975). Whether the Iowa Supreme Court would have similarly interpreted the Iowa version of the rule, despite the rule's explicit reference to the statutory attorney-client privilege, will never be known. But, in any event, a lawyer who comes to know of a client's perjured testimony is most likely to learn of its falsity through the client's confidential confession or through inconsistent statements made by the client during privileged communications.

refused to rectify the falsity with the tribunal or person affected.[306]

By contrast, Rule 3.3 of the Model Rules of Professional Conduct mandates that the attorney disclose the client's perjury to the court, notwithstanding that the lawyer may have learned of it through a privileged communication.[307] In a formal ethics opinion, the American Bar Association's Standing Committee on Ethics and Professional Responsibility confirmed that Model Rule 3.3 "represent[s] a major policy change" from the Code of Professional Responsibility because the duty to disclose a client's perjury would no longer be excused by client confidentiality.[308] The committee concluded that the attorney's duty under Rule 3.3 to take "reasonable remedial measures" to correct the fraud indeed does mandate revealing his or her client's perjury directly to the court.[309]

As part of the transition in Iowa to the Model Rules format, the Iowa Supreme Court reconsidered the appropriate balance between the lawyer's duty to protect confidential information and the lawyer's duty of candor to the tribunal. The court chose to adopt the Model Rules standard, under which the public interest in the integrity of proceedings is given priority over attorney-client confidentiality. Accordingly, under paragraphs (a)(3) and (c) of Rule 3.3 of the Iowa Rules of Professional Conduct, if the attorney discovers after the fact that the client or a witness has offered perjured testimony or false evidence, the lawyer is required to disclose that information to the tribunal, even if the information would otherwise be a client confidence.[310] Subparagraph (a)(3) thus imposes a "whistleblowing" duty on lawyers to report client wrongdoing that undermines the integrity of the adjudicative process during the course of the lawyer's representation of a client before a tribunal. Under paragraph (c), that mandatory duty of

306. For an analysis consistent with this understanding of the prior directive of the Iowa Code of Professional Responsibility regarding the responsibilities of lawyers to preserve client confidentiality while taking other steps to prevent the presentation of false evidence, see State v. Hischke, 639 N.W.2d 6, 11 (Iowa 2002) (Carter, J., concurring) (while the majority found it unnecessary to address whether revelation to the court of proposed client perjury was proper because that issue was not raised on appeal, concurring justice opined that the lawyer should attempt to dissuade the client from false testimony, attempt a quiet withdrawal if unsuccessful in persuading the client, and not invite false testimony in questioning of client if not permitted to withdraw, but that the lawyer should not breach confidentiality by disclosing suspected perjury to the court).

307. Rule 3.3(a)(3), (c), Model R. of Prof'l Conduct (2005).

308. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 353 (1987).

309. *Id.*

310. Rule 3.3(a)(3), (b)–(c), Iowa R. Prof'l Conduct.

disclosure prevails over the lawyer's duty to protect confidential information related to the representation of the client.[311]

In effect, the Iowa Supreme Court has restored the expectations that applied a quarter of a century earlier, before Iowa had adopted the privilege exception to the lawyer's duty to disclose client fraud on a tribunal through a 1980 amendment to Iowa Disciplinary Rule 7-102(B)(1).[312] In a 1976 opinion reviewing a disciplinary proceeding that arose prior to the 1980 revision and indeed prior to the adoption of the Iowa Code of Professional Responsibility, the Iowa Supreme Court in *Committee on Professional Ethics & Conduct v. Crary*, had held that an attorney did have an affirmative duty to rectify client perjury in a deposition, including disclosure of confidential information, stating that "no duty exists to the client when the client perjures himself to the knowledge of the attorney" and "[s]uch conduct by the client falls outside the attorney-client relationship."[313] While the court did not suggest in *Crary* that a lawyer learning of client perjury could be compelled to take the stand and testify against the client, an extraordinary step that would impinge directly upon the attorney-client privilege, the court did speak of the lawyer's duty to divulge the truth to opposing counsel and the court.[314] In essence, the *Crary* court required a non-testimonial disclosure by the lawyer of information learned from attorney-client communications, without trespassing upon the attorney-client privilege to compel an evidentiary revelation of privileged communications by legal process.[315] By later incorporating the privilege exception to disclosure into Iowa Disciplinary Rule 7-102(B), Iowa changed its position and precluded even non-testimonial disclosure of client perjury when the lawyer knew of the

311. *See* HAZARD & HODES, *supra* note 44, § 29.3, at 29-5 (describing Rule 3.3 as a "trumping" rule because it imposes duties with which the lawyer must comply even if compliance requires disclosure of information otherwise protected as confidential).

312. Iowa adopted a revised version of the American Bar Association's 1974 amendment precluding disclosure when protected by attorney-client confidentiality to Disciplinary Rule 7-102(B)(1) of the Model Code of Professional Responsibility. The Iowa version, which became effective on January 21, 1980, provided that the lawyer should not disclose a client's fraud upon the tribunal "when barred from doing so by Iowa Code section 622.10." Section 622.10 is the statutory testimonial attorney-client privilege provision.

313. Comm. on Prof'l Ethics & Conduct v. Crary, 245 N.W.2d 298, 306 (Iowa 1976).

314. *See id*.

315. On the relationship of exceptions to confidentiality in the ethics rules to the protection of the attorney-client privilege, see *supra* Part IV.D.5.

falsity of the testimony through a privileged communication.[316]

Having previously modified the rule regarding ethically-compelled disclosure of confidential information, the Iowa Supreme Court certainly has the authority to change course again. And now it has. With the adoption of new Rule 3.3 in 2005, the Iowa Supreme Court effectively has restored the duty of non-evidentiary disclosure of client fraud or perjury against a tribunal, whether or not the information was learned through a privileged communication, that had been in place prior to adoption of the 1980 revision to the Iowa Code of Professional Responsibility.

B. *The Standard of Knowledge As Applied to the Falsity of Evidence*

The duty of the lawyer to prevent false evidence from being offered to the tribunal and to take reasonable remedial measures to correct false evidence after the fact is triggered only when the lawyer "knows" the evidence is false. Subparagraph (a)(3) of Rule 3.3 directs the lawyer not to "offer evidence that the lawyer knows to be false."[317] This subparagraph further directs the lawyer to take corrective measures with respect to material evidence when "the lawyer comes to know of its falsity."[318] Comment 8 to Rule 3.3 emphasizes that "[a] lawyer's reasonable belief that evidence is false" does not mandate withholding the evidence.[319] Moreover, the comment urges the lawyer to "resolve doubts about the veracity of testimony or other evidence in favor of the client."[320] At the same time, the comment observes that a lawyer's knowledge that evidence is false "can be inferred from the circumstances," and that "the lawyer cannot ignore an obvious falsehood."[321]

In *State v. Hischke*, a case arising before adoption of the Iowa Rules of Professional Conduct, but while the transition to the new rules was well under way, the Iowa Supreme Court considered "what standard of knowledge is required before a lawyer may inform the court of his or her

316. *See* WOLFRAM, *supra* note 295, § 12.5.3, at 657 n.63 (explaining that the disclosure requirement in *Crary* "ha[d] been narrowed by an amendment to the Iowa Code of Professional Responsibility," as "Iowa DR 7-102(B)(1) now provides that if disclosure is prevented by the attorney-client privilege," the lawyer instead must withdraw unless the client agrees to disclosure).

317. Rule 3.3(a)(3), Iowa R. Prof'l Conduct.

318. *Id.*

319. Rule 3.3, cmt. 8, Iowa R. Prof'l Conduct.

320. *Id.*

321. *Id.*

client's plan to commit perjury."[322] Rejecting the extremes of requiring that the lawyer have knowledge beyond a reasonable doubt or allowing a lawyer merely to have made a good faith determination, the court settled upon the test of whether the lawyer was "'convinced with good cause to believe the defendant's proposed testimony would be deliberately untruthful.'"[323] The court also regarded it as unnecessary in every case for the lawyer to conduct an independent investigation of the facts before reaching the conclusion that the client intended to commit perjury.[324]

By declining to adopt a particular version of "actual knowledge" as the standard,[325] the *Hischke* court's ruling might appear to be in conflict with the standard subsequently adopted in the Iowa Rules of Professional Conduct. Rule 3.3 imposes the duties to prevent or correct false evidence only when the lawyer "knows" the evidence is false,[326] and Rule 1.0(f) defines "knows" as "denot[ing] actual knowledge of the fact in question."[327] However, the particular "actual knowledge" standard that was advanced by the criminal defendant in *Hischke* appears to have envisioned an exceptionally high degree of subjective certainty on the part of the lawyer. As the Iowa Supreme Court explained, the defendant's proposed "standard would be virtually impossible to satisfy unless the lawyer had a direct confession from his or her client or personally witnessed the event in question."[328] Indeed, the Massachusetts Supreme Judicial Court has understood the Iowa Supreme Court in *Hischke* to have rejected a proposed standard that was equivalent to demanding lawyer knowledge beyond a reasonable doubt.[329] By contrast, Rule 1.0(f), while indeed requiring "actual knowledge of the fact in question," expressly states that "[a] person's knowledge may be inferred from circumstances."[330] The "actual knowledge" standard under the rules does not countenance willful ignorance. While a simple belief, reasonable or not, is not sufficient to invoke the duties under Rule 3.3, the *Hischke* court's standard of "conviction-with-good-cause-to-believe," appears consistent with that subsequently codified in the new Iowa Rules of Professional Conduct. This

322. State v. Hischke, 639 N.W.2d 6, 9 (Iowa 2002).
323. *Id.* at 10 (quoting State v. Whiteside, 272 N.W.2d 468, 471 (Iowa 1971)).
324. *Id.*
325. *Id.*
326. Rule 3.3(a)(3), Iowa R. Prof'l Conduct.
327. Rule 1.0(f), Iowa R. Prof'l Conduct. *See generally* SISK & CADY, *supra* note 2, § 4:03(b).
328. *Hischke*, 639 N.W.2d at 10.
329. Commonwealth v. Mitchell, 781 N.E.2d 1237, 1247 (Mass. 2003).
330. Rule 1.0(f), Iowa R. Prof'l Conduct.

standard focuses upon the lawyer's confidence in reaching a conclusion that is firmly rooted in facts known to the lawyer and is based on objective circumstances experienced by the lawyer.[331] Professor Nathan Crystal suggests that a criminal defense lawyer would have actual knowledge that a defendant intends to (or did) testify falsely when the defendant confesses to the lawyer that the testimony is false, when the defendant admits certain facts to the lawyer that contradict the testimony, or when facts known to the lawyer from independent investigation are inconsistent with the defendant's testimony.[332]

However formulated or specified, the knowledge standard that triggers the lawyer's duties under Rule 3.3 is appropriately high. The lawyer, especially when representing a client against the prosecutorial power of the government, should not lightly question his or her client's veracity. Absent exceptional circumstances and a solid factual foundation that forces a contrary conviction, the lawyer properly presumes that the client has testified truthfully. The lawyer should not assume the role of judge or jury against his or her own client. As Iowa attorney John Burns writes, "[t]he credibility of the defendant's testimony should, in most cases, be measured by the jury, not by his or her own advocate."[333]

In his concurring opinion in *Nix v. Whiteside*, Justice Stevens suggested that what may appear "pellucidly clear" to an appellate court, which has the distinct advantage of reviewing the evidence after the facts have been sifted at trial by another judge, may have been anything but certain when viewed from the perspective of a trial lawyer evaluating "mixtures of sand and clay" in preparing for trial.[334] Even when the client's story has changed, Justice Stevens warned that "[a] lawyer's certainty that a change in his client's recollection is a harbinger of intended perjury—as well as judicial review of such apparent certainty—should be tempered by the realization that, after reflection, the most honest witness may recall (or sincerely believe he recalls) details that he previously overlooked."[335]

331. *See Hischke*, 639 N.W.2d at 10.

332. Crystal, *supra* note 302, at 1534–37.

333. 4A B. JOHN BURNS, IOWA PRACTICE SERIES: CRIMINAL PROCEDURE § 39:5(b), at 747–48 (2005); *see also* State v. Whiteside, 272 N.W.2d 468, 470 (Iowa 1978) ("[A] lawyer's task is not to determine guilt or innocence, but only to present evidence so that others—either court or jury—can do so.").

334. Nix v. Whiteside, 475 U.S. 157, 190 (1986) (Steven, J., concurring in the judgment).

335. *Id.* at 190–91.

C. *Taking Reasonable Steps to Remedy False Evidence*

Subparagraph (a)(3) of Rule 3.3 requires the lawyer, who has come to know of the falsity of evidence offered by the "lawyer, the lawyer's client, or a witness called by the lawyer," to "take reasonable remedial measures, including, if necessary, disclosure to the tribunal."[336] Although disclosure to the tribunal may be necessary, revelation by the lawyer should not be the option of first resort. As Comment 10 to Rule 3.3 advises, the lawyer should begin with confidential remonstration with the client, explaining the lawyer's ethical duty to protect the integrity of the proceeding and seeking the client's cooperation in withdrawing or otherwise correcting false statements or evidence.[337] In addition to emphasizing the wrongfulness of perjury or other misleading representations, the lawyer may suggest to the client that the correction will be better received if coming from the client and that it may be possible to make the correction in a manner that mitigates any negative effect on the client's interests. Many clients will accept their lawyer's advice and agree to rectify the false evidence, particularly if their lawyer has spelled out the consequences of failing to do so, namely that the lawyer will disclose the client's false testimony or other evidence.

If the client refuses to cooperate with the lawyer in disclosing or otherwise correcting the false evidence, the lawyer may not voluntarily continue to represent the client. To concretely disassociate him or herself from any fraud upon the tribunal, the lawyer ordinarily should seek permission of the tribunal to withdraw. Nonetheless, even though the advocate ordinarily must request such permission, withdrawal is unlikely to be an effective remedy when false evidence has been submitted to the tribunal and the client resists its correction. As Comment 10 to Rule 3.3 acknowledges, "[i]f 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."[338] Because the silent withdrawal of the lawyer from the representation is unlikely to fully rectify the situation, disclosure to the tribunal of the false evidence almost invariably must follow. And, again, paragraph (c) of Rule 3.3 makes plain that the duty of disclosure preempts the protection of confidentiality under Rule 1.6.[339]

336. Rule 3.3(a)(3), Iowa R. Prof'l Conduct.
337. Rule 3.3, cmt. 10, Iowa R. Prof'l Conduct.
338. *Id.*
339. *See* Rule 3.3(c), Iowa R. Prof'l Conduct.

Once the lawyer has disclosed the nature of the problem to the tribunal, the lawyer's ethical obligations have been satisfied. As Comment 10 states, "[i]t is for the tribunal then to determine what should be done—making a statement about the matter to the trier of fact, ordering a mistrial, or perhaps nothing."[340] If the lawyer is not permitted to withdraw, as frequently will be the case,[341] the lawyer must continue with the representation. If the tribunal also chooses to allow the case to proceed without taking any further action, which often may be the only reasonable course for the tribunal, especially in a criminal case, the lawyer of course may not exploit the perjured testimony or other false evidence by making any further use of it in arguments to the trier of fact or otherwise.

In a criminal case, the tribunal confronted with a lawyer's disclosure of false evidence, especially client perjury, faces a difficult choice, in which choosing to allow the matter to go forward to resolution by the jury frequently will be the least worst option. In a jury trial, the lawyer's disclosure should be presented to the judge in a sidebar, outside the presence or hearing of the jury. Because the jury thus will not have been tainted by learning of the lawyer's contradiction of the evidence submitted on behalf of the lawyer's own client, declaration of a mistrial by the tribunal will ordinarily be unnecessary. Still, because the lawyer's disclosure may be seen by the client as a grave betrayal, resulting in a serious loss of trust, a mistrial may be necessary for that reason, although such a complete breakdown of the attorney-client relationship may not be "an inevitable result."[342] By contrast, if a criminal prosecution was being tried to the bench, and the lawyer is forced to disclose the falsity of evidence over the client's objection, a mistrial appears unavoidable.[343] Not only has the lawyer become a (non-testifying) witness against the client before the trier of fact, but the lawyer and client may find themselves in irreconcilable conflict about the fundamental facts, making continued representation impossible.

If a mistrial is not declared in a criminal case, the judge may direct such corrective measures, if any, as are appropriate and feasible under the circumstances. The prosecution might be allowed a continuance to conduct

340. Rule 3.3, cmt. 10, Iowa R. Prof'l Conduct.

341. FREEDMAN & SMITH, *supra* note 255, § 6.05, at 160 (noting that motions by lawyers to withdraw are commonly denied, as the judge responds by saying that the situation is understood but that the next lawyer would face the same difficulty, so the lawyer simply must proceed as best as the lawyer can).

342. HAZARD & HODES, *supra* note 44, § 29.21, at 29-38 to -39.

343. *Id.*; ROTUNDA & DZIENKOWSKI, *supra* note 194, § 3.3-5(f), at 662.

further investigation or be allowed to present additional witnesses to rebut the false evidence. Witnesses may be recalled to undergo further examination or cross-examination. However, the judge in a criminal case may not instruct the jury to disregard the accused's testimony or to find a particular fact to have occurred or not to have occurred, because the prosecution bears the burden of establishing all of the elements of the charge beyond a reasonable doubt.[344]

Nor may the defendant's lawyer be forced or permitted to testify as a witness against his or her own client, or otherwise provide evidence of privileged communications that could be used against the client, even if the lawyer has been permitted to withdraw. As Professors Hazard and Hodes observe, "[t]he lawyer usually will 'know' of the falsity of the client's [testimony or other evidence] because it does not jibe with other information the lawyer gained during the confidential relationship."[345] While information imparted by the client to the lawyer that directly facilitated the crime of perjury would fall within the crime-fraud exception to the attorney-client privilege,[346] Professors Hazard and Hodes note that the information that typically would alert the lawyer to the falsity of evidence ordinarily would have been received earlier in the representation and not for the purpose of advancing perjury.[347] "A client's confession to her lawyer that she was in fact guilty, for example, would be privileged, even if she later decided that she was going to lie about her guilt."[348]

That a lawyer may be permitted or required under the Iowa Rules of Professional Conduct to divulge client confidences, including disclosing information obtained through communications with a client, for the purposes of preventing or correcting a serious harm or for some other important purpose such as preserving the integrity of a judicial proceeding, does not necessarily mean that the lawyer may be called as a witness or otherwise be required to provide evidence that would be admissible in court against the client.[349] Unless an exception to confidentiality under the rules (such as the Rule 3.3 duty to disclose false evidence) is directly coextensive with an exception to the attorney-client privilege, the lawyer is authorized or required to share information only in the manner and to the

344. *See* Mullaney v. Wilbur, 421 U.S. 684, 691–703 (1975); *In re* Winship, 397 U.S. 358, 361–64 (1970).

345. HAZARD & HODES, *supra* note 44, § 29.21, at 29-36.

346. On the crime-fraud exception to privilege, see *supra* Part IV.D.1.

347. HAZARD & HODES, *supra* note 44, at 29-56 n.10.

348. *Id*.

349. *See supra* Part IV.D.5.

extent necessary to prevent or correct the harm or to achieve the designed purpose, but not to testify or give evidence against the client. When an exception to confidentiality stated in the ethics rules does not align with an exception to the attorney-client privilege, the lawyer's duty of disclosure is limited to extra-evidentiary forms, namely sharing the information with the appropriate person or authorities. In sum, the exception to confidentiality in Rule 3.3 does not permit introduction of attorney-client communications into evidence through lawyer testimony or permit inquiry about those communications as part of the presentation of evidence before any tribunal, absent a recognized exception to the privilege itself.

D. *The Duration of the Obligation to Remedy False Evidence*

When a professional disciplinary rule imposes an affirmative duty, which the lawyer fails to uphold only at the risk of a disciplinary penalty for such failure, the scope or duration of the obligation should not be left open-ended. Paragraph (c) of Rule 3.3 provides that the lawyer's duties of candor in representations to the tribunal, to refrain from presenting false evidence, and to take reasonable remedial measures to protect the tribunal from false evidence or other criminal or fraudulent conduct related to the proceeding "continue to the conclusion of the proceeding."[350] Because these duties articulated by the rule are connected to the nature of the representation in an adjudicative matter before a tribunal, the rule clarifies that the lawyer's duty regarding correction of perjury, fraud, or other offenses to the administration of justice continues only while the proceeding itself continues and thus while "the lawyer can be said to have contributed (even if unwittingly) to the court's being led astray."[351] In sum, the lawyer's responsibilities with respect to the representation before the tribunal appropriately begin and end with the adjudicative matter for which the lawyer was retained and do not persist into the infinite future.

By adoption of specific language in the comment accompanying Iowa Rule 3.3, however, the Iowa Supreme Court has extended the point at which a proceeding is regarded as concluded beyond the appeal stage to include the period during which certain post-judgment remedies may be sought. Comment 13 to the Model Rule fixes the conclusion of the proceeding at the point "when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed."[352] By contrast, Comment 13 to Iowa Rule 3.3 states that a proceeding has been concluded

350. Rule 3.3(c), Iowa R. Prof'l Conduct.
351. HAZARD & HODES, *supra* note 44, § 29.3, at 29-5.
352. Rule 3.3, cmt. 13, Model R. Prof'l Conduct (2005).

"when it is beyond the power of a tribunal to correct, modify, reverse, or vacate a final judgment, or to grant a new trial."[353] This alternative Iowa language is plainly designed to encompass post-judgment proceedings, and indeed the text of the comment is parallel to the Iowa civil procedure rule governing petitions to vacate or modify a judgment. In a civil case in Iowa state courts, the court retains the power to "correct, vacate or modify a final judgment or order, or grant a new trial," on various grounds, specifically including "[i]rregularity or fraud practiced in obtaining it."[354] A petition to vacate or modify a civil judgment on such grounds must be filed within one year of the judgment.[355] Accordingly, the attorney's duty to take reasonable remedial measures to correct fraud on the tribunal under Rule 3.3 continues not only through the appeal or until the time for appellate review has passed, but through the one-year period after the trial court's judgment during which a petition to vacate or modify the judgment as having been fraudulently obtained may be filed, whichever (the expiration of time to seek appeal or completion of appellate proceedings and the time period for post-judgment remedies) occurs latest in time.

In a criminal case, this alternative comment language likewise compels the conclusion that a proceeding has not been concluded and the attorney's duties under Rule 3.3 continue until expiration of the time period for seeking or completion of both direct appellate review and any post-judgment motions. If the defendant is acquitted, the proceeding obviously is concluded and may not be reopened, due to the attachment of double jeopardy. If the defendant is convicted, the proceeding certainly remains open until the trial court has addressed all post-trial motions and the conviction either has been affirmed or reversed on appeal or the time for filing an appeal has passed. While the language in Iowa Comment 13 to

353. Further indicating dissatisfaction with a definition of "conclusion of the proceeding" that is fixed too tightly to the final judgment in the trial court and the passage of the appeal period, Comment 13 to Iowa Rule 3.3 also omits language from the Model Rule comment that would emphasize the need for a "definite point" at which the conclusion is said to have concluded. Comment 13 to Model Rule 3.3 includes the following two additional sentences (omitted from the Iowa comment): "A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation." Rule 3.3, cmt. 13, Model R. Prof'l Conduct (2005).

354. Rule 1.1012(2), Iowa R. Civ. P. On relief against judgments, see generally 12 BARRY A. LINDAHL, IOWA PRACTICE: CIVIL & APPELLATE PROCEDURE § 40:50 (2006). On fraud as a basis for vacating a judgment, see *In re* Marriage of Short, 263 N.W.2d 720, 723 (Iowa 1978).

355. Rule 1.1013(1), Iowa R. Civ. P.

Rule 3.3 might be construed to encompass post-conviction remedies, which could dramatically extend the duration of the Rule 3.3 remedial duties, the language most naturally is read to speak to the power of the court that originally hears or reviews the matter with respect to the same proceeding, rather than encompassing a separate collateral attack upon a judgment. For that reason, the duties imposed by Rule 3.3 may not persist during the indefinite and open-ended period in which a convicted defendant might seek collateral relief to set aside a criminal conviction,[356] such as an application for postconviction relief in Iowa (which may be sought within three years of the finality of the applicant's conviction)[357] or a petition for habeas corpus in federal court (which may not be sought until state remedies are exhausted and also may be raised many years later if new constitutional principles are articulated or new facts are discovered).[358] While the comment language is not unambiguous on this point, your author suggests that a collateral attack on a prior conviction should be regarded as the institution of a new proceeding, rather than the continuation of an unconcluded prior proceeding.

E. *The Likely Impact of the Rule Change Mandating Disclosure of False Evidence*

When considering adoption of a new ethics regime patterned on the Model Rules of Professional Conduct, Iowa was forced to confront a sharp difference in ethical direction and underlying policy on the persistent problem of client perjury. The Iowa Supreme Court had to choose whether to adhere to the Code's elevation of attorney-client confidentiality to a position of superior protection or instead to incorporate the Model Rules mandate for disclosure of client perjury as necessary to protect the integrity of the tribunal. Whatever answer was given would be controversial, as the problem of client perjury is one where some regard anything less than full disclosure as the lawyer suborning perjury, while others regard the cure of revelation as being worse than the disease of falsity. Nor was any answer likely to achieve more than grudging acceptance within the bar, as those on both sides of the scholarly debate have acknowledged that they remain less than satisfied with their own positions, and even persons with strongly-held views have changed their

356. *See* ROTUNDA & DZIENKOWSKI, *supra* note 194, § 3.3-5(f), at 661.

357. IOWA CODE § 822.3 (2005). *See generally* BURNS, *supra* note 333, § 33:1–.3.

358. *See generally* BURNS, *supra* note 333, § 33:4.

positions over the years.[359] And, in the end, at least one commentator suggests that the issue has become unduly inflated in importance, as "few criminal defendants who go to trial are acquitted," whether they lie on the stand or not, and thus "a disclosure rule would affect the outcome in an insignificant number of cases."[360]

Perhaps the most sensible approach is to resist any utopian impulses and accept that any resolution for this intractable problem will do little more than provide some general direction for lawyers and judges who face what we may hope is an uncommon if not rare scenario. Although lawyers, particularly those in the criminal defense bar, may regularly encounter situations where they suspect or even reasonably believe that a client's story is less than fully truthful, the ABA's Standing Committee on Ethics and Professional Responsibility anticipated that the disclosure duty under Rule 3.3 would seldom be invoked because it will be "the unusual case where the lawyer does know" about client perjury.[361] When that unusual case does arise, we should leave ample room for the lawyers involved, and the judges who receive a report of client perjury, to make the best of a difficult situation. They must struggle to uphold their obligations of integrity, while avoiding a mistrial if feasible, attempt if possible to salvage the attorney-client relationship from irretrievable breakdown despite a compelled disclosure, protect the attorney-client privilege as much as possible by ensuring that the lawyer's disclosure is limited to a side-bar with the judge and counsel outside the presence of the jury, and be careful not to trespass upon the constitutional rights afforded a criminal defendant to testify in his or her own defense and to having the charges evaluated by a jury. We should resist the temptation to be too specific in setting guidelines that must govern every case, regardless of circumstances, or to engage in second-guessing of those who are on the front lines.

We all might do well to learn from the hard-won experience and later reassessment of federal district Judge Marvin E. Frankel, who had been the most prominent advocate of the adamant position that truth-finding must

359. *See* FREEDMAN & SMITH, *supra* note 255, § 6.22, at 188–89 (acknowledging that the authors "are less [than] completely satisfied with" their position in opposition to a disclosure rule in the case of client perjury, and noting that Professor Geoffrey Hazard, who had strongly supported Rule 3.3, had come to believe "that requiring a criminal defense lawyer to 'blow the whistle' on client perjury is futile or counterproductive" (quoting Hazard, *supra* note 294, at 1060)).

360. Nathan M. Crystal, *Confidentiality Under the Model Rules of Professional Conduct*, 30 KAN. L. REV. 215, 242 (1982).

361. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 353 (1987).

be the paramount value in the litigation process[362] and who later was the primary architect of the mandatory disclosure directive that was incorporated into Rule 3.3 of the Model Rules.[363] Several years later, after leaving the bench and returning to the practice of law, he acknowledged that, despite the mandatory disclosure duty in the rules, "no evidence suggests that there has been a notable increase in truth-telling in the courthouse."[364] He further admitted, "[t]he more I see of life and the practice of law, the more justifiable I find the stance that we really ought not be called upon to 'know' when someone's story is false."[365] While rules about client perjury are "easily stated," he lamented, they are "only the beginning of daunting perplexities."[366] In the end, he wisely suggested, recognizing that "we are not omniscient remains a sound perception and a legitimate comfort in these situations."[367]

F. *The Lawyer's Duty to Counteract Client Fraudulent or Criminal Conduct Before the Tribunal*

Together with the advocate's duty of candor to the tribunal, in speaking truthfully and refusing to present or to acquiesce in the presentation of false evidence, paragraph (b) of Rule 3.3 requires the lawyer to "take reasonable remedial measures" when the lawyer representing a client in that proceeding "knows that a person intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding."[368] The duty to take "reasonable remedial measures" includes the duty to disclose the matter to the court if necessary to rectify the situation. As with the lawyer's discovery that false evidence has been presented to the tribunal, the duty of disclosure with respect to fraudulent or criminal conduct relating to the proceeding applies under paragraph (c) of Rule 3.3 "even if compliance requires disclosure of information otherwise protected" as confidential under Rule 1.6.[369]

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362. *See, e.g.*, Marvin Frankel, *Partisan Justice: A Brief Revisit*, LITIG., Summer 1989, at 43, 44 [hereinafter Frankel, *Partisan Justice*]; Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1035 (1975) [hereinafter Frankel, *The Search for Truth*].

363. On Judge Frankel's role and later change of position, see FREEDMAN & SMITH, *supra* note 255, § 6.23, at 189–90.

364. Frankel, *Partisan Justice*, *supra* note 362, at 44.

365. *Id.*

366. *Id.* at 43.

367. *Id.* at 44.

368. Rule 3.3(b), Iowa R. Prof'l Conduct.

369. Rule 3.3(c), Iowa R. Prof'l Conduct; *see also* Rule 1.6, Iowa R. Prof'l

As subparagraph (a)(3) addresses the presentation of false evidence in the proceeding, which of course is a form of fraud upon the tribunal and when done knowingly constitutes a crime, paragraph (b) is addressed to other forms of criminal or fraudulent conduct that undermine the integrity of the adjudicative process. Comment 12 to Iowa Rule 3.3 provides such examples "as bribing, intimidating, or otherwise unlawfully communicating with a witness, juror, court official, or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence, or failing to disclose information to the tribunal when required by law to do so."[370] The lawyer again not only must refrain from assisting such wrongful misconduct but, upon obtaining knowledge that such activities have occurred or are underway, must take those measures necessary to counteract the deleterious effects upon the proceeding, including disclosure to the tribunal as necessary.

XIV. GENERAL PRINCIPLES GOVERNING DISCLOSURE PURSUANT TO EXCEPTIONS TO CONFIDENTIALITY

When the lawyer is authorized to disclose confidential information, the lawyer's revelation ordinarily should occur only after consultation with the client about alternative means to achieve the purpose served by the exception to confidentiality. In all events, the disclosure should be limited to the extent necessary to achieve that purpose.

As discussed above, with respect to the client crime-fraud exceptions,[371] when the lawyer is considering disclosure of confidential information to prevent or rectify harm to another, or to comply with a legal requirement, the lawyer generally should offer the client the opportunity to make the disclosure instead. In this way, the client's dignity is preserved in some measure and the client may be better perceived or even receive mitigating treatment by being the source of the disclosure. On occasion, however, the imminence of the anticipated harm, or the fact that the lawyer is using confidential information to defend him or herself against the client's allegations of wrongdoing, will make prior consultation impossible or impractical.

In any event, the lawyer should disclose only so much information as necessary to achieve the purpose and only to those persons necessary. That an exception to confidentiality allows disclosure of some information

Conduct.

370. Rule 3.3, cmt. 12, Iowa R. Prof'l Conduct.

371. *See supra* Part VIII.D.

does not excuse the lawyer from a continuing duty to safeguard other confidential information that need not be disclosed. And on no occasion should a lawyer use the exception for another purpose, such as threatening the permitted (but not required) disclosure of confidential information in order to secure an advantage against the client.

XV. CONFIDENTIALITY AS A PERVASIVE CONCERN THROUGHOUT THE RULES

Rule 1.6 of the Iowa Rules of Professional Conduct establishes the requirement that the lawyer protect client confidences, defines the broad scope of confidentiality, and sets forth several permissive provisions and one mandatory provision for lawyer disclosure of confidential information. The fundamental principle of confidentiality permeates the application of the rest of the rules as well.

Among the other rules that also implicate confidentiality most directly are the following:

- Rule 1.9(c) prohibits the lawyer from using confidential information to the disadvantage of a former client or revealing information relating to the representation of a former client.[372]
- Rule 3.4(a) prohibits a lawyer from unlawfully obstructing another party's access to evidence or unlawfully altering, destroying, or concealing potential evidence, which in turn requires consideration of the bounds of confidentiality as it relates to the lawyer's knowledge about such evidence and its location.[373]
- Rule 4.2, which limits the authority of a lawyer to make an ex parte contact with a person represented by another lawyer,[374] is accompanied by Comment 7 which emphasizes that while the rule permits ex parte contact with former constituents of an entity, "[i]n communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization," that is, privileged or other protected information.[375]

372. Rule 1.9(c), Iowa R. Prof'l Conduct. *See generally* SISK & CADY, *supra* note 2, § 5:09(d).

373. *See* Rule 3.4(a), Iowa R. Prof'l Conduct. *See generally* SISK & CADY, *supra* note 2, § 7:04(b).

374. Rule 4.2, Iowa R. Prof'l Conduct.

375. Rule 4.2, cmt. 7, Iowa R. Prof'l Conduct. *See generally* SISK & CADY, *supra* note 2, § 8.02.

- Rule 4.4(a) directs the lawyer not to "use methods of obtaining evidence that violate the legal rights of" a third person,[376] which accompanying Comment 1 confirms does include "unwarranted intrusions into privileged relationships, such as the client-lawyer relationship" and which prohibits the lawyer from attempting to obtain from employees or agents of an entity any information that is protected by the attorney-client privilege or work-product doctrine.[377]
- Rules 8.1(b)[378] and 8.3(c)[379] confirm that the lawyer's responsibility to cooperate with admissions or disciplinary authorities and to report the professional misconduct of another lawyer or judge does not supersede the obligation to protect client confidences.

XVI. CONCLUSION

During the notice-and-comment period on the proposed Iowa Rules of Professional Conduct that took place in late 2004 and early 2005, the Iowa State Bar Association, the Iowa Rules of Professional Conduct Drafting Committee, and other Iowa lawyers (including your author) respectfully urged the Iowa Supreme Court to preserve the existing expectations regarding protection of confidential information in Iowa. As discussed above, the preexisting provisions in the Iowa Code of Professional Responsibility admitted of few permissive exceptions to confidentiality and imposed no enforceable obligation to disclose confidential information against the lawyer's wishes. By contrast, as discussed throughout this Article, new Rules 1.6, 3.3, and 4.1 of the Iowa Rules of Professional Conduct introduce new bases for disclosure of client confidences that were previously unknown or not as clearly delineated in Iowa and also reverse prior Iowa practice by mandating disclosure of even privileged communications, in at least some circumstances, when fraud on a tribunal or another person is discovered after the fact. Because so many in the Iowa Bar were troubled by these proposed changes, and were apprehensive that the longstanding priority given to attorney-client confidentiality in Iowa would be seriously undermined, the final adoption

376. Rule 4.4(a), Iowa R. Prof'l Conduct.

377. Rule 4.4, cmt. 1, Iowa R. Prof'l Conduct. *See generally* SISK & CADY, *supra* note 2, § 8:04.

378. Rule 8.1(b), Iowa R. Prof'l Conduct. *See generally* SISK & CADY, *supra* note 2, § 12:01(c).

379. Rule 8.3(c), Iowa R. Prof'l Conduct. *See generally* SISK & CADY, *supra* note 2, § 12:03(c).

of these changes in Rules 1.6, 3.3, and 4.1 may be unsettling to many Iowa practitioners. For these reasons, I offer a few concluding words of reassurance and a suggestion for future evaluation.

The core of attorney-client confidentiality remains undisturbed in Iowa. The criminal defendant who confesses past wrongdoing to the lawyer may be assured that the information remains protected, subject to incursion only if that defendant subsequently introduces false evidence or testimony to a tribunal. The business client who seeks to learn the limits of the law and is prepared to conform his, her, or its behavior to those limits need not fear any breach of the wall of confidentiality. Moreover, as has been discussed above with respect to each of the exceptions, the lawyer's discretion or obligation to disclose ordinarily is limited to extraordinary circumstances in which serious harm is reasonably certain to occur or has resulted. The exceptions to confidentiality remain few and continue to be narrowly drawn. In sum, the promise of confidentiality offered by the lawyer to the client continues to be as good as gold, excepting only those rare circumstances where the client's own persistence along a wrongful path or other disturbing potential for great harm tarnishes that expectation of confidentiality.

The commitment of the justices of the Iowa Supreme Court collectively and individually to guarantee attorney-client confidentiality cannot fairly be questioned. Indeed, by adopting the exceptionally broad definition of confidentiality in the very first paragraph of Rule 1.6, the court meaningfully expanded the scope of confidentiality in Iowa.[380] Furthermore, the justices in their deliberations regarding Rule 1.6 carefully considered the sincere concerns and trepidations expressed by many lawyers about the proposed new exceptions to confidentiality. Only after being satisfied that the occasions for application of exceptions to confidentiality would be few, that the circumstances justifying disclosure were narrow, that a compelling public interest was present, and that the heart of the confidentiality principle would still beat steadfastly, the justices decided to permit (and in three instances require) disclosure of otherwise confidential information in certain additional but still exceptional ways. Although the exceptions adopted by the court may have gone further than many Iowa lawyers (including your author) desired at the time, no one can pretend that there has been consensus within the legal profession across the nation as to where the line should be drawn between recognizing an exceptional need for information in the public interest and shielding information relating to the attorney-client relationship. That a majority of

380. *See supra* Part III.

the Iowa Supreme Court drew that contested line in one place rather than another should not be misunderstood as evidence of any wavering by the court regarding the general sanctity of the confidential attorney-client relationship.

At the same time, whenever significant changes are made in the governing rules that touch upon a central element of the professional relationship, such as the fundamental principle of confidentiality, the risk arises that harm to the principle may be realized through misunderstanding or unanticipated consequences.

First, if Iowa lawyers were mistakenly and paternalistically to assume that these new exceptions open the door widely to disclosure of confidential information whenever the lawyer in his or her own judgment thinks employment of that information would be useful to protect the interests of the client or other persons, then the security of confidential information would be seriously threatened. The enlarged discretion conferred upon lawyers by the new provisions is carefully circumscribed, allowing the lawyer to reveal confidential information without client consent only in cases of necessity and only to avoid or remedy reasonably certain and significant harm. The application of the new provisions that actually mandate disclosure likewise are reserved for instances where the magnitude of threatened harm is great, involving imminent danger to human life or bodily security, or where the lawyer comes to know that the client has perpetrated an actual fraud upon a tribunal or another person. The new provisions do not grant the lawyer a roving warrant to reveal confidential information as he or she sees fit, nor do the rules convert the lawyer into a judge against the interests of his or her own client. The presumption still stands against disclosure of confidential information.

Each Iowa practitioner should carefully read Iowa Rule 1.6 (and Rules 3.3 and 4.1) and be clear as to what the rules do and do not say, not assuming that the changes regarding confidentiality are as profound and wide-sweeping as some reports might have suggested. This Article is designed to help in that process of education and familiarization with the new language, while placing the discussion in the context of longstanding expectations. Moreover, one of the new exceptions to confidentiality enhances the opportunity for lawyers to deliberate more carefully and more completely before choosing to divulge a client confidence. Although it was implicit under past practice, the rule now expressly authorizes a lawyer to reveal confidential information to secure the advice of another

lawyer about compliance with the rules,[381] which of course would include advice as to the permissions and obligations regarding disclosure of confidential information. Except in emergency situations, a lawyer would be well-advised to seek the counsel of other well-regarded lawyers in the Iowa bar before determining to take the momentous step of disclosing a client confidence without the client's consent and adverse to the client's interests.

Second, there remains the possibility that the new exceptions to confidentiality will prove in practice to have the deleterious results feared by opponents, either because these new provisions fail in their purpose of protecting the public or because they weaken the cornerstone of confidentiality more substantially than the Iowa Supreme Court anticipated. On the one hand, as noted above, a proper understanding of the exceptional circumstances for application of these provisions should reduce the occasions for misuse. On the other hand, if lawyers do find that these exceptions are invoked, or at least potentially implicated, more frequently than anticipated, lawyers may find it awkwardly necessary to warn clients that information shared may not be protected. Lawyers also may strive to avoid becoming aware of unpleasant facts so as to avoid the problem (although this is not likely to be a wise course of action and indeed could be contrary to the lawyer's duty of diligence). If we, as a profession, find that the enlarged exceptions to confidentiality have the effect of diminishing the flow of information from clients, then no disclosure to the public to remedy past harm would be possible, thus defeating the public interest purpose of the rule. In such an event, the lawyer also would be left without the necessary information to well represent and counsel the client.

The Iowa Supreme Court intends to monitor the transition to (now implementation of) the new ethical regime, and has appointed a committee of judges, lawyers, and law professors to assist in that task,[382] with an eye toward adjustments to the rules in the future as necessary or appropriate. In addition, the court regularly solicits and obtains the advice of the bar in multiple other ways each year, so that reports of trends and problems should be regularly collected and evaluated by the court.

To say that Iowa experienced a sea change in the realm of confidentiality through the adoption of the new Iowa Rules of Professional

381. Rule 1.6(b)(4), Iowa R. Prof'l Conduct; *see supra* Part IX.

382. On the Iowa Rules of Professional Conduct Monitoring Committee appointed by the Iowa Supreme Court, see SISK & CADY, *supra* note 2, § 2:13.

Conduct would be a gross exaggeration. But the boat may have been rocked a bit. Considering the higher level of protection given to confidentiality in Iowa under the former Code of Professional Responsibility in certain circumstances, the new rules do institute significant change, at least in theory. During this period of adaptation to the new regime and in the coming years, we may learn whether the public interest purposes intended to be advanced by the new exceptions are actually realized and whether the core principle of confidentiality remains genuinely secure. As with any set of rules, their effectiveness and integrity depend not only upon what the text says but also upon the informed discretion of lawyers in applying those rules and the wise judgment of the courts in interpreting those rules in the context of each case.