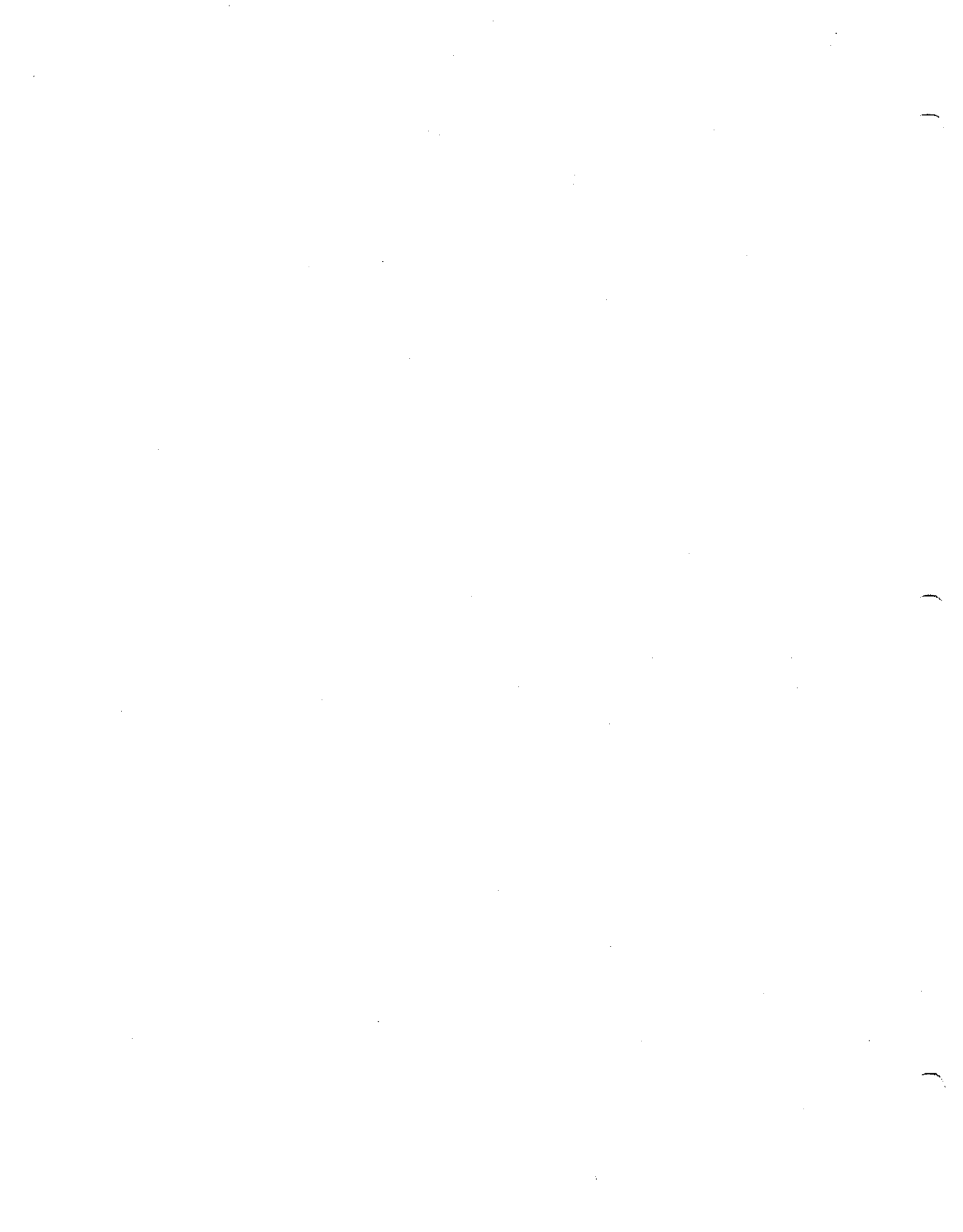


Section Six

Ethical Issues in Representing Children



CLC PRACTICE POINT

No. 10

November 12, 2010

PROTECTING CONFIDENTIALITY IN CHILD PROTECTION CASES

By: Kyle Fisher, University of Minnesota Law School Student (J.D. Candidate, 2012)
And Lori Semke, CLC System Reform Program Director

The experience of representing a child in foster care is a unique one, different from the typical adult client relationship. Not only are the interactions with a child client inherently different from those with an adult client in tone, demeanor and complexity, the court proceedings and interactions with other parties often have a more informal feel. In ideal cases, the child's attorney works collaboratively with the Guardian ad Litem, county attorney, foster parent and social worker to ensure the child is receiving the appropriate services. Disputes are often resolved not by formal motion but by discussing issues openly in court. Because of this less formal nature of child protection proceedings, it is even more critical that children's attorneys remain as vigilant about their duties to their child client as they would be with an adult client in other legal settings. One of the most important obligations, which can be overlooked in casual settings, is the attorney's duty of confidentiality, including protecting the attorney-client privilege.

DUTY OF CONFIDENTIALITY

A lawyer owes a client a number of duties throughout the course of representation. These include competence, deference, diligence and promptness, communication, and confidentiality.¹ Rule 1.6 of the Minnesota Rules of Professional Conduct provides the general rule regarding confidentiality of information. It states, "A lawyer shall not knowingly reveal information relating to the representation of the client."² The confidential nature that exists between attorney and client can be considered the bedrock upon which much of the relationship is founded. The primary purpose of confidentiality is to encourage open communication between lawyers and clients.³ If no such duty existed, the client may be more hesitant to bring problems forth for discussion, as the lawyer could later disseminate such information. This could lead to a number of problems ranging from damage to one's reputation to legal consequences for the client.⁴

REPRESENTING CHILDREN

Children have had a right to an attorney in Minnesota by statute since 1959.⁵ A lawyer owes the same duties to both minor and pro bono clients as they do to paying, adult clients.⁶ Under the Minnesota Rules, the duties

¹ See MINNESOTA RULES OF PROF'L CONDUCT R. 1.1, 1.2, 1.3, 1.4, 1.6 (2009) [hereinafter MRPC].

² MRPC, *supra* note 1, R. 1.6 (A list of exceptions is provided and these include: a client's informed consent, implied authorization, preventing/mitigating damages from crime or fraud, preventing reasonably certain death or substantial bodily harm, obtaining advice about the lawyer's compliance with rules, defending oneself against claims in respect to representation, and compliance with court orders).

³ See MRPC, *supra* note 1, R. 1.6 cmt. 2; *Swidler & Berlin v. U.S.*, 524 U.S. 399, 403 (1998).

⁴ See generally MRPC, *supra* note 1, R. 1.6 cmt. 2.

⁵ Gail Chang Bohr, *Ethics and the Standards of Practice for the Representation of Children in Abuse and Neglect Proceedings*, 32:3 WM. MITCHELL L. REV. 989-990 (2006) (citing 1959 Minn. Laws ch. 685, § 22, subd. 2.).

⁶ See ABA STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES § A-1, § A-1 cmt. (1996) [hereinafter ABA STANDARDS]; MRPC, *supra* note 1, R. 6.2 cmt. 3. See also MINN. STAT. § 260C.163, subd. 3(a) (giving children the right to effective assistance of counsel in connection with proceedings in juvenile court).

of a normal attorney-client relationship are to be maintained while representing a minor “as far as reasonably possible.”⁷

APPLICATION OF CONFIDENTIALITY TO REPRESENTATION OF CHILDREN

As noted previously, a lawyer owes a child client the same duties that he owes an adult. But what makes the application of such duties, particularly the duty of confidentiality, more important in this context? Imagine being a child going through a foster care proceeding – you have been subjected to neglect or physical and verbal abuse, and most (if not all) of the adults in your life have proven unreliable or untrustworthy. Because of their conduct, you are now before a court with a lawyer appointed to represent you. After being hurt by the adults that you cared about the most, and after being removed from your home by adults that you didn’t know, why should you now trust yet another new adult? Imagine how difficult it would be to disclose sensitive personal information to yet another new person involved in your life.

Whereas an adult client may not have such fears and/or lack of trust, many children who are being provided representation in the child protection context will. It is therefore essential to begin the lawyer-client relationship by ensuring that your client has a clear understanding of an attorney’s duties of representation. The ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases encourages such disclosure. It states that the child’s attorney should “counsel the child concerning the subject matter of the litigation, the child’s rights, the court system, the proceedings, the lawyer’s role, and what to expect in the legal process.”⁸ It becomes far easier for a child to open up if they understand the obligations that lie on the lawyer’s side of the relationship. An explanation that the attorney cannot disclose anything the child might tell him without the client allowing him to, barring exceptions discussed later, may provide the assurance the child needs in order to open up to his or her attorney.

- ❖ **TIP: The ideal opportunity to explain your duty of confidentiality to your client is when you review and have your client sign the CLC representation agreement.**
 - Confidentiality is listed first under “My Rights as a Client,” so take the opportunity to clearly explain why it is so important. Ask the client if she understands what it means, and have her explain it back to you in her own words.
 - Both the lawyer and the child sign the representation agreement. By doing this, the child comes away with a tangible understanding that the lawyer intends to stand by his promise.

- ❖ **TIP: Periodically throughout the representation, remind the child of your duty of confidentiality and make sure she continues to understand it. Your continued protection of the child’s confidences will help build a high level of trust in your relationship with your client.**

- ❖ **TIP: Be mindful of your duty of confidentiality in every interaction you have with the players in the child protection system. It is easy to let your guard down while passing in the halls of the courthouse amidst the chatter and small talk among parties. Be wary that you do not discuss confidential information in this setting or any other public setting.**
 - Parents, Guardians ad Litem, social workers, or others with an interest in the child may also engage you in discussion about the child. Gathering information about the case is always valuable, so you should not avoid these conversations altogether, but

⁷ MRPC, *supra* note 1, R. 1.14(a).

⁸ ABA STANDARDS, *supra* note 6, § B-1(5).

always be alert to the details you are disclosing. Not even the best intentioned inquiry into the child's wellbeing can trump your duty of confidentiality to your client.

ATTORNEY CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE

Giving effect to rule 1.6 are the attorney-client privilege and the work product doctrine.⁹ These principles apply in judicial and other proceedings where a lawyer or client may be called upon to testify or produce evidence concerning the client.¹⁰

Attorney-Client Privilege

The general common law rule for the attorney-client privilege provides that any communication made to an attorney, in confidence, and for the purposes of obtaining legal advice or services is privileged.¹¹ Under this rule, an attorney and client cannot be required to testify or disclose to other parties the contents of privileged communications without the client's consent.¹²

It is important to ensure that no third parties are present when communicating with your client, as the communication would no longer be made in confidence, and thus would not be privileged.¹³ However, some exceptions may be made - for example, if a child needs a guardian, interpreter, or psychological support present to effectively communicate, the communication will still be privileged.¹⁴

❖ **TIP: Explain the attorney-client privilege to the child in simple terms. Emphasize that you cannot share anything you and the client talk about in private about the client's situation with anyone else involved in the case – including the judge, the child's family, the social worker and the guardian ad litem – unless the client approves it.**

➤ **Explain that the right to decide what the attorney can share with other parties belongs to the client, and the attorney cannot waive it without the client's permission.¹⁵ Children feel a sense of empowerment when they understand that in nearly all situations their attorney is bound to the child's decision about what gets disclosed.**

Waiver of the Attorney-Client Privilege

Keep in mind that if the privilege is waived and a privileged communication is disclosed to other parties, another party might be able to seek disclosure of additional privileged communications on the same subject matter.¹⁶

❖ **TIP: You should try to address the possible effects of waiving privilege when you counsel your client about what should and should not get disclosed. If a discussion about the effect of a waiver is not possible, use your discretion to make strategic decisions and assess whether the**

⁹ MRPC, *supra* note 1, R. 1.6 cmt. 3.

¹⁰ *Id.*

¹¹ See David B. Leland, *Attorney-Client Privilege*, 68 GEO. WASH. L. REV. 600 (2000); See also *Colton v. U.S.*, 306 F.2d 633, 637 (2d Cir. 1962); RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 68, [hereinafter RESTATEMENT].

¹² MINN. STAT. § 595.02, subd. 1(b) (2010).

¹³ Leland, *supra* note 11, at 600.

¹⁴ Leland, *supra* note 11, at 601; LISA G. LERMAN, PHILIP G. SCHRAG, *ETHICAL PROBLEMS IN THE PRACTICE OF LAW* 154 (2d ed. 2008) [hereinafter *ETHICAL PROBLEMS*].

¹⁵ See RESTATEMENT, *supra* note 11, § 78; *U.S. v. United Shoe Machine Corp.*, 89 F. Supp. 357, 359 (D.C. Mass. 1950).

¹⁶ See RESTATEMENT, *supra* note 11, § 79 cmt. f. Keep in mind that information itself is not privileged; it is the communication between attorney and client that is privileged. *Id.* cmt. e.

privileged communication does in fact need to be disclosed to achieve the desired goal. If so, limit the disclosure as much as possible.

The Work Product Doctrine

The work product doctrine operates in much the same way as confidentiality and privilege. Anything an attorney prepares in preparation for litigation (i.e. mental impressions, drafts, etc.) is exempt from disclosure.¹⁷

- ❖ **TIP: Explain to your client that any notes you take while interviewing the client and drafts of documents you work on cannot be released without the client's permission or a court order.**¹⁸

Child protection cases often contain a rather large amount of paperwork and documents. Reports and updates are frequently shared with other parties electronically. Pay close attention to what gets sent out to other parties and ensure that work product and privileged information is not included. Your communications with CLC staff in consultation about your case should be considered work product that is not forwarded or otherwise disclosed to other parties.

EXCEPTIONS TO CONFIDENTIALITY RULE

There are some exceptions to the confidentiality rule. The lawyer may reveal confidential information in a number of situations.¹⁹ The exceptions that most likely apply to representation of a child in a child protection matter include informed consent, implied authorization, and preventing reasonably certain substantial bodily harm.²⁰

Consent/Implied Authorization

A client may waive the duty of confidentiality by informed consent – affirmatively telling the lawyer they may disseminate confidential information after being appropriately counseled by the lawyer about the potential consequences of such disclosure. Implied authorization is another form of consent, in which authorization to disclose confidential information is inferred from the representation agreement with the client.²¹ This includes seeking guidance about the case from other attorneys at CLC or within the same firm, admitting the existence of facts that cannot properly be disputed, or disclosing a fact necessary to facilitate a result sought by the client.

- ❖ **TIP: The best practice is to seek explicit authorization from the client. In any situation in which you must disclose confidential information, the disclosure should be no greater than reasonably necessary to accomplish the purpose specified by MRPC Rule 1.6(b). Limit disclosure to only those persons having a need to know it and consider utilizing a protective order where the information is particularly sensitive.**²²

¹⁷ See RESTATEMENT, *supra* note 11, § 87; *Hickman v. Taylor*, 329 U.S. 495 (1947).

¹⁸ See MINN. R. Civ. P. 26.02.

¹⁹ See *supra* note 2.

²⁰ See MRPC, *supra* note 1, R. 1.6(b).

²¹ MRPC, *supra* note 1, R. 1.6(a)(3) and R. 1.6 cmt. 5.

²² MRPC, *supra* note 1, R. 1.6 cmt. 12.

Prevention of Substantial Bodily Harm

As the attorney for a child, you are not a mandated reporter for abuse and neglect of children. You should remind your client of this frequently, and reassure them that you are duty-bound to preserve the client's confidentiality. Nonetheless, a lawyer may break the duty of confidentiality if they are reasonably certain that a substantial bodily harm will result from not doing so.²³ This presents a predicament for the attorney in the area of child protective services. For example, if a lawyer believes—based on information about past abuse disclosed to him by the child—that the child may be placed into a potentially dangerous situation, short of reporting this abuse, what options does a lawyer have?

The ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases provide us with useful commentary on this point. This type of ethical conflict may be resolved through the lawyer's "counseling function." Discuss the client's rights and options, your concerns for their safety, the positive and negative consequences that may flow from the available options, and attempt to persuade the child to abandon a proposed course that is dangerous.²⁴ Counseling the client and coming to an agreement to take a safer course of action can have the dual effect of both protecting the child from harm and preserving the trust within the attorney-client relationship. Where a question remains of what should be disclosed without the client's permission, the lawyer may seek advice from CLC, or more formally from the Office of Lawyers Professional Responsibility, about compliance with the rules.²⁵

- ❖ **TIP: When you are concerned about a risk of substantial harm because of something your client has shared in confidence, take advantage of your unique counseling role to explore all aspects of your client's wishes. See if you can find a way to remove the risk of harm without disclosure of confidential information.**

- ❖ **TIP: If the client does authorize the disclosure of information, or if you are required to disclose confidential information for any reason, make sure your disclosure covers only that which is necessary and in the narrowest possible scope and to the fewest people practicable.**²⁶

CONCLUSION

Preserving your client's confidentiality is a key part of building trust – an aspect of the attorney-client relationship that is particularly important and challenging when representing a child in foster care. Do not be lulled into complacency by the more informal nature of child protection proceedings, but rather be mindful at all times of your duty of confidentiality with every action you take as the child's attorney. By holding your duty inviolate, and preserving the attorney-client privilege at all times, your client's trust in you will increase and you will be an even more effective counselor and advocate for the child.

²³ MRPC, *supra* note 1, R. 1.6(b)(1). According to the Restatement, disclosure of confidential information to prevent a threat to someone's life or safety would not constitute a waiver of the attorney-client privilege. See RESTATEMENT, *supra* note 11, § 79 cmt. c.

²⁴ ABA STANDARDS, *supra* note 6, § B-4(3) cmt.

²⁵ MRPC, *supra* note 1, R. 1.6(b)(4) ("A lawyer may reveal information relating to the representation of a client . . . to secure legal advice about compliance with these Rules."), and R. 1.6 cmt. 7.

²⁶ ETHICAL PROBLEMS, *supra* note 14, at 162.

