Georgia State University Law Review

Volume 38
Issue 2 *Winter 2022*

Article 11

4-1-2022

Lawyers' Duty of Confidentiality and Clients' Crimes and Frauds

Douglas R. Richmond
University of Florida, doug.richmond@aon.com

LAWYERS' DUTY OF CONFIDENTIALITY AND CLIENTS' CRIMES AND FRAUDS

Douglas R. Richmond*

ABSTRACT

Lawyers' ethical duty of confidentiality is a fundamental aspect of the attorney-client relationship. It is also an extraordinarily broad duty; indeed, it is broader than the attorney-client privilege. So extensive a duty of confidentiality is necessary to encourage clients to trust their lawyers and to be candid with them. The public also benefits from lawyers' duty of confidentiality, as a comment to Rule 1.6 of the ABA's Model Rules of Professional Conduct explains: "Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld."

As broad as lawyers' duty of confidentiality may be, however, it is not absolute. There are times when the usual public interest in lawyers' preservation of client confidentiality may yield to a greater interest in preventing, mitigating, or rectifying clients' unlawful conduct. Model Rule 1.6(b)(2) accordingly permits a lawyer to disclose a client's information "to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services." Model Rule 1.6(b)(3) permits a lawyer to reveal a client's 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 the lawyer's services."

* Managing Director, Aon Professional Services, Olathe, Kan. J.D., University of Kansas. Opinions expressed here are solely those of the author.

Lawyers' ability to disclose information related to clients' representations where they reasonably believe or even know that the clients are planning, engaging in, or have committed financial crimes or frauds is an incredibly important issue. Absent the ability to make such disclosures, lawyers may face significant civil and criminal liability, as well as professional discipline, arising out of clients' dishonest schemes. At the same time, the circumstances in which lawyers may disclose clients' malfeasance are narrow, often difficult to appreciate, and require lawyers to make nuanced judgments. This Article examines in practical fashion lawyers' critical but limited ability to disclose clients' information to prevent, mitigate, or rectify clients' financial crimes and frauds.

CONTENTS

ABSTRACT 493
INTRODUCTION 496
I. CLIENT COMMUNICATION IN THE CRIME OR FRAUD CONTEXT 501
II. ANALYZING MODEL RULES 1.6(B)(2) AND (B)(3) 506
A. The Lawyer's Reasonable Belief that Disclosure Is Necessary 507
B. Disclosure to the Extent Necessary to Prevent, Mitigate, or Rectify Substantial Injury to the Financial Interests or Property of Another 516
C. Clients' Crimes and Frauds 520
D. The Client's Use of the Lawyer's Services in Furtherance of the Crime or Fraud 524
III. THE MODEL RULE 4.1(B) OVERLAY 526
IV. THE CRIME-FRAUD EXCEPTION TO THE ATTORNEY-CLIENT PRIVILEGE 528
CONCLUSION 532

INTRODUCTION

Lawyers' duty of confidentiality is essential to the attorney-client relationship.[1] Indeed, it is "axiomatic that among the highest duties an attorney owes a client is the duty to maintain the confidentiality of client information."[2] Under Rule 1.6(a) of the Model Rules of Professional Conduct, a lawyer cannot "reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted" by one of the exceptions listed in Rule 1.6(b).[3] As Model Rule 1.6(a) makes clear, lawyers' duty of confidentiality is very broad.[4] It is broader than the attorney-client privilege.[5] It is also broader than the confidentiality protections afforded by the work product doctrine.[6] So extensive a duty of

1. *See In re* Lane's Case, 889 A.2d 3, 12–13 (N.H. 2005) (calling a lawyer's duty of confidentiality "the foundation of the attorney-client relationship"); State v. Aiken, 129 A.3d 87, 92 (Vt. 2015) (asserting that confidentiality is the "cornerstone of the attorney-client relationship"); Cal. State Bar Comm. on Pro. Resp. & Conduct, Formal Op. 2015-192, 2015 WL 1308145, at *3 (2015) ("One of the most important duties of an attorney is to preserve the confidences of her client.").

2. Commonwealth v. Downey, 793 N.E.2d 377, 381 (Mass. App. Ct. 2003).

3. MODEL RULES OF PRO. CONDUCT r. 1.6(a) (AM. BAR ASS'N 2021). Some states have modified their versions of Rule 1.6(a). For example, California's version of Rule 1.6(a) states: "A lawyer shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) unless the client gives informed consent, or the disclosure is permitted by paragraph (b) of this rule." CAL. RULES OF PRO. CONDUCT r. 1.6(a) (STATE BAR OF CAL. 2021). The statute cited in the rule provides that "it is a duty of a lawyer: 'To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.'" *Id.* r. 1.6 cmt. 1 (quoting CAL. BUS. & PROF. CODE § 6068(e)(1)). New York's version of Rule 1.6(a) states: "A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person," subject to certain exceptions. N.Y. RULES OF PRO. CONDUCT r. 1.6(a) (N.Y. STATE BAR ASS'N 2021). The rule defines confidential information as "information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential." *Id.* r. 1.6(a)(3).

4. *See* MODEL RULES OF PRO. CONDUCT r. 1.6 cmt. 3 (AM. BAR ASS'N 2021) (explaining that a lawyer's duty of confidentiality applies to all information related to the representation, regardless of its source).

5. Elijah W. v. Super. Ct., 156 Cal. Rptr. 3d 592, 599 (Cal. Ct. App. 2013); *In re* Est. of Rabin, 474 P.3d 1211, 1219 (Colo. 2020); Adams v. Franklin, 924 A.2d 993, 996–97 (D.C. 2007); State v. Tensley, 955 So. 2d 227, 242 (La. Ct. App. 2007); *In re* Rules of Pro. Conduct & Insurer Imposed Billing Rules & Procs., 2 P.3d 806, 822 (Mont. 2000); Pellegrino v. Oppenheimer & Co., 851 N.Y.S.2d 19, 23 (N.Y. App. Div. 2008); Off. of Disciplinary Couns. v. Baldwin, 225 A.3d 817, 843 (Pa. 2020); ABA Comm. on Ethics & Pro. Resp., Formal Op. 480, at 2 (2018) [hereinafter ABA Formal Op. 480].

6. *In re Rules of Pro. Conduct & Insurer Imposed Billing Rules & Procs.*, 2 P.3d at 822.

confidentiality is necessary to encourage clients to trust their lawyers and to be candid with them.[7] The public also benefits from lawyers' duty of confidentiality, as a comment to Model Rule 1.6 explains: "Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld."[8]

As broad as lawyers' duty of confidentiality may be, it is not absolute. For example, a client may expressly or impliedly consent to a lawyer's disclosure of information related to the client's representation.[9] There are other times when the usual public interest in lawyers' preservation of client confidentiality may yield to a greater interest in preventing, mitigating, or rectifying clients' unlawful conduct.[10] Model Rule 1.6(b)(2) accordingly permits a lawyer to disclose a client's information "to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services[.]"[11] On the back end, Model Rule 1.6(b)(3) permits a lawyer to reveal a client's 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 the lawyer's services[.]"[12] In both circumstances, the disclosure of information related to the client's representation must be limited to "the extent the lawyer reasonably believes necessary" to accomplish the rule's purpose.[13] This limitation on the information that a lawyer may reveal respects

7. Honolulu Civil Beat, Inc. v. Dep't of Att'y Gen., 463 P.3d 942, 955 (Haw. 2020); MODEL RULES OF PRO. CONDUCT r. 1.6 cmt. 2 (AM. BAR ASS'N 2021).
8. MODEL RULES OF PRO. CONDUCT r. 1.6 cmt. 2 (AM. BAR ASS'N 2021).
9. *Id.* r. 1.6(a).
10. *Id.* r. 1.6 cmt. 6.
11. *Id.* r. 1.6(b)(2).
12. *Id.* r. 1.6(b)(3).
13. *Id.* r. 1.6(b)(2)-(3).

the general principle that exceptions to the duty of confidentiality should be narrowly construed.[14]

The American Bar Association (ABA) adopted Model Rules 1.6(b)(2) and (b)(3) at the August 2003 meeting of the House of Delegates.[15] The ABA did so at the recommendation of its Presidential Task Force on Corporate Responsibility, which had been established the year before "to address 'systemic issues relating to corporate responsibility arising out of the unexpected and traumatic bankruptcy of Enron and other Enron-like situations[.]'"[16] In sum:

> The Task Force believed that where the client abuses the client-lawyer relationship by using the lawyer's services to commit a crime or fraud that results in substantial economic harm to another, the policy of protecting confidentiality is outweighed by the policy of protecting the interests of society and the professional integrity of the lawyer.[17]

The House of Delegates agreed in a close vote.[18]

Although Rules 1.6(b)(2) and (b)(3) were new additions to the Model Rules in 2003, some of their principles were already embodied or established in professional conduct rules.[19] DR 4-101(C)(3) of the predecessor Model Code of Professional Responsibility more broadly provided that a lawyer could reveal a client's intent "to commit a crime and the information necessary to prevent the crime."[20] By 2003, most states had adopted rules that either permitted or required lawyers to

14. *See In re* Bryan, 61 P.3d 641, 656 (Kan. 2003) (stating that lawyers' ethical duty of confidentiality is "interpreted broadly, with the exceptions being few and narrowly limited").

15. AM. BAR ASS'N, CTR. FOR PRO. RESP., A LEGISLATIVE HISTORY: THE DEVELOPMENT OF ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982–2013 139 (Arthur Garwin ed., 4th ed. 2013) [hereinafter A LEGISLATIVE HISTORY].

16. Lawrence A. Hamermesh, *The ABA Task Force on Corporate Responsibility and the 2003 Changes to the Model Rules of Professional Conduct*, 17 GEO. J. LEGAL ETHICS 35, 35 (2003) (quoting the Task Force's mission statement).

17. A LEGISLATIVE HISTORY, *supra* note 15.

18. *Id.* (stating that the House of Delegates adopted the Task Force's recommended amendments to Model Rule 1.6 by a vote of 218 to 201).

19. *See, e.g.*, MODEL CODE OF PRO. RESP. DR 4-101(C)(3) (AM. BAR ASS'N 1969).

20. *Id.*

disclose information related to a client's representation to prevent or rectify the client's criminal or fraudulent conduct.[21] Most of those rules permitted or even required disclosure in more situations than Model Rules 1.6(b)(2) and (b)(3) contemplate.[22] Other Model Rules imposed similar obligations on lawyers in connection with litigation as they do today.[23] In particular, Model Rule 3.3(b) provided then, as it does now, that "[a] lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal."[24]

Regardless of the specific language, Model Rules 1.6(b)(2) and (b)(3) and their state counterparts particularly benefit lawyers with counseling or transactional practices, who may learn of clients' crimes or frauds before they are consummated or while their effects can be mitigated.[25] Although lawyers normally are unwitting enablers of clients' criminal or fraudulent schemes—dishonest clients tend to be as good at fooling their lawyers as they are at deceiving their intended victims—lawyers have no ability to alert authorities or the marks once they realize their clients' wrongdoing, absent an exception to their duty of confidentiality.[26] Making matters worse, a lawyer who represents a dishonest client potentially faces serious civil liability for allegedly

21. *See* Norman E. 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, 15–18 (2002) (providing what was then a current accounting of states' approaches to lawyers' disclosure of information related to a client's representation to prevent, mitigate, or rectify the client's crime or fraud).

22. *See id.* (describing the state rules of professional conduct in place at the time).

23. *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 3.3(a)(3) (AM. BAR ASS'N 2002) ("If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal."). The current version of Model Rule 3.3(a)(3) employs identical language. *See* MODEL RULES OF PRO. CONDUCT r. 3.3(a)(3) (AM. BAR ASS'N 2021).

24. *Compare* MODEL RULES OF PRO. CONDUCT r. 3.3(b) (AM. BAR ASS'N 2002), *with* MODEL RULES OF PRO. CONDUCT r. 3.3(b) (AM. BAR ASS'N 2021).

25. Fundamentally, lawyers may not knowingly assist clients in criminal or fraudulent conduct. MODEL RULES OF PRO. CONDUCT r. 1.2(d) (AM. BAR ASS'N 2021).

26. *See, e.g., id.* r. 1.13(c) (providing a limited exception to lawyers' duty of confidentiality when representing an organization where there is a clear violation of law that the lawyer reasonably believes is certain to substantially harm the organization).

aiding and abetting the client's misconduct if the lawyer does not make some disclosure before the client's nefarious scheme causes harm.[27] Of the publicly reported judgments against, or settlements by, U.S. law firms that exceed $20 million, more than two-thirds are due in whole or part to the firm's representation of a dishonest client.[28] Other dishonest-client claims of similar severity have been resolved confidentially.[29]

The potential consequences for lawyers who represent clients in connection with criminal or fraudulent schemes that they failed to appreciate or recognize until it was too late are not confined to civil liability.[30] For example, two partners from respected global law firms have been criminally convicted for assisting clients' frauds despite their claims of innocence.[31] Other lawyers have been convicted of money laundering or like offenses arising out of their head-scratching facilitation of clients' illegal schemes.[32] As if a criminal conviction is not bad enough, significant professional discipline is sure to follow.[33]

---

27. *See* Douglas R. Richmond, *Dishonest or Unworthy Clients: Pink Flags*, 26 PRO. LAW., no. 1, 2019, at 9, 9 [hereinafter Richmond, *Pink Flags*] ("It is well known among lawyers that dishonest clients—or, if you prefer, 'unworthy' clients—pose a major professional liability risk for even the very best law firms."); Douglas R. Richmond, *A Primer on Lawyer Liability for Aiding and Abetting Clients' Misconduct*, 25 PRO. LAW., no. 2, 2018, at 20, 20 ("[A]iding and abetting claims are among the most dangerous claims that a lawyer or law firm can face.").

28. Richmond, *Pink Flags*, *supra* note 27.

29. *Id.*

30. Regrettably, lawyers sometimes are willing participants in clients' criminal schemes. *See, e.g.*, United States v. Farrell, 921 F.3d 116, 122–23 (4th Cir. 2019) (affirming a lawyer's conviction of multiple crimes for his role in a multi-state marijuana trafficking syndicate).

31. *See* David Z. Morris, *Martin Shkreli's Lawyer Sentenced to 18 Months in Prison*, FORTUNE (Aug. 18, 2018, 11:48 AM), https://fortune.com/2018/08/18/martin-shkreli-lawyer-sentenced-prison [https://perma.cc/SM8W-BAAZ] (reporting that Evan Greebel, a former corporate partner at Katten Muchin Rosenman and Kaye Scholer, who was convicted of assisting notorious pharmaceutical CEO Martin Shkreli in his fraud schemes, was sentenced to eighteen months in federal prison); Martha Neil, *'Certifiable Saint' but for Indirect Role in $2.4B Fraud, Ex-BigLaw Partner Gets 1 Year in Club Fed*, ABA J. (July 16, 2013, 3:45 PM), https://www.abajournal.com/news/article/certifiable_saint_except_for_role_in_2.4b_fraud_former_biglaw_partner_gets_ [https://perma.cc/3RYK-GHT8] (reporting that Joseph Collins, a former Mayer Brown partner, was sentenced to just over a year in federal prison for his role in a $2.4 billion fraud on investors in the commodities brokerage Refco Inc.).

32. *See, e.g.*, *In re* Rimberg, 124 N.Y.S.3d 75, 76 (App. Div. 2020) (involving a clueless lawyer who was charged with money laundering but pled guilty to a lesser charge of involvement in an unlicensed money-transmitting business); *In re* Albrecht, 42 P.3d 887, 897–99 (Or. 2002) (rejecting the lawyer's claim that he was an "unwitting dupe to a talented con man" in a money laundering scheme).

33. *See, e.g.*, *In re Rimberg*, 124 N.Y.S.3d at 77 (suspending the lawyer from practice for three years); *In re Albrecht*, 42 P.3d at 902 (disbarring the lawyer for money laundering).

This Article examines in practical fashion lawyers' ability to disclose information related to clients' representations in circumstances where lawyers reasonably believe or even know that their clients are planning, engaging in, or have committed crimes or frauds. Part I examines a lawyer's duty to explain to a client the possibility that the lawyer may disclose information related to the client's representation under Model Rules 1.6(b)(2) and (b)(3).[34] Part II analyzes the constituent elements of Model Rules 1.6(b)(2) and (b)(3), which in combination essentially provide that a lawyer may reveal information related to a client's representation where (1) the lawyer reasonably believes the disclosure is necessary (2) to prevent, mitigate, or rectify (3) substantial injury to the financial interests or property of another (4) that is reasonably certain to result (5) from the client's planned, ongoing, or past crime or fraud (6) in furtherance of which the client used or is using the lawyer's services.[35] Part III discusses the interplay between Model Rules 1.6(b)(2) and (b)(3) and Model Rule 4.1(b).[36] This is an important junction of responsibilities because, while disclosure of client information is optional in limited circumstances under Model Rules 1.6(b)(2) and (b)(3), it may, in some instances, be mandatory under Model Rule 4.1(b).[37] Finally, Part IV compares lawyers' ethical duty of confidentiality with the potentially overlapping obligation to protect confidential client communications under the attorney-client privilege.[38]

I. CLIENT COMMUNICATION IN THE CRIME OR FRAUD CONTEXT

Before analyzing lawyers' ability to ethically reveal clients' crimes or frauds under Model Rules 1.6(b) and (b)(3), it is necessary to consider lawyers' obligation, if any, to disclose that ability to their

34. *See infra* Part I.

35. *See infra* Part II.

36. *See infra* Part III.

37. *See* MODEL RULES OF PRO. CONDUCT r. 4.1(b) (AM. BAR ASS'N 2021) ("In the course of representing a client a lawyer shall not knowingly: . . . (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.").

38. *See infra* Part IV.

clients. Model Rules 1.6(b)(2) and (b)(3) are silent regarding a lawyer's duty to inform a client about the prospect of such disclosures.[39] This duty nonetheless exists under Model Rule 1.4, which governs lawyers' duty to communicate with clients in general.[40]

First, Model Rule 1.4(b) states that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[41] Consistent with Model Rule 1.4(b), a client may consider limits on a lawyer's obligation to keep information related to the representation confidential to be vital, especially if confidentiality concerns may affect the client's calculation about what or how much information to share with the lawyer.[42] A client's ability to make informed decisions on possible courses of conduct depends on her knowledge of the associated "material risks" and "reasonably available alternatives,"[43] which, in turn, may require a high level of comfort that her lawyer will maintain confidentiality. Second, and more pointedly, Model Rule 1.4(a)(5) requires a lawyer to "consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law."[44] Certainly, a client would want to know that the lawyer could, if she chose, expose the client's criminal or fraudulent conduct. In fact, Model Rules 1.6(b)(2) and (b)(3) are perhaps most valuable in this situation because they allow lawyers to remonstrate with their clients far more effectively than if their only persuasive tool was threatening withdrawal from the representation.[45]

39. *See* MODEL RULES OF PRO. CONDUCT r. 1.6(b)(2) & (3) (AM. BAR ASS'N 2021).

40. *Id.* r. 1.4 ("Communications").

41. *Id.* r. 1.4(b).

42. Elisia M. Klinka & Russell G. Pearce, *Confidentiality Explained: The Dialogue Approach to Discussing Confidentiality with Clients*, 48 SAN DIEGO L. REV. 157, 176 (2011).

43. *See* MODEL RULES OF PRO. CONDUCT r. 1.0(e) (AM. BAR ASS'N 2021) (defining "informed consent").

44. *Id.* r. 1.4(a)(5).

45. GEOFFREY C. HAZARD, JR., W. WILLIAM HODES & PETER R. JARVIS, 1 THE LAW OF LAWYERING § 10.34, at 10-154 (4th ed. Supp. 2015).

The possibility of disclosure gives lawyers powerful leverage in their efforts to caution or convince clients to behave lawfully.[46]

The question regarding a lawyer's obligation to inform a client of exceptions to the lawyer's duty of confidentiality is less about whether the obligation exists than it is about *when* it arises. Some scholars suggest that lawyers should explain the exceptions to the duty of confidentiality in detail at the outset of the representation.[47] Others endorse discussing the exceptions to the duty of confidentiality during the initial consultation between the lawyer and the client but encourage the lawyer to do so "through honesty and dialogue."[48] For instance, a lawyer might say in an initial meeting with a client:

> I want you to know that I have an ethical obligation to maintain the confidentiality of information you share with me. I will not disclose this information unless you give me authorization or the law authorizes disclosure. The law authorizes disclosure in very few circumstances—to prevent serious bodily or financial harm to others, to prevent fraud on the court, and to protect my interests in very rare instances, such as if you were to sue me for malpractice or I were to sue you to collect fees. Even then, I could only disclose the information to the extent necessary. Do you have any questions about my obligation to keep your information confidential? If you have any questions about confidentiality at any point during our relationship, please let me know. We can talk about this again at any time. You should also know that if I feel we need to discuss these issues again, I will let you know. I want our relationship to be a

46. *Id.*; *see also* N.Y. State Bar Ass'n Comm. on Pro. Ethics, Formal Op. 866, 2011 WL 7784077, at *7 (2011) [hereinafter N.Y. Ethics Op. 866] ("In the rare situation in which the client is reluctant to accept the lawyer's advice, the lawyer's threat of disclosure is a measure of last resort that may persuade the client.").

47. Klinka & Pearce, *supra* note 42, at 191.

48. *Id.* at 196.

two-way street.[49]

Still other commentators recommend that lawyers generally explain their duty of confidentiality to clients at the outset of the representation but not go into the exceptions to the duty in detail.[50] Utilizing this approach, lawyers may defer discussing specific exceptions to the duty of confidentiality "until they become relevant."[51]

In truth, there is no single correct time to disclose to a client the lawyer's ability to reveal the client's communications or information under Model Rules 1.6(b)(2) and (b)(3) except that the lawyer generally should disclose her ability and intent to do so before she blows the whistle.[52] Consultation before disclosure is an opportunity for the lawyer to "appeal to the good judgment and moral sense of the client, to persuade the client to abandon the intended course or to make whole any victim" of the client's deviance.[53] The lawyer's threat of disclosure may be enough to appropriately redirect the client.[54] Even so, the qualifier "generally" is necessary when analyzing a lawyer's duty to communicate with a client in this context because there may be times that prior consultation with the client is impracticable if the harm at issue is to be prevented or rectified.[55] In those situations, the lawyer is left to inform the client of the disclosure of the client's information after the fact.[56] In most instances, the lawyer should allow enough time between the disclosure of her ability or intent to reveal the client's communications or information and any follow through to permit the client to (1) legitimately persuade her that the troubling conduct is, in fact, lawful, (2) reconsider or reverse a planned course

49. *Id.*

50. *Id.* at 189 (citing STEPHEN ELLMANN ET AL., LAWYERS AND CLIENTS: CRITICAL ISSUES IN INTERVIEWING AND COUNSELING 251 (2009)).

51. *Id.*

52. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 67(3) (AM. L. INST. 2000).

53. *Id.* § 67 cmt. i.

54. *See* N.Y. Ethics Op. 866, *supra* note 46 ("[T]he lawyer's initial duty, where practicable, is to remonstrate with the client. In the rare situation in which the client is reluctant to accept the lawyer's advice, the lawyer's threat of disclosure is a measure of last resort that may persuade the client.").

55. *See* RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 67 cmt. i (AM. L. INST. 2000) (stating that consultation with the client prior to disclosure is required where it is "feasible" in view of various adverse considerations or circumstances).

56. *See id.*

of conduct, or (3) appropriately disclose the crime or fraud on the client's own.[57] Again, there may be times that the lawyer must act urgently to prevent, mitigate, or cure harm attributable to the client's planned or actual misconduct, such that allowing the client a grace period is not feasible.

There is no standard of conduct that requires a lawyer to always inform a client of the possible disclosure of information related to the representation in accordance with the exceptions to confidentiality in Model Rules 1.6(b)(2) and (b)(3).[58] All clients and representations are different.[59] Some matters and practice areas are significantly more likely to raise concerns about a client's potential use of a lawyer's services to further a criminal or fraudulent scheme than are others.[60] Even more fundamentally, lawyers are generally entitled to believe that their clients are honest in their dealings with them.[61] "[I]n the absence of circumstances indicating otherwise, a lawyer may assume that a client will use the lawyer's counsel for proper purposes."[62] At bottom, a lawyer's duty to inform a client that the lawyer may have the right to reveal information related to the representation to prevent the client's crime or fraud or to mitigate or rectify its effects is a case-and fact-specific question properly entrusted to the lawyer's good judgment.[63]

---

57. GREGORY C. SISK ET AL., LEGAL ETHICS, PROFESSIONAL RESPONSIBILITY, AND THE LEGAL PROFESSION § 4-6.6(b)(2), at 342 (2018) (explaining why the lawyer generally should afford the client the opportunity to make the disclosure instead of the lawyer).

58. *See id.* § 4-6.6(b)(1), at 341 (opining that because a lawyer's nonconsensual revelation of a client's information represents "a departure from the normal progression of a legal representation," a lawyer who opts not to warn a client at the outset of a representation that the client's confidential information may be used against the client in exceptional circumstances is unlikely to be seen as acting unethically).

59. *See* N.Y. State Bar Ass'n Comm. on Pro. Ethics, Formal Op. 2018-4, 2018 WL 4608936, at *2 (2018) ("In many representations, there is no reason for the lawyer to doubt the lawfulness of the client's proposed actions. On the other hand, there may be representations where the circumstances raise suspicions or questions.").

60. *See, e.g.*, Douglas R. Richmond et al., *The Aon Claims Experience*, QUALITY ASSURANCE REV. (Aon plc, Chicago, Ill.), Summer 2015, at 1, 11 (illuminating the professional liability risks to corporate and transactional lawyers associated with representing dishonest clients) (on file with the author).

61. *See* ABA Comm. on Ethics & Pro. Resp., Formal Op. 491, at 2 (2020) (stating that lawyers are generally entitled to believe clients rather than doubt them).

62. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 94 cmt. g (AM. L. INST. 2000).

63. Depending on the circumstances, the lawyer may wish to seek the advice of another lawyer who is experienced in the practice area, well-versed in the rules of professional conduct, or both. *See generally*

Of course, when a lawyer advises a client of the lawyer's duties under Model Rules 1.6(b)(2) and (b)(3), she must do so accurately. If the client asks about the lawyer's confidentiality obligations, the lawyer must answer truthfully.[64]

II. ANALYZING MODEL RULES 1.6(B)(2) AND (B)(3)

With that understanding of lawyers' obligation to share with clients their ability to reveal information relating to the clients' crimes or frauds, it is time to turn to Model Rules 1.6(b)(2) and (b)(3) themselves. Again, those rules provide:

> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> . . . .
>
> (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
>
> (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services[.][65]

In summary, under these exceptions to the duty of confidentiality, a lawyer may reveal information related to a client's representation if (1)

MODEL RULES OF PRO. CONDUCT r. 1.6(b)(4) (AM. BAR ASS'N 2021) (permitting a lawyer to reveal information related to a client's representation to the extent reasonably necessary to secure legal advice regarding the lawyer's compliance with rules of professional conduct).

64. *See In re* Indeglia, 765 A.2d 444, 447 (R.I. 2001) (stating that a lawyer's "transmittal of untruthful information to a client does not keep that client 'reasonably informed' about the status of the representation" as required by Rule 1.4).

65. MODEL RULES OF PRO. CONDUCT r. 1.6(b)(2)-(b)(3) (AM. BAR ASS'N 2021).

the lawyer reasonably believes the disclosure is necessary (2) to prevent, mitigate, or rectify (3) substantial injury to another person's or entity's financial interests or property (4) that is reasonably certain to result (5) from the client's planned, ongoing, or past crime or fraud (6) furthered through the client's use of the lawyer's services.[66] In addition, lawyers must limit any disclosure of client information to that which is necessary to achieve the rules' purposes.[67]

A. The Lawyer's Reasonable Belief that Disclosure Is Necessary

To reveal information related to a client's representation under either Model Rule 1.6(b)(2) or Model Rule 1.6(b)(3), the lawyer must "reasonably believe" that the disclosure is necessary to achieve the rule's purpose.[68] The question thus becomes the amount or nature of information required for a lawyer's belief to be reasonable in this context. The Model Rules are no help to a lawyer wrestling with discretionary disclosure; Rule 1.0(i) circularly defines "'[r]easonable belief' or 'reasonably believes' when used in reference to a lawyer" as "denot[ing] that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable."[69] It is safe to say, however, that a lawyer's reasonable belief that disclosure of client information is allowed under Model Rules 1.6(b)(2) and (b)(3) is a lower standard than actual knowledge.[70] At the same time, the standard is not too lax. For instance, a lawyer's speculation about a client's activities does not equate to a reasonable belief permitting disclosure.[71]

66. *See id.*
67. *Id.*
68. *Id.*
69. *Id.* r. 1.0(i).
70. *See* State v. Chambers, 994 A.2d 1248, 1259 (Conn. 2010) (discussing a lawyer's Rule 3.3(a)(3) duty of disclosure and contrasting a lawyer's actual knowledge with a "*mere* 'reasonable belief'" that a client intends to commit perjury (emphasis added)).
71. Carliss N. Chatman, *Myth of the Attorney Whistleblower*, 72 SMU L. REV. 669, 683 (2019); *see, e.g.*, People v. Braham, 470 P.3d 1031, 1044 (Colo. 2017) (explaining that the lawyer's unfounded suspicions about his clients' bankruptcy fraud did not justify disclosure under Colorado Rule 1.6(b)(3), which is similar to Model Rule 1.6(b)(2)); N.C. State Bar, 1999 Formal Op. 15, 2000 WL 33300699, at *1 (2000) (stating that a lawyer's mere suspicion that a client was committing fraud on a bankruptcy court would not suffice to trigger an exception to the lawyer's duty of confidentiality).

In re Lane's Case[72] and *Florida Bar v. Knowles*[73] offer competing examples of the level of knowledge necessary for a lawyer to reasonably believe that disclosing a client's information is appropriate.

In re Lane's Case arose out of lawyer Kendall Lane's representation of the estate of Robert Bennett, through his law firm, Lane & Bentley, and Lane's eventual marriage to Robert Bennett's daughter, Molly.[74] Robert Bennett was survived by his wife Jane; three daughters—Molly Bennett Lane, Ann Kunz Bennett, and Jane Brown; and a son, Dick Bennett.[75] In 1993, Jane Bennett had a lawyer prepare a will and trust agreement for her under which she and Dick Bennett were co-trustees.[76] Dick also obtained his mother's power of attorney.[77] In the summer of 1995, Molly Lane and Ann Bennett became worried about their mother's declining health and met with their brother and mother's lawyer to evaluate their mother's finances.[78] Dick Bennett provided a doctor's letter stating that Jane Bennett was not competent to manage her own money.[79] He also produced an accounting that reflected a trust balance of just over $300,000, not including two homes that Jane Bennett owned with a combined value of $440,000.[80] Based on those numbers, the trust balance was projected to last for nearly six years and the total value of the trust would support Jane Bennett for eighteen years.[81]

Jane Bennett's health continued to deteriorate, and by late 1995, she could no longer live independently.[82] When her children disagreed over the nursing home where she should reside, Dick Bennett argued that they could not afford a facility in the city his sisters favored, despite his earlier assurance that their mother's trust assets would

72. *In re* Lane's Case, 889 A.2d 3 (N.H. 2005).
73. Fla. Bar v. Knowles, 99 So. 3d 918 (Fla. 2012).
74. *In re Lane's Case*, 889 A.2d at 5.
75. *Id.* at 5–6.
76. *Id.* at 6.
77. *Id.*
78. *Id.*
79. *Id.*
80. *In re Lane's Case*, 889 A.2d at 6.
81. *Id.*
82. *Id.*

support her for eighteen years.[83] Alarmed by this development, the sisters hired lawyer Silas Little to petition the probate court to replace Dick Bennett as their mother's guardian.[84] Dick Bennett hired his own lawyer, David Wolowitz, to oppose the petition.[85]

The guardianship proceeding was terminated in March 1996 when Jane Bennett's fragile health necessitated her placement in a nursing home in the city her daughters preferred.[86] Dick Bennett also promised to account to his sisters for their mother's trust assets.[87] When the accounting listed the trust assets as a mere $65,917—down from over $300,000 less than a year earlier—the sisters asked Little to investigate the situation.[88]

Happenstance and sleuthing revealed several insurance policies covering Robert Bennett, the proceeds of which should have passed from Robert Bennett's estate to his widow's estate.[89] Dick Bennett denied the existence of one of the policies, a John Hancock life insurance policy.[90] Little asked Lane about the insurance policies based on his former representation of Robert Bennett's estate.[91]

Lane searched his law firm's files for evidence of the John Hancock policy.[92] In the process, he found a 1993 accounting of Jane Bennett's estate that was prepared by Dick Bennett, which Lane secretly gave to Little.[93] That accounting did not mention the John Hancock policy.[94] But then Lane diligently called John Hancock and learned "that the policy had been in effect, that a claim had been made on the policy and that there was no named beneficiary on the policy."[95] Lane sent a letter to the insurer seeking more information, and the response opened the floodgates:

---

83. *Id.*
84. *Id.*
85. *Id.*
86. *In re Lane's Case*, 889 A.2d at 6.
87. *Id.*
88. *Id.*
89. *See id.* at 6–8.
90. *Id.* at 7.
91. *Id.* at 6–7.
92. *In re Lane's Case*, 889 A.2d at 7.
93. *Id.*
94. *Id.*
95. *Id.*

> John Hancock sent . . . a copy of a cancelled check in the amount of $100,000 paid to the order of Jane Bennett. A stamp on the back of the check indicated that it had been deposited at the First New Hampshire Bank in Hooksett. Additionally, John Hancock sent Lane a "facility of payment" form which provided that, in the event of Robert Bennett's death without a designated beneficiary, the proceeds were to be paid to the surviving spouse. Lane took the cancelled check to the First New Hampshire Bank branch in Keene, and asked a customer service representative if the stamp on the back indicated where the check had been deposited. A few days later, the customer service representative not only told Lane where the check had been deposited, but also gave him a copy of the deposit slip indicating that the check had been deposited in a joint account of Jane Bennett and Dick Bennett.[96]

Without consulting Dick Bennett or Wolowitz, Lane furnished this proof of Dick Bennett's apparent theft to Little.[97] Little sued to remove Dick Bennett as trustee of Jane Bennett's trust.[98] After that litigation settled, Wolowitz filed an ethics complaint against Lane.[99] Acting on the complaint, the state's ethics committee alleged that Lane wrongly disclosed information about his former client's representation.[100] The referee appointed to hear the matter rejected this argument, and the case then reached the New Hampshire Supreme Court on the committee's petition to nonetheless suspend Lane from practice for six months.[101]

The New Hampshire version of Rule 1.9 in effect at the time provided: "'A lawyer who has formerly represented a person in a matter shall not thereafter: . . . (b) use information relating to the

96. *Id.* at 7–8.
97. *Id.* at 8.
98. *In re Lane's Case*, 889 A.2d at 8.
99. *Id.*
100. *Id.*
101. *Id.* at 5, 8.

representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.'"[102] Among his defenses to the alleged Rule 1.9 violation, Lane asserted that his disclosure to Little was protected under New Hampshire's then-version of Rule 1.6(b), which stated: "'A lawyer may reveal [information relating to the representation of a client] to the extent the lawyer reasonably believes necessary . . . to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or bodily harm or substantial injury to the financial interest or property of another . . . .'"[103]

Lane argued that he supplied information to Little to prevent Dick Bennett from stealing from his mother's estate and from "dealing with 'property that [was] entrusted to him as a fiduciary . . . in a manner [that he knew was] a violation of his duty and which involve[d] substantial risk of loss to the owner or to a person for whose benefit the property was entrusted,'" in violation of a New Hampshire statute.[104] "The referee found that Lane reasonably believed that his disclosure was necessary to prevent future criminal activity by Dick Bennett, which would cause substantial injury to Jane Bennett."[105] The court agreed with the referee and denied the committee's petition for discipline.[106] As the court explained:

> The Rules of Professional Conduct define "reasonably believes" to mean that "the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable." . . . Lane knew that Dick Bennett, along with Jane Bennett, was a co-trustee of the trust created after Robert Bennett's death. Lane knew that in August 1995, Dick Bennett provided an accounting showing that the trust had over $300,000 exclusive of certain real estate. However,

102. *Id.* at 9 (quoting N.H. RULES OF PRO. CONDUCT r. 1.9(b) (1996) (N.H. BAR. ASS'N 2021)).
103. *Id.* at 13 (quoting N.H. RULES OF PRO. CONDUCT r. 1.6(b) (N.H. BAR. ASS'N 2021)) (alterations in original).
104. *In re Lane's Case*, 889 A.2d at 13 (quoting the statute).
105. *Id.*
106. *Id.* at 5, 13.

> in March 1996, Lane learned from Ann Kunz Bennett that Dick Bennett was concerned about the trust finances. In May 1996, Lane learned of another accounting showing a balance of $65,917. In August 1996, Lane learned that Ann Kunz Bennett had discovered an invoice and a cancelled check indicating the existence of a John Hancock policy. Lane corroborated the existence of the policy by contacting John Hancock. Lane also learned that the $100,000 proceeds from the policy had been paid into a joint account in the names of Jane and Dick Bennett. Neither the existence of the policy nor the deposit into the account had been disclosed by Dick Bennett in any of the accountings . . . . In addition, Lane knew that Dick Bennett had denied the existence of the insurance policy.
>
> At the time of the disclosure, Lane knew that there had been a large, sudden and mysterious diminution of the trust assets . . . . Lane knew that there was a life insurance policy payable to Jane Bennett, that Dick Bennett knew about the policy, that Dick Bennett had not disclosed the existence of the policy, that the proceeds had been deposited into a joint account to which Dick Bennett had access and that, in fact, Dick Bennett had denied that there was any insurance policy. In light of the above facts, we conclude that Lane proved by a preponderance of the evidence the applicability of Rule 1.6(b) as an exception to Rule 1.9. Accordingly, the evidence supports the referee's finding that Lane reasonably believed that his disclosure was necessary to prevent future criminal activity by Dick Bennett . . . .[107]

The *In re Lane's Case* court rejected a dissenting justice's view that Lane could not have believed that his disclosure of his former client's information was required to prevent Bennett's commission of a crime "because he was aware of a possible innocent explanation" for the

107. *Id.* at 13–14 (citations omitted).

disappearance of the John Hancock policy proceeds;[108] that is, Lane could not rule out the possibility that Jane Bennett had spent or given away the money unbeknownst to her son.[109] In the majority's view, however, "the dissent place[d] the bar too high. Lane's reasonable belief need not have been beyond a reasonable doubt."[110]

The *In re Lane's Case* court also rejected the dissent's position that Lane could not have believed that Dick Bennett was committing a crime or would do so in the future because all the evidence of malfeasance was circumstantial.[111] After all, prosecutors can prove the commission of crimes beyond a reasonable doubt through circumstantial evidence.[112] That being so, circumstantial evidence certainly is sufficient to support a lawyer's belief that a crime is being committed or has been committed for Rule 1.6(b) purposes.[113]

Florida Bar v. Knowles[114] lies at or near the opposite end of the reasonable belief spectrum. In that case, Petia Knowles represented a client in various civil, criminal, and immigration matters, including a request for political asylum pending in an immigration court.[115] In early 2009, Knowles and her client had a fee dispute in the political asylum matter.[116] In response, Knowles filed a vituperative motion to withdraw littered with information about the client's representation, which she dismissed when the client agreed to a new fee arrangement.[117] The dispute apparently left a bad taste in the client's mouth, however, and in April 2009, the client retained new counsel in her political asylum case.[118] Knowles withdrew as counsel in the matter and again disparaged her client in the process.[119] Knowles

108. *Id.* at 14.
109. *Id.* at 16 (Dalianis, J., concurring in part and dissenting in part).
110. *In re Lane's Case*, 889 A.2d at 14.
111. *Id.*
112. *Id.*
113. *Id.*
114. Fla. Bar v. Knowles, 99 So. 3d 918 (Fla. 2012).
115. *Id.* at 920.
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*

nonetheless continued to represent the client in a separate criminal matter.[120]

In May 2009, the prosecutor responsible for the client's criminal case sent a letter to the Department of Homeland Security in which she stated that Knowles "had informed her that she had reason to believe her client would lie to the Immigration Court at an upcoming hearing."[121] The prosecutor further reported that she had received confidential documents from an anonymous source regarding the client's political asylum case.[122] Because the client's political asylum file was a confidential record, logic compelled the conclusion that Knowles was the source of the documents.[123]

In subsequent disciplinary proceedings against Knowles, the referee on the case found that the disparaging motions to withdraw constituted conduct that was prejudicial to the administration of justice and recommended a ninety-day suspension from practice.[124] The referee also found that Knowles had not violated her duty of confidentiality under Florida's version of Rule 1.6.[125] The Florida Bar challenged the referee's Rule 1.6 determination and recommended sanction in the Florida Supreme Court.[126]

The Bar contended that Knowles breached her duty of confidentiality when she reported her client's purported intent to commit perjury to the prosecutor.[127] The referee had concluded that Knowles's disclosures to the prosecutor were permitted by Rule 4-1.6(b)(1) of the Rules Regulating the Florida Bar, which allowed a lawyer to reveal client information to the extent the lawyer reasonably believed necessary to prevent the client from committing a crime.[128] The Florida Bar acknowledged the general applicability of Rule 4-1.6(b)(1) but reasoned that Knowles nonetheless violated the rule

120. *See Knowles*, 99 So. 3d at 920 (discussing the criminal case).
121. *Id.*
122. *Id.*
123. *Id.* at 922.
124. *Id.* at 921.
125. *Id.* at 920.
126. *See Knowles*, 99 So. 3d at 921.
127. *Id.* at 922.
128. *Id.*

because she reported the client to the prosecutor rather than to the immigration court.[129]

The *Knowles* court saw no reason to address the Bar's complaint about the proper forum for the report because "[t]he disclosure was improper on its face and should not have been made to any individual or entity."[130] More to the point, Knowles had testified in her disciplinary case that the client "had been through numerous attorneys to avoid deportation and had mentioned . . . that she would do anything, including lying in court, to avoid deportation."[131] This expression of exasperation or frustration by the client "did not establish that there was a sufficient basis for [Knowles] to reasonably believe that her client was going to commit a crime by lying to the [immigration] court at the upcoming hearing."[132] Knowles's communication with the prosecutor was therefore improper.[133]

For her improper disclosure to the prosecutor and for violating her duty of confidentiality in connection with her intemperate motions to withdraw from the client's political asylum case, the Florida Supreme Court suspended Knowles from practice for one year.[134] The court further ordered her to complete formal ethics and professionalism courses before seeking reinstatement.[135]

When comparing *In re Lane's Case* and *Knowles*, there is a stark contrast in the amount of information the lawyers had—and in their efforts to collect information—to support their disclosures of possible criminal conduct. Lane accumulated substantial evidence of Dick Bennett's perfidy before making his disclosure.[136] Knowles, on the other hand, acted on a single statement from her client that was far more likely an expression of frustration or exasperation with the judicial process than it was evidence of the client's intent to lie to the

129. *Id.*
130. *Id.*
131. *Id.*
132. *See Knowles*, 99 So. 3d at 922.
133. *Id.*
134. *Id.* at 925.
135. *Id.*
136. *In re* Lane's Case, 889 A.2d 3, 13–14 (N.H. 2005).

immigration court.[137] Unlike Lane, who diligently sought to confirm Dick Bennett's seemingly dishonest conduct, Knowles never attempted to ascertain whether her client was truly considering perjury or whether she was simply venting her spleen.[138] Long story short, courts are much more likely to deem a lawyer's belief to be reasonable where the lawyer has independent evidence—even if circumstantial—of the client's seeming crime or fraud.[139] The lesson for lawyers is to make a reasonable effort to determine the relevant facts before disclosing client information under Model Rules 1.6(b)(2) or (b)(3).[140]

B. Disclosure to the Extent Necessary to Prevent, Mitigate, or Rectify Substantial Injury to the Financial Interests or Property of Another

Under Model Rules 1.6(b)(2) and (b)(3), a lawyer's disclosure of client information must be limited "to the extent . . . necessary . . . to prevent, mitigate, or rectify substantial injury" to another person's or entity's financial interests or property attributable to the client's crime or fraud.[141] Where a client's crime or fraud is still in the planning stages when the lawyer sees enough signs of it to try and set the client straight, ideally the lawyer will succeed and no disclosure of client information will be necessary.[142] As a general rule, disclosure should be a last resort.[143] In all cases in which a lawyer reasonably believes that disclosure of a client's information is called for, however, the lawyer must still balance her duty to protect the client's confidentiality with the need to alert third parties to the client's criminal or fraudulent conduct.[144] The lawyer should reveal only that client information

137. *Knowles*, 99 So. 3d at 922.

138. *See generally In re* Lane's Case, 889 A.2d 3; *see also Knowles*, 99 So. 3d at 922 (mentioning no effort by Knowles to probe the seriousness of her client's statement or to remonstrate with the client).

139. *See In re Lane's Case*, 889 A.2d at 13–14, 23.

140. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 67 cmt. h (AM. L. INST. 2000); MODEL RULES OF PRO. CONDUCT r. 1.6(b)(2)-(3) (AM. BAR ASS'N 2021).

141. MODEL RULES OF PRO. CONDUCT r. 1.6(b)(2)-(3) (AM. BAR ASS'N 2021).

142. *See supra* notes 52–54 and accompanying text.

143. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 67 cmt. j (AM. L. INST. 2000).

144. Ill. State Bar Ass'n, Advisory Op. 20-05, 2020 WL 6652233, at *5 (2020).

necessary to fulfill the purposes of Model Rules 1.6(b)(2) and (b)(3) and should confine the disclosure to necessary recipients.[145] The fact that an exception to the duty of confidentiality permits a lawyer to reveal some information related to a client's representation does not relax the lawyer's duty to maintain the confidentiality of the client's other information.[146]

Absent client consent or the application of some other Model Rule 1.6(b) exception to the duty of confidentiality, lawyers enjoy no right to reveal a client's financial crimes or frauds for any reason other than the prevention, mitigation, or rectification of serious resulting harms.[147] *In re Smith*[148] is a case in point. There, Indiana lawyer Joseph Smith wrote a book that he marketed as an autobiographical account of his long professional and personal relationship with a former client (FC) who was politically active and once held a senior position in the federal government.[149] Indiana disciplinary authorities charged Smith with multiple ethics violations linked to the book, including wrongfully revealing details of his representation of FC.[150]

In the book, Smith described in detail his representation of FC in several criminal cases.[151] Smith recounted his negotiations of FC's bail arrangements and plea agreements, relived his discussions with a police detective concerning one of FC's cases, discussed his conversations with FC regarding the charges against her and her incarceration, described FC's mental and physical condition at various times, revealed the sources of funds FC used to pay restitution,

145. SISK ET AL., *supra* note 57, § 4-6.6(b)(2), at 342.

146. *Id.*

147. *See, e.g.*, *In re* Venie, 395 P.3d 516, 523–24 (N.M. 2017) (reasoning that the lawyer's disclosure of sensitive client information in a pleading in a fee dispute was an improper attempt to gain leverage rather than an effort to prevent a client from committing a financial crime or fraud); *In re* Lackey, 37 P.3d 172, 177 (Or. 2002) (concluding that an Oregon National Guard JAG officer revealed sensitive confidential communications to embarrass or damage officers with whom he had work-related conflicts rather than to rectify any alleged government fraud, and accordingly suspending him from practice for one year); Off. of Disciplinary Couns. v. Baldwin, 225 A.3d 817, 854 (Pa. 2020) ("When the disclosure does not serve the purpose of preventing, mitigating or rectifying the consequences of the use of the client's services, disclosure is not authorized.").

148. *In re* Smith, 991 N.E.2d 106 (Ind. 2013).

149. *Id.* at 107.

150. *Id.*

151. *Id.* at 108.

disclosed their discussions about his fees, offered his personal thoughts on FC and her prosecutions, and reported that he once shared his files on FC's criminal cases with her husband.[152] Smith also wrote about his representation of FC in her divorce.[153] He revealed details of related conversations with FC, exposed details of her marriage, and volunteered his observations and opinions about her marital behavior.[154]

Smith defended his disclosures in the book on the basis that they were permitted under Indiana Rule of Professional Conduct 1.6(b)(3), which provided:

> A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes 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.[155]

He claimed that he reasonably believed that FC had lied about her criminal history and other legal entanglements to obtain her position with the federal government.[156]

Smith's Rule 1.6(b)(3) defense was doomed from the outset. He had no evidence that FC falsified documents in securing her government position.[157] There was no evidence that the federal government was deceived into hiring FC based on false or misleading information on her application for security clearance.[158] Smith's disclosure of FC's purported fraud came years after she left her federal job, such that the

152. *Id.*
153. *Id.*
154. *In re Smith*, 991 N.E.2d at 108.
155. *Id.* (quoting IND. RULES OF PRO. CONDUCT r. 1.6(b)(3) (IND. STATE BAR ASS'N 2021)) (alteration in original) (emphasis omitted).
156. *Id.*
157. *Id.*
158. *Id.*

disclosure could not have mitigated or rectified the alleged fraud's effects.[159] Plus, there was no evidence that FC's government service substantially injured anyone's financial interests or that FC exploited Smith's services in advancing her alleged fraud.[160] The disciplinary hearing officer assigned to Smith's case concluded that Smith's "purpose in seeking to market the book arose from [his] desire to recoup financial losses allegedly caused by FC rather than to prevent, mitigate or rectify her alleged fraud."[161]

In considering Smith's possible discipline, the Indiana Supreme Court was plainly upset by his conduct.[162] The court concluded that Smith's multiple ethics violations—especially his self-aggrandizing breach of FC's confidentiality, which had the potential to publicly embarrass her and impair her job opportunities—justified his disbarment.[163]

Once a lawyer appropriately discloses a client's information in accordance with Model Rules 1.6(b)(2) or (b)(3), the lawyer cannot thereafter assist the client's victims or a government agency in obtaining compensation or restitution for the victims.[164] It is not necessary, for example, for a lawyer who blows the whistle on a client's fraud against the government to subsequently serve as a relator in a qui tam action against the client.[165] A lawyer may not represent a victim in a lawsuit against the lawyer's client (or presumably former client) related to the client's crime or fraud.[166] Nor may a lawyer offer to serve as a witness against the client in a criminal prosecution, administrative action, or civil lawsuit arising out of the client's crime or fraud.[167]

Lastly, and while it should go without saying, a lawyer may invoke Model Rules 1.6(b)(2) and (b)(3) only where the lawyer's client is

159. *Id.*
160. *In re Smith*, 991 N.E.2d at 108.
161. *Id.*
162. *See id.* at 110.
163. *Id.*
164. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 67 cmt. f (AM. L. INST. 2000).
165. United States v. Quest Diagnostics Inc., 734 F.3d 154, 164, 165 (2d Cir. 2013); N.Y. Cnty. Laws.' Ass'n Comm. on Pro. Ethics, Formal Op. 746, 2013 WL 11305903, at *6 (2013).
166. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 67 cmt. f (AM. L. INST. 2000).
167. *Id.*

planning or has committed the crime or fraud in question. Absent the client's informed consent, a lawyer may not disclose a client's information to prevent, mitigate, or rectify harm that is or may be attributable to a crime or fraud committed by *someone other than* the client.[168]

C. Clients' Crimes and Frauds

Model Rules 1.6(b)(2) and (b)(3) come into play only where the client's misconduct constitutes "a crime or fraud."[169] While determining whether a client's planned or actual conduct is criminal is a relatively straightforward exercise, whether certain conduct qualifies as fraudulent, and is thus subject to possible disclosure, is less clear. In applying the crime-fraud exception to the attorney-client privilege, for instance, some courts have expanded the definition of "fraud" to include a variety of claims or causes of action characterized by dishonesty, such as:

> [B]reaches of fiduciary duty, civil contempt of court, conversion, gross negligence, inequitable conduct in patent prosecution, insurance bad faith, intentional infliction of emotional distress, "intentional torts moored in fraud," an "intentional tort that undermines the adversary system itself," improper ex parte communications with represented parties as part of a "sting" operation, pretextual justifications for terminating a plaintiff's employment in violation of federal anti-discrimination laws, "sham" litigation, surreptitious background investigations of a party and her lawyer, tortious interference with contract or business relations based on a misrepresentation, and a bank's

168. *See, e.g.*, *In re* Schafer, 66 P.3d 1036, 1042–43, 1047 (Wash. 2003) (disciplining a lawyer who revealed client information to expose a judge's dishonesty while the judge was still in private practice).

169. MODEL RULES OF PRO. CONDUCT r. 1.6(b)(2) & (b)(3) (AM. BAR ASS'N 2021).

wrongful denial of an account holder's access to his funds.[170]

Fraud for purposes of disclosure under Model Rules 1.6(b)(2) and (b)(3), however, arguably describes a narrower range of misconduct than that encompassed by the crime-fraud exception to the privilege.[171] "Fraud" as used in the Model Rules "denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive."[172] Neither negligent misrepresentation nor the "negligent failure to apprise another of relevant information" constitute fraud within the meaning of Model Rules 1.6(b)(2) and (b)(3).[173] Certainly, a lawyer may not disclose information related to a client's representation to prevent, mitigate, or rectify harm that may be, or has been, caused by a client's mere negligence.[174]

Even so, lawyers must recognize that some courts may define fraud broadly in the professional responsibility context just as they do when interpreting the scope of the crime-fraud exception to the attorney-client privilege.[175] The New Jersey Supreme Court's decision in *A. v. B.*[176] is representative.

The *A. v. B.* tale began in October 1997, when a husband (H) and wife (W) retained the law firm of Hill Wallack to represent them in their estate planning.[177] Unfortunately, the law firm staff member who opened the clients' file misspelled their surname, meaning that the misspelled surname was entered in the firm's conflict of interest database.[178] This was consequential because, as much as H may have loved W, he also loved another woman (M), who, in January 1998, retained Hill Wallack to pursue a paternity action against him.[179] This

170. Douglas R. Richmond, *Understanding the Crime-Fraud Exception to the Attorney-Client Privilege and Work Product Immunity*, 70 S.C. L. REV. 1, 4–5 (2018) (footnotes omitted).
171. *See* MODEL RULES OF PRO. CONDUCT r. 1.0(d) (AM. BAR ASS'N 2021) (defining the terms "fraud" and "fraudulent").
172. *Id.*
173. *Id.* r. 1.0 cmt. 5.
174. SISK ET AL., *supra* note 57, § 4-6.6(d)(2), at 347.
175. *See, e.g.*, A. v. B., 726 A.2d 924 (N.J. 1999).
176. *Id.*
177. *Id.* at 925.
178. *Id.*
179. *Id.*

time, when running a computerized conflicts check, the Hill Wallack staffer spelled H's surname, as the adverse party, correctly.[180] As a result, the search did not reveal the firm's representation of H and W.[181] So, Hill Wallack agreed to represent M in her paternity action against H—a clear, but then unrecognized, conflict of interest.[182] H hired a different law firm, Fox Rothschild, to defend him in the paternity action.[183] Oddly, H never objected to Hill Wallack's representation of M, nor did he alert the firm to the conflict of interest.[184]

DNA testing revealed H to be the father of M's child.[185] When negotiations over child support failed, Hill Wallack sued H on M's behalf.[186] After M filed her paternity action, H and W executed their wills.[187] In their respective wills, H and W left their residuary estates to each other.[188] In that instance, "[i]f the other spouse does not survive, the contingent beneficiaries are the testator's issue."[189] Under New Jersey law, "the term 'issue' includes both legitimate and illegitimate children."[190] Thus, when W executed her will, she potentially but unwittingly left her property to M's child in addition to her own children.[191]

The conflict of interest later emerged through written discovery in the paternity action.[192] Hill Wallack promptly told M that it was representing H in an unrelated matter but did not describe the matter.[193] The firm then withdrew from M's representation in the paternity case.[194] Next, the firm "wrote to [H] stating that it believed it had an

180. *Id.*
181. *A.*, 726 A.2d at 925.
182. *Id.* at 925–26.
183. *Id.* at 926.
184. *Id.*
185. *Id.*
186. *Id.*
187. *A.*, 726 A.2d at 926
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.*
193. *A.*, 726 A.2d at 926.
194. *Id.*

ethical obligation to disclose to [W] the existence, but not the identity, of his illegitimate child."[195] The firm also told H that it had to inform W "that her current estate plan may devise a portion of her assets through her spouse to that child."[196] Finally, Hill Wallack urged H to so advise W and warned "that if he did not do so, it would."[197] H instead joined Hill Wallack as a third-party defendant in the paternity action and won an order from an intermediate appellate court barring the firm from disclosing his love child's existence to W.[198] Hill Wallack then appealed to the New Jersey Supreme Court.[199]

The New Jersey Supreme Court acknowledged the importance of lawyers' duty of confidentiality,[200] but further recognized that Rule 1.6(c)(1) of the New Jersey Rules of Professional Conduct permitted "a lawyer to reveal confidential information to the extent the lawyer reasonably believe[d] necessary 'to rectify the consequences of a client's criminal, illegal or fraudulent act in furtherance of which the lawyer's services had been used.'"[201] The *A. v. B.* court explained that the term "fraudulent act" as used in New Jersey Rule 1.6 derived its meaning from the court's "construction of the word 'fraud,' found in the analogous 'crime or fraud' exception to the attorney-client privilege."[202] When analyzing the crime-fraud exception to the attorney-client privilege, New Jersey courts interpret the term "fraud" expansively.[203] The *A. v. B.* court thus reasoned that it should similarly construe the term "fraudulent act" as used in Rule 1.6(c)(1).[204]

On that basis, H's calculated decision not to tell W about his illegitimate child defrauded her.[205] When discussing their respective estates with Hill Wallack, H and W "reasonably could expect that each

195. *Id.*
196. *Id.* (quoting Hill Wallack's letter to *H*).
197. *Id.*
198. *Id.* at 925.
199. *A.*, 726 A.2d at 925.
200. *See id.* at 926 ("Crucial to the attorney-client relationship is the attorney's obligation not to reveal confidential information learned in the course of representation.").
201. *Id.* at 927 (quoting N.J. RULES OF PRO. CONDUCT r. 1.6(c)(1) (N.J. STATE BAR ASS'N (1998)) (current version at N.J. RULES OF PRO. CONDUCT r. 1.6(d)(1) (N.J. STATE BAR ASS'N 2021)).
202. *Id.*
203. *Id.* (quoting Fellerman v. Bradley, 493 A.2d 1239, 1245 (N.J. 1985)).
204. *Id.*
205. *A.*, 726 A.2d at 927.

would disclose information material to the distribution of their estates, including the existence of children who [were] contingent residuary beneficiaries."[206] H did not hold up his end of the bargain.[207] His breach of duty potentially was material in the sense that "[u]nder the reciprocal wills, the existence of [H's] illegitimate child could affect the distribution of [W's] estate, if she predeceased him."[208] More immediately and concretely, H's child support payments and any other financial obligations he might owe to his child with M "could deplete that part of his estate that otherwise would pass to his wife."[209]

After considering additional arguments over Hill Wallack's ability to disclose the child's existence to W, the court concluded that the firm could make the disclosure.[210] The *A. v. B.* court thus reversed the lower appellate court's holding in favor of H.[211]

In a jurisdiction that does not expansively define "fraud" for Rule 1.6 purposes, a lawyer may reasonably believe that a client is using her services to further some other form of serious misconduct, such as a breach of fiduciary duty, that nonetheless falls short of fraud. The lawyer's inability to disclose the client's wrongdoing in that situation does not mean that the lawyer lacks recourse. In an appropriate case, a lawyer might disavow, rescind, or withdraw an affidavit, opinion letter, or other legal document that she prepared for the client if the client is using it in connection with its breach of duty.[212] Alternatively or conjunctively, the lawyer may withdraw from the client's representation.[213] In some circumstances, withdrawal may be mandatory.[214]

D. The Client's Use of the Lawyer's Services in Furtherance of the

206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.* at 932.
211. *A.*, 726 A.2d at 932.
212. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 67 cmt. j (AM. L. INST. 2000); MODEL RULES OF PRO. CONDUCT r. 4.1 cmt. 3 (AM. BAR ASS'N 2021).
213. MODEL RULES OF PRO. CONDUCT r. 1.16(b)(4)-(7) (AM. BAR ASS'N 2021).
214. *Id.* r. 1.16(a)(1) (mandating withdrawal where "the representation will result in violation of the [R]ules of [P]rofessional [C]onduct or other law").

Crime or Fraud

Finally, for a lawyer to be able to disclose a client's information under Model Rules 1.6(b)(2) and (b)(3), the client must be using, or must have used, the lawyer's services in furtherance of the criminal or fraudulent scheme.[215] Absent the lawyer's involvement in the client's scheme—such as laundering money by structuring ostensibly legitimate real estate transactions, by issuing an opinion letter based on facts the lawyer did not realize were false, or by papering transactions that the lawyer did not recognize as fraudulent transfers intended to shield the client's assets from creditors—the lawyer's duty of confidentiality remains firm.[216] A lawyer's knowledge of a client's criminal or fraudulent conduct in which the lawyer has or had no role does not empower the lawyer to disclose the client's information to prevent, mitigate, or rectify any associated financial harm.[217] To repeat, absent the client's improper use of the lawyer's services, the lawyer's duty of confidentiality remains intact.[218] Depending on the facts, the lawyer in the latter situation may remonstrate with the client, withdraw from the representation, or both in that order, but disclosure of the client's information is not an option.[219]

The requirement that the client use the lawyer's services in furtherance of the client's criminal or fraudulent scheme does not mean that the lawyer's services must be essential to the scheme's success or that the client must direct the details of the lawyer's work.[220] It suffices for Model Rule 1.6(b)(2) and (b)(3) purposes "if the [lawyer's] services were or are being employed in the commission of the act."[221]

215. *Id.* r. 1.6(b)(2)-(3).
216. HAZARD ET AL., *supra* note 45, § 10.34, at 10-155.
217. *Id.*
218. *See* RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 67 cmt. b (AM. L. INST. 2000) ("Clients remain protected in consulting a lawyer concerning the legal consequences of any [wrongful] act in which the lawyer's services were not employed, including acts constituting crimes or frauds.").
219. HAZARD ET AL., *supra* note 45, § 10.34, at 10-155 to -156.
220. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 67 cmt. e (AM. L. INST. 2000).
221. *Id.*

III. THE MODEL RULE 4.1(B) OVERLAY

Model Rules 1.6(b)(2) and (b)(3) *permit* a lawyer to reveal information related to a client's representation in the specified circumstances, but they do not *require* disclosure in those circumstances.[222] Pausing there, a lawyer who can reveal a client's information under either rule but who chooses not to do so cannot be disciplined for that decision.[223] But when contemplating disclosure versus continued confidentiality, a lawyer must also consider Model Rule 4.1(b), which provides that when "representing a client a lawyer shall not knowingly: . . . (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6."[224] As a result, in many cases where the requirements of Model Rules 1.6(b)(2) or (b)(3) are met,[225] Model Rule 4.1(b) will mandate the lawyer's disclosure of information related to the client's representation rather than leaving that decision to the lawyer.[226] The rule does not have that effect in all cases, though, for at least three reasons.[227]

222. MODEL RULES OF PRO. CONDUCT r. 1.6(b) (AM. BAR ASS'N 2021) (stating that "[a] lawyer *may* reveal information relating to the representation of a client" under the exceptions to the duty of confidentiality listed in the rule (emphasis added)).

223. *See* Att'y Grievance Comm'n v. Rohrback, 591 A.2d 488, 496 (Md. 1991) ("Rule 1.6(b) is permissive. Failure to reveal that which may be revealed, as opposed to that which must be revealed, is not a basis for disciplinary action."); Alaska Bar Ass'n, Ethics Comm., Formal Op. 2003-2, 2003 WL 1950012, at *1 (2003) (explaining that where a lawyer's disclosure under an exception to Rule 1.6(b) is permissive, the lawyer does not commit an ethical violation by choosing to keep a client's information confidential).

224. MODEL RULES OF PRO. CONDUCT r. 4.1(b) (AM. BAR ASS'N 2021).

225. *Id.* r. 1.6(a) (If the elements required for discretionary disclosure under Model Rules 1.6(b)(2) and (b)(3) are not present in a matter, there can be no mandatory disclosure under Model Rule 4.1(b) because, in that case, disclosure will remain prohibited by Model Rule 1.6(a)). *See id.* ("A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).").

226. SISK ET AL., *supra* note 57, § 4-6.6(d)(3), at 348.

227. For additional arguments that Model Rule 4.1(b) does not necessarily supersede Model Rules 1.6(b)(2) and (b)(3) in all cases, see Peter R. Jarvis & Trisha M. Rich, *The Law of Unintended Consequences: Whether and When Mandatory Disclosure Under Model Rule 4.1(b) Trumps Discretionary Disclosure Under Model Rule 1.6(b)*, 44 HOFSTRA L. REV. 421, 431–37 (2015).

First, the term "knowingly" as used in Model Rule 4.1(b) imposes an actual knowledge standard.[228] That is, the lawyer must know that if she does not disclose a material fact, she will be assisting a client in committing a crime or fraud. In contrast, Model Rules 1.6(b)(2) and (b)(3) permit disclosure of client information where a lawyer reasonably believes a client will commit, is committing, or has committed a crime or fraud.[229] Thus, where a lawyer *reasonably believes but does not know* that the disclosure of client information is necessary to prevent, mitigate, or rectify a client's crime or fraud, disclosure remains discretionary.

Second, the Model Rules do not define the term "assisting" as used in Rule 4.1(b).[230] "Assisting," however, implies that a lawyer is actively aiding or helping a client commit a criminal or fraudulent act.[231] On that basis, Model Rule 4.1(b) does not create a mandatory disclosure obligation where the client is no longer using the lawyer's services to further the crime or fraud when the light bulb comes on for the lawyer. Where the lawyer grasps the client's criminal or fraudulent scheme after her work is concluded—even if the scheme is ongoing—the lawyer may choose whether to reveal the client's information to prevent, mitigate, or rectify harm caused by the scheme rather than being compelled to do so.

Third, a lawyer's disclosure of a material fact to avoid assisting a client's criminal or fraudulent act under Model Rule 4.1(b) is a measure of last resort.[232] The preferred approach under Model Rule 4.1(b) is for the lawyer to withdraw from the dishonest client's representation and secondarily to make a "noisy" withdrawal.[233] This approach is clear from a comment to Model Rule 4.1:

---

228. MODEL RULES OF PRO. CONDUCT r. 1.0(f) (AM. BAR ASS'N 2021).

229. *Id.* r. 1.6(b)(2)-(3).

230. *See id.* r. 1.0 (defining many terms used in the Model Rules, but not "assist" or "assisting"); *id.* r. 4.1(b).

231. *See* EEOC v. Illinois, 69 F.3d 167, 170 (7th Cir. 1995) ("Assisting, and failing to prevent, are not the same thing.").

232. *See* MODEL RULES OF PROF'L CONDUCT r. 4.1 cmt. 3 (AM. BAR ASS'N 2021) (discussing crime or fraud by a client).

233. *Id.*

> Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud *only by disclosing this information*, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6.[234]

Thus, where a lawyer can avoid assisting a client's criminal or fraudulent conduct by withdrawing from the representation, there will be no mandatory disclosure obligation under Model Rule 4.1(b) because disclosure will not be necessary.[235]

IV. THE CRIME-FRAUD EXCEPTION TO THE ATTORNEY-CLIENT PRIVILEGE

In considering lawyers' disclosure of client information, it is important to keep in mind that Model Rule 1.6(a) is not the sole basis for lawyer-client confidentiality nor are Model Rules 1.6(b)(2) and (b)(3) the only exceptions to confidentiality linked to clients' crimes or frauds. The attorney-client privilege protects confidential communications between attorneys and clients made for the purpose of delivering or seeking legal advice.[236] The confidentiality afforded by the attorney-client privilege is also subject to a crime-fraud exception, which requires a party seeking to discover otherwise privileged communications to "'make a prima facie showing that (1) the client was committing or intending to commit a fraud or crime, and

234. *Id.* (emphasis added).
235. *See* Jarvis & Rich, *supra* note 227, at 433 (making this point with respect to noisy withdrawals).
236. EDNA S. EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 6 (6th ed. 2017).

(2) the attorney-client communications were in furtherance of that alleged crime or fraud.'"[237]

Lawyers' ethical duty of confidentiality and the attorney-client privilege are not perfectly aligned. For example, a lawyer's duty of confidentiality under Model Rule 1.6(a) attaches not just to the lawyer's communications with the client but rather to all information related to the representation, regardless of the source.[238] In terms of the doctrines' respective crime-fraud exceptions, the crime-fraud exception to the privilege applies only to ongoing or planned misconduct by the client; it does not expose lawyer-client communications about past crimes or frauds unless they involve concealment or cover-up of the client's wrongdoing.[239] Model Rule 1.6(b)(3), on the other hand, allows a lawyer to disclose a client's past crime or fraud to prevent, mitigate, or rectify the predicted or resulting harm if the client used the lawyer's services to further the unlawful activity.[240]

In addition to those differences, lawyers' duty of confidentiality does not have the evidentiary effect of the attorney-client privilege.[241] For example, lawyers may not rely on their ethical duty of confidentiality to resist subpoenas seeking client communications,[242]

237. *In re* Grand Jury Subpoena, 745 F.3d 681, 687 (3d Cir. 2014) (quoting *In re* Grand Jury, 705 F.3d 133, 151 (3d Cir. 2012)) (emphasis omitted).

238. State v. Tensley, 955 So. 2d 227, 242 (La. Ct. App. 2007); State *ex rel.* Okla. Bar Ass'n v. McGee, 48 P.3d 787, 791 (Okla. 2002); State v. Meeks, 666 N.W.2d 859, 868 (Wis. 2003); ABA Formal Op. 480, *supra* note 5, at 3; MODEL RULES OF PRO. CONDUCT r. 1.6 cmt. 3 (AM. BAR ASS'N 2021).

239. EPSTEIN, *supra* note 236, at 880; Richmond, *supra* note 170, at 32.

240. *See* MODEL RULES OF PRO. CONDUCT r. 1.6(b) cmt. 8 (AM. BAR ASS'N 2021) ("Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated."); RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 1.6 12(f)(3), at 345 (2018–2019 ed. 2018) ("This exception to confidentiality seeks to permit a lawyer to take action after the criminal or fraudulent behavior has taken place but before its effects are over, in the case where the lawyer's disclosure can prevent, rectify, or mitigate substantial loss to the third person.").

241. Adams v. Franklin, 924 A.2d 993, 999 n.6 (D.C. 2007).

242. *See, e.g.*, *In re* Grand Jury, 475 F.3d 1299, 1306 (D.C. Cir. 2007) (referring to a grand jury subpoena); Pace-O-Matic, Inc. v. Eckert Seamans Cherin & Mellot, LLC, No. 20-cv-00292, 2021 WL 602733, at *5 (M.D. Pa. Feb. 16, 2021) (involving a non-party subpoena issued in accordance with the Federal Rules of Civil Procedure), *rev'd on other grounds*, 2021 WL 1264323 (M.D. Pa. Apr. 6, 2021); *In re* Grand Jury Subpoena, 533 F. Supp. 2d 602, 604–06 (W.D.N.C. 2007) (discussing a grand jury subpoena); State *ex rel.* Kaminski v. Evans, No. 15-1100, 2016 WL 1411730, at *8 (W. Va. Apr. 7, 2016) (concluding that the trial court did not err in holding that Rule 1.6 did not prevent a lawyer from complying with a subpoena in a civil case).

quash an administrative summons seeking client information,[243] refuse to respond to discovery requests,[244] or avoid testifying at depositions.[245] Rule 1.6 "does not operate to render information inadmissible at a judicial proceeding."[246]

On the other side of the coin, a Rule 1.6(b) exception to the duty of confidentiality that would permit a lawyer to reveal client information does not excuse a lawyer's duty to safeguard that information under the attorney-client privilege.[247] Lawyers must "protect the attorney-client privilege to the maximum possible extent on behalf of their clients."[248] The lawyer may not unilaterally waive the attorney-client privilege.[249] It is the responsibility of the party that wants to pierce the privilege to assert the crime-fraud exception in seeking discovery of the disputed information.[250] As an Illinois federal court observed, "the existence of the privilege is for the [c]ourt, not counsel, to determine."[251] In the case of the crime-fraud exception to the privilege, that is a carefully-orchestrated procedure.[252]

---

243. United States v. Servin, 721 F. App'x 156, 159–60 (3d Cir. 2018).

244. Burke v. Messerli & Kramer, P.A., No. 09-1630, 2010 WL 2520615, at *2 (D. Minn. June 15, 2010).

245. *See, e.g.*, Zino v. Whirlpool Corp., No. 11CV1676, 2012 WL 5197377, at *5 (N.D. Ohio Oct. 19, 2012) (concluding that a lawyer's duty of confidentiality did not prevent him from testifying at a deposition about matters not otherwise protected by the attorney–client privilege or work product immunity); *Adams*, 924 A.2d at 999–1000 (rejecting the lawyer's claim that the Rule 1.6 duty of confidentiality expanded the scope of the attorney-client privilege); *In re* Est. of Wood, 818 A.2d 568, 570, 573 (Pa. Super. Ct. 2003) (holding that a lawyer could not invoke his duty of confidentiality to avoid testifying at a deposition).

246. Peterson v. State, 118 A.3d 925, 956 (Md. 2015).

247. State v. Boatwright, 401 P.3d 657, 661–62 (Kan. Ct. App. 2017).

248. *In re* Search Warrant Issued June 13, 2019, 942 F.3d 159, 173 (4th Cir. 2019); *see also* Breton v. Comm'r of Corr., 899 A.2d 747, 751 (Conn. Super. Ct. 2006) ("The attorney-client privilege belongs to the client, however, not the attorney, although *it is incumbent upon the attorney to protect that privilege zealously in his or her client's interest*." (emphasis added)).

249. *See* Affiniti Colo., LLC v. Kissinger & Fellman, P.C., 461 P.3d 606, 614 (Colo. App. 2019) (stating that the attorney-client privilege "rests with the client and can only be waived by the client"); Selby v. O'Dea, 156 N.E.3d 1212, 1243 (Ill. App. Ct. 2020) ("As the holder of the attorney-client privilege, only the client may waive it."); Girl Scouts-W. Okla., Inc. v. Barringer-Thomson, 252 P.3d 844, 847 (Okla. 2011) ("The attorney-client privilege belongs to the client and not to the lawyer, and it may be waived only by the client."); *In re* Cook, 597 S.W.3d 589, 597 (Tex. Ct. App. 2020) ("The attorney-client privilege is personal to the client, and the right to waive the privilege belongs solely to the client.").

250. Richmond, *supra* note 170, at 20.

251. Harris Davis Rebar, LLC v. Structural Iron Workers Loc. Union No. 1, Pension Tr. Fund, No. 17 C 6473, 2019 WL 447622, at *6 (N.D. Ill. Feb. 5, 2019).

252. *See* Richmond, *supra* note 170, at 21–31.

A lawyer who chooses to reveal client information under Model Rules 1.6(b)(2) or (b)(3), or who is compelled to do so by way of Model Rule 4.1(b), must be careful not to breach the attorney-client privilege in the process. This should be possible in at least some cases because the privilege only protects confidential communications between the client and the lawyer for purposes of seeking or giving legal advice.[253] Thus, where the lawyer discerns the client's criminal or fraudulent plan or acts through other means or from other sources, the privilege is no impediment to disclosure.[254]

If a lawyer cannot reveal client information under Model Rules 1.6(b)(2) or (b)(3) without violating the attorney-client privilege, the lawyer's best alternative probably is to withdraw from the representation. That is also true where Model Rule 4.1(b) comes into play.[255] If the lawyer believes that disclosure is required under Model Rule 4.1(b) but withdrawal is for some reason not an option, it might be possible for the lawyer to petition a court to be relieved of her confidentiality obligations under the attorney-client privilege.[256] If the lawyer violates the attorney-client privilege through a disclosure under Rule 1.6(b)(2), Rule 1.6(b)(3), or Rule 4.1(b), it will fall to the client to argue in any later proceeding that any information so revealed should be inadmissible.[257] In any event, because the lawyer did not make the disclosure in her capacity as the client's agent, it should not

253. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 68 (AM. L. INST. 2000).

254. *Cf.* EPSTEIN, *supra* note 236, at 85 ("If what is sought to be discovered does not contain the substance or content of a communication between a client and an attorney, then it is not privileged.").

255. See *supra* notes 232–235 and accompanying text.

256. *See, e.g.*, State v. Karlowski, No. 97,998, 2008 WL 850146, at *5 (Kan. Ct. App. Mar. 28, 2008) (affirming the trial court's decision to grant the lawyer's motion to release him from his duties under the attorney-client privilege so that he could defend himself against his former client's ineffective assistance of counsel claim and secure advice about compliance with Kansas ethics rules). Granted, *Karlowski* involved pending litigation that gave the lawyer a ready forum in which to file his motion, but there is no obvious reason that a lawyer could not seek similar relief through a declaratory judgment or similar action, so long as the lawyer did not violate the privilege through statements in the petition or other court documents, or through statements made in oral argument to the court. The lawyer could further ask to file all documents under seal.

257. *See, e.g.*, Newman v. State, 863 A.2d 321, 333, 335–37 (Md. 2004) (holding that the lawyer's disclosure under Rule 1.6 that his client had expressed her intent to kill her estranged husband did not defeat the client's assertion of the attorney-client privilege and explaining the rationale for that ruling, and further explaining why the crime-fraud exception to the privilege did not apply).

constitute a subject-matter waiver of other privileged communications between the lawyer and the client.[258]

CONCLUSION

Confidentiality is essential to the practice of law. Indeed, lawyers' ethical duty of confidentiality is a good part of the foundation on which both litigation and transactional practices are built. As important as confidentiality is, however, there are times when it may yield to a greater public interest in the prevention, mitigation, or rectification of clients' criminal or fraudulent conduct. Model Rules 1.6(b)(2) and (b)(3) establish two critical but narrow exceptions to lawyers' duty of confidentiality in some related circumstances. Model Rule 4.1(b) sometimes combines with these rules to require lawyers to reveal client information to avoid assisting the client in committing a criminal or fraudulent act.

Lawyers who are concerned that a client may be involved in criminal or fraudulent conduct should first carefully study their jurisdictions' rules of professional conduct. State versions of Rule 1.6(b) may not mirror Model Rule 1.6(b), and those differences may materially affect lawyers' rights or duties. Second, lawyers contemplating the disclosure of client information should evaluate their options or obligations against their potentially competing obligations under the attorney-client privilege. Finally, lawyers should avoid making disclosure determinations in isolation. These are difficult and often nuanced decisions best made in consultation with other lawyers who are versed in professional responsibility.

258. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 67 cmt. c (AM. L. INST. 2000).