# THE ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES AN AGE-OLD PRINCIPLE UNDER MODERN PRESSURES

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#### I. Introduction

Embedded in the American legal system is the concept that courts and attorneys should accord special deference to confidential communications between a client and attorney. The American Bar Association officially endorses the theory that "preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private."

Confidentiality is held sacrosanct in the U.S. legal system through the courts' recognition of privileged communications between attorney and client, meaning that such communications are "privileged" against compelled testimony. The privilege is one of the few exceptions to the general liability of every person to give testimony on all facts in a court of law. This paper will explore the contours of the attorney-client privilege and will examine how the attorney-client privilege and the American professional rules of conduct are mutually reinforcing. We will then examine recent pressures threatening to erode the privilege, particularly in the context of government anti-money laundering and anti-terrorism efforts.

# II. The Meaning and Scope of the Privilege

As is the case with many of our legal traditions in the United States, the attorney-client privilege is one we carried over from Great Britain, where the privilege dates back to at least the reign of Elizabeth I. Originally, the privilege began as a consideration of the oath and honor of the attorney. However, by the end of the 1700's the theory behind the privilege shifted to one of providing for the client's freedom from apprehension in consulting a legal advisor. Such was the concept of the privilege when it took root in the United States.

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MODEL RULES OF PROF'L CONDUCT, Preamble at ¶ 8.

<sup>&</sup>lt;sup>4</sup> 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2290, at 542. (McNaughton Rev. 1961) [hereinafter "WIGMORE"].

<sup>&</sup>lt;sup>5</sup> WIGMORE § 2290, at 543-45.

The attorney-client privilege has no precise expression in the U.S. Federal Rules of Evidence. Rather, the privilege is creature of state and federal common law. While the privilege is not guaranteed by the U.S. Constitution, <sup>6</sup> it is deeply entrenched in U.S. jurisprudence and has generated a wide body of case law.

# A. <u>Elements of the Privilege</u>

What is the privilege? The privilege is a rule of discovery which provides an exception to compelled testimony. Under the exception, neither the attorney nor the client will be compelled by a court to give testimony on the confidential communications between the two. Once established, the attorney-client privilege provides what has been referred to as "absolute protection," protecting information against disclosure regardless of the need or good cause for that information shown by another party. <sup>7</sup>

A communication is not privileged merely because it is uttered by or to a lawyer. Nor is the presence of a lawyer in a room sufficient to make a conversation privileged. The communication must meet a number of elements to be beyond the reach of the courts. While the subtleties of the privilege vary among the different court jurisdictions in the United States, the general principle, often quoted by other courts, was neatly summarized by the federal district court in Massachusetts in 1950:

The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or is his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion of law or (ii) legal services (iii) assistance in some sort of legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

What communications are covered by the privilege? Several points are in order to bring out the nuances of the scope of the privilege:

For a discussion of the Constitutional issue, see 1 PAUL R. RICE ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES, § 2:7 at 39-40 (West Group 1999) [hereinafter "RICE"].

<sup>&</sup>lt;sup>7</sup> See RICE, §2:2 at 10-11.

<sup>8</sup> U.S. v. United Shoe Machinery Corp., 89 F. Supp. 357 (D. Mass. 1950).

- The privilege covers communications made pursuant to, and for the purpose of, the client seeking legal advice, as opposed to non-legal advice. The client's intent to seek legal advice, and the client's belief she is consulting an attorney are key to a court's inquiry as to whether the privilege holds. In a well-known recent case, the District of Columbia Circuit Court held that the privilege did not apply to advice provided by Deputy White House Counsel Bruce Lindsey to President Clinton on how to prevent other litigation in which the President was involved from interfering with his institutional duties. The Court found the advice not to be legal advice and therefore concluded that the conversations were not within the scope of the privilege.
- Spoken words between the client and the attorney are not the only forms of "communication" covered by the privilege. For example, in the classic hypothetical, suppose a client shows a scar to the attorney. That act may fall under the privilege, if done as part of the communication to the attorney and if intended to be confidential. By contrast, observances made by the attorney which would have come to the attorney's attention in any event, and acts taken by the client unrelated to communications to the attorney as legal adviser -- did the attorney witness the client drunk in a public place? -- fall outside the scope of the privilege. <sup>10</sup>
- The privilege protects communications, not the underlying facts or information contained in the communication. Difficult issues arise, though, as to the application of the privilege to documents or other items delivered or shown by the client to the attorney. The law is clear that a client cannot bring a document under the privilege merely by turning it over to the attorney. <sup>11</sup> On the other hand, documents coming into existence as a result of communications with the attorney may fall under the privilege. An environmental audit prepared for attorneys to assess regulatory compliance, for example, has been held to fall within the privilege. <sup>12</sup>
- A communication must be made in confidence to be covered by the privilege: The client must intend the communication to be confidential, the intention of confidentiality must be reasonable, and the confidentiality must be subsequently maintained. The policy behind the privilege -- the need for the client to secure confidential legal advice -- is, obviously, moot if the

In re Lindsey, 158 F.3d 1263 (D.C. Cir. 1988), cert. denied, 119 S. Ct. 466 (U.S. 1998), originally reported at 148 F.3d 1100 (D.C. Cir. 1988) when sealed portions were deleted.

<sup>&</sup>lt;sup>10</sup> See WIGMORE, § 2306 at 588-91.

Note though that under a separate privilege called the work-product doctrine, statements, memoranda, and other documents prepared by an attorney in anticipation of litigation generally are not subject to discovery. Among the differences between the attorney-client privilege and the work product doctrine are that: (a) the work-product doctrine may be overcome by the party seeking discovery upon a showing that production of facts in those documents is essential to the preparation of the party's case; and (b) the work product privilege may be asserted by either the client or the attorney.

Olen Properties Corp. v. Sheldahl, Inc., 38 Env't Rep. Cas. (BNA) 1887, 24 Envtl. L. Rep. 20936, 1994 WL 212135 (C.D. Cal. 1994).

client has no expectation of confidentiality. Thus, courts will often find that disclosures made to an attorney in the presence of another party are not privileged -- a loud conversation between attorney and client in a public hallway, for example. The manner in which attorneys and clients maintain documents is key to a court's determination of whether those documents fall within the privilege, an issue of particular importance for corporate clients. Thus, an AT&T subsidiary failed to convince the court that the privilege should apply to documents which had been maintained in files that were routinely reviewed by employees in the course of their employment. He course of their employment.

• The "client," for purposes of the privilege, is one who seeks legal advice. The privilege applies to confidential communications between client and lawyer irrespective of whether a formal retainer agreement is signed, irrespective of whether attorneys fees have been paid, and irrespective of whether litigation has begun or is contemplated. When the attorney's representation of the client ends, *further* communications between the attorney and the former client are no longer protected. However, the confidential communications that have taken place between client and lawyer during the representation are forever covered by the privilege, even beyond the end of that attorney-client relationship. In the case of a corporate client, the privilege survives the dissolution of the corporation. The privilege survives even after the death of the client, although one widely accepted exception is that in a dispute over a will, communications between the testator and his attorney relating to the terms and conditions of his last will and testament will not be protected, so that the court may attempt to discern the intentions of the testator.

# B. <u>Application of the Privilege to Corporations</u>

The concept of the attorney-client privilege has evolved to recognize that attorney-client relations are often more complex than two people sitting in a room. Courts have long held that statements made by agents of the client, or agents of the attorney, are protected if the other elements of the privilege are met. The privilege also covers communications under joint representation, in which an attorney represents more than one client on a matter of common interest, or joint defense arrangements, in which clients with a common legal interest and their attorneys communicate for the purpose of preparing a joint strategy. These situations are an exception to the rule that the presence of a third party will destroy the privilege.

See, e.g., U.S. v. Blasco, 702 F.2d 1315, (11<sup>th</sup> Cir. 1983) (While the fact that conversation between client and attorney took place in public hallway is not in itself fatal to the privilege if the conversation had been conducted in low voices and it were clear that outsiders were not present; here defense counsel spoke with intonations loud enough for any casual passerby to hear.) See also WIGMORE, § 2311 at 601-03.

Jarvis, Inc. v. American Telephone & Telegraph Co., 84 F.R.D. 286 (D. Colo. 1979). See also, e.g., U.S. v. Kelsey-Hayes Wheel Co., 15 F.R.D. 461, 165 (E.D. Mich. 1954) ("It is difficult to be persuaded that the documents were intended to remain confidential in light of the fact that they were indiscriminately mingled with the other routine documents of the corporation...")

Most significantly for modern law practice is the extension of the privilege to corporations, government agencies, and other organizations. The courts have never been in agreement, though, on who in the corporation constitutes "the client" whose confidential communications with the corporation's counsel are protected. Most courts formerly employed a "control group" test which protected communications of an employee if the employee was in a position to control or take a substantial part in a decision about any action which the corporation may take upon the advice of an attorney.

The U.S. Supreme Court, in *Upjohn Co. v. U.S.*, <sup>17</sup> rejected the control group test as too narrow for corporate attorneys to formulate sound legal advice, particularly given the complexities of regulation confronting the modern corporation. Thus, the Court in *Upjohn* held that the privilege protected conversations between corporate counsel and employees who would not fall under the "control group" under that test. The Court declined to lay down hard and fast test, though, as to who within a corporation qualifies as "the client." The Court, without explicitly saying so, seemed to be endorsing the sort of "subjective test" used by many courts, under which an employee's communications are privileged where the employee makes the communication at the direction of the superiors in a corporation and where the subject matter concerns the scope of the employee's corporate duties. <sup>18</sup>

The privilege also covers communications between in-house counsel and outside counsel in which legal advice is sought. <sup>19</sup> The privilege does not, in most circumstances, extend to shareholders (unless they sit on the board or are part of the corporate management), because shareholders are generally not the persons seeking legal advice related to management of the corporation, and therefore there is no policy reason for the privilege to protect their communications. However, in a shareholder suit challenging the directors' management, it is possible that the court will give the shareholders access to privileged communications. <sup>20</sup>

In this era of corporate scandals, it is also important to note that the privilege belongs to the corporation, not to its individual agents. Thus, the board of directors, officers, and managers have the right to assert or waive the privilege. The collective will of the corporation -- e.g. the board of directors -- will control over the wishes of any individual corporate agent. <sup>21</sup> The notion

<sup>&</sup>lt;sup>15</sup> See RICE, § 4:11-15 at 40-66.

The "control group" test was first articulated in *City of Philadelphia v. Westinghouse Elec. Corp.*, 210 F. Supp. 483, 485 (E.D. Pa. 1962).

<sup>&</sup>lt;sup>17</sup> Upjohn Co. v. U.S., 449 U.S. 383, 101 S. Ct. 677 (1981).

The "subject matter" test was first articulated in *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487, 491-92 (7<sup>th</sup> Cir. 1970).

<sup>19</sup> See RICE, § 4:4 at 24-6.

See Id., § 4:8 at 34-5.

<sup>&</sup>lt;sup>21</sup> See Id., § 4:20 at 92-4 and §4:25 at 116-9.

that the privilege belongs to the corporation also has implications for employees who might themselves be the target of a legal investigation, as they cannot invoke the privilege to protect their own incriminating statements that they have given to corporate counsel. Again, the decision as to whether to disclose such statements would rest with the corporation. <sup>22</sup>

#### C. Waiver and Exceptions

Even though the privilege is described as "absolute," the privilege may become inapplicable through several means, the most obvious way being waiver by the holder of the privilege. It is important here to highlight the fundamental concept that the privilege is owned by the client, not by the attorney. Thus, the right to waive the privilege and allow the testimony of either client or attorney regarding confidential communications rests with the client, not with the attorney.

There are other limited circumstances in which the privilege will cease to protect communications, regardless of the client's wishes. In addition to the circumstances surrounding a contested will or s shareholder lawsuit against corporate directors, noted above, the privilege will not protect client communications if the client is planning a criminal or fraudulent activity at the time of seeking legal advice, and if the client seeks the assistance of the attorney for purposes of perpetuating the crime or fraud. This is the so-called "crime-fraud" exception to the attorney-client privilege. To break the privilege under this exception, the party seeking to compel testimony must make a prima facie showing that the client has abused the attorney-client relationship in furtherance of a wrong-doing. The courts generally require more than a mere allegation of wrong-doing, but otherwise, there is a lack of consistency among the courts as to when the prima facie standard is met. Usually, a judge will conduct an in camera review of the communications to determine whether the client consulted the attorney for the purpose of wrong-doing.

The attorney faces a difficult situation if he knows, or suspects, that a client plans to commit a crime or fraud. Absent being compelled by a court to testify, when, if ever, is an attorney allowed, or obligated, to disclose client communications which the attorney knows or suspects to be in furtherance of the crime or fraud? On this issue, attorneys and the courts draw guidance from the U.S. legal ethics codes.

# III. The Complementary Rules of Professional Conduct

### A. The ABA Model Rules of Professional Conduct

That confidentiality is at the core of the attorney-client relationship in the United States is readily apparent in the rules of professional conduct governing lawyers. While these ethics rules vary from state to state, and from state to federal courts, they are largely based on Model Rules of Professional Conduct promulgated by the American Bar Association. Violation of the rules can lead to a sanction of the attorney, usually imposed by the courts.

<sup>&</sup>lt;sup>22</sup> See Id., § 4:21 at 94-101.

Model Rule 1.6 strictly limits the occasions on which an attorney may reveal confidential client communications. <sup>23</sup> In keeping with the protection afforded to the client by the attorney-client privilege, Rule 1.6 states that the attorney "shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation," (emphasis added), or under the enumerated limited circumstances in which the attorney *may* reveal information relating to the representation to the extent the lawyer believes is necessary:

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to secure legal advice about the lawyer's compliance with these Rules;
- (3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
- (4) to comply with other law or a court order.

Of course, the Rules do not give license to an attorney to engage in illegal behavior, or to assist the client in illegal activity. The Model Rules prohibit a lawyer from counseling a client to engage in, or assisting a client, in conduct the lawyer knows is criminal or fraudulent, but allow the lawyer to discuss the legal consequences of any proposed course of conduct with a client and to counsel or assist the client to make a good faith effort to determine the validity, scope, meaning, or application of the law. <sup>24</sup>

A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation...This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

MODEL RULES OF PROF'L CONDUCT, Rule 1.6, Comment 2.

The official comment to Rule 1.6 explains a public policy which tracks the rationale used by courts to explain the attorney-client privilege:

MODEL RULES OF PROF'L CONDUCT, Rule 1.2(d).

The Rules require the lawyer to withdraw from representation if the representation will result in violation of the Rules of Professional Conduct or other law. <sup>25</sup> Also, the lawyer is allowed, but not required, to withdraw if the client has used the lawyer's services to perpetuate a crime or fraud. <sup>26</sup> The Rules require the lawyer to disclose otherwise confidential information if the attorney discovers that the client, or the client's witness, has offered false evidence before a court, or if the client otherwise engages in a fraud upon the court, such as bribing a witness. <sup>27</sup>

Otherwise, Rule 1.6 imposes a strict rule of confidentiality on the attorney, requiring the attorney to keep confidential information that is not necessarily protected by the attorney-client privilege. The Rule applies to all information related to the representation, regardless of whether it was communicated by the client. Rule 1.6 requires the attorney to maintain confidences in all situations, not only when evidence is sought through compulsion of law (the situation in which the attorney-client privilege applies).

Throughout the Rules, the confidentiality requirement of Rule 1.6 remains paramount, even when a rule might suggest that disclosure would be appropriate. For starters, note that the four exceptions listed in Rule 1.6 to the strict rule of confidentiality are instances in which the lawyer is permitted, but not required, to disclose information. Elsewhere, in Rule 4.1, the attorney is prohibited from failing to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, but this Rule is limited by the phrase "unless disclosure is prohibited by Rule 1.6," leading to some confusion as to when the lawyer would be able to make such a disclosure.

Yet as narrow as Rule 1.6 is, the rule actually has been slightly liberalized by recent amendments. The previous version of the Rule allowed disclosure of a "criminal act that the lawyer believes is likely to result in *imminent death*." (Emphasis added.) The new language requires no criminal intent by the client, and the word "imminent" has been replaced by the broader term "reasonably certain," which, according to the drafters, would allow disclosure of "a present and substantial threat that a person will suffer such injury at a later date, as in some instances involving toxic torts."

Further liberalization of Rule 1.6 has been discussed within the American Bar Association but has proven controversial. Specifically, the ABA has considered, but has not adopted, language which would allow disclosure to "prevent the client from

<sup>&</sup>lt;sup>25</sup> *Id.*, Rule 1.16(a).

<sup>&</sup>lt;sup>26</sup> *Id.*, Rule 1.16(b)(3).

<sup>&</sup>lt;sup>27</sup> *Id.*, Rule 3.3.

Report 401, Amendments to Model Rules of Professional Conduct (Ethics 2000) to the House of Delegates, American Bar Association, Model Rule 1.6, Reporter's Explanation of Changes at 49.

committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another" if the lawyer's services have been used in furtherance of that activity, or to "prevent, mitigate, or rectify" such financial or property damage "that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services."<sup>29</sup>

While disclosure in these circumstances would be voluntary, these further liberalizations of Rule 1.6 provoked a sharp dissent within the ABA from those who base their opposition on two fears. First, they argue, lawyers will face increased liability and legal inquiries into whether the lawyer "should have known" of the crime or fraud, when in reality the lawyer is likely to have knowledge only in hindsight. In this respect, the proposed rule introduces a "whistleblower" element to the ethics rules which may often pressure the lawyer to disclose for fear of guessing wrong about the client's activities or intentions. Second, expanding the circumstances in which the lawyer could disclose client confidences would create an additional impediment to trust between lawyer and client, reducing the likelihood that the lawyer would be able to counsel the client to abide by the law. <sup>30</sup>

#### B. Trends in State Ethics Rules

While these amendments are stalled within the ABA, the trend within the State court rules is towards greater voluntary disclosure, and in some cases towards *mandatory* disclosure.

Like the Model Code, the ethics codes of the fifty States and the District of Columbia impose an ethical obligation of the attorney not to reveal the confidences of the client, except under enumerated limited exceptions. While the language of the rules vary from State to State, in general, seventeen States follow the Model Code in allowing permissive disclosure by the attorney in order to prevent the client from committing a criminal act (or a fraudulent act under the rules of six of these States) which the lawyer believes is likely to lead to death or substantial bodily harm. Another twenty-five States allow voluntary disclosure to prevent or to reveal the intention of a client to commit "a crime" or "criminal act," without explicit guidance as to how serious the crime should be in order for the attorney to feel that disclosure is appropriate. One State (Georgia) permits disclosure to prevent "harm...as the result of criminal conduct" without explicitly defining the degree of harm within the text of the rule.

Seven States go even further, mandating the attorney to reveal information in order to prevent the client from committing a criminal act (or fraudulent act, under the rules of at least three States) which the lawyer believes is likely to lead to death or substantial bodily harm. At least two States have an extremely broad exception, mandating disclosure to prevent a client from committing "a crime." (One of these States

<sup>&</sup>lt;sup>29</sup> *Id.*, Proposed Rule 1.6 at 42.

*Id.*, Minority Report at 8.

-- Virginia -- requires the attorney to first advise the client of the legal consequences, urge the client not to commit the crime, and advise the client that the attorney must reveal the client's intentions unless abandoned.)

Ten States also have embraced the concept that voluntary disclosure includes situations in which the attorney believes that criminal or fraudulent acts of the client will lead to substantial financial injury to the financial or property interest of another. (Again, the wording varies from State to State.) One State -- Wisconsin -- even mandates that the attorney reveal information under this circumstance.

Most States have adopted a rule similar to ABA Model Rule 4.1, stating that a lawyer should not fail to disclose a material fact to a third person when disclosure is necessary to avoid "assisting" a criminal or fraudulent act by the client, but as with the ABA Rule, these States qualify the requirement by making it inapplicable if disclosure is prohibited by the State-equivalent to Rule 1.6. At least five States mandate disclosure in order to avoid "assisting" a criminal or fraudulent act of the client, without the qualifying language.

At least 15 of the States have adopted rules allowing lawyers to disclose confidential communications to "rectify" the consequences of a client's criminal or fraudulent act when the lawyer's services have been used in the commission of that act. At least two States mandate disclosure in certain instances in which the lawyers' services have been used by the client in furtherance of a criminal or fraudulent act.

These trends in the State rules show that, for now, the States have been more willing than the ABA to expand the circumstances in which the attorney may (or in some case must) reveal client confidences. Further expansion of disclosure, though, may come not from within the State ethics codes, but from statutory mandates resulting from the concern of lawmakers that law enforcement tools need to be updated to counteract the increasing sophistication of criminals.

## IV. The Role of the Lawyer: Confident or Informant?

Well before September 11 of 2001, law enforcement concerns led to a reexamination of the attorney-client privilege both within and without the bar. The trend toward greater disclosure in the professional rules of conduct shows an increased sense of unease among many in the bar that they may suddenly discover that their services are being used to perpetuate a crime. Meanwhile, law enforcement officials have become increasingly worried that the privilege provides too great a degree of cover for those with criminal intent, to the detriment of the public welfare.

So, while the ABA and the State bars have pondered an expansion of voluntary disclosure, and in narrow instances mandatory disclosure, the government has considered whether an effective crime-fighting response would be to *require* lawyers to disclose suspect behavior of clients. The suggestion that the disclosure rules shift from the purview of self-regulation imposed by the various bars to one of statutorily-imposed mandates is extremely controversial within the U.S. legal profession. In addition, legal associations have complained of

recent attempts by law enforcement authorities to narrow the protections of the attorney-client privilege within the existing rules.

# A. <u>Prosecutorial Pressure to Waive the Privilege</u>

The American College of Trial Lawyers issued a report last spring sharply criticizing a memorandum issued by President Clinton's Deputy Attorney General, Eric Holder. The Holder memorandum, so the ACTL argued, is a "blueprint for maximizing the government's leverage to induce waivers of the corporate attorney-client privilege." In the authors' opinion, for example, the Holder memo encourages "non-prosecution" agreements, or promises of more lenient sentencing recommendations to courts, as leverage to force corporate targets to waive the attorney-client privilege. The ACTL report also argues that prosecutors are increasingly invoking the crime fraud exception to the privilege, with the result being that "the current rules allow prosecutors to obtain an in camera review based on unsubstantiated information that they may have collected through an unlawful intrusion into the privilege, without giving defendants an opportunity to challenge the reliability or validity of that evidence."

# B. The Gatekeeper Initiative

Government attempts to curb money laundering have also resulted in suggestions for mandatory disclosure by attorneys of otherwise privileged communications. One proposal that has generated much concern within the American Bar Association is a proposal called the "Gatekeeper Initiative." This initiative was put forth in May 2002 by the Financial Action Task Force on Money Laundering ("FATF"), an inter-governmental body established by the G-7 nations for the purpose of developing policies to combat money laundering.

The Gatekeeper Initiative is directed at lawyers, accountants, auditors and other professionals who assist clients in financial transactions and business dealings, and who, in the eyes of law enforcement officials, are in a position to serve as "gatekeepers" to prevent money laundering.

Within the U.S. government, an inter-agency group, led by the Department of Justice, is developing the administration's position on the Gatekeeper Initiative as it applies to lawyers. Questions raised in this review suggest unprecedented changes to American notions of the attorney-client relationship: Should attorneys be required to investigate prospective clients? Should attorneys be required to monitor proposed and consummated transactions? What kind of records should attorneys be required to keep of client transactions? And -- most controversially --

American College of Trial Lawyers, "Report on the Erosion of the Attorney-Client Privilege and Work Product Doctrine in federal Criminal investigations," May 2002.

<sup>&</sup>lt;sup>32</sup> *Id.* at 16.

<sup>33</sup> *Id.* at 16-18.

<sup>&</sup>lt;sup>34</sup> *Id.* at 43-52.

- should attorneys be required to submit "S uspicious Transaction Reports" to law enforcement authorities regarding the activities of their clients?

The American Bar Association has formed a task force to analyze and provide commentary on the Gatekeeper Initiative. The Task Force has put forth a suggestion that the ABA should cooperate with law enforcement authorities on proposals that would subject attorneys who serve as financial intermediaries to certain reasonable requirements. For example, these attorneys should be subject to reasonable requirements to verify the identity of their clients. This requirement would not intrude on the attorney-client privilege, as the identify of the client falls outside the scope of the privilege already. Likewise, the Task Force believes that there could be a reasonable implementation of the proposal which would require attorneys to maintain records of transactions for a certain number of years. Thus, records would be available to government authorities should there be a criminal investigation. Of course, it would be controversial if law enforcement authorities had access to such records absent traditional law enforcement processes such as judicial subpoenas and statutory investigative demands. Finally, the Task Force supports training programs that would educate lawyers serving as financial intermediaries on ways to identify money laundering or other misuse of the legal system for criminal purpose.

The Task Force has issued strong cautions, though. For starters, the scope of coverage of the Gatekeeper Initiative should be narrowly tailored to apply to attorneys who serve as financial intermediaries -- in other words, those who receive or transfer funds on behalf of clients. Lawyers who practice in specialized field such as tax, corporate, or estate planning have expressed concerns about the parameters of coverage of any new requirements when the lawyer does not serve as financial intermediary. <sup>39</sup>

Most troubling to the Task Force is the Gatekeeper Initiative proposal that lawyers submit "Suspicious Transaction Reports" to government authorities upon mere suspicion that the funds involved in a client's transaction stem from an illegal activity. The Task Force concluded that this proposal would "fundamentally alter every aspect of the attorney-client relationship, turning a trusted advisor and counselor into a potential government informant, acting inimically to the best interests of his or her client." While the Gatekeeper proposal, on its face, would exempt privileged information from this requirement, the line between privileged and non-

See, American Bar Association, Task Force on Gatekeeper Regulation and the Profession, "Comments of the ABA Task Force on Gatekeeper Regulation and the Profession on the Financial Action Task Force Consutation Paper Dated May 30, 2002," August 23, 2002.

<sup>36</sup> *Id.* at 11-14.

<sup>37</sup> *Id.* at 14.

<sup>&</sup>lt;sup>38</sup> *Id.* at 14-15.

<sup>&</sup>lt;sup>39</sup> *Id.* at 10.

<sup>40</sup> *Id.* at 16.

privileged information is likely to be unclear, leaving attorneys difficult choices about what to disclose.

Also troubling are Gatekeeper proposals to require covered attorneys to "pay special attention to all complex, unusual large transactions, and all unusual patterns of transactions with no apparent economic or visible lawful purpose" and to "report any suspicions that funds stem from criminal activity." Again, the proposals suggest a shift in the role of the lawyer from confidant to investigator. Several other thorny issues also arise. For example, the proposals would prohibit attorneys from disclosing to the client that suspicious behavior has been reported to the government. Ethics rules suggest the attorney should withdraw from representation in this situation, but terminating the relationship could lead to breach of contract or a malpractice suit—not to mention the fact that it would probably tip off the client that a report has been filed. The proposals, in requiring attorneys to report "suspicious" behavior may also have the unintended effect of encouraging stereotyping or racial profiling of clients.

# C. The Patriot Act

Of course, law enforcement concerns have heightened since September 11 of last year. The "Patriot Act" passed by Congress as a response to the terrorist attacks signals a further trend toward shifting crime-detection responsibilities from law enforcement officers to those in the private sector who may come into contact with criminals. The statute expands the scope of the current U.S. anti-money laundering law by requiring not only traditional financial institutions but also securities brokers and dealers to file "Suspicious Activity Reports" with the government. Lawyers and law firms are not explicitly included in the definition of "financial institutions" subject to the statute's disclosure requirements. The law may be written broadly enough, though, to allow the Treasury Department to apply the statute to law firms through its regulations in certain situations (for example, if a law firm substitute for the business of a financial institution), although there are no indications that the Treasury Department would so expand the coverage. The bar will keep a close watch on implementation of this statute, nevertheless.

## D. Legislation and the ABA Task Force on Corporate Responsibility

In the wake of Enron and other corporate scandals in the United States, the Congress passed legislation enforcing stricter rules on corporate disclosure. Among the provisions of this legislation (named the Sarbanes-Oxley Act of 2002 after its sponsors)<sup>42</sup> is a requirement that the Securities and Exchange Commission (SEC) adopt a rule requiring attorneys to report evidence of a "material violation" of securities law, breach of fiduciary duty, or similar violation by the company or its agent, to the chief legal counsel or the chief executive officer of the company. The legislation goes on to require that if the counsel or CEO does not "appropriately respond," the attorney must report the evidence to the audit committee of the board of directors, or to another committee of the board comprised solely of directors not directly employed by the corporation, or to the board of directors itself. On January 29, 2003 the SEC adopted a rule to

<sup>&</sup>lt;sup>41</sup> Pub.L. 107-56 (2001).

<sup>&</sup>lt;sup>42</sup> Pub.L. 107-204 (2002).

implement these requirements. The rule clarifies that the reporting obligation extends only to attorneys providing legal services to a company issuing securities who have an attorney-client relationship with the issuer, and who have notice that documents they are preparing or assisting in preparing will be filed with or submitted to the SEC. Under the rule, the trigger for reporting is when the attorney becomes aware of "credible evidence, on the basis of which it would be unreasonable under the circumstances, for a prudent and competent attorney not to conclude that it is reasonably likely that a material violation has occurred, is ongoing, or is about to occur." Significantly, the statute does not require the attorney to divulge the information to the SEC or to anyone outside the corporation. Thus, it remains to be seen whether the new rule will impose obligations on an attorney beyond ethical obligations that already exist in the codes of professional conduct. At a minimum, though, the Sarbanes-Oxley legislation is significant in that it signals a willingness of Congress to impose federal regulation on a profession that heretofore has been regulated at the State level. 44

The American Bar Association itself has formed a Task Force on Corporate Responsibility and has issued recommendations to "enhance corporate governance practices and ethical principles to make it more likely that the system of checks and balances involving outside directors, auditors and corporate counsel will work effectively to help ensure that the corporation is ethically and legally responsible and managed in the long run best interests of the corporation and its shareholders." With respect to in-house and outside counsel, the Task Force recommends that the Model Rules be amended to expand the situations in which the attorney reports concerns about misconduct to a higher level of authority in the corporation. <sup>46</sup>

The Task Force would also adopt the amendments (discussed above) thus far rejected by the ABA which would permit the attorney to disclose confidential communications in order to prevent or rectify the consequences of a crime or fraud in which the client has used the lawyer's services and that was reasonably certain to result in substantial injury to the financial interests or property of another. The Task Force would also mandate disclosure "in order to prevent client conduct known the lawyer to involve a crime, including violations of federal securities laws and regulations, in furtherance of which the client has used or is using the lawyer's services, and

<sup>&</sup>lt;sup>43</sup> 17 C.F.R. § 205.2(e).

In response to another instance of federal intrusion into the regulation of the legal profession, the American Bar Association has filed a lawsuit against the Federal Trade Commission (FTC) challenging the application to lawyers of certain provisions of the Gramm-Leach-Bliley Act. The challenged provisions require banks and other financial institutions to notify customers of their privacy policies and explain how they share personal information with other businesses. The FTC has moved to apply these provisions to lawyers such as tax or estate planners who in the eyes of the FTC provides "financial services" within the meaning of the Act, even though the Act does not specifically mention lawyers.

American Bar Association, "Preliminary Report of the American Bar Association Task Force on Corporate Responsibility," July 16, 2002 at 10.

<sup>46</sup> *Id.* at 27-30.

which is reasonably certain to result in substantial injury to the financial interests or property of another."

Among other recommendations, the Task Force would also amend the Rules to prohibit a lawyer from counseling or assisting the client in conduct not only that the lawyer knows to be criminal or fraudulent (as Rule 1.2 currently reads) but also when a lawyer should "reasonably know" the conduct is criminal or fraudulent. Likewise, the Task Force would supplement the requirement that a lawyer should not "knowingly" fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act (Rule 4.1) by requiring disclosure when the lawyer should "reasonably know" disclosure is necessary. <sup>48</sup>

# V. Conclusion

The proposals towards greater disclosure, if enacted, could create additional liabilities for attorneys. Whether a client is engaging, or planning to engage, in criminal conduct will not always -- and in fact may seldom be obvious -- to the attorney. In large measure, the disclosure proposals, whether voluntary or mandatory, would require the attorney to make a guess as to whether the client's behavior is suspicious enough to report. What if attorney guesses wrong? If the attorney does not disclose, would the attorney be subject to criminal charges should the client engage in criminal behavior? On the other hand, if the attorney errs on side of caution and discloses when in fact the client is not engaging in criminal behavior, the risk is that the attorney may be sued for malpractice by the client.

The other dilemma is that faced by the client: Will the client be comfortable seeking legal advice knowing that communications intended to be confidential may be disclosed? The real risk in these proposals is the potential uprooting of the longstanding policy behind both the attorney-client privilege and the professional rules of conduct requiring confidentiality: people are likely to seek legal advice if their communications are held in confidence, and people who seek legal advice are likely to heed the legal advice. Any new mandates for attorney due diligence must be carefully weighed against this policy so as not to be counterproductive.

<sup>47</sup> *Id.* at 32.

<sup>48</sup> *Id.* at 33-5.