State Bar of Arizona
Continuing Legal Education

"The Attorney-Client Privilege"

and

or

"The Duty of Confidentiality"

Presented by
Gary L. Stuart
Jennings, Strouss & Salmon
December 3, 4, 1997

TABLE OF CONTENTS

INTRODUCTION

This paper is intended to be a resource manual for lawyers whose duty is the assertion of the client's privilege regarding confidential communications. The privilege belongs to the client, not the lawyer. The duty, on the other hand is strictly limited to the lawyer. While this may sound simplistic, it is something some lawyers forget all too often. The Duty of Confidentiality is fraught with "ethical dilemmas." In fact, any ethical discussion of the duty of confidentiality must first recognize the inherent argument about conflicting positions.

Dilemma Ethics

"Ethical" and "dilemma" are words universally found coupled together, as though they were linguistically bound. For some lawyers, it is hard to visualize one word without the other. For some philosophers, ethical dilemmas are the natural by-product of the discipline of "dilemma ethics."[1] Ethics is therefore said to be only really understood when posed in terms of dilemmas. Dilemmas are predicated on the ideology of choice. The dictionary defines "dilemma" as a situation requiring a choice between equally undesirable alternatives.[2] In this context, duty and privilege occasionally become competing terms; thus invoking the ideology of choice. Courts often have to choose between the lawyer's duty and the client's privilege. Lawyers often are caught before they start because, by definition, there are no good answers and no good choices in "dilemma ethics."

There are some self-righteous souls who claim to choose "justice" over "client connivance" and therefore assert that the privilege should be abandoned when necessary to promote the cause of justice. Viewed from an historical perspective, this kind of "choosing" was eloquently repudiated by one of America's most respected jurists in 1915. Judge Taft said:

> I have recently heard an arraignment of our present judicial system in the trial of causes by a prominent, able and experienced member of the Boston Bar. . . He feels that the procedure now in vogue

[1] *See*, The Soul of the Law, by Benjamin L. Sells, (Element Inc. 1994)

[2] *The Random House Dictionary of the English Language,* (Random House, New York, 1987).

> authorizes and in fact requires counsel to withhold facts from the court which would help the cause of justice if they were brought out by his own statement. To remedy this he suggests that all counsel should be compelled to disclose any facts communicated to them by their own clients which would require a decision of the case against their clients. . . To require the counsel to disclose the confidential communications of his client to the very court and jury which are to pass on the issue which he is making, would end forever the possibility of any useful relation between lawyer and client. It is essential for the proper presentation of the client's cause that he should be able to talk freely with his counsel without fear of disclosure. . . The useful function of lawyers is not only to conduct litigation, but to avoid it, where possible, by advising settlement or withholding suit. Thus, any rule that interfered with the complete disclosure of the client's inmost thoughts on the issue he presents would seriously obstruct the peace that is gained for society by the compromises which the counsel is able to advice.[3]

The answers to every ethical dilemma will never be found in learned treatises, much less in this small paper. But, I hope that the basic rules and the significant cases cited herein will be helpful in resolving most problems dealing with confidentiality and the attorney-client privilege. At the outset, it may be helpful to recall that the duty of confidentiality is an ethical mandate. On the other hand, the attorney-client privilege is an evidentiary rule. The former includes <u>any</u> information relating to the representation of a client. The latter is <u>limited</u> to communications with the client. The difference is vital because the duties which evolve from one are rarely proscribed by the other.

Origin of the Rule of Confidentiality

[3] W.H. Taft, *Ethics in Service, pp. 31-32 (1915) citing Greenough v. Gaskell,* 1 Myl. & K. 98 (1833).

The lawyer's Rule of Confidentiality is of ancient origin. It has been historically justified on a myriad of grounds but its modern purpose was stated by the United States Supreme Court in Upjohn Co. v. United States:[4]

> . . . its purpose is to encourage full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client. *Id*. at 389.

While perhaps misplaced, my hope in creating this unduly long paper is to encourage lawyers to revisit the Rule of Confidentiality in light of the inherent tension between the perceived need to "protect" the client and the actual need to "comply" with the law. By revisiting the rule, the cases about it and the opinions on it, I hope to promote the broader public interest in the observance of the law of attorney-client privilege. Like any privilege, it can be abused. In abusing it, we run the risk of losing it. At the risk of gross oversimplification, the attorney-client privilege was not created to "hide" facts, it was created to "learn" facts.

Skilled advocates can only advance the position of their clients if they know all the facts. We do little to advance the cause of our clients by merely hiding the facts we learn.

Communications in General

The preamble to the Ethical Rules of Professional Conduct reminds all trial lawyers that they must keep in confidence information relating to the representation of a client, except as required or permitted by the Rules of Professional Conduct or by law. The ABA Ethical Rule 1.6 has been attacked by both scholars and practitioners as being overly protective of the client, and giving insufficient regard to important interests of third parties and of society

[4] 449 U.S. 383 (1983).

as a whole. As a result, many states that have adopted the Ethical Rules have adopted a modified version of Rule 1.6.

Arizona's Version of Ethical Rule 1.6

Arizona's "version" of ABA Ethical Rule 1.6 is dramatically different from the "national" rule adopted by the House of Delegates of the American Bar Association on August 2, 1983. The Arizona Rules of Professional Conduct were promulgated on September 7, 1984, and became effective February 1, 1985.

Both the ABA rule and the Arizona rule protect client confidences about past crimes. Both rules "permit," but do not require, the revelation of confidential information to defend against a client's charges.

The ABA's rule "permits" disclosure of confidential information which the lawyer reasonably believes is necessary to prevent the client from committing a criminal act likely to result in imminent death or substantial bodily harm. Arizona's rule, on the other hand, "requires" this disclosure. Arizona's rule also "permits" the disclosure of information regarding the client's intention to commit any crime; the ABA's rule does not.

In addition to the candor required in court under Ethical Rule 3.3, trial lawyers must also be truthful in statements to others. Ethical Rule 4.1 prohibits trial lawyers from knowingly making false statements or failing to disclose material facts when disclosure is necessary to avoid assisting a client's criminal or fraudulent act. However, Ethical Rule 4.1 might conflict with Ethical Rule 1.6 where the false statement or material omission is a product of client confidential information. Once again, should that conflict arise, disclosure is prohibited and withdrawal is mandated. Ethical Rule 1.16(a) (1) mandates withdrawal where the continued representation will result in the violation of the Rules of Professional Conduct or any law.

There are many places in the Ethical Rules of Professional Conduct where various circumstances either permit or require a lawyer to disclose information relating to the representation, e.g., Ethical Rule 1.9(c), 2.2, 2.3, 3.3, and 4.1. While interpretation and personal judgment will always be necessary, the guiding presumption if the Ethical Rules is "to protect the information, not disclose it."

There is no principle more fundamental to trial lawyers than the protection of client confidentiality. The "old" Code of Professional Responsibility drew a distinction between client confidences, which were protected by the traditional evidentiary privilege, and client secrets, which meant other information which the client had requested be held inviolate. The Arizona Supreme Court's Comment to Ethical Rule 1.6 clarifies that the Ethical rule of lawyer-client confidentiality applies in situations "other" than those where the evidence is sought from the lawyer through the compulsion of law.

Timing: How Long Must the Lawyer Keep the Confidence?

It is axiomatic that the duty of client confidentiality attaches at all times during the course of the representation. Trial lawyers, however, commonly face the dilemma of client confidentiality after the representation has been terminated. Ethical Rule 1.9(b) prohibits a lawyer from using information relating to the representation to the disadvantage of a former client except as Ethical Rule 1.6 would permit it or "when the information has become generally known."

It is not clear from either the rule itself or the comment to Ethical Rule 1.9 that there was any intended "opening" of client confidentiality upon termination of the relationship.

It should be obvious that after withdrawal from a case, a trial lawyer must refrain from disclosing information relating to the representation except as specifically provided in Ethical Rule 1.6.[5] The notice of withdrawal, coupled with the disaffirmance of any opinion or document, constitutes an escape valve more likely to benefit the business lawyer than the trial lawyer.[6]

The temporal nature of confidentiality comprises the subject of important opinions by the United States Supreme Court and the Arizona Supreme Court. The former reaffirmed the basis and the importance of the attorney-client privilege in Upjohn Co. v. United States.[7] The latter rendered a blistering opinion on the subject in Parsons v. Continental National American Group.[8]

---

[5]*See especially* ETHICAL RULES OF PROFESSIONAL CONDUCT 1.6 cmt. (1983).
[6]*Id.*
[7]449 U.S. 383 (1981).
[8]113 Ariz. 223, 550 P.2d 94 (1976).

Upjohn Co. v. United States: Internal Investigations by General Counsel

In *Upjohn*, the corporation's general counsel conducted an internal investigation regarding possible illegal payments to foreign governments. The company lawyers talked to numerous officers, managers, and employees from around the company's worldwide operations. The IRS summoned the company to produce the notes taken from the interviews. The Supreme Court held that the notes were protected by the attorney-client privilege:

> The communications at issue were made by Upjohn employees to counsel for Upjohn acting as such, at the direction of corporate superiors in order to secure legal advice from counsel. . . The Court of Appeals declined to extend the attorney-client privilege beyond the limits of the control group test for fear that doing so would entail severe burdens on discovery and create a broad "zone of silence" over corporate affairs. Application of the attorney-client privilege to communications such as those involved here, however, puts the adversary in no worse position than if the communications had never taken place. The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney.[9]

Candor Toward the Court

The essence of trial lawyering is to present the case so as to persuade the trier of fact that the client's position is correct. The pursuit of that goal, however, is subordinate to the trial lawyer's duty of candor to the tribunal.

Most lawyers believe that client perjury is the most serious Ethical dilemma that a lawyer can face. As such, it is treated more specifically in pages

[9] 449 U.S. at 395.

72 through 79 infra. The broader discussion, here, presents the problems faced by the trial lawyer regarding candor in court. There are two important Ethical rules regarding client confidentiality and candor to the court. Client confidentiality is controlled by Ethical Rule 1.6 which prohibits the disclosure of client information pertinent to the representation. Candor to the court is controlled by Ethical Rule 3.3, which prohibits trial lawyers from making false statements, failing to disclose material facts, failing to disclose controlling legal authority, and offering evidence known to be false.[10]

Ethical Rule 3.3 <u>Trumps</u> Ethical Rule 1.6

On occasion the trial lawyer will have to deal with a conflict between his duty of candor to the court and his duty of confidentiality to the client. When that occurs, it is critical to recall that E.R. 3.3 trumps E.R. 1.6. The duty of candor to the court is superior to and unequivocally overrules the duty of client confidentiality.

The Comment to Ethical Rule 3.3 states that trial lawyers, while responsible for pleadings and other documents, are usually not required to vouch for the evidence. The court is responsible for assessing the probative value of all trial evidence. The trial lawyer is not required to have personal knowledge of the matters asserted in those pleadings. Litigation documents ordinarily present assertions by clients, not assertions by the trial lawyer. Thus, the submission of a "false statement" in testimony during trial is not necessarily a violation of Ethical Rule 3.3 unless it rises to the level of an assertion by the trial lawyer.

While the problem of "false evidence" is rare, it is nevertheless relatively easy to resolve from an Ethical standpoint. When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes. The temporal relationship between offering the false evidence and learning of its falsity is vitally important in assessing the Ethical obligation of the trial lawyer. A practical time limit on the obligation to rectify the presentation of false evidence is established in the Comment 13 to Ethical Rule 3.3. The conclusion of the proceeding is said to

[10]ETHICAL RULES OF PROFESSIONAL CONDUCT 3.3 (1983). MR 3.3(a)(1) is identical to DR 7-102(A)(5) regarding the making of false statements; MR 3.3(a)(2) is implicit in DR 7-102(A)(3) regarding required disclosure of material fact; and MR 3.3(a)(3) is the same as DR 7-106(B)(1) regarding required disclosure of applicable law; and MR 3.3(a)(4) is substantially similar to DR 7-102(A)(4) regarding the offer of false evidence. *Cf. also* CAL. RULES OF PROF. CONDUCT 5-200 (1994).

be a reasonably definite point for the termination of the obligation to rectify the presentation of false evidence.

False Evidence

A lawyer must refuse to offer proof which he or she "believes" to be false. The Preamble to the Ethical Rules defines "belief" or "believes" as a term that denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances. In that context, a trial lawyer has the authority to refuse to offer testimony or other proof that the lawyer believes is not trustworthy. The basis for such authority is that offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Of course, in criminal cases, a lawyer may be denied this authority by constitutional requirements governing the right to counsel.[11]

One of the more acute problems for the trial lawyer involves legal argument by opposing counsel which appears to be not only legally unsound but is in fact a "false" representation of the law. Such conduct constitutes dishonesty toward the tribunal and is clearly prohibited by Ethical 3.3. This does not mean that trial lawyers are expected to offer disinterested expositions of the law but that they must recognize and candidly present pertinent controlling legal authority.

A lawyer generally has a duty to disclose material facts to the court if a failure to disclose would further a fraud upon the court.[12] The Arizona Ethics Committee opined that if a plaintiff's lawyer learned that the defendant had offered a witness a bribe to testify in his favor in a civil collection action, the plaintiff's lawyer had an Ethical obligation to report the defendant's conduct to the appropriate law enforcement agency.[13] The Rhode Island Ethics Committee, on the other hands, permits, but does not require disclosure.[14] And the New Hampshire Ethics Committee would prevent an attorney from

[11]*See generally* Nix v. Whiteside, 475 U.S. 157 (1986).
[12]ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 61:304 (1996).
[13]Ariz. Ethics Op. 80-28 (Dec. 2, 1980).
[14]RI 91-52, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 1001:7805 (Ethical Opinions 1990-1995).

disclosing suspicions that a third party has offered false evidence to a tribunal if the disclosure is against the client's wishes.[15]

In one of the few decisions directly considering a counsel's attempts to deceive a court, a lawyer attempted to avoid discipline by arguing that his deceitful practices were common among other Arizona attorneys.[16] The court held that the fact that other members of the bar would use similar deceitful practices provided no excuse and did not alter the fact that they were unlawful and professionally improper.[17] The court volunteered that employment of any such practices by other lawyers subjected the other lawyers to discipline.[18]

Ethics of Corporate Conduct

For general reference, trial lawyers representing corporations should read the Ethics of Corporate Conduct (American Assembly 1977). In addition, ABA Informal Opinions 1300[19] and 1323[20] are helpful in analyzing situations in which "disqualified" law firms are allowed to take cases by insulating the individually disqualified member of the firm.

Insurer-Insured Clients

The triangular relationship between an insurance company, its retained defense counsel, and the insured has been the subject of many opinions. At the heart of all of the opinions is determining when an insurance defense lawyer has an impermissible conflict of interest between insurer and insured. The analysis is necessarily ad hoc, as each triangular relationship carries its own unique facts and circumstances. Beyond that, the tools for solving the triangular Ethical dilemma are contained in Ethical Rule 1.7 (Conflicts of Interest: General Rule), Ethical Rule 1.8 (Conflicts of Interest: Prohibited Transactions), and Ethical Rule 1.6 (Confidential Information).

---

[15]NH 1995-96/5, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 1001:5708 (ethics Opinions 1990-1995).

[16]*See In re* Wetzel, *supra* note 34. *See also* In re Lingle, 27 Ill.2d 459, 189 N.E.2d 342 (1963);The Florida Bar v. Wagner, 212 So.2d 770 (1968).

[17]*In re* Wetzel, *supra* note 34.

[18]*Id*.

[19]ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1300 (1974).

[20]ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1323 (1975).

In Fulton v. Woodford,[21] the insured sued his insurance defense counsel and the carrier for not settling the underlying wrongful death case against him. The Arizona Court of Appeals held that the insurer's duty of equal consideration to the insured and itself when considering settlement does not arise until it can be reasonably foreseen that the verdict would exceed policy limits. The court also held that, since the attorney was not authorized to settle the case through no fault of his own, he was not guilty of malpractice for failing to settle.

In Farmers Insurance Co. of Arizona v. Vagnozzi,[22] the court held that the insurer is bound by the judgment in an underlying claim where it has been given an opportunity to appear on behalf of the insured in the tort suit to protect that common interest. The court noted that an insurance defense attorney owes the insured undeviating allegiance and cannot act as an agent of the insurance company by supplying information detrimental to the insured.

A detailed discussion of the special ethical problems arising out of the insurance defense lawyer's triangular relationship can be found in Volume 53 of the Insurance Counsel Journal.[23]

Direct Adversity vs. Differing Interests

The basic conflict rule in Ethical Rule 1.7 speaks in terms of "direct adversity." However, many of the problems endemic to insurance defense are

[21]26 Ariz. App. 17, 545 P.2d 979 (1976). *Cf.* Samson v. Transamerica Ins. Co., 30 Cal.3d 220, 636 P.2d 32, 178 Cal.Rptr. 343 (1981); Commercial Union Assur. Companies v. Safeway Stores, Inc., 26 Cal.3d 912, 610 P.2d 1038, 164 Cal.Rptr. 709 (1980); Soto v. State Farm Ins. Co., 83 N.Y.2d 718, 635 N.E.2d 1222, 613 N.Y.S.2d 352 (1994); U. S. Fidelity and Guaranty Co. v. Copfer, 48 N.Y.2d 871, 400 N.E.2d 298, 424 N.Y.S.2d 356 (1979); Maryland Insurance Company v. Head Industrial Coatings and Services, Inc., Gans & Smith Insurance Agency, 1996 WL 596632, 40 Tex. Sup. Ct. J. 49 (1996); Texas Farmers Ins. Co. v. Soriano, 881 S.W.2d 312 (Tex. 1994); Krutsinger v. Illinois Cas. Co., 10 Ill.2d 518, 141 N.E.2d 16 (1957); Shuster v. South Broward Hosp. Dist. Physicians' Professional Liability Ins. Trust, 591 So.2d 174, 17 Fla. L. Weekly S4 (1992).

[22]138 Ariz. 443, 675 P.2d 703 (1983). *Cf.* J.C. Penney Cas. Ins. Co. v. M.K., 52 Cal.3d 1009, 804 P.2d 689, 278 Cal.Rptr. 64 (1991); Garcia v. Truck Ins. Exchange, 36 Cal.3d 426, 682 P.2d 1100, 204 Cal.Rptr. 435 (1984); Allstate Ins. Co. v. Zuk, 78 N.Y.2d 41, 574 N.E.2d 1035, 571 N.Y.S.2d 429 (1991); First State Ins. Co. v. J & S United Amusement Corp., 67 N.Y.2d 1044, 495 N.E.2d 351, 504 N.Y.S.2d 88 (1986); Williams v. Madison County Mut. Auto. Ins. Co., 40 Ill.2d 404, 240 N.E.2d 602 (1968); State Farm Fire and Cas. Co. v. Gandy, 925 S.W.2d 696, 39 Tex. Sup. Ct. J. 965 (1996); Employers Cas. Co. v. Block, 744 S.W.2d 940 (Tex. 1988).

[23]Mallen, *A New Definition of Insurance Defense Counsel,* 53 INS. COUNSEL J. 108 (1986).

founded on "differing interests," whether they be conflicting, inconsistent, or diverse. For an examination of the breadth of this problem, see In re Mercer.[24]

ABA Opinion 282: Who is the Client?

The initial question must always be: "Who is the client?" One of the first, and still fundamentally persuasive, answers to this question was provided by the ABA Standing Committee on Professional Conduct in its Formal Opinion 282, issued in 1950.[25] Opinion 282 accepts unequivocally that a lawyer may Ethically represent both the insurer and the insured in the defense of a third-party action against the insured. The opinion is predicated upon the initial commonality of interest:

> From an analysis of their respective undertakings [in the insurance contract] it is evident at the outset that a community of interest exists between the company and the insured growing out of the contract of insurance with respect to any action brought by a third person against the insured within the policy limitations. The company and the insured are virtually one in their common interest.[26]

Opinion 282 states clearly that "the essential point of ethics involved is that the lawyer so employed shall represent the insured as his client with undivided fidelity." Beyond the initial commonality of interest, all courts and all opinions subsequent to ABA Formal Opinion 282 share one dogma: If "differing interests" of the insurer and the insured arise, then the lawyer's Ethical duty of undivided loyalty to the client is owed only to the insured.

Common to many court decisions is the theorem that, while the insurance company pays for the lawyer, the real client is the insured. Thus, in American Employers Insurance Co. v. Goble Aircraft Specialties, Inc.,[27] the court said:

---

[24]133 Ariz.391, 652 P.2d 130 (1982). *See also* Matter of Shannon, 179 Ariz. 52, 876 P.2d 548 (1994); General Dynamics Corp. v. Superior Court (Rose), 7 Cal.4th 1164, 876 P.2d 487, 32 Cal.Rptr.2d 1 (1994); *In re* Owens, 144 Ill.2d 372, 581 N.E.2d 633 (1991); *In re* Vrdolyak, 137 Ill.2d 407, 560 N.E.2d 840 (1990); The Florida Bar v. Beach, 675 So.2d 106, 21 Fla. L. Weekly S188 (1996); The Florida Bar v. Della-Donna, 583 So.2d 307, 16 Fla. L. Weekly S419 (1989).

[25]ABA Comm. on Professional Ethics and Grievances, Formal Op. 282 (1950).

[26]*Id.* at 6.

[27]131 N.Y.S.2d 393 (1954).

> When counsel, although paid by the casualty company, undertakes to represent the policyholder and files his notice of appearance, he owes to his client, the assured, an undeviating and single allegiance. His fealty embraces the requirement to produce in court all witnesses, fact and expert, who are available and necessary for the proper protection of the rights of his client. It is immaterial that such procedure increases the cost to the carrier beyond the policy coverage limit.[28]

Parsons v. CNA: Retained Defense Counsel's Duty of Confidentiality

The leading Arizona case on the tri-party relationship is Parsons v. Continental National American Group.[29] In *Parsons*, the carrier had denied coverage to its insured based on the intentional act exclusion in the policy. The information regarding the policy defense had been secured by the retained defense lawyer while acting on behalf of the insured in the underlying tort action.

Having secured a favorable verdict against the insured, plaintiff instituted garnishment against CNA after settlement negotiations had proved unfruitful. The same law firm and attorney that had previously represented the insured represented the carrier in the garnishment action. The Arizona Supreme Court ruled that CNA should be estopped to deny coverage and that it had waived reliance upon its intentional act exclusion in the policy because the company had taken advantage of the fiduciary relationship between its agent, the retained defense lawyer, and its insured. The court relied, in part, upon the ABA Committee on Ethics of Professional Responsibility Informal Opinion 949:

> If the firm does represent the insured in the personal injury action, to subsequently reveal to the insurer any information received from the insured for possible use by the insurer in defense of a

[28] *Id.* at 401.

[29] 113 Ariz. 223, 550 P.2d 94 (1976). *See also* Kelly v. Greason (State Report Title: Matter of Kelly), 23 N.Y.2d 368, 244 N.E.2d 456, 296 N.Y.S.2d 937 (1968).

> garnishment proceeding by the injured person, would be a clear violation of [the Ethical rules] regarding confidences of a client.[30]

California's Famous "Cumis" Case

In San Diego Navy Federal Credit Union v. Cumis Insurance Society, Inc.,[31] the insurer notified the insured that it had retained counsel to defend the insured in a third-party lawsuit but under reservation of rights. The California Court of Appeals broadly declared: "A conflict arises once the insurer takes the view a coverage issue is present."[32] The court stated its rationale as follows:

> In the usual tripartite relationship existing between insurer, insured and counsel, there is a single, common interest shared among them. Dual representation by counsel is beneficial since the shared goal of minimizing or eliminating liability to a third party is the same. A different situation is presented, however, when some or all of the allegations in the complaint do not fall within the scope of coverage under the policy. . . . Here, it is uncontested the basis for liability, if any, might rest on conduct excluded by the terms of the insurance policy.[33]

The *Cumis* court concluded that the Ethical rules obligated defense counsel to explain to the insured and the insurer the full implications of joint representation where the insurer has reserved its rights to deny coverage.

---

[30]Parsons v. Continental National American Group, 113 Ariz. 223at 226, 550 P.2d 94 at 97 (1976) (citing ABA Comm. on Professional Ethics, Informal Op. 949 (1966)). *Cf.* Horace Mann Ins. Co. v. Barbara B., 4 Cal.4th 1076, 846 P.2d 792, 17 Cal.Rptr.2d 210 (1993); Albert J. Schiff Associates, Inc. v. Flack, 51 N.Y.2d 692, 417 N.E.2d 84, 435 N.Y.S.2d 972 (1980); Waste Management, Inc. v. International Surplus Lines Ins. Co., 144 Ill.2d 178, 579 N.E.2d 322 (1991); Western Cas. & Sur. Co. v. Brochu, 105 Ill.2d 486, 475 N.E.2d 872 (1985); Doe on Behalf of Doe v. Allstate Ins. Co., 653 So.2d 371, 20 Fla. L. Weekly S135 (1995); Tiedtke v. Fidelity & Cas. Co. of New York, 222 So.2d 206 (Fla. 1969).

[31]208 Cal. Rptr. 494 (Cal. Ct. App. 1984).

[32]*Id.* at 502.

[33]*Id.* at 498.

Cumis aroused considerable comment from the insurance defense bar. The California Court of Appeals, in McGee v. Superior Court,[34] later criticized the Cumis court for its "overly broad language." The court in *McGee* held that a reservation of rights by itself did not create a conflict of interest requiring disqualification of the insurer's designated counsel. According to the *McGee* court, the crucial fact in *Cumis* was that the insurer reserved its rights based upon the insured's conduct which, depending on the evidence developed at trial, would affect whether coverage existed. In *McGee*, on the other hand, the basis for the reservation of rights was the resident relative exclusion in the insured's automobile policy.

Waiver of the Privilege

The "waiver rules" regarding client confidentiality are explicitly set forth in Ethical Rule 1.6. The most significant is found in Ethical Rule 1.6(a), which allows disclosures that are "impliedly authorized in order to carry out the representation." Subparagraphs (b), (1), and (2) waive client confidentiality regarding criminal acts that the lawyer believes is likely to result in imminent death or substantial bodily harm; and information that the lawyer reasonably believes necessary to establish a claim or defense on behalf of the lawyer in client controversies, civil or criminal charges against the lawyer, or disciplinary proceedings concerning the lawyer's representation.

The waiver of confidentiality issue often arises within the context of defense counsel retained by an insurance company on behalf of its insured. In Arizona Ethics Opinion 79-16,[35] the trial lawyer had been retained by the carrier to provide a defense on behalf of its insured in a case involving property damages for loss of a building.

The underlying loss resulted from negligent operation of a tractor in the building where the fire occurred. The defendant told his lawyer that certain information given by him to his insurance company was incorrect but was given in order to invoke insurance coverage. Presumably, if the insurance company knew the true facts, coverage would be withdrawn. The client's deposition was taken and he never explicitly testified to the "true facts." The logical inference from the deposition testimony was consistent with the original information

[34]221 Cal. Rptr. 421 (Cal. Ct. App. 1985).
[35]Ariz. Ethics Op. 79-16 (June 7, 1979).

given by the insured to his insurance company for the purpose of invoking coverage.

The Committee opined that the lawyer could not demand that his client inform the insurance company of the "true facts" relating to coverage. They also said that he must withdraw as counsel in the case, by reason of the ruling of the Arizona Supreme Court in Parsons v. Continental National American Group.[36] The Committee advised that the lawyer could not give detailed information to the carrier as to why he was withdrawing his counsel. While the Committee could not render advice with regard to the reasons to be given for the withdrawal, the Committee did state: "It is submitted that a simple statement that an irreconcilable conflict has arisen without further elaboration should be sufficient."[37]

With respect to the issue of reporting on the client's deposition, the Committee noted that the most appropriate means for handling this problem would normally be simply to provide the insurance company a copy of the transcript. On this point the Committee cautioned:

> It would, however, be inappropriate for [the retained defense counsel] to comment on the "inferences" which might defeat coverage. The transcript of the deposition may or may not be a public record, depending on local rules of practice relative to "sealing" of deposition transcripts. At any rate, no confidence would be disclosed by this procedure.[38]

The Corporate Attorney-Client Privilege

Any discussion of the nature, extent and duration of a privilege between a corporation and its in-house counsel must begin with Arizona's famous Samaritan Foundation v. Superior Court.[39] In *Samaritan*, a child suffered a cardiac arrest in surgery and was left neurologically impaired. Shortly after surgery, at the direction of the hospital's legal department, a nurse paralegal interviewed four operating room witnesses, all employees of

[36] 113 Ariz. 223, 550 P.2d 94 (1976).
[37] Ariz. Ethics Op. 79-16 at 4.
[38] *Id.* at 5.
[39] 176 Ariz. 497, 862 P.2d 870 (1993).

the hospital. When the hospital was sued for negligence, the paralegal's interview summaries became the subject of a discovery dispute. The hospital objected to their disclosure, claiming that the statements were absolutely protected by the attorney-client privilege and as work product.

Samaritan Foundation v. Superior Court: Attorney Client Privilege for In-House Counsel

The *Samaritan* court rejected each of the hospital's contentions. With respect to the work product argument, the summaries were prepared in anticipation of litigation. Save for the mental impressions contained in the summaries, which could be properly reacted by the court during in camera inspection, the factual statements in the summaries were discoverable upon plaintiffs' showing of substantial need.[40]

The court's holding regarding the attorney-client privilege came as a surprise and further confounds an already confusing area of the law. The court rejected the United States Supreme Court's definition in *Upjohn*[41] of the attorney-client privilege as being too expansive. The Upjohn court held that the lawyer-client privilege extended beyond the "control group" employees of a corporation; it should also apply to those "middle-level" and "indeed lower-level" employees whose actions within the scope of their employment could "embroil the corporation in serious legal difficulties."[42]

Departing from *Upjohn*, Justice *Martone* wrote for the *Samaritan* court that the traditional "control group" test is too narrow. The control group test omits from the privilege communications by noncontrol group employees that should be protected. On the other hand, the control group test is too broad because it includes in the privilege employees who are "mere witnesses."

The *Samaritan* court held:

> [W]here an investigation is initiated by the corporation, factual communications from corporate employees to corporate counsel are within the corporation's privilege only if they concern the

[40]176 Ariz. at 500, 862 P.2d at 873.
[41]Upjohn Co. v. United States, 449 U.S. 383 (1981).
[42]*Id*. at 391.

> employee's own conduct within the scope of his or her employment and are made to assist counsel in assessing or responding to the legal consequences of that conduct for the corporate client.[43]

Samaritan is important because it represents a compromise between the "Upjohn" and "control group" cases in attempting to define the precise extent of the corporate attorney-privilege in a litigation context. The decision makes clear that employees who seek advice from corporate counsel can rely on the traditional privilege of confidentiality.[44] However, if a corporate representative seeks out that employee and initiates the conversation, the traditional privilege will apply only if it concerns the employee's own conduct and the conversation is made to assist counsel in assessing or responding to the consequences of the employee's conduct.[45] The teaching point in the case is the clear doctrine that conversations with employees by corporate lawyers about the conduct of some other person are not privileged. Those conversations might be protected under a work product claim but not as confidential communications under Ethical Rule 1.6 or the traditional evidentiary attorney-client privilege. The court recognized the importance of the issue, stating "Unless the privilege is known to exist at the time the communication is made, it will not promote candor."[46]

Note that in defining the scope of the attorney-client privilege, the *Samaritan* court tacitly defines the scope of the attorney-client relationship. Consequently, the court limited the scope of the absolute protection accorded between attorney and client to those individuals in the control group. This aspect of the Samaritan holding is fundamentally at odds with the Lang decision and Ethical Rule 4.2. Under the Lang rationale, the definition of a party includes not only those individuals in an organization's control group but also those individuals that may bind the organization or whose acts or omissions spurred the subject litigation. This is the same rationale supporting the Supreme Court's decision in *Upjohn* that is rejected in *Samaritan*.

In a rare but focused exercise of its power, the Arizona Legislature directly countermanded *Samaritan* by passing a bill that overrules the portions

[43]*Samaritan*, 176 Ariz. at 499, 862 P.2d at 872.
[44]*Id*. at 503, 862 P.2d at 876.
[45]*Id*. at 507, 862 P.2d at 880.
[46]*Id*. at 506, 862 P.2d at 879.

of the opinion dealing with the corporate-attorney-client privilege (but not affecting the work-product privilege).[47]

The Legislative Version of the Corporate Attorney-Client Privilege

The legislative version (A.R.S. &12-2234) of the corporate-attorney-client privilege is broad but unclear and, perhaps, unconstitutional.[48] The statutory privilege is very broad and applies to any communication:

1. between an attorney for a corporation, governmental entity, partnership, business, association or other similar entity or an employer
2. and any employee, agent or member of the entity or employer
3. regarding acts or omissions of or information obtained from the employee, agent or member
4. if the communication is either for the purpose of providing legal advice to the entity or employer or to the employee, agent or member or
5. For the purpose of obtaining information in order to provide legal advice to the entity or employer or to the employee, agent or member.

The new statutory privilege applies only to civil actions. The attorney client privilege for criminal matters is recognized in other Arizona statutes.[49] A constitutional scholar has observed that Arizona's new statutory privilege has no application to criminal cases and, arguably, *Samaritan* provides the appropriate test such cases.[50]

The Crime Fraud Exception to the Attorney-Client Privilege

[47] 1994 Arizona Sess. Laws Ch. 334. The legislation was signed by the Governor on April 26, 1994 and codified as A.R.S. & 12-2234.

[48] For an excellent analysis of the statute and its history, see, *A Legislative Response to Samaritan; Arizona's Restive Attorney-Client Privilege for Corporations* by David G. Campbell, Arizona Attorney (Dec. 1994).

[49] A.R.S. & 13-4062.2

[50] See, David G. Campbell's article, footnote 254 above.

Understanding the so-called "crime-fraud" exception requires a refresher on E.R. 1.6 which forbids disclosure of confidential information regarding past crimes or fraud. For example, the statement by the lawyer who brought his client to the police station and said that his client had shot his wife and that the gun was at their apartment was inadmissible at the trial of the client. The client had not waived the attorney-client privilege and the lawyer had not been "used" in perpetrating the crime.[51] Although a lawyer cannot knowingly permit his advice to be used to further a crime or a fraudulent scheme, he may not disclose past crimes or frauds unknown to him at the time his services were used.[52]

One of the pivotal issues regarding the crime-fraud exception is whether lawyers ought to be required to "rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services have been used."[53] The ABA has addressed the idea of rectification.[54] The ABA's position is:

1. If a lawyer finds that his or her services are being used to perpetrate a fraud he or she should:

    (a) Withdraw from any representation that would directly or indirectly assist the continuation of the fraud.

With respect to future frauds and crimes, withdrawal is mandatory. A lawyer must withdraw if his services will be used by the client in materially furthering a course of criminal or fraudulent conduct.[55]

Because a lawyer may not reveal confidences about past misconduct outside the context of a tribunal, but is required by E.R. 4.1(b) to disclose confidential information about contemporaneous or prospective conduct to avoid assisting a client's criminal or fraudulent act, the determination of when client conduct is "past" or "completed" is crucial.

---

[51] New York v. Cassas, 646 N.E. 2d 449, (N.Y. 1995).
[52] See, for example, *Nassau County Bar Association Comm. On Professional Guidance, Opinion 94-10 (1993); Philadelphia Bar Association Opinion 93-6.*
[53] For a detailed discussion of the subject, see 60 U.S.L.W. 2122 (Aug. 20, 1991)/
[54] ABA Formal Opinion 92-336.
[55] See, comment to E.R. 1.6

In short, the attorney-client privilege does not apply and does not exist to protect the client when the lawyer is consulted to further a continuing or contemplated criminal or fraudulent scheme.[56] This is the "crime-fraud" exception.

The Crime-Fraud Exception to the Corporate Attorney-Client Privilege

In an important 1996 case, the crime-fraud exception was utilized to defeat an assertion of the corporate-attorney-client privilege.[57] In this case two former lawyers employed as in-house counsel were compelled to testify about internal communications concerning an employee's immigration status and internal communications regarding the employee's compensation. The corporate-employer attempted to quash the subpoena citing attorney-client privilege. The prosecutor opposed the motion, arguing that the testimony of the lawyers fell within the crime-fraud exception.

In upholding the subpoena, the Ninth Circuit emphasized that the lawyer's knowledge, state of mind or actions are irrelevant. The correct focus is that of the client. The lawyer need not be aware of the illegality involved. It is enough if the lawyer's communication furthered, or was intended to further, the illegality.

While there is a societal interest in enabling clients to obtain complete and accurate legal advice there is no such interest when the client consults the lawyer to further the commission of a crime or to perpetrate a fraud.

Counseling Client Falsehoods

In preparing a case for trial, the trial lawyer must acquire many facts from the client. It seems natural for trial lawyers to have much zeal and enthusiasm at the early stages of representation. Hoping that the case will go smoothly, the lawyer is tempted to "structure" facts as they are elicited during client interviews. Giving in to this temptation not only constitutes poor lawyering but also triggers various ethical violations. Throughout Arizona's

---

[56] Pritchard-Keang Nam Corp. v. Jaworski, 751 F2d 277 (8th Cir. 1984), *cert. dismissed,* 472 U.S. 1022 (1985); United States v. Friedman, 445 F.2d 1076 (9th Cir), *cert. denied,* 404 U.S. 958 (1971).

[57] In Re Grand Jury Proceedings, 87 F.3rd 377 (9th Cir. 1996).

Rules of Professional Conduct there are numerous provisions prohibiting an attorney from offering perjured testimony, falsifying evidence, and making misrepresentations to a tribunal.

Counseling client falsehoods is specifically addressed by Ethical Rule 3.4(b), which prohibits a trial lawyer from counseling or assisting a witness, whether or not a client, to testify falsely.[58] In addition, Ethical Rule 3.3(a) prohibits a trial lawyer from offering evidence which the lawyer knows to be false. Ethical Rule 1.2(d) prohibits a lawyer from assisting in a client's criminal or fraudulent conduct. Ethical Rule 1.6 allows the trial lawyer to reveal a client's intention to commit a crime, including a fraud on the court. Although these provisions pertain to false testimony or evidence offered to a tribunal, the ethical parameters defined by the cited rules are broad enough to prohibit the coloring or structuring of facts during the early client interviews. Common sense dictates that structuring facts in the lawyer's office may lead to falsifying evidence in the courtroom.

In Re Hoover: Lawyer Participates in Client Perjury

In In re Hoover,[59] the Arizona Supreme Court dealt with the clearest form of falsifying evidence—the lawyer directly participating in the falsehood. The court suspended a lawyer who offered evidence that his client was a resident of Arizona for purposes of initiating a divorce proceeding. The lawyer had information in his possession that proved that the client was not an Arizona resident. The court reasoned that a lawyer's anxiety and zeal in representing a client could not excuse false representations to a court.[60]

---

[58]ETHICAL RULES OF PROFESSIONAL CONDUCT 3.4(b) (1983).

[59]46 Ariz. 24, 46 P.2d 647 (1935).

[60]*Id.* at 34-35, 46 P.2d at 651. *See also In re* Spear, 160 Ariz. 545, 774 P.2d 1335 (1989) (lawyer disciplined for back-dating a land purchase contract so that client could reap tax benefits); *In re* Burns, 139 Ariz. 487, 679 P.2d 510 (1984) (lawyer disciplined for counseling client to keep portion of personal injury award that belonged to United States Air Force). *Cf.* Matter of Fee, 182 Ariz. 597, 898 P.2d 975 (1995); Davis v. State Bar of California, 33 Cal.3d 231, 655 P.2d 1276, 188 Cal.Rptr. 441 (1983); Olguin v. State Bar of California, 28 Cal.3d 195, 616 P.2d 858, 167 Cal.Rptr. 876 (1980); *In re* Fahey, 8 Cal.3d 842, 505 P.2d 1369, 106 Cal.Rptr. 313 (1973); Matter of Holtzman, 78 N.Y.2d 184, 577 N.E.2d 30, 573 N.Y.S.2d 39 (1991); *In re* Stern, 124 Ill.2d 310, 529 N.E.2d 562 (1988); *In re* Harris, 93 Ill.2d 285, 443 N.E.2d 557 (1982); *In re* Eaton, 14 Ill.2d 338, 152 N.E.2d 850 (1958); The Florida Bar v. Temmer, 632 So.2d 1359, 19 Fla. L. Weekly S25, 19 Fla. L. Weekly S133 (1994); The Florida Bar v. Saphirstein, 376 So.2d 7 (Fla. 1979); The Florida Bar v. Lewin, 342 So.2d 513 (Fla. 1977); Dodd v. Florida Bar, 118 So.2d 17 (Fla. 1960).

In Re American Continental/Lincoln Savings Litigation: Lawyers Participation in Clients Fraudulent Misconduct

In a more subtle treatment of this issue, the court in In re American Continental Corp. & Lincoln Savings & Loan Securities Litigation,[61] denied summary judgment for a law firm that allegedly participated in securities fraud, RICO violations, and common-law fraud. Summary judgment was inappropriate because there was evidence that the lawyers knew that the savings and loan client was involved in deceitful and fraudulent conduct. Moreover, there was evidence that the law firm provided hands-on assistance in hiding loan file deficiencies from federal regulators, offered detailed advice about setting up bond sales programs, and provided other services perpetuating the client's fraudulent activity. The court reasoned that the firm had a duty to withdraw as counsel under Ethical Rule 1.16 because the client's activity forced the firm to violate the Rules of Professional Conduct and laws prohibiting objectionable activity.[62]

The well-advised trial lawyer must seek truthful and accurate information at the onset of the attorney-client relationship. The lawyer who ignores false or fraudulent information not only faces the danger of ethical censure but may also be pulled into the web of the client's criminal conduct. Zeal and anxiety of representation cannot excuse perpetuating a fraud on the court or fraud toward others.

The most recent ABA Formal Opinion on this issue arises from the regulatory efforts by the federal government over savings and loan associations and their lawyers.[63] In this opinion the ABA concluded that

> . . . [I]n representing a client in a bank examination, a lawyer may not under any circumstances lie to or mislead agency officials, either by affirmative

[61]794 F. Supp. 1424 (D. Ariz. 1992).

[62]*Id.* at 1452. *Cf.* Matter of Fee, 182 Ariz. 597, 898 P.2d 975 (1995); Santa Clara County Counsel Attorneys Ass'n v. Woodside, 7 Cal.4th 525, 869 P.2d 1142, 28 Cal.Rptr.2d 617(1994); Lebbos v. State Bar of California, 53 Cal.3d 37, 806 P.2d 317, 278 Cal.Rptr. 845 (1991); People v. Simac, 161 Ill.2d 297, 641 N.E.2d 416 (1994); *In re* Johnson, 133 Ill.2d 516, 552 N.E.2d 703 (1989); The Florida Bar v. Burkich-Burrell, 659 So.2d 1082, 20 Fla. L. Weekly S453 (1995); The Florida Bar v. Cillo, 606 So.2d 1161, 17 Fla. L. Weekly S673 (1992); The Florida Bar v. Kinney, 606 So.2d 367, 17 Fla. L. Weekly S618 (1992); The Florida Bar v. Belleville, 591 So.2d 170, 16 Fla. L. Weekly S770 (1991); Bull v. State, 548 So.2d 1103, 14 Fla. L. Weekly 443 (1989); Matter of Interest on Trust Accounts: Petition to Amend Rules Regulating the Florida Bar, 538 So.2d 448, 14 Fla. L. Weekly 49 (1989).

[63]ABA Comm. on Ethics and Professional Responsibility, Formal Opinion 93-375 (1993).

> misstatement or by omitting a material fact necessary to assure that statements made are not false and misleading.[64]

The ABA noted in the above opinion that counsel was under no duty to disclose weaknesses in the client's case or otherwise to reveal confidential information that would be protected under Ethical Rule 1.6. At the same time, the lawyer may not be a party to a fraud on the part of the client. The opinion discusses the interrelationship of the rules dealing with client confidentiality, candor to the court, and truthfulness by trial counsel.

Dealing with Client Perjury

Closely related to a lawyer's participation in client fraud is client perjury, which presents one of the most difficult dilemmas to a trial lawyer. Several ethical rules address the prohibitions against client perjury and the remedial measures available to rectify perjured testimony. The applicable rules range from Ethical Rule 3.3, which prohibits the lawyer from participating in perjured testimony, to Ethical Rule 1.2(d) and (e), which prohibit similar conduct and require the lawyer to consult with the client to rectify the illegality.

Perhaps the most important issues are those of confidentiality, protected by Ethical Rule 1.6, and mandatory withdrawal, covered by Ethical Rule 1.16(a). The trial lawyer's ethical duty with respect to client perjury is complicated not only by conflicting jurisdictional approaches to the issue but by the constitutional implications involved in criminal cases.

Many states, including Arizona, have mandatory disclosure requirements for perjured testimony. Such mandatory disclosure rules are controversial and some attorneys contend they invade time-honored confidentiality privileges between lawyer and client.

Prospective Perjury in Criminal Cases

The trial lawyer's ethical dilemma regarding the client who wants to commit perjury in a criminal case is created by two constitutional

[64] *Id.* at 2.

considerations. First, if the lawyer prohibits the client from taking the stand, the lawyer may infringe on the client's right to testify. Second, by prohibiting client testimony or attempting to rectify prospective perjury, the lawyer may deny the client effective assistance of counsel protected by the sixth amendment.

Nix v. Whiteside: Revealing Client's Purported Perjury

In Nix v. Whiteside,[65] the Supreme Court held that threats to withdraw or to reveal perjury do not prejudice a client's constitutional rights to testify and have effective counsel. Although the holding was based upon the finding that the client's rights were not prejudiced, the decision provides persuasive authority that a lawyer should seek to withdraw or rectify false testimony if the client insists on committing perjury.

There is little agreement over whether withdrawal is mandatory and whether a trial lawyer may disclose the reasons for withdrawal. Several courts require withdrawal if the client is intent on offering perjured testimony,[66] an approach which has its pitfalls. The mere mention of withdrawal may signal the court that the client intends to engage in improper conduct. Arguably, this might breach the lawyer's duty to preserve confidences of a client. Withdrawal also creates serious problems for the client, including undue prejudice, the possibility of double jeopardy, and the danger of a similar dilemma facing the client's new lawyer.[67]

If a request for withdrawal is denied, there are four different approaches that a lawyer may take. First, the trial lawyer may disclose the proposed perjury to the judge. In accordance with the Whiteside majority's interpretation of the Ethical Code and Ethical Rules, a lawyer not permitted to withdraw and faced with a client who cannot be dissuaded from committing perjury must disclose the proposed conduct to the court. Although a defendant has a right to testify and a right to effective assistance of counsel, a defendant does not have the right to expect counsel to assist in presenting perjured testimony. Two appellate court

[65]475 U.S. 157 (1986). *Cf.* People v. Taggart, 233 Ill.App.3d 530, 599 N.E.2d 501 (Ill.App. 1992); People v. Bartee, 208 Ill.App.3d 105, 566 N.E.2d 855 (Ill.App. 1991); U.S. v. Kopel, 552 F.2d 1265 (7th Cir. (Ill.), 1977); U.S. v. Dipp, 581 F.2d 1323 (9th Cir. (Nev.), 1978); McKissick v. U.S., 379 F.2d 754 (5th Cir. (Ala.), 1967).

[66]*E.g.*, Newcomb v. State, 651 P.2d 1176 (Alaska Ct. App. 1982); People v. Blye, 43 Cal. Rptr. 231 (1965); ABA Informal Opinion 1318 (1975).

[67]People v. Schultheis, 683 P.2d 8 (Colo. 1981); Sanborn v. State, 474 So. 2d 309 (Fla. Dist. Ct. App. 1985); *In re* Goodwin, 305 S.E.2d 578 (1978).

decisions accord with this position.[68] Both courts commended counsel for acting in a professional manner by first attempting to withdraw from representation and then disclosing the defendant's intention to commit perjury.

Some jurisdictions take a contrary position and do not allow the lawyer to disclose the prospective perjury when denied withdrawal,[69] finding *Whiteside* unpersuasive.[70] It is certainly a valid position that the Ethical Rules and Ethical Code do not allow revelation of a defendant's proposed perjury. There is also concern that disclosure would destroy judicial impartiality and require the lawyer to reveal a client confidence.

Although unresolved by Arizona courts, mandatory withdrawal seems to be the correct course of action in that state. Arizona maintains a unique version of Ethical Rule 1.6, which allows revelation of intended future criminal conduct.[71] Unlike the ABA's Ethical Rules of Professional Conduct, there is no Arizona qualification that the lawyer only reveal prospective crimes threatening life or limb.

The only directly pertinent Arizona case addresses witness perjury rather than defendant perjury. In State v. Lee,[72] the court held that a defendant did not have a constitutional right to a witness's perjured testimony. The trial lawyer, not the client, must decide which witnesses will testify at trial. If counsel refuses to call a witness because he or she fears the witness will testify falsely, defendant's constitutional right of effective counsel is not violated.[73]

The Connecticut Ethics Committee opined that when an attorney reasonably believes a criminal defense client intends to commit perjury, the attorney is permitted--but not required--to refuse to offer evidence believed to be false. Disclosure of the prospective perjury is not, however, an Ethical

---

[68]State v. Henderson, 468 P.2d 136 (Kan. 1970); State v. Robinson, 224 S.E.2d 174 (N.C. 1976).

[69]Wilcox v. Johnson, 555 F.2d 115 (3d Cir. 1977); Butler v. United States, 414 A.2d 844 (D.C. 1980).

[70]The *Whiteside* decision focused only on the constitutional implications of the attorney's request for withdrawal and threatened disclosure of perjury. Of course, the *Whiteside* majority's position on a particular state's Ethical rules of conduct is outside of the Supreme Court's jurisdiction and is not binding on state courts.

[71]ETHICAL RULES OF PROFESSIONAL CONDUCT 1.6(c) (1983). *Cf.* ETHICAL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101, EC 4-4 (1981)(established a two-pronged duty, regarding information protected by attorney-client privilege, and acquired in the professional relationship that the client requests to be held confidential and which would be embarrassing or detrimental to the client if disclosed). *Cf. also* CAL. BUS. & PROF. CODE §6217.

[72]*State v. Lee*, 142 Ariz. 210, 689 P.2d 153 (1984).

[73]*Id.* at 215, 689 P.2d at 158. *Cf.* People v. Henderson, 171 Ill.2d 124, 662 N.E.2d 1287 (1996); People v. Titone, 151 Ill.2d 19, 600 N.E.2d 1160 (1992); People v. Hall, 413 Ill. 615, 110 N.E.2d 249 (1953); Vaughn v. State, 931 S.W.2d 564 (Tex. 1996).

alternative. The attorney should discuss the matter with the client, attempt to dissuade the client form committing perjury, and explain an attorney's duties regarding false testimony. If the client persists, the attorney must attempt to withdraw from representation. The Committee further held, however, that if the attorney is not permitted to withdraw, the client may be allowed to testify in narrative form, and the attorney should advise the court that counsel will be unable to conduct an examination.[74]

The Connecticut approach represents another method of dealing with prospective client perjury. Prior to *Whiteside*, the narrative approach was the preferred method of coping with client perjury. When faced with the threat of perjury, the lawyer would ask the defendant to testify in narrative fashion without the aid of direct examination. The approach affords the defendant the right to testify and allows the lawyer to refrain from active participation in the perjury. Before 1986, several jurisdictions endorsed the narrative approach.[75]

ABA Opinion 87-353: Lawyer Must Seek Withdrawal and Then Disclose the Perjurious Testimony of Client

The problem with the narrative approach is that it may undermine the lawyer's duty to offer effective assistance of counsel. This is the conclusion reached by ABA Formal Opinion 87-353.[76] There, the ABA reasoned that under Ethical Rule 3.3(a) (2), when read in conjunction with *Whiteside*, the narrative approach no longer insulates a lawyer from a charge of assisting perjury. As noted, the Whiteside court held that, under the Ethical Rules and the Ethical Code, the lawyer must seek withdrawal and then disclose the perjurious testimony if necessary.

The third approach to combating client perjury when withdrawal is denied calls for the lawyer to "fully" represent the defendant. The lawyer makes no explicit or implicit reference to the perjury. This view emphasizes confidentiality over candor toward the tribunal.

---

[74]Conn 42, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 1001:2001 (Ethical Opinions 1991-1995). *See also* DC 234, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 1001:2304 (Ethical Opinions 1991-1995); Maine 140, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 1001:4205 (Ethical Opinions 1991-1995).

[75]United States v. Campbell 616 F.2d 1151 (9th Cir. 1980); Butler v. United States, 414 A.2d 844 (D.C. 1980); Thornton v. United States, 357 A.2d 429 (D.C. 1976); Sanborn v. State, 474 So. 2d 309 (Fla. Dist. Ct. App. 1985); People v. Lowery, 366 N.E.2d 155 (Ill. App. Ct. 1977).

[76]ABA Comm. on Ethics and Professional Responsibility, Formal Opinion 87-353 (1987).

Although endorsed by various courts and commentators,[77] this approach is not without its detractors. Some argue that the allowance of perjurious testimony makes the lawyer guilty of subornation of perjury. The approach also distinguishes between past and prospective perjury, and generally prohibits revelation of a client's confidence without the client's knowing and voluntary consent. Although controversial, the approach may be the most widely utilized by criminal defense attorneys.

The American Bar Association endorses the final approach to dealing with prospective defendant perjury. Under that approach, the lawyer can refuse to place the defendant on the stand and, if forced to do so by the court, can reveal the perjury.[78] This view is the same as the "prospective perjury instances" arising in civil cases.

The Attorney-Client Privilege and Rule 26.1 Disclosure Statements

The 1991 amendments to Arizona's rules of discovery have created considerable controversy over what types of information are ripe for discovery.[79] The application of the new mandatory disclosure rules to witness statements is no exception. One of the more significant problems is the inability of many trial lawyers to distinguish between information obtained from lay witnesses and information obtained from their clients. All trial lawyers understand that information from witnesses is not "protected by the privilege." Unfortunately, some of those same lawyers believe that if the information comes from the client, it need not be disclosed. The fundamental problem is the inability to distinguish between the "fact" acquired in confidence and what you do with the "fact" after it is acquired.

In accordance with Rule 26.1 of the Arizona Rules of Civil Procedure (The Disclosure Statement), counsel is required to disclose the names of all witnesses to a contested matter and disclose the subject matter of each witness's expected testimony. In addition, the trial lawyer must disclose all witness

[77]Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966); Coleman v. State, 621 P.2d 869 (Alaska 1980); People v. Blye, 43 Cal. Rptr. 231 (1965).

[78]ABA Comm. on Ethics and Professional Responsibility, Formal Opinion 87-353 (1987).

[79]*See* ARIZ. R. CIV. P. 26.1 (as amended 1991).

statements taken and the custodian of the particular statements. Hence, in accordance with these requirements, save for the pure legal impressions possibly contained in a witness statement, opposing counsel is entitled to witness statements.

The lawyer can still argue that witness statements prepared in anticipation of litigation are work product and that discovery is only justified if opposing counsel could present some substantial need.[80] Although, the argument remains intact, the factual nature of most witness statements and the requirements of disclosure render the argument moot. The reality of the new rules is that opposing counsel is entitled to much, if not all, of the information contained in a witness statement.

Aside from discovery by opposing counsel, the trial lawyer should realize that a witness has an absolute right to discover his or her own witness statement.[81]

Post-Trial Disclosures at Variance with Trial Testimony

One of the worst days a trial lawyer can have is, while still enjoying the occasion of a successful verdict, he or she is approached by the client who confesses his testimony to have been untrue. The client exclaims to the lawyer that he is only telling him this because he knows the communication is privileged and the lawyer cannot reveal the perjury to the court.[i] Unfortunately, the dilemma is not rare. After representation is terminated, the lawyer may learn of deceitful acts or false evidence used by the client to secure a favorable litigation result, the lawyer having been manipulated to effect a fraud on the court.

Arizona's Unique Rule: The Duty to Preserve the Integrity of the System Prevails Over the Duty of Confidentiality

Due to unique aspects of Arizona's rendition of Ethical Rule of Professional Conduct 1.6, the trial lawyer may have an option in such situation not available in other jurisdictions. In accordance with Arizona's ER 1.6, the

[80]Klaiber v. Orzel, 148 Ariz. 320, 714 P.2d 813 (1986) (investigator's statements prepared for trial were work product and only discoverable after a showing of substantial hardship); *see also* Longs Drug Stores v. Howe, 134 Ariz. 424, 657 P.2d 412 (1983).

[81]*Klaiber*, 148 Ariz. at 323, 714 P.2d at 816.

lawyer may reveal a client's proposed criminal conduct even if it does not involve a threat of serious bodily harm or injury to others. In addition, revelation of prospective crimes threatening life or limb must be revealed. This is a large deviation from the ABA's Ethical Rules and the Code of Professional Responsibility, which only permit revealing life or serious injury threatening crimes. In Arizona, therefore, the lawyer's duty to preserve the integrity of the judicial system prevails over the duty of confidentiality.

Note, however, that the lawyer may only reveal the threat of future crimes, not past crimes. In the above scenario, the revelation of the perjury comes just after a trial verdict. There is presumably some work yet to be done, e.g., the judgment must be submitted, collection proceedings may follow, or an appeal may follow. Even at this late point in the process, the lawyer must withdraw from representation to avoid knowingly participating in perpetrating a fraud on the court. Ethical Rule 1.16 requires the lawyer to withdraw if representation results in a violation of the Rules of Professional Conduct or some other law.

When the client hires a new lawyer and tries to perfect and collect on the judgment, the permissive revelation of future crimes language of Ethical Rule 1.6 becomes applicable. The lawyer may then choose to reveal the past perjury because the client intends to use the "falsely obtained" judgment in committing a future crime.

If the lawyer learns of client perjury after the representation is terminated or if the client's future actions with respect to the matter do not amount to criminal conduct, the lawyer cannot reveal the past perjury.[82] Although there is contrary authority in other jurisdictions and in early Arizona Ethics Opinions, the lawyer's duty of confidentiality trumps any duty to reveal the client's commission of past crimes.

Conclusion

It is the prerogative of any author to speculate at the end of the work about what, if anything, has been accomplished in the writing. To that end, I offer my speculation on the moral basis for the Rule of Confidentiality and what we, as lawyers, should do to preserve it. In doing so, I make no

[82] *See* cases cited in § 25.3, *infra*.

pretense of a polished or even complete conclusion. Rather, this is a simple sketch of what I believe should constitute a professional trial advocate's use of what is learned in confidence from or about the client.

- We should be as vigorous about enforcing the rule of disclosing confidential information as we are about keeping it confidential.

- We should ignore the moral quality of the client or the cause in applying the rule of confidentiality. That is to say, we must treat "bad" facts the same as "good" facts. Revealing them or disclosing them should not be tested on the basis of helping or hurting the client. Our test should be whether or not the Rule of Confidentiality requires them to be revealed or disclosed.

- We should never forget the "Ethic" part of the word "Ethics." Moral philosophy helps us examine rules and their principles in light of the good or harm they produce. Applying the discipline of moral philosophy may also assist us in re-examining whether a particular rule engenders or erodes respect for the persons who are subject to the rule in question.

I recognize that this paper cites several inconsistent appellate cases and that I am offering a fair amount of ambiguity in the opinions excerpted from advisory committees. I also recognize the fact that there is much tension in the rules themselves. Despite the length of this paper and the quantity of the citations, I am not laboring under any false impression of solving or resolving all of the Ethical dilemmas presented in assessing the lawyer's obligations under the Rule of Confidentiality.

I end where I began: This is a resource manual, not an answer.

Gary L. Stuart,
December 3, 1997

See, Stuart, *Confidentiality, Compliance With Candor*, 26 ARIZ. BAR JOURNAL 54 (1985).

