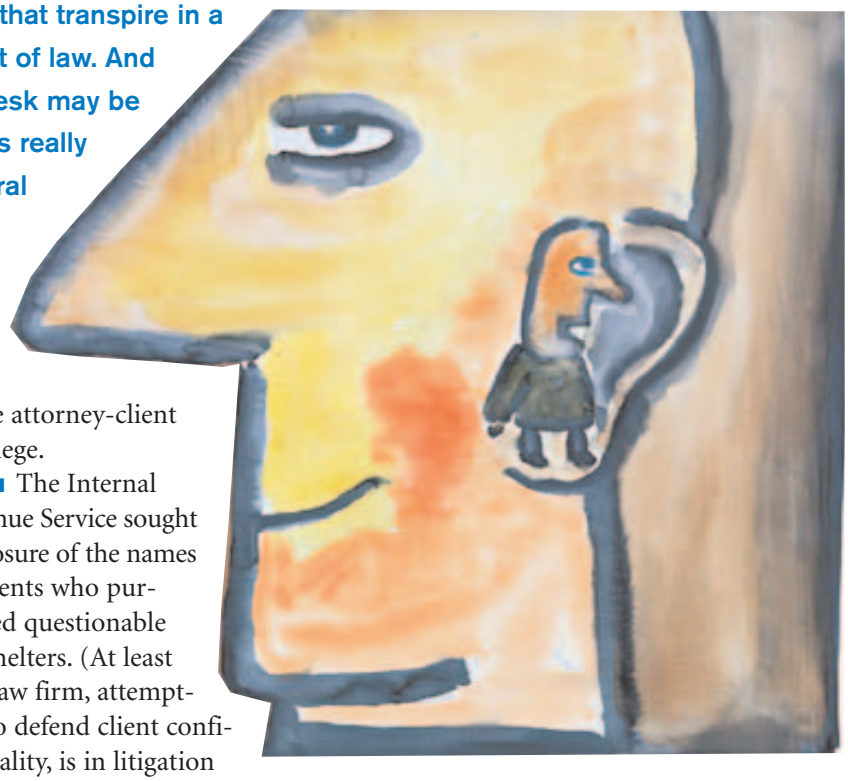
Tattletale!
Rewriting Attorney-Client Privilege

BY PHILLIP M. PERRY

Let the word go forth: Any conversations that transpire in a lawyer's office may be repeated in a court of law. And any documents passed over a lawyer's desk may be stamped "Exhibit A" down the road. Is this really possible? It hinges on the fallout of several phenomena—including a move to muffle attorney-client privilege, the encouragement of permissive disclosure and the threat of noisy withdrawal.



Tattletale. Whistleblower. Rat. Fink. Snitch. Those terms are not on the short list of endearments by which lawyers would like to be known to clients. Like it or not, though, such verbal brickbats may find soft targets in the years ahead as legal professionals adjust to a looser interpretation of the traditional concept of attorney-client privilege.

Consider these moves by government agencies in the past year:

- The U.S. Securities and Exchange Commission adopted a rule requiring lawyers to report potential fraud to corporate boards. The SEC may further require that lawyers report such suspicions to the agency in the absence of appropriate board response.
- The Department of Justice stated that one issue in determining whether a company or individual has been cooperative with an investigation, or in determining leniency, is whether the defendant is willing to waive attorney-client privilege.
- The Internal Revenue Service sought disclosure of the names of clients who purchased questionable tax shelters. (At least one law firm, attempting to defend client confidentiality, is in litigation with the agency.)
- The Federal Trade Commission asked law firms to send privacy policy statements to clients.

In addition, the American Bar Association revised its Model Rules of Professional Conduct to allow lawyers to disclose confidential information if there is a suspected risk of financial harm to others.

What's All the Fuss About? Justice at Risk

Not everyone would characterize the new regulatory environment as healthy. Indeed, some would diagnose it as downright pathological. One such critic is Lawrence J. Fox, a partner at Philadelphia's Drinker Biddle & Reath and former chair of the ABA Standing Committee on Ethics and Professional Responsibility. Fox specializes in corporate representation and litigation and also represents lawyers.

None of the new regulations and guidelines, says Fox, enhances the legal environment. He calls the modification of the ABA rules "as bad as bad can be." And the new aggressive posture by federal agencies is no better. "Everywhere we look the government is making its job easier at the

expense of the lawyer-client relationship," Fox says. "The IRS coming after lawyers to identify clients is a disaster. And Justice asking clients to waive privilege is a disaster."

Many lawyers share Fox's belief about the new rules and regulations. The concerns are on three fronts: First, clients will not receive the advice they need because they'll fear the repercussions of informing their lawyers of all information relevant to the case. Second, society will then be harmed when uninformed clients commit acts that unintentionally result in harm to others. Lastly, lawyers will face the nearly impossible task of balancing the need for open client conversation with the risk of prosecution for professional misconduct down the road.

"Confidentiality should cloak the entire attorney-client relationship," says Fox. "Any exceptions should be quite extraordinary and support a public policy that is more important than client confidentiality." That policy, he points out, is clear in the case of obviating bodily harm, since such a tragic event cannot be reversed. But that's not the case with other matters. "We are making a terrible mistake by making an exception for fraud," Fox warns. "We do more good by having confidentiality cloak the client relationship—thus giving lawyers the opportunity to tell clients to do the right thing—than we ever will do by turning lawyers into whistleblowers and having them rat on their clients."

Go Tell Mom: Permissive Disclosure Issues

One of the highest-profile breaches of the traditional attorney-client firewall occurred in early 2003, when the SEC issued a ruling requiring attorneys to report to a company's top executives any "evidence of a material violation" of securities laws. That was controversial enough, but the SEC may go further. It is considering requiring what is called "noisy withdrawal." This concept requires an attorney to report suspected financial fraud directly to the SEC if a corporation's board of directors does not take appropriate action following a warning of wrongdoing.

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"It is still open for comment and still open for rule making," says Dana Welch, a managing partner at the San Francisco office of Ropes & Gray, who has followed these events closely. But her take on the noisy withdrawal requirement is clear: "If it does occur, we will all become deputized regulators."

Apparently, the SEC is attempting to level the playing field by giving advisors a two-edged sword—with "power" inscribed on one side and "responsibility" on the other. On the one hand, lawyers are being given the leverage to help enforce the law in real-world situations. On the other, lawyers are being sent a message that they are answerable to more than just the corporation paying their bills.

"The SEC is changing the way those who do day-to-day corporate work view their responsibility," says Mark S. Radke, a partner in the corporate responsibility department of Howrey Simon Arnold & White, in Washington, D.C. Before joining the firm, he served as chief of staff to the SEC's chair. In that capacity, Radke oversaw the agency's input into the legislative process in shaping the Sarbanes-Oxley Act of 2002 as well as that legislation's resultant rule making. According to Radke, "The new rule boils down to a reexamination of who the client is: It's not just the corporation's deputy general counsel but also the shareholders and the larger community of interested parties."

The more aggressive SEC stance has been given a considerable boost by the ABA's revision to the rules of conduct. Adopted last year, the revision reflects the concept of "permissive disclosure," a concept that allows—but does not require—a lawyer to reveal information to prevent a crime that would lead to "substantial injury to the financial interests of property of another and in furtherance of which the client has used or is using the

lawyer's services." The lawyer may report "up the ladder" to a client firm's higher-level officers when actions by officers or employees will likely harm the organization. Further, if such reporting fails to resolve the issue, the lawyer may reveal information to entities outside the organization "if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization."

Many feel that the ABA move was influenced by the recent corporate scandals that hit the nation's headlines. "The ABA was under tremendous pressure to allow permissive disclosure," says Welch. "I am concerned that the new rule will lead to many clients saying, 'Do I really know if my lawyer will report me? Do I want to take that chance?'"

Similar concerns are being expressed concerning the recent policy move by the Department of Justice. "I feel the new policy is wrong," says Albert J. Krieger, a Miami-based attorney and immediate past chair of the ABA Criminal Justice Section. "In exchange for a plea bargain the DOJ is requiring that the client disclose whatever was discussed with the lawyer. The questions put to the pleading defendant are these: 'Did you talk with a lawyer?' and 'What did you say to the lawyer?' and 'What did the lawyer say to you?' Well, you can forget about the principle of attorney-client confidentiality."

A Gag Order for Clients

Faced with these threats, what's a client to do? For most observers the answer is obvious: Keep secrets.

Many lawyers say all the developments of the past year are likely to chill communications between lawyers and clients, who will balance the need to be honest with the danger of subsequent disclosure. "That is what the new regulations are designed to do and that is what they are likely to do," Fox believes. "It will be hard to get empirical data, but you would certainly think it a necessary corollary. Clients don't trust us to start with. Clients don't trust anybody. It's hard enough to get them to tell you what the truth is. But if you tell them you work for the SEC part-time, that changes the way clients see you."

Welch shares those apprehensions: "One concern is that clients will be less likely to confide in attorneys and seek their attorneys' advice for fear of being reported up to the board of directors. So attorneys will have less influence on clients."

Unfortunately, clients who are not candid with their lawyers can get hurt. "The client does not necessarily know or understand the ramifications of that which the client thinks the client has done or which the client has [in fact] done," says Krieger. "For example, I get a client who comes in and says, 'I did it. Get me the best deal possible.' Then I say, 'Tell me what you think you did.' It turns out that the client did not really commit the crime. So I need openness if I am going to serve the client and the system of justice. I know that in order for me to represent a client, I need full disclosure," he continues. "I want questions answered with candor and completeness."

Changing Times, From the Intake to the Bargaining Table

Discussing the ramifications of new regulations in a theoretical sense is one thing. But how does all this translate where the tire hits the highway? What will actually change in the interaction between lawyer and client?

Dana Welch says the waiver of privilege has proven to be a difficult issue for practicing lawyers. "It means when the company has an internal investigation there may be nothing that can be protected from regulators," she says. Further, she points out that if regulators insist on access to privileged materials, those inevitably will fall into the hands of civil litigators. "Most courts say if you produce documents to one adversary, then you must produce them to all adversaries."

Fox foresees that practicing lawyers will face new challenges. "I am not planning on exercising the discretion allowed by the ABA code," he says. "But lawyers who want to be in that position will have to share with clients their views about the limited nature of confidentiality." He says lawyers will need to address two broad issues: "The first is how does the lawyer-client relationship begin? What do we say at the outset? When they talk to their clients about the lawyer-client confidentiality, they will need to give warnings that they otherwise would not give."

The second area of consideration, according to Fox, is how the lawyer will react when discovering that questionable conduct is going on. "Will the lawyer trump the client's decision?" Here, again, the question of ambiguity arises. "Suppose there is a debate about disclosure," poses Fox. "The outside lawyer says we should disclose. The client says no, and the general counsel says there is no obligation. Under the new regime the lawyer may feel he should trump the general counsel or the client's board because the lawyer may be held responsible if the client makes the wrong decision." (See the sidebar "Lawyers at Risk" for an analysis

of the dangers that the new regulations pose for lawyers.)

The new game in action. For a real-world example of the challenge presented at the client intake state, let's return to Albert Krieger. How will his opening remarks change with new clients? Traditionally Krieger would assure a new client of confidentiality in words such as these: "Anything you tell me in which you are going to try to utilize me to commit a crime—or concerning crimes you are going to commit in the future—is not private. But if we deal with the crimes that have already occurred about which you are here to seek advice, there is no power to make me disclose what you say. You can speak as freely to me as you do to yourself."

Times have changed. At the very first client meeting the prudent lawyer needs to discuss the possibility that everything discussed may be subject to revelation. That includes intimate things that might be embarrassing. For Krieger, "You don't want the client to say later, 'But you never told me that what we discussed was going to be made public.'"

When informed of these new rules of the game at their first visit to Krieger's office, clients are shocked. "I recently had a client say, 'What? What? I can't believe this!' I haven't had anyone get up and walk out of my office, but that doesn't mean it won't happen."

There can also be an awkward situation come plea bargain time when the lawyer must announce a breach of the confidentiality firewall. Krieger says, "The lawyer will need to tell the client: 'During these negotiations you will be subject to a no-holds-barred interrogation by the government. So … remember what you told me about what happened with so and so?' If they ask questions about that, you will have to answer them."

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In the worst-case scenario, the DOJ policy can turn a defense lawyer into an adversary—because of the waiver. After all, the privilege is primarily the client's. "An attorney can also be hit with a subpoena when the plea negotiations begin," says Krieger. "I could be asked 'Did your client say this and this?' What if my recollection differs from that of my client? Then the question will arise as to whether the client has made a full statement." In such cases, the lawyer's testimony could be used against the client.

Defending the Rules: A Good Purpose, But to What Effect?

Given all these concerns, is the bill for a higher level of perceived ethical standards too high? At what point is too much information subject to disclosure?

Mark Radke acknowledges that many people are concerned about the chilling effect of the new rules. "It may be that a client will not be completely candid if notes at a meeting will likely end up at the SEC," he says. "With any public policy question you have a balancing act, and that is a real concern."

Nevertheless, he feels that the new SEC posture serves a good purpose. "The SEC is giving more leverage to the attorney to make sure the client does the right thing. The attorney now sees that if the client is not following his or her advice, that is not the end of the analysis. I think that is a healthy thing."

In the best of all resolutions, Radke says, corporate management will become more candid about company problems to avoid the penalties of disclosure down the road. Corporate officers will "regard what they say more carefully because they assume that it will go to all their constituencies."

"You will get to the point that even if there are problems, they are discussed openly," Radke believes. "Long term what we are going to see in management in corporate America is a much more transparent management style."

What about the deleterious effects on open lawyer-client communication? Radke says the jury is still out. "It's too early to know how the new rules will ultimately affect attorney-client relations." He notes, though, "From the experience I have had to this point, I am not aware of any material chilling effect."

But good intentions can have unintended effects, especially in situations of moral ambiguity. "I fully understand what the regulators are trying to get at," says Welch. "They want lawyers to respond appropriately and not be just scriveners. While that was the impetus for the rules, like with any other policy change there is blowback, and the result may be the opposite of what is desired: less, not more, compliance with the law." LP

Phillip M. Perry (phil@pmperry.com) is a New York-based, award-winning freelance writer who frequently covers legal issues.

Lawyers at Risk

The SEC rule may be putting lawyers in an untenable spot–behind a moral eight ball.

The internal turmoil that the new SEC regulations have inspired in law firms indicates that firms need to tread carefully over what is largely uncharted terrain. "Everyone is real wary that their own law firm will end up as a test for the SEC," says Lawrence J. Fox, partner at Drinker Biddle & Reath. "There are lots of memos going around law firms figuring out how to comply with the Sarbanes-Oxley Act. In my own firm, we sent around a memo to our lawyers reminding them of our obligations under the law."

His firm requires lawyers who think that they're in a situation covered by the new regulations to report to the managing partners for guidance.

Lawyers who make the wrong moves face financial damage and possible prosecution. "Now lawyers have to worry about not only protecting and advising clients but also about protecting themselves and whether they have complied with the letter of the law or whether their actions could be misconstrued," says Dana Welch, managing partner at Ropes & Gray's San Francisco office. "For example, the SEC could say with the benefit of 20/20 hindsight an attorney did not appropriately report up the ladder or did not correctly analyze whether there was an appropriate client response to a warning. The result is that the lawyer could be deprived of the ability to practice before the commission. For securities lawyers, that is our livelihood."

See no evil, hear no evil? Life is full of ambiguities that could send clients down shadowy moral roads, and sometimes the lawyer is the last to know. "In many cases lawyers do not see fraud occurring and often end up representing clients who have alleged to have engaged in fraud," [AQ: WHO?] points out. Once in that position, the lawyer is endangered. The question becomes an echo of the old refrain: What did you know and when did you know it? "With benefit of hindsight one can always challenge an attorney," says Fox. "The lawyer may face questions such as 'Why didn't you know?' and 'Why didn't you disclose?'"

One example of this risk is provided by Albert J. Krieger, immediate past chair of the ABA Criminal Justice Section. "Suppose an

officer from a company tells me about something that has been going on and tells what steps he has been taking and why. Using my best judgment, I tell the person what he has done is in a gray area but that he has not gone over to the dark side." At this point, Krieger would advise the client on proper actions to take.

"Now suppose a huge news story hits and additional facts come out about the case," Krieger continues. "I can be approached and told that a lawyer with my experience should have known this was part of an ongoing fraud, and that therefore I had a duty to report to those who could stop or mitigate the effects of such fraud, and therefore I am responsible."

The revision to the ABA Model Rules of Conduct to allow lawyers to disclose confidential information in certain circumstances, can also put a lawyer at great risk, Krieger believes. "The danger for the lawyer is that the word 'reasonably' is sprinkled throughout," he says. "But in determining when an attorney is 'reasonably certain' that actions will result in financial harm, we are dealing with subjective evaluations. And subjective evaluations are traps for all who are going to be judged by them."

That the ABA rules permit but do not require disclosure is not much help, says Krieger. "The ABA says a lawyer may reveal a confidence. In real life that creates a huge amount of difficulty. If you are a dissatisfied stockholder who loses enormous money and further discovers that I, as an attorney, did not take a step to stop it, do you think the difference between 'may' and 'shall' will protect me? Not in this world. Not with the juries of today."

But the danger to lawyers does not stop there. If lawyers are expected to read clients' minds on financial matters, why not on matters of physical harm? Krieger offers an example: "How many times have I had a client, just exploding with anger, yell some threat about a particular witness? I know the client is just ventilating and the outburst is the gross equivalent of a mother screaming at her child, 'I am going to kill you if you walk in the street again.'

"In such cases I have made reasonable evaluations—based on my knowledge of the individuals—that the person will not act on the threat."

But can Krieger still make such judgments without fear of harm to himself? "The way things are going today, if a client has that kind of outburst I would make a determination of reasonableness with substantial risk to myself. As a result, I am interposing in free and open communication between myself and my client something new: I am no longer thinking of what is good for my client and learning all the facts I can about my client. I am sitting at my desk saying, 'Albert better not get his feet wet.'"

The danger is intensified because of the possibility of client deception. "I know that if I recognize that my client is involving me in criminality, my response is simple and straightforward. I would sever the relationship," Krieger says. "However, you can be duped. It happens."

Theory versus real-world practice. In condemning the new regulatory environment, no one is suggesting that a lawyer be allowed to engage in wrongdoing—the profession, after all, already has rules prohibiting that. "Lawyers should not aid and abet, and if they think they are engaged in an unfortunate adventure, they should withdraw," says Fox. The big problem, he points out, is that moral choices are not as cut-and-dry as some like to believe: "It's easy to say a lawyer should never engage in fraud, and then pose some hypothetical situation. But real life presents lawyers with much more difficult challenges."

— *Phil Perry*