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Client-Lawyer Confidentiality

William D. Popkin*

I. Introduction

A professional code of ethics for lawyers serves two major purposes. First, it implements society's interest in the client-lawyer relationship by encouraging the distribution of legal services, and by encouraging or tempering the lawyer's zeal for the client, depending on the circumstances. Second, a professional code protects the client when the client is unable to protect himself. Complex ethical problems arise whenever these purposes conflict, and it becomes difficult to define and weigh the interests involved. The dispute over lawyer advertising and soliciting is a good example. Earlier rules prohibiting advertising and soliciting prevented lawyers from overreaching clients and stirring up litigation, but also discouraged the distribution of legal services. As public concern for access to legal services increased, many of the prophylactic rules against advertising and soliciting gave way to case-by-case determinations of abuse.

Designing a code is further complicated by the proliferation of roles played by lawyers. The lawyer is no longer just the courtroom advocate hired by the client to appear in adversary proceedings, familiar in the earlier Canons of Ethics. Departures from that model—which was never a completely accurate picture of reality—have increased dramatically in recent years. The lawyer now engages in pretrial settlement, appears before administrative tribunals in nonadversary disputes, issues opinions to clients for dissemination to

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1. See, e.g., ABA CODE OF PROFESSIONAL RESPONSIBILITY ECs 2-25, 4-1 (1980) [hereinafter cited as CODE]. See also ASS'N OF THE BAR OF THE CITY OF NEW YORK, TOWARD A MANDATORY CONTRIBUTION OF PUBLIC SERVICE PRACTICE BY EVERY LAWYER, RECOMMENDATIONS AND REPORT OF THE SPECIAL COMMITTEE ON THE LAWYER'S PRO BONO OBLIGATIONS (undated).

2. See, e.g., CODE Canon 7, DR 7-102, -106 (1980).


4. The history of amendments to the Code in response to Supreme Court decisions on advertising and solicitation is described in The Supreme Court, 1977 Term, 92 HARV. L. REV. 185, 195 n.59 (1978).

nonclients, negotiates contracts, argues for legislation and administrative rules, and represents classes of litigants in test cases, often in situations where the client does not pay the fee.

This variety of roles has several implications for a professional code. First, it complicates the drafter's task because the weights attached to interests may vary in different settings, a fact that has always been explicitly recognized in drafting special rules applicable to prosecutors and criminal defense counsel. Second, it calls into question the ability of the bar or the highest court of the state to adopt rules for situations far removed from the adversary courtroom setting with which they are most familiar. Third, the variety of roles psychologically complicates the lawyer's effort to comply. Lawyers may be good at advising clients to conform to rules in different legal environments, but they may not find it easy to govern their own professional lives when confronted with ethical requirements that change with the institutional setting in which the lawyer operates.

The proliferation of lawyers' roles combined with the shift in the evaluation of interests that shape a professional code to lead to the creation of the ABA Commission on Evaluation of Professional Standards. The commission issued a Discussion Draft and then a proposed Final Draft of Model Rules of Professional Conduct barely ten years after the Code of Professional Responsibility replaced the earlier Canons of Professional Ethics. The Model Rules of Professional Conduct are structured explicitly to account for the various roles played by lawyers and to alter the existing balance between the lawyer's obliga-


7. In all jurisdictions the bar, the highest court of the state, or both are exclusively responsible for adopting a professional code for lawyers. Report of the Special Committee to Secure Adoption of the Code of Professional Responsibility, 97 A.B.A. Rep. 268 (1972).


10. ABA Canons of Professional Ethics (1908).

11. The Model Rules Discussion Draft is divided into Part A (The Practice of Law) and Part B (The Responsibilities of a Public Profession). Part A has seven sections, five of which deal separately with different lawyer roles: § 2 (Adviser), § 3 (Advocate), § 4 (Negotiator), § 5 (Intermediary), § 6 (Legal Evaluator). Section 3 is further divided to deal specially with ex parte proceedings (Rule 3.5), unrepresented opponents (Rule 3.6), prosecutors (Rule 3.10), defense counsel (Rule 3.11), and advocacy in nonadjudicative proceedings (Rule 3.12).

The Model Rules Final Draft is not subdivided into parts, and explicit references to lawyer roles have been reduced. See § 2 (Counselor), § 3 (Advocate), § 4 (Transactions with Persons Other Than Clients). Section 2 is further divided into Advisor (Rule 2.1), Intermediary (Rule 2.2), and Evaluation for Use by Third Persons (Rule 2.3). Section 3 refers to the Prosecutor (Rule 3.8)
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tions to the client and the public interest.  
This Article is concerned with one area of ethical responsibility addressed by the Model Rules: the obligation to preserve or disclose the client’s confidences.  
Part II compares how existing Code provisions and both versions of the Model Rules deal with disclosure problems in a variety of settings. Part III critically evaluates the reasons that might support the changes made by the Model Rules. Part IV explores the limits of a generally applicable code of professional conduct by analyzing the problems of disclosure in tax disputes.

II. Client Confidentiality Under the Existing Code and the Model Rules: A Modest Shift Toward Greater Disclosure

Even without a careful analysis of the Model Rules the reader could anticipate, simply from the change in formal placement of the confidentiality rules, that the lawyer’s obligation has shifted towards greater disclosure of client confidences. Preservation of client confidences is the fourth axiomatic norm in the current Code.  
The Model Rules, which do not set forth the axiomatic norms of the present Code, place the disclosure provisions sixth in the section dealing with the client-lawyer relationship.  
and to the Advocate in Nonadjudicative Proceedings (Rule 3.9). Rule 4.3 is entitled “Dealing with Unrepresented Persons.”

The drafters of the Model Rules issued a Final Alternative Draft that follows the format of the current Code. See ABA MODEL RULES OF PROFESSIONAL CONDUCT (Alternative Draft May 1981) [hereinafter cited as MODEL RULES ALTERNATIVE DRAFT]. Considerable controversy had arisen over the format of the Discussion Draft, which fashioned rules according to the various roles played by lawyers. See supra. Compare MODEL RULES DISCUSSION DRAFT Table of Contents with NATIONAL ORGANIZATION OF BAR COUNSEL, REPORT ON A STUDY OF THE PROPOSED ABA MODEL RULES OF PROFESSIONAL CONDUCT WITH RECOMMENDATIONS 2-5 (1980). No substantive differences between the Model Rules Alternative Draft and the Model Rules Final Draft were intended. Rules relating to confidentiality are found in the Alternative Draft in Disciplinary Rules 4 and 7. See MODEL RULES ALTERNATIVE DRAFT DR 4-101; id. DRs 7-102(A), (D), (F).

12. For example, zealously for the client has been replaced with diligence. Compare Code Canon 7 with MODEL RULES FINAL DRAFT Rule 1.3. See also text accompanying notes 14-88 infra.


15. See MODEL RULES FINAL DRAFT Rule 1.6. By contrast, the discussion draft of the American Trial Lawyer's Code of Conduct self-consciously puts confidentiality as the lawyer's first obligation. ROSCOE POUND-AMERICAN TRIAL LAWYERS FOUNDATION, THE AMERICAN LAWYER'S CODE OF CONDUCT Introduction, at v-vi; id. § 1, at 101-10 (Discussion Draft June 1980) [hereinafter cited as AMERICAN LAWYER'S CODE].

Form mirrors substance, as the following catalogue of variations among the Code and the two versions of the Model Rules illustrates. The relatively radical increases in disclosure of client confidences suggested in the Discussion Draft of the Model Rules have been substantially limited in the final version of the proposed Rules, although some vestiges of the shift toward increased disclosure remain. The following paragraphs point out specific differences between the two drafts, and subpart II(B) discusses the reasons for the Final Draft's retreat from disclosure.

1. Criminal or Fraudulent Acts by the Client.—Although the Discussion Draft permitted disclosure of client confidences to prevent the consequences of “deliberately wrongful acts” by the client, the Final Draft allows discretionary disclosure to prevent “criminal or fraudulent act[s] . . . likely to result in substantial injury to the financial interest or property of another” or to “rectify the consequences of [such acts] in the commission of which the lawyer’s services had been used.”

For example, the client, the majority owner of a corporation, consults the lawyer about buying out the minority shareholders. During the discussion it becomes clear that the client wants to be rid of the minority owners because he fears discovery that he improperly withdrew money from the corporation to pay personal debts. The lawyer determines that the withdrawal was clearly illegal and advises the client to return the money. The client refuses to return the money.

The Final Draft prohibits the lawyer from disclosing confidences to rectify the consequences of this past wrongful act by the client, unless the lawyer’s services had been used in the commission of the act. The Discussion Draft allowed disclosure in this situation, regardless of the lawyer’s involvement in the past wrongful act.

Existing rules can be charitably described only as unclear. The closest analogue to the Model Rules in the Code permits disclosure to prevent a crime and requires application of the vague notion of a “con-
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tinuimg crime.” ABA Ethics Committee opinions add to the confusion by sometimes requiring and sometimes prohibiting disclosure to prevent crimes. The contradictions in the ABA opinions are compounded by their uncertain relevance under the present Code. They interpreted the prior Canons, and their citation in footnotes to the current Code is not supposed to be authoritative, but at least one ABA informal opinion indicates that the earlier opinions are still valid interpretations of the Code. Moreover, the ABA opinions deal with disclosure in the case of fugitives from justice, a situation in which disclosure obligations might be greater because the court’s jurisdiction has already attached.

The Discussion Draft eliminated these ambiguities by clearly permitting disclosure and by defining the occasion for allowing disclosure as the prevention of harm resulting from wrongdoing, not the act of wrongdoing itself. The Final Draft prohibits disclosure concerning prior acts by the client, except when the lawyer’s services are used in the commission of the act, and shifts the focus back to the prevention of the act itself, not the prevention of the act’s harmful consequences.


23. ABA FORMAL OPINIONS Nos. 156 (1936), 155 (1936); ABA INFORMAL OPINIONS No. 1141 (1970).

24. ABA FORMAL OPINIONS No. 23 (1930).


26. E.g., CODE DR 4-101(C)(3), at n.16 (citing ABA FORMAL OPINIONS Nos. 314 (1965), 155 (1936)).

27. The Code’s Preamble states that the footnotes are not the views of the committee that drafted the text of the Code. CODE Preamble, at n.1.


29. Two ABA Opinions deal with clients free on bail, ABA FORMAL OPINIONS Nos. 155 (1936), 23 (1930), one with a client on probation, id. No. 156 (1936), and one with a client who was a military deserter, ABA INFORMAL OPINIONS No. 1141 (1970).

30. AMERICAN BAR FOUNDATION, ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY 179 (1979). It is also possible that these ABA opinions are meant to apply the mandate that lawyers disclose confidences when “required by law,” rather than when a crime can be prevented. See CODE DR 7-102(A)(3); id. DR 4-101(C)(2), at n.15 (citing ABA FORMAL OPINIONS Nos. 156 (1936), 155 (1936)). See note 33 infra (concerning disclosure “required by law”).

31. See note 18 supra & accompanying text.

32. See MODEL RULES FINAL DRAFT Rule 1.6(b)(2). Rule 1.6(b)(3) is the only part of the final version of the Rules that focuses explicitly on the consequences of wrongful client acts. The rule allows a lawyer to reveal confidential information to the extent necessary “to rectify the consequences of a client’s criminal or fraudulent act in the commission of which the lawyer’s services have been used.” MODEL RULES FINAL DRAFT Rule 1.6(b)(3). Rule 1.6(b)(2), which is
Some ambiguity remains in the application of both versions of the Rules, however, because the standards for exercising discretion are unclear.\textsuperscript{33} For example, the comment to Rule 1.6\textsuperscript{34} cites lawyer involvement in the transaction as one of many factors in determining whether to disclose, and not as a sufficient condition of disclosure.\textsuperscript{35}

The Model Rules also would replace the existing rules requiring disclosure when a client, represented by a lawyer, defrauds another person.\textsuperscript{36} Whether fraud overrides client-lawyer confidentiality has been unclear under the Code.\textsuperscript{37} The 1969 version of the Code was silent on this point, but a 1974 amendment prevented disclosure of privileged information, despite perpetration of fraud on another person.\textsuperscript{38} An ABA formal opinion interprets the 1974 amendment to apply to all

the revised version of Model Rules Discussion Draft Rule 1.7(c)(2), drops the earlier version's references to "consequences of a deliberately wrongful act" and focuses simply on the prevention of a criminal or fraudulent act by the client. The new rule does require that the act be one "that the lawyer believes is likely to result in" harm—a phrase not in the earlier version—so that the emphasis remains on the prevention of harm caused by the client, though not as explicitly as in the Discussion Draft.

33. The Model Rules also fail to clarify the uncertainty surrounding disclosure when necessary "to comply with...other law," except to make clear that failure to disclose violates the ethical rules. Compare Model Rules Final Draft Rule 1.6(b)(3) (lawyer may disclose information to the extent required by law) with Code DR 4-101(C)(2) (lawyer may reveal information when permitted under Disciplinary Rules or required by law or court order) and Code DR 7-102(A)(3) (lawyer shall not fail to disclose what the law requires to be revealed). See American Bar Foundation, supra note 30, at 173-74. The problem, which persists under the Model Rules, is to determine whether the "law" requires disclosure. Most existing rulings deal with physical evidence of a crime, In re Ryder, 263 F. Supp. 360 (E.D. Va.), aff'd, 381 F.2d 713, 714 (4th Cir. 1967); Morrell v. State, 575 P.2d 1200, 1211-12 (Alaska 1978); ABA Informal Opinions No. 1057 (1968), and compliance with court orders, In re January 1976 Grand Jury, 534 F.2d 719, 729 (7th Cir. 1976); In re Kerr, 86 Wash. 2d 655, 662 n.2, 548 P.2d 297, 301 n.2 (1976). See Callan & David, supra note 25, at 357 n.109.


34. Model Rules Final Draft Rule 1.6, Comment, at 40.

35. An earlier draft of the Model Rules required lawyer involvement. Kaufman, A Critical First Look at the Model Rules of Professional Conduct, 66 A.B.A. J. 1074, 1078 (1980). The final version does make lawyer involvement a necessary condition in the application of Rule 1.6(b)(3) regarding disclosure to rectify the consequences of a past criminal or fraudulent act by the client. Model Rules Final Draft Rule 1.6(b)(3).

36. Code DR 7-102(B)(1).


38. The history of the amendment is explained in Note, Client Fraud and the Lawyer—An Ethical Analysis, 62 Minn. L. Rev. 89, 96-104 (1977). See also ABA Formal Opinions No. 341 (1975).
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information acquired by the lawyer in a professional relationship, "secrets" as well as "confidences," whether or not privileged under the attorney-client privilege.\textsuperscript{39}

The Discussion Draft permitted what the amended prior rule prohibited—applying the standard of permissive disclosure to all deliberately wrongful acts with harmful consequences, including prior frauds.\textsuperscript{40} In the Final Draft, however, not all prior frauds are subject to permissive disclosure to rectify their harmful consequences. Rule 1.6(b)(3) specifies that a lawyer can disclose information only when the lawyer's services have been used in the commission of the fraudulent act.\textsuperscript{41}

Another area in which the Final Draft retreats from the disclosure standards suggested in the Discussion Draft is disclosure when necessary to prevent death or serious bodily harm. The Discussion Draft required, rather than permitted, disclosure of confidences when necessary to prevent the client from committing an act that would result in death or serious bodily harm to another person.\textsuperscript{42} The Final Draft reduces the standard to permissive disclosure,\textsuperscript{43} allowing discretionary disclosure regardless of the type of harm anticipated.\textsuperscript{44}

2. Client Fraud upon the Tribunal.—The Model Rules treat client

\textsuperscript{39} ABA FORMAL OPINIONS No. 341 (1975). The opinion appears to reinstate earlier rulings against disclosure, such as ABA FORMAL OPINIONS Nos. 23 (1930), 202 (1940), and 274 (1946). Opinion 341 states that disclosure is still required under the Code if the lawyer discovers the fraud outside of the professional relationship or if it is required by law, ABA FORMAL OPINIONS No. 341, at 4 (1965), but that does not leave much to disclose. Wolfram, supra note 37, at 820, 836-37 & n.106; Note, supra note 38, at 109-11.

The lawyer, who cannot himself disclose, is required to counsel the client to reveal prior fraud. ABA INFORMAL OPINIONS No. 1416 (1978). See ABA INFORMAL OPINIONS No. 1318 (1975); Wolfram, supra note 37, at 846.

\textsuperscript{40} MODEL RULES DISCUSSION DRAFT Rule 1.7(c)(2).

\textsuperscript{41} MODEL RULES FINAL DRAFT Rule 1.6(b)(3).

\textsuperscript{42} MODEL RULES DISCUSSION DRAFT Rule 1.7(b). Compare id. (disclosure required when death or serious bodily harm is threatened) with MODEL RULES DISCUSSION DRAFT Rule 1.7(c)(2) (discretionary disclosure for deliberately wrongful client acts generally). Accord, Callan & David, supra note 25, at 356 (disclosure should be required when life or safety seriously endangered); ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE DEFENSE FUNCTION § 3.7(d) (1971) (disclosure when life or safety seriously endangered and lawyer believes disclosure necessary for prevention). By contrast, the American Lawyer's Code would never require disclosure and would permit disclosure only under certain conditions. AMERICAN LAWYER'S CODE § 1, at 101-03. Alternative A would permit disclosure to prevent imminent danger to human life and bribery or extortion of judge or juror. Id. §§ 1.4-5, at 101-02.

\textsuperscript{43} MODEL RULES FINAL DRAFT Rule 1.6(b)(2). The drafters also replaced the objective language of the earlier version (prevention of an act "that would result in death or serious bodily harm") with a subjective test (prevention of an act "that the lawyer believes is likely to result in death or substantial bodily harm"). Compare MODEL RULES DISCUSSION DRAFT Rule 1.7(b) with MODEL RULES FINAL DRAFT Rule 1.6(b)(2). The final version replaces the phrase "serious bodily harm" with "substantial bodily harm" and requires that the client's act be criminal or fraudulent. See MODEL RULES FINAL DRAFT Rule 1.6(b)(2).

\textsuperscript{44} See notes 18-19 supra & accompanying text.
misrepresentation in the course of advocacy before a tribunal in the section on advocacy and not in the earlier rules dealing with client confidences and general client wrongdoing. Both versions of the Model Rules impose the general requirement that a lawyer must take action to remedy the effect of presenting before a tribunal evidence that the lawyer comes to know is false, even if this requires disclosure of information otherwise confidential under Rule 1.6. The Discussion Draft, however, required the lawyer explicitly to disclose the fact that evidence or testimony offered in the course of representation by the lawyer was false, whether or not his intentions in offering it were fraudulent. The Final Draft does not require explicit disclosure of falsity, but rather requires "reasonable remedial measures." The comment to the Rule, however, indicates that disclosure would generally be required.

Existing rules are the same as those applicable to fraud upon a person, which prohibit disclosure if the information is privileged.

45. See Model Rules Final Draft Rule 3.3.
46. See Model Rules Final Draft Rule 1.6.
47. See Model Rules Final Draft Rules 3.3(a)(4), 3.3(b); Model Rules Discussion Draft Rule 3.1(b).
48. Model Rules Discussion Draft Rule 3.1(b) does not explicitly state that the falsehood must be presented "in the course of representation" by the lawyer, compare Code DR 7-102(B)(1), but that is its meaning. See Model Rules Discussion Draft Rule 10.1, Comment, at 130 (reference to Model Rules Discussion Draft Rule 3.1 as requiring lawyer involvement).
49. See Model Rules Discussion Draft Rule 3.1(b).
50. It is arguable that an innocent or negligent client falsehood would not invoke the lawyer's disclosure obligation. Model Rules Final Draft Rule 3.3, Comment, at 125-26, juxtaposes falsehood and deception. However, the rules themselves refer only to "false" evidence, in contrast to the current Code's reference to "fraud," see Code DR 7-102(B)(1), which has been interpreted to require scienter or intent to deceive. ABA Formal Opinions No. 341, at 5 (1975). See also American Bar Foundation, supra note 30, at 324-25. Some commentators on the Model Rules illustrate their discussion of disclosure with examples of intentional falsehoods, Redlich, supra note 13, at 989; White, supra note 13, at 935-36, but do not explicitly equate false and fraudulent statements. Whether innocent falsehoods should be disclosed is discussed at text accompanying notes 105-12 infra.
51. See Model Rules Final Draft Rule 3.3(a)(4). Lawyers representing criminal defendants occupy a somewhat different position under the proposed rules. In the Discussion Draft the rule made an explicit exception for lawyers whose decisions to disclose must be determined ultimately by the criminal defendant's constitutional right to assistance of counsel. See Model Rules Discussion Draft Rule 3.1(f). The Final Draft deleted the explicit exception, but inserted a caveat which cautions that "constitutional law defining the right to assistance of counsel in criminal cases may supersede the obligations stated in this rule." Model Rules Final Draft Rule 3.3. See also Callan & David, supra note 25, at 365-81 (fifth amendment might prevent disclosure by defense counsel).
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The new Rule, therefore, is one of two important instances when the Model Rules require a lawyer to disclose confidential information that could not be disclosed under the current Code. 54

The Model Rules reject several stopping points along the continuum between full disclosure and complete nondisclosure. For example, disclosure does not depend on the scienter of the client in the prior misrepresentation 55 of fact or on the silence of the lawyer amounting to corroboration of the prior falsehood. 56

Rule 3.3 of the Final Draft, however, does make disclosure depend on whether the false evidence that has been offered is "material." 57 Aside from the materiality requirement, though, disclosure depends simply on whether the lawyer has come to know that the tribunal was misled.

The drafters of the Model Rules also rejected the common halfway house of lawyer withdrawal upon discovery of client perjury. This alternative was popular in some ABA formal opinions 58 and recent court decisions, 59 but the Model Rules' drafters chose prompt disclosure to the court as the advocate's proper course. 60

3. Disclosure of Evidence to Opposing Party.—The Discussion Draft allowed a lawyer to disclose to another party evidence favorable to that party, including evidence acquired from the client during the attorney-client relationship. 61 The drafters of the Discussion Draft considered, but rejected, an even more expansive measure, which reading silence after client falsehood). See also ABA INFORMAL OPINIONS No. 1314 (1975) (lawyer forewarned of perjury must disclose truth if client lies).

54. The other instance is the rule requiring disclosure of relevant facts to a tribunal in ex parte proceedings. See notes 66-67 infra & accompanying text.

55. See notes 47-50 supra & accompanying text.

56. The lawyer's corroboration of a falsehood by silence is critical in two ABA opinions. ABA FORMAL OPINIONS Nos. 314, at 691 (1965); 287, at 637-38 (1953). In both opinions the alternative to silence is withdrawal rather than disclosure.

57. See MODEL RULES FINAL DRAFT Rule 3.3(a)(4). This version of the rule confirms earlier conclusions that failure to disclose misrepresentations of insignificant facts would be unlikely to result in discipline. See Wolfram, supra note 37, at 844.

58. E.g., ABA FORMAL OPINIONS No. 287 (1953). Under the rule in Formal Opinion 314, withdrawal is required only if it does not amount to disclosure. ABA FORMAL OPINIONS No. 314, at 691 (1965).

59. See Wolfram, supra note 37, at 854-62.

60. See MODEL RULES FINAL DRAFT Rule 3.3, Comment, at 127. The American Lawyer's Code adopts a different approach. It would permit withdrawal in noncriminal litigation when the client has knowingly induced lawyer action on the basis of material misrepresentations, unless the lawyer would be required to make explicit disclosure as a condition of withdrawal. If disclosure were only an indirect result of withdrawal, the lawyer could withdraw. AMERICAN LAWYER'S CODE § 6.5, at 601. Withdrawal is not conditioned, however, on continued participation amounting to corroboration. Id., Illustrative Case 6(d), at 605-06.

61. MODEL RULES DISCUSSION DRAFT Rule 3.1(a).
quired disclosure of evidence that would "probably have a substantial effect on the determination of a material issue." 62

The Final Draft, however, omits the entire provision, 63 conforming to existing rules on this subject, which prohibit disclosure. 64 The Final Draft contains a provision, though, that may require disclosure of evidence in certain circumstances. Rule 3.3(a)(1) forbids a lawyer from failing to disclose a fact when failure to make the disclosure is the equivalent of making a material misrepresentation. 65

4. Disclosure of Relevant Facts in Ex Parte Proceedings.—The Discussion Draft and the Final Draft are virtually identical on this subject. Both require a lawyer to inform the tribunal of all relevant facts known to the lawyer that should be disclosed to the tribunal. 66 The Final Draft clarifies this by making explicit the relation between disclosure and the objective of informed decisionmaking. 67

5. Disclosure During Negotiation.—While the Discussion Draft treated negotiation in a separately denominated section, the Final Draft substitutes a section entitled “Transactions with persons other than clients.” 68 Both versions contain a rule that addresses disclosure of facts to other persons, including those with whom the lawyer is negotiating. The Discussion Draft paralleled the obligation imposed in adversary proceedings by requiring the correction of manifest misapprehensions of fact resulting from prior representations made by the client, 69 whether or not intentionally fraudulent. 70 The Final Draft,

62. Id. Rule 3.1, Comment, at 63.
63. Compare Model Rules Discussion Draft Rule 3.1(e) with Model Rules Final Draft Rule 3.3.
64. Code DR 4-101(B). However, a prosecutor must disclose significant facts. Id. DR 7-103(B).
66. See Model Rules Discussion Draft Rule 3.5(b); Model Rules Final Draft Rule 3.3(d).
67. See Model Rules Final Draft Rule 3.3(d).
69. Model Rules Discussion Draft Rules 3.1(b), 4.2(b)(2). The parallel depends on assuming that the lawyer is implicated in a misrepresentation in both cases. In advocacy, the involvement arises from presenting the client’s evidence or testimony. Id. Rule 3.1; id. Rule 10.1, Comment, at 130. In negotiation, the involvement arises because the lawyer necessarily incorporates the client’s prior representations into his own bargaining efforts, whether or not the lawyer explicitly makes the statements, alludes to them, or was representing the client when the client made them.
70. There is room for debate whether the Discussion Draft requires disclosure of the client’s misrepresentation. See notes 47-50 supra & accompanying text (similar questions arising in connection with advocacy). The Discussion Draft refers to another party’s being “misled,” which might suggest intentional fraud. Nonetheless, the rules refer to “representations” by the client and
however, limits disclosure to situations in which nondisclosure would be equivalent to a material misrepresentation by the lawyer.\footnote{71}

The existing rules, as amended, prohibit disclosure of privileged information even if the client perpetrated a prior fraud on the opposing party during negotiations.\footnote{72} The Model Rules, therefore, expand the obligation to disclose misrepresentations in the negotiation process.

6. Disclosure During Lobbying.—The Model Rules deal separately with the role of the advocate who participates in nonadjudicative proceedings such as influencing administrative rulemaking and legislative policymaking.\footnote{73} Both the Discussion Draft and the Final Draft require the lawyer to follow the general rules regarding candor of the advocate toward the tribunal.\footnote{74} Thus, the lawyer appearing before a rulemaking body has the same obligations to disclose or remedy false evidence and the client’s misrepresentations as does a lawyer appearing before a court. The attorney appearing as a lobbyist must take into account the same considerations discussed above in connection with the courtroom advocate: proper remedial measures, intentional or unintentional falsehoods, and disclosure of perjury.\footnote{75}

B. The Final Draft’s Emphasis on Lawyer Involvement in Client Wrongdoing

As illustrated above, the Final Draft of the Model Rules represents a more modest shift toward greater disclosure of client confidences than did the Discussion Draft. One explanation for this seems to be a reluctance to make the lawyer’s role in pursuing the general public interest an ethical responsibility,\footnote{76} and a preference to rely on civil or criminal law to determine when disclosure serves the public good.\footnote{77} For example, the duty to warn the client of harm to others from a serious legal wrong has been recast in the Final Draft to emphasize protec-
tion of the client. The drafters apparently adopted the view that confidentiality encourages prevention of harm by facilitating the lawyer's ability to counsel proper behavior.

The changes incorporated in the Final Draft are not unambiguous, however. First, the lawyer may find it more difficult to avoid disclosure of falsehood in negotiations than might at first appear. A lawyer cannot knowingly fail to disclose when silence is the equivalent of a material misrepresentation. Once a lawyer learns that a prior fact was falsely represented in negotiations, it may be difficult to continue to participate in the negotiations and at the same time deny that silence is not a misrepresentation. Second, the lawyer may be required to disclose in order to prevent assisting a client engaged in criminal or fraudulent activity, or to prevent being held to have assisted such conduct by his silence. The common theme in these two situations is the Final Draft's stronger emphasis on protecting the lawyer from the taint of falsity. The Draft contains numerous examples of this attitude. The Final Draft places greater emphasis than the Discussion Draft on prohibiting the lawyer from assisting criminality and fraud; it explicitly links disclosure of a client's innocent falsehood in the advocacy setting to preventing the lawyer from providing such assistance; and it revives an earlier draft's conditioning of disclosure to rectify harm on the lawyer's involvement, however innocent, in the client's criminal or fraudulent acts. Whether intended to preserve the public image of the lawyer or the lawyer's self-image, the dominant theme in the Final

78. Compare MODEL RULES DISCUSSION DRAFT Rule 2.4, Comment, at 14 with MODEL RULES FINAL DRAFT Rule 2.1, Comment, at 110-11. Cf. MODEL RULES FINAL DRAFT Rule 1.13 (clearly specifying that the lawyer for an organization acts solely to further the best interests of the organization, not to blow the whistle in the public interest).


80. See note 100 infra. Partial disclosure in tax shelter opinions, for example, may amount to a misrepresentation unless further disclosure is made. MODEL RULES FINAL DRAFT Rule 4.1, Comment, at 164.

81. MODEL RULES FINAL DRAFT Rule 4.1(b)(1), Comment, at 162. See also id. Rule 3.3(a)(1) (failure to disclose can be the equivalent of material misrepresentation).

82. Id. Rule 1.6, Comment, at 39.

83. Id. Rule 1.2(d), Comment, at 13.

84. Id. Rule 1.2(d). The Discussion Draft hinted at this result, see MODEL RULES DISCUSSION DRAFT Rule 1.16(a)(1), (b)(2), but was explicit only as to advice and negotiations. See id. Rules 2.3(a), 4.3.


86. Id. Rule 1.6(b)(3), Comment, at 47. See note 35 supra. The effort to distinguish lawyer and client fraud, see MODEL RULES FINAL DRAFT Rule 4.1, Comment, at 162-63, will be difficult to sustain. See id. Rule 1.6, Comment, at 39 (equating the lawyer's fraud under Rule 3.3(a)(4) with assisting the client's fraud under Rule 1.2(d)). See also id. Rule 1.6, Comment, at 47 (mandatory disclosure required by Rules 1.2(d), 3.3(a) and 4.1 when the lawyer's conduct is inextricably bound to client misconduct).
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Draft is avoiding the appearance of lawyer involvement in client wrongdoing.

III. Confidentiality vs. Disclosure: The Relevant Factors

Despite stopping short of mandating disclosure of material facts, and despite some lack of clarity concerning the criteria for permissive disclosure, the Final Draft of the Model Rules alters, in the direction of greater disclosure, the emphasis in the existing Code on preserving confidences. Although we should not expect complete agreement on the philosophy supporting this shift, the specific provisions in the Model Rules nonetheless reflect an underlying view about the nature of lawyering and the legal system. This section addresses these broader philosophical issues.

A. Social Values: Client Protection vs. Informed Decisionmaking

The core of the dispute over confidentiality is whether informed decisionmaking or client protection is the major objective of legal representation. The usual assumption that confidentiality results in client protection rests on the theory that clients will speak more freely with lawyers and thus obtain more effective protection from their adversaries through the legal system. The decision to prohibit, permit, or require disclosure depends on how strongly we value this use of the legal system.

I. Confidentiality and Client Protection:—Commitment to client

87. See text accompanying notes 61-65 supra.
88. See text accompanying notes 33-35 supra.
90. See VIII J. Wigmore, Evidence § 2291, at 545 (1961); Code EC 4-1; Model Rules Discussion Draft Rule 1.7, Comment, at 6.
91. To my knowledge, there is no empirical research supporting or rejecting these assumptions. We cannot be completely sure that confidentiality is important either in encouraging use of lawyers or in helping the representative protect the client’s rights. The fact that consultation with nonlawyers is common in such areas as tax law, even though the attorney-client privilege is inapplicable, does not demonstrate the irrelevance of confidentiality, because disclosure by nonlawyers may be very unusual and clients may be under the impression that their communications are confidential. See notes 134, 139 & 145 infra (discussing the accountant’s disclosure obligation).
confidentiality varies according to two different concepts of the legal dispute. One concept envisions two adversaries who enter the legal battle on an unequal footing—one party is politically or institutionally at a disadvantage. Decisions about confidentiality depend on whether a client needs protection from the opponent or is instead the one who dominates the decisionmaking process. For example, the criminal defendant obviously benefits from a decision that he needs protection from his party-opponent—the government. Similarly, the American Trial Lawyers Foundation views lawyers as necessary to protect the client's right to maximize liberty and limit government control in civil as well as criminal cases. Client confidentiality, therefore, is the sum-mum bonum in its Code of Conduct.

The difficulty with constructing confidentiality rules on the assumption that clients need protection is that not all clients have the same need. Assuming that clients uniformly require protection tends to constitutionalize all decisions about the client-lawyer relationship and obscure the varying political strengths of different client groups. We can stop far short of asserting that law and the role of lawyers are mere reflections of a political struggle and still recognize that facilitating a client's ability to press for legal advantages in the enforcement and interpretation of rules has political implications. This recognition could lead to confidentiality rules that distinguish the work of the securities lawyer and tax shelter adviser from representation of the poor and of criminal defendants. In this view, the treatment of the criminal defendant no longer would be a special exception to a general confidentiality rule, but would become one of many rules reflecting the special considerations applicable to each area of the law.

Another less political concept of the legal system sees clients as neither excessively vulnerable nor particularly powerful. The legal system, in this view, has a life of its own, with legal rules developing inde-
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pendently of the political power struggle. Confidentiality rules would not vary according to the political balance of forces prevailing in particular areas of the law. Also, the commitment to confidentiality would not be as singleminded if the prototypical client were not considered the target of an overbearing opponent. If client use of an autonomous legal system were considered desirable, the confidentiality rules would stop short of requiring disclosure to a degree that would discourage consultation with lawyers. The less political view of the legal system, therefore, would produce uniform confidentiality rules that reflect a balanced view of the need for disclosure.

2. Confidentiality and Informed Decisionmaking.—Efforts to facilitate legal advice by preserving confidentiality inevitably conflict with the important value of informed decisionmaking. And, the significance of this value differs in the contexts of negotiation and adjudication.

In negotiation, a true and complete set of facts facilitates the personal autonomy of the negotiators by trusting them to shape their own destiny in accordance with reality, insofar as that is possible within the existing legal system and distribution of wealth. Autonomous judgments, of course, are possible without complete information; there is little moral significance to such reduced capacity for informed decisionmaking when acquiring facts is excessively costly, just as there is no moral significance if a natural disaster prevents someone from achieving a goal. Information known to the other party, however, is not a natural or costly obstacle to informed judgment. Concealment, therefore, has moral implications.

100. Such use probably would be viewed as desirable because it would encourage peaceful resolution of disputes, participation in creative judicial rulemaking, and exposure to lawyers who counsel legality. MODEL RULES DISCUSSION DRAFT Rule 2.4 requires the lawyer to warn clients if they are likely to commit a legal wrong. Lawyers often have played this role whether required to or not. See Darrell, Responsibilities of the Lawyer in Tax Practice, in PROFESSIONAL RESPONSIBILITY IN FEDERAL TAX PRACTICE 87, 101-02 (B. Bittker ed. 1970); AMERICAN LAWYER'S CODE Introduction, at iv; Paul, The Lawyer as a Tax Adviser, 25 ROCKY MTN. L. REV. 412, 416 (1953).

101. Noonan, The Purpose of Advocacy and the Limits of Confidentiality, 64 MICH. L. REV. 1485, 1489 (1966). Informed decisionmaking, rather than truth, is a better way to define this objective because truth ambiguously refers to the final outcome of a dispute as well as to the facts on which the outcome depends. Uviller, The Advocate, The Truth and Judicial Hackles: A Reaction to Judge Frankel's Idea, 123 U. PA. L. REV. 1067, 1071-72 (1975). If an accurate final outcome is defined as the objective, the way is open to something less than informed decisionmaking to reach that result, and the lawyer would have too much discretion to substitute his judgement for that of the tribunal in determining how best to achieve an accurate result. See M. FREEDMAN, supra note 89, at 30; Noonan, supra at 1489. The discussion in these references concerns destroying the reliability of truthful witnesses on cross-examination to assure an accurate final result.

102. Cf. S. BOK, LYING 39, 220 (1979) (lying impairs "liberty of judgment").

103. The importance of this loss of autonomy in negotiations might vary depending on what
True and complete facts are even more important in adjudication. Not only do they enable parties to make informed settlement offers, but true and complete facts also allow the application of rules according to their intent. Toleration of incomplete and untrue facts is, in effect, a denial of the sovereignty of the legal rules relevant to the dispute.

Advocates of preserving confidences are unwilling to concede that informed decisionmaking will suffer if disclosure is prohibited. They see the adversary system not only as the client’s protector, but also as a mechanism for making informed judgments. Although empirical data are lacking to support the conclusion, much accurate information probably is never revealed in legal disputes because parties fail to make use of discovery and other investigative techniques, fail to ask the right questions, and fail to be alert to evasive answers.

3. Confidentiality and the Prevention of Harm.—Facilitating legal advice conflicts with another social value: the prevention of harm from illegal acts. However, there are good reasons for not elevating this concern to the same level as informed decisionmaking. The seriousness of harm likely to result from illegal acts varies, and thus the prevention of harm, unlike informed decisionmaking, is a value not uniformly shared. Moreover, every time a client divulges past behavior as a prelude to advice from counsel, a significant number of possible legal harms are likely to come to the lawyer’s attention. At its extreme, the objective of preventing harmconjures up an alarming image of an open-ended commitment by lawyers to police the legal system.

B. Personal Values—A Lawyer’s Ethical Considerations

Confidentiality rules must also depend on the individual lawyer’s ethics, considerations that form the counterpart to the two relevant social values discussed in subpart III(A). In deciding whether to disclose would accomplish. If the facts disclosed relate solely to the other party’s preferences for the subject of the negotiations, denial of that information could only affect the distribution of wealth between the two parties by altering the propensity to hold out for a better bargain. Information allowing someone to hold out for a higher price may not be of the same moral significance as information relevant to determining preferences. It is difficult, however, to categorize facts into such airtight compartments. Information about the other party’s preferences is likely to affect the value placed on the subject matter of negotiations.

104. AMERICAN LAWYER’S CODE Preamble, at 5-6. The adversary system may do all that can be expected of it if it produces an impartial judge. Professional Responsibility: Report of the Joint Conference, 44 A.B.A. J. 11 (1958), even if it does not get high marks for informed decisionmaking.

close a confidence, a lawyer inevitably will face an ethical conflict. On the one hand, any professional feels loyalty to a client who has placed his trust in the professional's expertise. What was once called "honor," purged of its aristocratic limitations as a code of behavior for gentlemen,\textsuperscript{106} will exert a strong moral pull.\textsuperscript{107} On the other hand, a lawyer's training commits him to the rule of law, which presupposes the accuracy of the facts to which rules are applied. Although likely to be an agnostic about where ultimate truth lies, the lawyer—perhaps on that very account—is committed to a process untainted by false or incomplete disclosure.\textsuperscript{108}

Ethical concerns will vary with the situations in which the lawyer becomes a party to uninformed decisionmaking. The lawyer might knowingly lie; the lawyer might unintentionally fail to disclose material facts. Between these extremes are numerous variations: fabricated facts that might result from suggesting legal positions to the client; knowing use of perjured testimony; cross-examination of a truthful witness; silence when the lawyer knows of perjury in advance or discovers it later; and silence after the lawyer becomes aware of prior client misrepresentations innocently made. Disclosure depends on the point at which the client has forfeited his claim to loyalty; this in turn depends on what the lawyer defines as central to his ethical role. Once the client asks the lawyer to depart from that role, his claim on the lawyer's fidelity is broken.

The effect of the individual lawyer's ethics depends on a number of concerns. First, the lawyer might view his role as centrally bound up with accuracy. Anything that taints the lawyer with a misrepresentation, however innocent, would require disclosure. This appeals to the lawyer's role as guardian of the process by which decisions are made. Second, the lawyer might limit his concern with the truth to situations in which the substantive law provides a remedy for the misrepresenta-

\textsuperscript{106}. The attorney-client privilege was originally the lawyer's privilege, on the theory that a gentleman would not betray a trust. C. McCormick, \textit{Handbook on the Law of Evidence} § 87, at 175 (2d ed. E. Cleary 1972); VIII J. Wigmore, \textit{Evidence} § 2290, at 543 (1961).


\textsuperscript{108}. The moral significance of full and honest disclosure is different in many interpersonal relationships than it is in a legal setting. The preservation of mutual trust, which requires honesty, see S. Bok, \textit{ supra} note 102, at 18-33, is already absent in many legal encounters. The diminished importance of mutual trust in legal disputes explains the inversion of the usual view that saving a life is a justification for concealing the truth, which otherwise should be revealed. \textit{Id.} at 48. The prospect of saving a life is a reason for violating a confidence and disclosing a truth which otherwise would remain concealed. \textit{Model Rules Discussion Draft Rule 1.7(b)}.
tion or nondisclosure, either by way of a criminal penalty or civil action, such as avoidance of a contract or negligence penalty. This ties the lawyer's disclosure obligation to the substantive law of misrepresentation and disclosure, and it appeals more to the lawyer's commitment to the substantive law than to the process by which rules are made. Third, the lawyer might limit disclosure to intentional misrepresentations. Only a limited category of misrepresentations that are subject to sanction under the substantive law of fraud would so taint the lawyer that they would have to be disclosed pursuant to the professional code of ethics. Fourth, concern with substantive law and misrepresentation might combine in a different way to supplement or replace the third approach: disclosure would be required when the misrepresented fact is dispositive of a legal obligation. Misrepresentation of material but nondispositive facts would not have to be disclosed unless, perhaps, the misrepresentation was intentional. The innocence of the misrepresentation, however, would not prevent disclosure of a dispositive fact. The lawyer would thereby avoid involvement with clear violations of the law, however innocent the misrepresentation. Fifth, concern with misrepresentation might be limited to the adjudicative setting, on the theory that lawyers are centrally concerned with that process.

The significance of the ethical dimension of a professional code should not be underestimated. Warnings about the dangers of disclosure often dwell on the difficulty of imagining a lawyer-client relationship with divided loyalties, which suggests not only a social policy favoring confidentiality, but also a moral discomfort on the part of the lawyer. Moreover, it is very difficult to understand how some ABA opinions can urge withdrawal after client perjury merely on the basis of the social values of preserving client confidences or informed decisionmaking, considering that withdrawal will betray the client without guaranteeing that the truth will emerge. Instead, withdrawal must be understood as an attempt to reconcile two ethical obligations, loyalty to the client and fidelity to the legal system, by preventing the lawyer from either disclosing the falsehood or associating himself with

111. The client might get another lawyer from whom the truth will be concealed, M. Freedman, supra note 89, at 33; Wolfram, supra note 37, at 856-57, or withdrawal might not be permitted. Code DR 2-110(A)(1). Moreover, withdrawal is meaningless if the negotiation or adjudication is completed.
C. Considerations of Clarity, Interaction with Substantive Law, and Effects on Nonlawyer Representation

Three subsidiary issues also influence an ethical code. First, the rules must be clear enough to provide notice to the lawyer and to obtain an adequate level of voluntary compliance. Requiring disclosure of innocent misrepresentations, for example, has the advantage of obviating the need for the lawyer to determine either the client's state of mind or the substantive law concerning misrepresentations and disclosure. Of course, certainty would also be obtained by severely restricting, as well as expanding, disclosure.

Second, stricter professional rules of disclosure might affect the development of other areas of the law. Lawyers might become liable in tort for nondisclosure of client threats to harm others, and contractual obligations might be avoided for failure to disclose innocent misrepresentations. There is no reason, however, to be wary of this possibility. Substantive law is not bound to follow ethical rules, but the possibility that it might is a desirable source of creative legal development.

Third, stricter rules for lawyers might lead clients to rely on other representatives who are less burdened by disclosure rules. The Model Rules might even encourage this result because they require the lawyer to advise the client of any ethical limitations that the client might not anticipate. This fear is probably exaggerated, however. Clients might not abandon legal counsel and, if they did, the legislature or an administrative agency might alter the ethical obligations of nonlawyers in order to conform to the lawyer's code. In any event, that is a risk which a profession must endure for promulgating ethical rules.

112. Withdrawal is advocated despite lack of authority in the Code. Wolfram, supra note 37, at 855.
113. See, e.g., M. Freedman, supra note 89, at 40-41, 48, 71-73.
115. Cf. Model Rules Discussion Draft Rule 4.2, Comment, at 90 (requiring disclosure of material facts might affect law on avoidance of transactions on the ground of mistake).
116. See note 33 supra (disclosure policy influences what the "law" requires to be disclosed).
118. For example, accountants and lawyers might both be subject to rules imposed by the Treasury. See note 126 infra.
D. The Model Rules' Assumptions About the Legal Process and Institutional Competence

How do the Model Rules fit into this scheme of values? As part II explained, the Final Draft does not go as far as the Discussion Draft in requiring disclosure.\textsuperscript{120} The Final Draft, unlike the Discussion Draft, does not require disclosure to prevent death or serious bodily harm, or to correct prior falsehoods made by the client in negotiations (except to prevent material misrepresentations by the lawyer). The mandatory disclosure rules of the two drafts are alike only in requiring disclosure of the fact that material evidence offered by the lawyer to a tribunal was false\textsuperscript{121} and disclosure of material facts in ex parte proceedings.\textsuperscript{122}

This reduced but not negligible concern for confidentiality seems most compatible with the following assumptions. First, clients do not uniformly require protection from overbearing opponents. Second, the adversary system cannot be entirely trusted to produce informed decisionmaking. These two assumptions prevent a singleminded commitment to confidentiality. Third, the law has a life of its own, independent of political forces. This assumption leads to uniformity of confidentiality rules without regard to substantive areas of law, except in criminal litigation, and to a refusal to discourage the legal process by allowing too much disclosure. Fourth, the lawyer's ethical concerns are also recognized by allowing disclosure of misrepresentations when they occur in the course of the lawyer's service to the client.\textsuperscript{123} The specific conditions that release a lawyer from his obligation of loyalty to the client affirm the lawyer's commitment to accuracy in the process by

\textsuperscript{120} See text accompanying notes 18-86 supra.
\textsuperscript{121} MODEL RULES FINAL DRAFT Rule 3.3(2)(4); MODEL RULES DISCUSSION DRAFT Rule 1.7(b). The Discussion Draft, however, permits disclosure of material facts to prevent harm from deliberately wrongful acts, \textit{id.} Rule 1.7(c)(2), and permits disclosure in adjudication. \textit{id.} 3.1(e). I doubt, however, that the lawyer's inclination to exercise his discretion to disclose will often overcome his sense of loyalty to the client.

It is interesting to speculate why the Discussion Draft does not permit disclosure of material facts in negotiations, and why the Final Draft eliminates mandatory disclosure of prior falsehood in negotiations. Do lawyers have a deeper commitment to rules applied in adjudication than to the negotiating process? See text accompanying note 102 supra; J. SHKLAR, LEGALISM 1-2 (1964). Are the drafters of the Model Rules office practitioners rather than trial counsel?\textsuperscript{122}

\textsuperscript{122} MODEL RULES FINAL DRAFT Rule 3.3(d); MODEL RULES DISCUSSION DRAFT Rule 3.5. Disclosure of material facts is not required, however, just because the other side is unrepresented or underrepresented. Perhaps the drafters hoped that lawyer competence would eliminate underrepresentation, compare \textit{CODE} Canon 6 with \textit{MODEL RULES FINAL DRAFT} Rule 1.1 and \textit{MODEL RULES DISCUSSION DRAFT} Rule 1.1, and that wide availability of legal services would eliminate lack of representation. \textit{Compare CODE EC 2-25 with MODEL RULES FINAL DRAFT Rule 6.1 and MODEL RULES DISCUSSION DRAFT Rule 8.1.} Moreover, mandating disclosure of material facts might place an intolerable factfinding burden on the conscientious lawyer to define materiality, thereby converting disclosure to a discretionary rule.

\textsuperscript{123} See notes 35 & 69 supra.
which rules are made, because disclosure is allowed whether or not the misrepresentations are innocently made.\(^\text{124}\)

Each of these assumptions rests on empirical and moral judgments about lawyering and the legal process, but the conclusion that law has an autonomous life of its own probably rests on an additional judgment about the institutional competence of those responsible for a professional code. The bar associations and courts that draft and adopt ethical rules are not unaware of the political uses of legal representation. But they would become embroiled in controversies they could not resolve if they tried to draft rules accounting for this reality.

This does not mean that a professional code should be innocent of the political implications of legal representation. It should, as the Model Rules do,\(^\text{125}\) encourage wide dissemination of legal services to balance as evenly as possible the ability of clients to make use of the legal system. Any effort to go further, however, and adjust the client-attorney relationship to account for political realities that vary with the context in which legal disputes arise would stretch the capabilities of a professional code beyond the breaking point. A professional code, therefore, should contain confidentiality rules based on the assumption that the law has a life of its own independent of political forces, and that institutions other than those responsible for a professional code should decide whether to adjust those rules to reflect the realities prevailing in particular legal settings. The final section of this Article explains these limits on institutional competence by analyzing the ethical problem of disclosure in tax disputes.

## IV. Tax Disputes and Institutional Competence

The political implications of confidentiality rules are nowhere more apparent than in disputes between the individual and the government, of which tax disputes with the Internal Revenue Service are a good example.\(^\text{126}\) A significant body of opinion holds that the relation-

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124. By contrast, the American Lawyer's Code limits violation of loyalty to the client to situations in which lawyer action was knowingly induced by the client. See American Lawyer's Code § 6.5. This demonstrates concern that the lawyer not be tainted by fraudulent misrepresentations. Even this concern is severely restricted, however, because the American Lawyer's Code permits only withdrawal, and then only if explicit disclosure is not required. See note 60 supra.


126. The ABA has not adopted special ethical rules for tax practice, apparently with the support of the ABA Tax Section, Collie & Marinis, supra note 119, at 460 n.16, but the ABA Committee on Professional Ethics has issued ABA Formal Opinions No. 314 (1965), dealing with tax practice, and ABA Formal Opinions No. 346 (1981), dealing with tax shelter opinions, and the ABA Tax Section has suggested tax practice guidelines for adoption by law firms. ABA Section of Taxation, Guidelines to Tax Practice, 31 Tax Law. 551 (1978). The Division of Federal Taxation of the American Institute of Certified Public Accountants
ship between the individual and the government in tax disputes creates a greater obligation of individual disclosure than is required in other types of litigation. The argument, in effect, is that the confidentiality rules should take account of the balance of power between the disputants and tilt it toward the government. If a professional code should not consider such factors, however, then the Model Rules should not make any special provision for tax disputes, but should instead leave the adoption of such provisions to other institutions. I will test this hypothesis first by explaining how the Model Rules would address some typical disclosure problems in tax practice, and then by consid-

(AICPA) has published Statements on Responsibilities in Tax Practice, which serve an advisory, educational function but which do not have the force of authority of the AICPA's Code of Professional Ethics. AICPA Div. of Fed. Taxation, Statements on Responsibilities in Tax Practice: Introduction, 127 J. ACCT. 60, 61 (1969). See also AICPA CODE OF PROFESSIONAL ETHICS Rule 102, at 18 (1975) ("In tax practice, a member may resolve doubt in favor of his client as long as there is reasonable support for his position.").


127. Darrell, supra note 100, at 91; Hellerstein, Ethical Problems in Office Counselling, 8 TAX. L. REV. 4, 9 (1952); Paul, The Responsibilities of the Tax Adviser, 63 HARV. L. REV. 377, 384 (1950). But see Johnson, Does the Tax Practitioner Owe a Dual Responsibility to his Client and to the Government?—The Theory, 15 S. CAL. TAX INST. 25 (1963); Paul, supra note 100, at 428-29. One must be cautious in interpreting broad statements favoring disclosure, because the specific application of general principles may turn out to be less controversial than the rhetoric surrounding them. See, e.g., Tarleau, Ethical Problems in Dealing with Treasury Representatives, 8 TAX L. REV. 10, 10-11 (1952), discussed in Paul, The Lawyer as a Tax Adviser, supra note 100, at 426 (client error on dispositive facts known to lawyer representing client).

128. A threshold problem under the Model Rules is whether nonadversary decisionmaking at the administrative level is adjudication or negotiation. The nonadversary process is one in which a tribunal applies legal rules but there is only one party to the dispute. The tribunal is expected to investigate the facts and apply the law without the help of an opposing party, but unlike ex parte proceedings, the tribunal usually has the time and resources to make an independent investigation. Some features of nonadversary proceedings make the relationship between the individual and the tribunal similar to negotiations, but other features resemble adjudication. A Comment to the Discussion Draft defines negotiation to include not only contract negotiations, but also negotiations to settle litigation and to determine what action will be taken by government regulatory agencies. MODEL RULES DISCUSSION DRAFT Rule 4, Comment, at 20. Nonadversary adjudication might therefore be considered negotiations under the Model Rules because settlement is sometimes possible, as in tax cases, 5 INT. REV. MANUAL—AD. (CCH) ¶¶ 8711-23 (1980), and because the hearings determine what the agency's position will be.

However, the differences between nonadversary adjudication and negotiations are greater than the similarities. In many settlement negotiations and in discussions with government regulators, legal rules are no more than the background against which the parties adjust relationships
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ering who is competent to adopt special confidentiality rules in tax disputes.129

A. Particular Fact Situations

1. False Claim on Audit.—A lawyer represents a client who has claimed a deduction for expenses of a two week trip to Europe. After the audit begins, the lawyer discovers that the client spent one of the two weeks on vacation. The law requires an allocation between deductible business and nondeductible personal expenses.130 The government is challenging the deduction on different grounds, however, arguing that the deduction is improper because of the small amount of time spent on business each day. The government is unaware that one-half of the days were spent on vacation.

Under the Model Rules, the lawyer’s obligation to a tribunal prohibits his filing a claim unless there is a reasonable basis for doing so.131 If a misrepresentation occurs while the lawyer is representing the

determined by political and economic as well as by legal considerations. In nonadversary adjudication, however, legal rules determine the outcome. Settlement, where possible, is influenced only by the strengths and weaknesses of the party’s legal position, and the hearing is meant to result in application of the law. Sometimes the hearing is the only way the individual can get a decision applying the law to the facts of the case, see 5 U.S.C. § 8128(b) (1976) (government employee benefits), and, in any event, the tribunal’s findings of fact are frequently very influential in subsequent judicial review. See 42 U.S.C. § 405(g) (1976) (social security). In tax litigation, the taxpayer usually has the burden of proof on findings made by the government at the administrative hearing level. M. Garbis & R. Frome, Procedures in Federal Tax Controversies, 8-4 to -6, 12-16 to -22 (1968). Analysis of the lawyer’s role in nonadversary adjudication is therefore best begun on the assumption that the lawyer is engaging in advocacy in an adjudicatory setting rather than in negotiations.

129. The following discussion is not concerned with whether disclosure might be required for non-ethical reasons. However, reasons for disclosure not embodied in a code of ethics may exist. First, disclosure might prevent imposition of fraud or negligence penalties against the taxpayer. ABA Formal Opinions No. 314, at 691 (1967); AICPA Div. of Fed. Taxation, Statement on Responsibilities in Tax Practice—Positions Contrary to Treasury Department or Internal Revenue Service Interpretations of the Code, 144 J. Acct. §§ .08, .12, at 103-04 (1977). Bittker, supra note 126, at 251.

Second, disclosure might preserve the lawyer’s reputation with the agency, which would prove valuable in other cases. Collie & Marinis, supra note 119, at 464; Darrell, supra note 100, at 98; Tarleau, supra note 127, at 13; What is Good Tax Practice: A Panel Discussion, 21 N.Y.U. Inst. Fed. Tax. 23, 29 (1963) [hereinafter cited as Panel Discussion]. However, the lawyer should not violate a client’s confidence in order to enhance his reputation and reap financial gain in future cases. Admittedly, the lawyer’s favorable reputation may ease the agency’s investigative burden if it can be relied on to vouch for the client’s claim. See Bittker, supra note 126, at 249-50; Paul, supra note 100, at 423. Requiring disclosure to enhance that reputation, however, begs the question because the pivotal issue in determining disclosure rules is the extent to which the lawyer should be required to assist the agency’s investigation.

130. I.R.C. § 274(c).

client, the lawyer must disclose the true facts if the client will not. In the context of a tax audit, this means that the lawyer cannot argue that an entire expenditure was a deductible travel expense when he knows that a portion was a nondeductible vacation expense; if the lawyer innocently makes this argument, he must upon discovering his error disclose the facts necessary to correct any prior misrepresentation. Even without establishing a greater obligation of disclosure in tax disputes, therefore, the Model Rules require disclosure in this type of situation.

The Model Rules do not explain how a lawyer should deal with a tax obligation unrelated to the claim that is the subject of litigation. For example, suppose that the taxpayer clearly owes tax because entertainment expenses are overstated, but the government’s audit is lim-

132. MODEL RULES FINAL DRAFT Rule 3.3(a)(4).

133. Disclosure rules apply to a lawyer's appearance before a “tribunal.” Id. Rule 3.3. The Code defined “tribunal” to include all adjudicatory bodies, not just courts. CODE Definitions, No. 6. The Model Rules do not contain this definition, but the omission should not narrow the definition of a tribunal.

134. Existing rules do not allow the lawyer knowingly to advance a claim for which there is no reasonable support, CODE DR 7-102(a)(2), but there is no obligation to disclose facts if the lawyer discovers that the claim is false. The lawyer must counsel the client to make disclosure, ABA FORMAL OPINIONS No. 314 (1965); 31 C.F.R. § 10.21 (1980), but the client's refusal to disclose can result only in the lawyer's withdrawal. Furthermore, the lawyer may withdraw only if nonwithdrawal amounts to corroboration of the false claim by the lawyer and if withdrawal would not disclose the confidence. ABA FORMAL OPINIONS No. 314 (1965). The ABA Tax Section's Guidelines to Tax Practice, supra note 126, are ambiguous. At one point they say that withdrawal is required if the client has lied, id. at 554, and later state that withdrawal is “normally” required only if the client has affirmatively misled the IRS. Id. Apparently, under the Guidelines, the lawyer's corroboration of a misrepresentation is not necessary for withdrawal, nor is the possibility that withdrawal would amount to disclosure a bar to withdrawal. Corroboration is, however, a sufficient reason for withdrawal. Id.

The rules for certified public accountants (CPAs) appear to be substantially the same as those set forth in ABA FORMAL OPINIONS No. 314 (1965). AICPA Div. of Fed. Taxation, “Statement on Responsibilities in Tax Practice No. 7: Knowledge of Error: Administrative Proceedings,” 130 J. AccT. §§ II, III(B), at 66-67 (1970). The only difference is that withdrawal by a CPA depends on the existence of a material understatement of tax liability. Id. § I, at 66. The similarity in the obligation of lawyers and CPAs belies the claim that accountants are more prone to disclosure because of their tradition as independent auditors. See Collie & Marinis, supra note 119, at 464-66; Johnson, supra note 127, at 34-35; Panel Discussion, supra note 129, at 27-28. But see Graves, Responsibility of the Tax Adviser, in BITKER, supra note 126, at 152. There may still be differences between the disclosure obligations of accountants and lawyers. See notes 139 & 145 infra.

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ited to disputed travel expenses. A number of commentators\textsuperscript{135} have argued that the claim in dispute is the entire tax obligation, not the issue that is the subject of attention. In this view, denial of an obligation to pay disputed travel expenses is in effect a denial that any taxes are due, at least for that year. Professor Bittker has suggested that a broad obligation of disclosure in this situation would not impose different obligations in tax cases than in other disputes. He analogizes this situation to a lawsuit in which a client who sues for nonpayment after delivery of goods fails to reveal that the goods have not been delivered, when the only defense raised by the defendant is that the goods are defective.\textsuperscript{136}

This analogy does not seem particularly apt, however. A suit for payment after delivery of goods necessarily asserts that the goods have been delivered. The more apt analogy is to ask whether a lawyer representing a plaintiff suing for the purchase price of delivered goods must disclose that his client owes the defendant an unrelated debt, even though the defendant has not asserted the debt as a set-off. As long as the lawyer is not required to reveal wrongful acts generally, he should not be required to disclose an error unrelated to the issue in dispute.\textsuperscript{137}

Determining what constitutes a “related” issue will admittedly be difficult in some cases.\textsuperscript{138} Arguably, the government’s claim that the time spent each day on business was negligible is not the same as claiming that some days were spent on exclusively personal pursuits. However, implicit in the lawyer’s defending against the government’s claim that the time spent each day on business was negligible is the assertion that at least some business transpired daily. The lawyer is not similarly tainted with an assertion of a falsehood if he remains silent about an improper deduction of entertainment expenses not raised by the government auditor.\textsuperscript{139}

\textsuperscript{135} Bittker, supra note 126, at 268-69. See also Darrell, supra note 100, at 137, 139-40. \textit{Contra}, Corneel, supra note 126, at 24.

\textsuperscript{136} Bittker, supra note 126, at 269.

\textsuperscript{137} A distinction might be made between defending against a government claim and filing for a refund. The more assertive posture of a refund claim may create greater disclosure obligations, especially given the practice of delaying refund claims until the statute of limitations has almost run on assessments. \textit{Cf.} I.R.C. § 1311(b)(1) (correction of error in a year otherwise closed by statute of limitations only when a party is actively pressing a claim inconsistent with a position taken in a closed year).

\textsuperscript{138} Consider the following: (1) the government asserts that an expense is personal, not business, and the lawyer knows that it is a nondeductible capital expenditure; (2) the government asserts a loss is personal, and the lawyer knows that the loss occurred on a sale to a related party defined in I.R.C. § 267(b).

\textsuperscript{139} Disclosure rules for CPAs may be stricter. They require disclosure of any patent error on a return of which any part is the subject of a proceeding before the IRS. AICPA Div. of Fed. Taxation, supra note 134, § III(B), at 66. The AICPA suggests that the CPA should determine
2. Revealing Facts on Audit.—The government audits a client’s tax return and argues that an alleged business trip to Europe was for personal purposes. The lawyer is aware that the taxpayer visited relatives during the trip, a relevant but not dispositive fact that tends to show that the visit was personal.

Under the Final Draft of the Model Rules, the lawyer is not permitted to disclose material facts in this context.140 Unless there is a greater obligation to disclose in tax disputes,141 the lawyer is under no obligation to disclose material facts tending to support the government’s position.142

3. Misrepresentations by the Client on Audit.—When the government alleges that a business trip to Europe was for personal purposes, the client denies having visited relatives there. The lawyer knows that the facts are otherwise.

The Model Rules require the disclosure of all facts, whether dispositive or not,143 if they are misrepresented by the client in the course of the lawyer’s representation.144 The Model Rules, therefore, require disclosure even if there is no greater disclosure obligation in tax disputes.145

whether he could have signed the return if the patent error had been known at the time of return preparation. The dominant role of CPAs as return preparers may furnish an appropriate analogy for their role in the audit process.

140. See text accompanying notes 61-65 supra.

141. Favoring such disclosure are Darrell, supra note 100, at 93; Hellerstein, supra note 127, at 9; and Paul, supra note 127, at 384. Professor Paul has doubts, however. Id. at 425, 427, 429. Professor Bittker opposes disclosure of material facts. BITTKER, supra note 126, at 253-55, 270-71.

142. Current rules forbid disclosure in this situation. ABA FORMAL OPINIONS No. 314 (1965). See also ABA Section of Taxation, supra note 126, at 554.

143. See MODEL RULES FINAL DRAFT Rule 3.3(a)(4), (b); MODEL RULES DISCUSSION DRAFT Rule 3.1(b). Materiality of the facts is probably required. See note 57 supra.

144. In tax litigation, there is a real possibility that the lawyer will first become involved at an appeal stage after misrepresentation has occurred at an earlier stage of the dispute. The lawyer’s later involvement, however, should taint the lawyer with misrepresentations made at any point in the adjudicative process. Cf. MODEL RULES DISCUSSION DRAFT Rule 4.2(b)(2) (lawyer must correct manifest misapprehension created by client in negotiations, even if the lawyer was not involved with the client at the time of the misrepresentation). But see Note, supra note 38, at 89 n.1, 106.

145. Current rules require withdrawal—not disclosure—if failure to withdraw would corroborate a misrepresentation, unless withdrawal itself would disclose a confidence. ABA FORMAL OPINIONS No. 314 (1965).

The AICPA rules seem concerned only with errors resulting in material understatements of tax liability, rather than misrepresentations of material facts. This distinction might reflect the accountant’s interest in the bottom line compared to the lawyer’s interest in the factfinding process. AICPA Div. of Fed. Taxation, supra note 134, § I, at 66. But see AICPA Comm. on Fed. Taxation, “Statements on Responsibilities in Tax Practice No. 3: Answers to Questions on Returns,” 122 J. ACCT. § III, at 60-61 (1966) (all questions on a return must be answered unless there are reasonable grounds for omission, which grounds must be explained on the return).
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4. False Tax Returns and Revealing Facts on a Tax Return.— When a lawyer prepares a tax return, he may face the same issues that arise in proceedings before a tribunal: false claims, misrepresentations, and disclosure of material facts. The Model Rules prohibit a lawyer from knowingly advancing a false claim or knowingly making a misrepresentation in a return, but they do not require disclosure of material facts in the return.\footnote{146} What should the lawyer do if he discovers that the client has made a false claim or misrepresentation in a tax return? Must the lawyer disclose that fact, and does the answer to that question depend on whether the lawyer prepared the return or whether the lawyer is now representing the taxpayer on audit?

The principles already discussed essentially provide the answers to these questions. If the lawyer did not prepare the return and an audit has not begun, the question becomes whether the lawyer must disclose a client's prior wrongful act. The Model Rules permit disclosure only to rectify the consequences of a fraudulent act when the lawyer's services have been used in the commission of that act.\footnote{147} If the lawyer participates in an audit of the return, the Model Rules require disclosure of any false claim or misrepresentation made in the course of the lawyer's representation in the audit, whether or not deliberately wrongful and whether or not the lawyer prepared the return.\footnote{148}

These questions also raise a new issue: whether a lawyer's preparation of the return imposes a disclosure obligation under the Model Rules if the lawyer does not represent the taxpayer on audit. The Rules require disclosure only if the return is considered the presentation of evidence to a tribunal.\footnote{149} Otherwise, the error is a prior wrongful act, and the Rules permit disclosure only if the client's act was fraudu-

\footnote{146} MODEL RULES FINAL DRAFT Rule 3.1; MODEL RULES DISCUSSION DRAFT Rule 3.1(a)(1). The same rules apply under the Code. See ABA FORMAL OPINIONS No. 314 (1965).

\footnote{147} MODEL RULES FINAL DRAFT Rule 1.6(b)(3). The Final Draft also permits disclosure to prevent a fraudulent act likely to result in substantial injury to another's financial interests, id. Rule 1.6(a)(2), but the example in the text specifies that the act has already been performed. The Discussion Draft differed by permitting disclosure to rectify the consequences of a deliberately wrongful act. MODEL RULES DISCUSSION DRAFT Rule 1.7(c)(2). Under the Code, disclosure was not permitted even if the error was deliberate. ABA FORMAL OPINIONS No. 314 (1965). The prior error is probably not a continuing crime. Compare Darrell, supra note 100, at 91 with Callan & David, supra note 25, at 348.

\footnote{148} MODEL RULES FINAL DRAFT Rule 3.3(a)(3); MODEL RULES DISCUSSION DRAFT Rule 3.1(b). See also note 144 supra. Such disclosure is prohibited by the Code. ABA FORMAL OPINIONS No. 314 (1965).

\footnote{149} Compare Darrell, supra note 100, at 93 (preparation of return is certification by the preparer resulting in a higher disclosure obligation) with Graves, supra note 154, at 158. See also Tarleau, supra note 127, at 13-14 (suggesting that the lawyer must disclose errors if the lawyer prepared the return and represents the taxpayer on audit).
Characterizing a tax return as evidence presented to a tribunal seems farfetched, however. The last thing the taxpayer wants is to begin a dispute requiring resolution by adjudication. The return is best characterized as the culmination of the advice that the lawyer gave to the client. The exception to this characterization is a refund claim. Such claims, by which the taxpayer affirmatively seeks a determination that the government owes him money, are analogous to commencement of litigation before a tribunal. The Model Rules should be read to require disclosure of false claims and misrepresentations presented in a refund claim prepared by the lawyer if the lawyer subsequently discovers an error.

B. How Much Disclosure, and Who Should Decide?

The foregoing discussion can be summarized as follows: Although they expand disclosure, the Model Rules do not clearly require disclosure in several important situations likely to arise in tax disputes. They do not require disclosure of material facts unless a misrepresentation has occurred in the course of an audit in which the lawyer has participated; they do not clearly require disclosure of tax obligations unrelated to the specific issues raised on audit; and they do not clearly require disclosure of false claims or misrepresentations in the absence of an audit when the lawyer has prepared the return. After examining the Model Rules, then, one might argue that lawyers should have greater disclosure obligations in tax disputes than the Rules require.

The argument for a greater disclosure obligation rests on three features of tax disputes. First, the individual's obligation to pay taxes is a special obligation, especially given the importance of citizen honesty in dealing with the government. Second, the volume of returns compared to the small percentage audited makes our tax system depend-

150. Model Rules Final Draft Rule 6(b)(3).

If preparation of the return taints the lawyer, contrary to the position taken here, the question remains whether advice on a matter that is relevant to an item appearing on a return taints the lawyer or whether the taint occurs only if the lawyer is the return "preparer." Few lawyers will be "preparers" under the regulations. See Treas. Reg. § 301.7701-15(a)(2), (b) (1977). In my view, it is the lawyer's participation in the advice leading to the presence or absence of the return item that associates the lawyer with that item and produces whatever disclosure obligation ensues.

152. See note 127 supra.
154. Paul, supra note 100, at 423-24; Rowen, supra note 126, at 249.
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tent upon taxpayer cooperation,\textsuperscript{155} especially in view of the taxpayer's control over the facts.\textsuperscript{156} Third, government officials who decide disputes are presumably impartial, not adversarial, and allowing taxpayers to play by the adversary rules\textsuperscript{157} gives them an unfair advantage.

The opposing view, adopted by an ABA opinion, is that the government is not unbiased.\textsuperscript{158} Furthermore, if the government needs facts, it can and does ask for them.\textsuperscript{159} Any special obligation to pay taxes must therefore yield, just as it does in most adjudication, to the need to protect the individual client.\textsuperscript{160}

Whatever the merits of the claim that taxes are a special obligation,\textsuperscript{161} the issue is how to adjust the balance of investigative power between the individual and the agency. We must ask who has an advantage in the struggle between the litigants and whether confidentiality rules should be modified to compensate for any such advantage. The political nature of these questions in the tax context becomes more clear by asking similar questions in the welfare adjudication context. Assume, for example, that the lawyer represents a welfare client who claims that the father of her child has left home and that the family is therefore eligible for Aid to Families with Dependent Children (AFDC),\textsuperscript{162} or that the lawyer's client argues that she is eligible for disability benefits because she is totally unable to work.\textsuperscript{163} Must the lawyer reveal that the father visited the AFDC claimant in her home for two days after the beginning of the father's alleged "continued absence," or that the disabled individual worked for two days after the alleged onset of disability at another job? Neither fact is dispositive,\textsuperscript{164}

\textsuperscript{155} Panel Discussion, supra note 129, at 25. \textit{But see} Johnson, supra note 127, at 30-31 (client trust in tax adviser encourages cooperation by taxpayer with government).

\textsuperscript{156} Paul, supra note 100, at 423; Panel Discussion, supra note 129, at 25.


\textsuperscript{158} ABA FORMAL OPINIONS No. 314, at 689 (1965). \textit{See also} Collie & Marinis, supra note 156, at 459; Paul, supra note 100, at 429-30; Panel Discussion, supra note 129, at 58-59.

\textsuperscript{159} Bittker, supra note 126, at 252-53, 255 (on tax return); Simmons, \textit{The "Eleven Questions"—An Extraordinary New Audit Technique}, 30 TAX LAW. 23 (1976) (on audit); Panel Discussion, supra note 129, at 47-48 (on tax return). \textit{But see} Rowen, supra note 126, at 260-62.

\textsuperscript{160} Bittker, supra note 126, at 268 (shadow of Big Brother implicit in argument that the Treasury represents all of us); \textit{id.} at 270 (legal assistance of adviser preserves democratic society).

\textsuperscript{161} I have argued elsewhere that such an obligation exists, based on the special significance of paying taxes in defining membership in a political community. Popkin, \textit{Standing to Challenge Generous Tax Rulings}, 6 TAX NOTES, 163, 168 (1978).

\textsuperscript{162} 42 U.S.C. § 606(a) (1976) ("continued absence" of parent from home).

\textsuperscript{163} 42 U.S.C. § 423(d)(1)(A) (1976) ("inability to engage in any substantial gainful activity").

\textsuperscript{164} It is not clear that "continued absence" requires physical absence at all times, \textit{see} Turnbow v. Mitchell, 10 CLEARINGHOUSE REV. 999 (1977), or that disability is negated by sporadic work, especially work performed for a relative. \textit{See} Prevette v. Richardson, 316 F. Supp. 144, 147 (D.S.C. 1970).
but each is relevant to the government's disposition of the claim. Must the lawyer reveal a clear overpayment of AFDC or disability benefits made prior to the date on which the new claim would be effective, or is the lawyer's obligation limited to the facts and issues relevant to the new claim?

The answers to these questions depend on one's view of the impartiality of the hearing officers in income maintenance disputes, of the importance of professional loyalty for arguably defenseless welfare claimants, and, more generally, of how the power struggle between income maintenance claimants and the government should turn out. After considering these factors, one might favor greater disclosure than that required by a nonpoliticized professional code drafted on the assumption that litigants are more or less equally balanced. Similarly, the desirable amount of disclosure in tax disputes might differ depending on whether one viewed taxpayers as innocents set upon by the government or as schemers who take advantage of the government. The generally strong reactions that people have to the image of a welfare or tax cheater suggests how political these judgments are in both the welfare and tax contexts.

Given the political nature of these issues, it seems doubtful that either the bar or highest court of the state has the procedures or insight to draft specialized confidentiality rules. Their concerns will likely differ from the government's in tax matters because of their members' social backgrounds and client orientation, and because those organizations are unlikely to hold hearings exposing them to the government's concerns. In welfare cases, the organized bar and the government are likely to share a bias against recipients. Confidentiality rules should rest, therefore, on an assumption that the law is a product of more or less balanced political pressures. More politically sensitive institutions should be responsible for deciding whether or not the generally applicable confidentiality rules should apply in specialized areas.165

At present, neither Congress nor the Department of Treasury, institutions that presumably are politically sensitive, has shown much interest in controlling tax advisers, much less in dealing with the problem of disclosure. Congress recently imposed penalties for negligent or willful understatement of taxes,166 and the Treasury proposed regula-

165. The risk is not only that the political judgments will be misinformed, but also that they may be biased. Some evidence suggests that the securities bar played a significant role in urging the 1974 Code amendments limiting disclosure. Note, supra note 38, at 102 n.53.
166. I.R.C. § 6694. The regulations allow the preparer to rely on facts provided by the client unless they appear incorrect or incomplete, or unless the Code explicitly requires further support to justify a deduction. Treas. Reg. § 1.6694-1(b)(2)(ii) (1978).
tions controlling tax shelter advice expected to be disseminated to non-client investors. These regulations concern disclosure to a limited extent by requiring the tax shelter opinion to disclose all facts "which bear significantly on each important Federal tax aspect" of the transaction. Their major thrust, however, lies in requiring the lawyer to exercise due diligence in determining relevant facts, to state the likely outcome of the transaction, and to issue the opinion only if the bulk of the advantages are more likely than not to be allowable. Outside of the tax shelter area, the Treasury imposes no greater disclosure obligations than does the Code of Professional Responsibility.

Whether greater disclosure could be required by the Treasury without legislative sanction, analogously to the rules recently imposed by the SEC, or only with legislative approval, as the ABA has argued with respect to the SEC rules, depends on how dramatically the proposal departs from generally accepted rules. In the tax context, for example, the more dramatic step of requiring disclosure of relevant facts...
facts in the absence of a misrepresentation might require legislative approval.\textsuperscript{176} The Treasury might, however, impose a more modest requirement to disclose prior misrepresentations made in a return prepared by a lawyer\textsuperscript{177} and tax obligations known to the lawyer but unrelated to the issues specifically in dispute.\textsuperscript{178} Agency rules might also deal with highly specialized problems, as in the tax shelter advice proposals.\textsuperscript{179} The important point is that those drafting a professional code should not be responsible for adjusting the code to fit the myriad political considerations affecting confidentiality rules in specific areas of practice.

V. Conclusion

Both the Discussion Draft and the Final Draft of the Model Rules represent a shift toward greater disclosure of client confidences by lawyers. The Final Draft, however, would effect a more modest shift than the Discussion Draft. Whether society's image of the lawyer and the lawyer's self-image will support this change remains to be seen. In any event, the Model Rules recognize an inevitable fact: the disintegration of legal roles into a variety of functions performed in a variety of institutional environments. Recognition of the political considerations relevant to confidentiality rules, however, is beyond the competence of any code's drafters. Modern legal practice is likely to lead us beyond a generally applicable professional code to a proliferation of standards that apply only to specialized areas of practice, but the legislatures and agencies with rulemaking authority should be responsible for imposing such standards.

\begin{footnotes}
\item[176] See notes 140-42 \textit{supra} \& accompanying text.
\item[177] See notes 149-51 \textit{supra} \& accompanying text.
\item[178] See notes 147-48 \textit{supra} \& accompanying text.
\item[179] See notes 167-71 \textit{supra} \& accompanying text. These proposals are criticized in Sax, \textit{supra} note 151, at 39-46.
\end{footnotes}