Sanctions Imposed For Revealing Attorney-Client Confidences

Policies Underlying DR 4-101 and Model Rule 1.6

Protection of confidential communications between attorneys and clients can be traced to early holdings in the Elizabethan period.[1] Such protection was, however, subject to many exceptions and existed for a time as the privilege of the lawyer.[2] The modern attitude toward confidential communications is expressed in Disciplinary Rule 4-101(B)[3] and Model Rule 1.6,[4] and this privilege may not be waived by the attorney, but belongs solely to the client.[5]

Within the general category of privilege or confidential communications, both "confidences" and "secrets" are protected under DR 4-101:

> (A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.[6]

The attorney-client privilege itself, upon which the disciplinary rules

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1. Hazard, *An Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061, 1069 (1978).

2. *Id.* at 1070 (stating that a gentleman does not give away matters confided to him).

3. MODEL CODE OF PROFESSIONAL RESPONSIBILITY [hereinafter cited as MODEL CODE] DR 4-101(B) (1981):

> (B) Except as permitted by DR 4-101(C); a lawyer shall not knowingly:
> (1) Reveal a confidence or secret of his client.
> (2) Use a confidence or secret of his client to the disadvantage of the client.
> (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

4. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983) [hereinafter cited as MODEL RULES]:

> Rule 1.6 Confidentiality of Information
> (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

5. Kevlik v. Goldstein, 724 F.2d 844, 850 (1st Cir. 1984); Cruz v. State, 586 S.W.2d 861, 865 (Tex. Crim. App. 1979).

6. MODEL CODE DR 4-101(A) (1981). *Cf.* MODEL RULES Rule 1.6(a) (1983).

are based, has been defined generally as encompassing any communications between an attorney and his client made with regard to their professional relationship.[7] This privilege has been held to include both oral statements and written documents and to extend beyond the termination of the attorney-client relationship as well as the death of the client.[8]

Originally, the policy underlying protection of communications between a client and his attorney centered on "the oath and honor of the attorney."[9] This later evolved into the present policy which places a premium on the need for confidence and trust between attorneys and clients in order to promote full disclosure by the client.[10] The purpose of the privilege has been described as "threefold":

> (1) to encourage free discussion by the client; (2) to relieve the attorney of the onus of determining on a good faith basis whether a communication is privileged; and (3) to deter the advertent or inadvertent use of privileged communications to the advantage or disadvantage of a new client.[11]

Other commentators have discussed in-depth how protection of confidences is indispensible to the attorney's role as counselor. Such protection is viewed as the vehicle by which a lawyer may gain a sense of "rapport" and "empathy" with his client in order to more effectively deal with the particulars of the case.[12]

Although the thrust of DR 4-101 and Rule 1.6(a) is protection of client communications, provisions in DR 4-101(c) and Rule 1.6(b) outline specific instances when an attorney may reveal client confidences.[13] These include the intention of a client to commit a crime

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7. Callan, David, *Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct in an Adversary System*, 29 RUTGERS L. REV. 332, 339 (1976).

8. *Id.* at 339-40.

9. *Id.* at 337.

10. Fisher v. United States, 425 U.S. 391, 403 (1976); Cruz v. State, 586 S.W.2d 865 (Tex. Crim. App. 1979) (stating that the purpose of the privilege is the promotion of communication unrestrained by fear that confidences will later be revealed).

11. Kevlik v. Goldstein, 724 F.2d 844, 849 (1st Cir. 1984) (citations omitted).

12. Gardner, *A Re-Evaluation of the Attorney-Client Privilege*, 8 VILL. L. REV. 279, 310 (1963).

13. MODEL CODE DR 4-101(C) (1981):

A lawyer may reveal:

(1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.

and the revelation of information necessary to prevent the crime.[14] The policies underlying these provisions are clearly protection of the public, protection of the attorney and the interest of justice. However, a troublesome dilemma can occur as the two policies may potentially conflict. While attorneys may be subject to discipline for revealing privileged communications, they might also be disciplined for failing to disclose a confidence or secret where it could adversely affect the public or some third party.[15]

In *Grievance Commission v. Malloy*,[16] an illustrative problem arose where the provisions of DR 7-102(B)(1),[17] instructing an attorney to reveal communications, came into conflict with DR 4-101(B),[18] which protects client confidences. The court affirmed the referee's recommendation of no sanctions as the respondent was "caught in a confusing situation where regardless of the course he chose he must run afoul of one of two conflicting professional obligations."[19]

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(2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.

(3) The intention of his client to commit a crime and the information necessary to prevent the crime.

(4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

MODEL RULES 1.6(b) (1983):

A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) 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.

14. *Id.*

15. Callan & David, *supra* note 7, at 334 for a full discussion of the duty to disclose client misconduct.

16. 248 N.W.2d 43 (N.D. 1976).

17. MODEL CODE DR 7-102(B)(1) (1981):

A lawyer who receives information clearly establishing that:

(1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he *shall reveal the fraud to the affected person or tribunal.* (emphasis added)

18. MODEL RULES, *supra* note 3.

19. 248 N.W.2d at 45 (quoting the referee). The *Malloy* court said the duties

Penalities For Revealing Confidential Communications

Specific sanctions may be imposed on an attorney who reveals confidential communications, but where there is the mere potential for disclosure, disqualification motions are common.[20] These motions typically claim that a lawyer or firm should be disqualified due to the fact that the lawyer or a member of his firm had previously represented the party desiring disqualification.[21]

While disqualification cases deal only with the possibility of disclosure, where actual disclosures of client confidences occur, individual sanctions may include formal reprimand, suspension or disbarment.[22] These various sanctions are imposed by courts to preserve the integrity of attorney/client communications as illustrated by case law concerning confidences which have been revealed. The Supreme Court of Indiana in *In re Roache II*,[23] found judicial reprimand to be the appropriate sanction where an attorney withdrew from representation of a buyer of a business and later agreed to purchase the business himself when the original buyer could not go through with closing. Although the court held that the attorney had used the confidence of the client to the disadvantage of the client and to his own advantage in violation of DR 4-101(B)(2) and (3), they instituted only a reprimand.[24] This may be explained by the fact that subsequent to his payment of earnest money, and on information that the original buyer was still interested, the attorney offered to assign his interest in the purchase to the original buyer.[25] This offer was declined, the attorney later rescinded his offer to purchase and the original buyer was ultimately

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under the two ethical rules were confusing as to information to be disclosed at deposition, but as to information sent a few months later, the court developed a new standard which would demand disclosure. Mr. Malloy was not held to this standard as it had not been previously stated in the jurisdiction.

20. Ruder, *Disqualification of Counsel: Disclosures of Client Confidences, Conflicts of Interest, and Prior Government Service*, 35 BUS. LAW. 963, 965 (1980).

21. *Id. See* Cossette v. Country Style Donuts, Inc., 647 F.2d 526 (5th Cir. 1981) (where the court stated that before disqualification occurs, there must be evidence that the information possessed by the challenged attorney or his firm would be of value); Sears, Roebuck & Co. v. Stanbury, 374 So. 2d 1051 (Fla. Dist. Ct. App. 1979) (where defendants sought to have plaintiff's attorney disqualified when a partner in the same firm had earlier represented the defendants in a similar case).

22. G. ARCHER, ETHICAL OBLIGATIONS OF THE LAWYER 161, at 282 (1910).

23. _____ Ind. _____, 446 N.E.2d 1302 (1983).

24. *Id.* at _____, 446 N.E.2d at 1304.

25. *Id.* at _____, 446 N.E.2d at 1303.

able to purchase the property.[26] There was no evidence that the attorney attempted to glean an undue profit from the original buyer or that he caused the buyer any difficulty other than "unnecessary delay and inconvenience."[27]

In re Rhame III[28] presented a case where an attorney who voluntarily reported his disclosure of privileged communications to the State Disciplinary Commission was reprimanded. The attorney in *Rhame* had represented in various capacities a husband and wife until their divorce, at which time he represented the wife.[29] The wife was later arrested for the murder of her former husband and the attorney made statements to a friend on the police force and the prosecuting attorney concerning the couple's divorce and financial difficulties.[30] After realizing that he had revealed privileged information, the attorney reported himself and cooperated fully with the defense counsel, refusing to testify for the prosecution.[31] Despite his voluntary admission, the court found it necessary to sanction the attorney as he had "engaged in conduct that is prejudicial to the administration of justice . . . that adversely reflects on his fitness to practice law. . . ."[32] Thus, the Supreme Court of Indiana in both *Roache* and *Rhame* instituted public reprimands for actions which did not severely prejudice their clients, but which did constitute disclosures of privileged communications.

A terse opinion by the Supreme Court of Alaska termed violations of "a clear and flagrant character" to be appropriate for public censure in *In re Craddick*.[33] The court based its decision largely on the findings of the Disciplinary Board and it is noteworthy to point out that the censure included not only violations of DR 4-101, but also DR 1-101, DR 2-102(a), DR 5-105, and DR 7-105.[34]

A lower court's finding of a violation of DR 4-101 was reversed in *In re Rachmiel*[35] where a former prosecuting attorney communicated with the press that the defendant had "refused to take a lie detector test and was offered a plea bargain which he refused."[36] This com-

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26. *Id.*
27. *Id.*
28. _____ Ind. _____, 416 N.E.2d 823 (1981).
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. 602 P.2d 406, 408 (Alaska 1979).
34. *Id.*
35. 90 N.J. 646, 449 A.2d 505 (1982).
36. *Id.* at _____, 449 A.2d at 513.

munication came after the attorney had left the prosecutor's office and entered private practice.[37] The Supreme Court of New Jersey said that the State must prove a disciplinary infraction by "clear and convincing evidence"[38] and that the evidence in the case did not meet that test.[39] It was additionally pointed out by the court that both of the alleged confidences had already been publicly disclosed.[40]

Several cases have involved attorneys who were suspended from practice for revealing confidential communications. These have often dealt with business transactions where an attorney was benefited and a client disadvantaged by the attorney's use of the privileged communications. An attorney was indefinitely suspended from practice in *Stark County Bar Association v. Osborne*,[41] where he entered into varying business relations with clients which were particularly advantageous to him and where he used confidences to gain such advantage. There was evidence that the attorney not only took advantage of his personal relationship with the client but of the client's ill health.[42] Through a series of questionable transactions, the client suffered substantial losses, directly due to the actions of attorney.[43] A supplemental complaint was also filed against the attorney by a second pair of clients whom he represented, while at the same time representing the other parties to a sales agreement.[44] Again, the clients suffered substantial losses due to the action of the attorney, and the attorney gained a pecuniary benefit.[45]

The Supreme Court of Oregon suspended an attorney from practice for 30 days in *In re Gant*.[46] The attorney in *Gant* had previously entered into a business relationship with a husband and wife while also

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37. *Id.* at _____, 449 A.2d at 508 (where the attorney had been a prosecutor for the defendant's third trial, and his remarks were made before defendant's fourth trial).

38. *Id.* at _____, 449 A.2d at 513.

39. *Id.*

40. *Id.*

41. 1 Ohio St. 3d 140, 438 N.E.2d 114 (1982).

42. *Id.* at _____, 438 N.E.2d at 115 (stating that the client appeared to have been suffering from alcoholism, cirrhosis and diabetes, and various witnesses including the client's doctor declared him unfit to conduct his business affairs).

43. *Id.*

44. *Id.*

45. *Id.* at _____, 438 N.E.2d at 116 (where the attorney, despite the adverse and conflicting interests of the parties, represented the buyers, sellers, and the bank involved in the transactions).

46. 293 Or. 130, 645 P.2d 23 (1982).

representing them on other matters. The couple later divorced and while the attorney declined to represent the wife in divorce proceedings, he did assist her in a real estate transaction. Subsequently, the attorney represented her husband concerning the divorce agreement.[47] The court sanctioned the attorney for an obvious conflict of interest where an attorney-client relationship had been developed with the wife.[48]

Abuse of business transactions and confidential communications also subjected an attorney to suspension in *In re Nulle*.[49] Confidences concerning the financial operation and options on a business were used by an attorney for his own benefit, directly conflicting with DR 4-101(B). As in *Osborne*, the court used suspension where the disadvantages caused to the client proved to be pecuniary in nature.[50]

Disbarment is of course the most serious sanction which a court may impose upon an attorney who reveals a privileged communication. In *In re Crumpacker*[51] the Supreme Court of Indiana disbarred an attorney who had revealed confidences and used confidential information to his advantage. However, this action was not predicated on a violation of DR 4-101(B) alone. The attorney in the case was found to have violated eleven separate disciplinary rules, and the court said of the individual:

> The acts set out under the various counts wherein this Court has found misconduct create a picture of a *vicious, sinister person, tunnel-visioned by personal pique, and willing to forego all professional responsibilities which conflict with acts of preconceived vengeance on personal enemies.*
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> . . .
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> *The course of conduct demonstrated by the Respondent has no place within the contemporary practice of law.*[52]

It is therefore difficult in considering this case to identify the type of circumstances in which a revealed communication alone could result in disbarment.

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47. *Id.* at _____, 645 P.2d at 24 (the attorney, on behalf of the husband, filed a petition to dissolve the marriage).

48. *Id.* at _____, 645 P.2d at 26.

49. 127 Ariz. 299, 620 P.2d 214 (1980).

50. *Id.* at _____, 620 P.2d at 218.

51. 269 Ind. 630, 383 N.E.2d 36 (1978) (where attorney revealed details of a compromise agreement that was strictly confidential).

52. *Id.* at _____, 383 N.E.2d at 52.

Conclusion

In the final statements of its opinion, the Court in *Crumpaker* outlined the policy considerations it felt relevant in disciplinary cases. These included the nature of the violation, the specific acts of misconduct, the preservation of the integrity of the Bar, and the duty to the public.[53] Such overriding policy factors were similarly outlined by the Arizona Supreme Court in *Nulle*, where they stated that disciplinary actions are not taken to punish the individual, but to protect "the public, the profession, and the administration of justice,"[54] as well as provide a deterring effect on other attorneys.[55] In reviewing the types of penalties which may be imposed upon lawyers who reveal confidential communications, consideration of these policies may lead to a better understanding of the disciplinary process. It is instructive to reconsider the holdings in *Roache*[56] and *Rhame*[57] where public censure was imposed when the disadvantage to the client was not substantial, but the court felt some expression of disapproval necessary. In cases where the client was the subject of actual pecuniary loss and the attorney gained some personal benefit, such as *Osborne*[58] and *In re Nulle*,[59] the court felt suspension the more appropriate penalty. By imposing such sanctions, even in cases of voluntary admission and nominal client injury,[60] the letter and spirit of the Disciplinary Rules are not compromised, but validated by the courts.

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53. *Id.*
54. *In re* Nulle, 127 Ariz. 299, _____, 620 P.2d 214, 218 (1980).
55. *Id.*
56. *See* notes 23-27 *supra* and accompanying text.
57. *See* notes 28-32 *supra* and accompanying text.
58. *See* notes 41-45 *supra* and accompanying text.
59. *See* notes 49-50 *supra* and accompanying text.
60. *See* notes 28-32 *supra* and accompanying text.