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CONFIDENTIALITY UNDER THE PENNSYLVANIA ATTORNEY-CLIENT PRIVILEGE STATUTES AND THE NEW PENNSYLVANIA RULES OF PROFESSIONAL CONDUCT†

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THE relationship of Pennsylvania’s attorney-client privilege statutes (the Privileges) to the attorney’s obligation with respect to confidentiality under the applicable codes governing attorney conduct has never been entirely clear.1 The Pennsylvania Supreme Court’s adoption of the Pennsylvania Rules of Professional Conduct2 (the Rules) presents an opportunity to re-examine and clarify the relationship between the two.

The Privileges provide that in either criminal or civil proceedings, “counsel shall not be competent or permitted to testify to confidential communications made to him by his client.... unless... this privilege is waived upon the trial by the client.”3 Rule 1.6 of the Pennsylvania Rules of Professional Conduct states that, “a lawyer shall not reveal information relating to representation of a client... without the client’s consent.”4 The rule also

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The author wishes to express his thanks to those organizations and to his colleague, Professor Doris Del Tosto Brogan, for her thoughtful suggestions.

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3. 42 PA. CONS. STAT. ANN. §§ 5916, 5928 (Purdon 1982).

4. PENNSYLVANIA RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (1987). In full, Rule 1.6 provides:

(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 paragraphs (b) and (c).

(b) A lawyer shall reveal such information if necessary to comply with the duties stated in Rule 3.3.

(91)
states that this duty “continues after the client-attorney relationship has terminated.”

It is clear that both the Privileges and the Rules share a common purpose—preventing lawyers from disclosing information about the client. However, despite this common purpose, the Privileges and the Rules are worded quite differently. The purpose of this article is to explore these differences in language and the reasons for them.

First, the Privileges and the Rules are aimed at different audiences. The Privileges speak to the judge; they tell the judge that “counsel shall not be competent or permitted to testify” as to protected information. This is an instruction to the judge to exclude this evidence assuming, of course, that there has been a timely objection. On the other hand, the Rules speak to the lawyer; they tell the lawyer that he shall not reveal “information relating to representation of a client.”

Second, since the Privileges speak only to the judge, they apply only in the context of litigation—at trial and in discovery. The Rules do not say anything about matters or proceedings and thus, apply not only in litigation but everywhere.

In addition to these differences in language, the Privileges and the Rules have different rationales. The rationale for the Privileges is based on three assumptions. First, it is desirable for lay persons to seek legal advice, both in the context of litigation

(c) A lawyer may reveal such information to the extent that the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm or substantial injury to the financial interests or property of another;

(2) to prevent or to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services are being or had been used; or

(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 or disciplinary proceeding 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.

(d) The duty not to reveal information relating to representation of a client continues after the client-lawyer relationship has terminated.

Id.

5. PENNSYLVANIA RULES OF PROFESSIONAL CONDUCT Rule 1.6(d) (1987).
8. PENNSYLVANIA RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1987).
and in other matters where their conduct may touch on legal concerns. Second, the lawyer must know the facts in order to give sound and accurate legal advice. And finally, the lawyer must be able to assure the client of confidentiality, or else the client may be inclined to hold back information or to give inaccurate information.\(^{10}\)

The express rationale for the Rules is similar:

The ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance. . . . [and] to communicate fully and frankly . . . even as to embarrassing or legally damaging subject matter.\(^{11}\)

The Rules are designed to accomplish other goals as well. The lawyer's duty of confidentiality is derived not only from the law of evidence, but also from the law of agency.\(^{12}\) The lawyer, as an agent, owes a fiduciary obligation to his client. The concept of fiduciary duty goes beyond nondisclosure. A fiduciary owes a

\(^{10}\) See Upjohn Co. v. United States, 449 U.S. 383 (1981); C. McCormick, McCormick on Evidence § 87 (3d ed. 1984 & Supp. 1987); 8 J. Wigmore, Evidence 2291 (McNaughton rev. 1961 & Supp. 1986); C. Wolfram, supra note 1, § 6.1.3. Pennsylvania courts have adopted the rationale for the Privileges as expressed by Professor Mechem:

The purposes and necessities of the relation between a client and his attorney require, in many cases, on the part of the client, the fullest and freest disclosure to the attorney of the client's objects, motives and acts. This disclosure is made in the strictest confidence, relying upon the attorney's honor and fidelity. To permit the attorney to reveal to others what is so disclosed, would be not only a gross violation of a sacred trust upon his part, but it would utterly destroy and prevent the usefulness and benefits to be derived from professional assistance. Based upon considerations of public policy, therefore, the law wisely declares that all confidential communications and disclosures, made by a client to his legal adviser for the purpose of obtaining his professional aid or advice, shall be strictly privileged;—that the attorney shall not be permitted, without the consent of his client,—and much less will he be compelled—to reveal or disclose communications made to him under the circumstances.


\(^{11}\) See Pennsylvania Rules of Professional Conduct Rule 1.6 comment (1987).

\(^{12}\) See Model Rules of Professional Conduct Rule 1.6 notes (Proposed Final Draft 1981); Restatement (Second) of Agency § 395 (1958); C. Wolfram, supra note 1, § 6.7.6.
duty of loyalty to his principal. Thus, a fiduciary should not use his position or the information which he gains in connection with his position to benefit any other person, including himself.13

For example, in the case of Slater v. Rimar, Inc.,14 the plaintiff, a minority shareholder, sued the defendant corporation and the individual who was its president and principal shareholder. The defendants sought to dismiss the action and to remove the plaintiff's lawyer on the ground that he had previously represented the defendants and had gained confidential information while serving in that capacity. The Pennsylvania Supreme Court affirmed the dismissal of the action and the removal of the lawyer based on a finding of fact that the action was based on information gained during the attorney-client relationship.15

This duty of loyalty also provides the very foundation of the lawyer-client relationship. A lawyer often develops a feeling of rapport or friendship with the client.16 A lawyer need not sympathize with what his client has done or plans to do, the lawyer might even decide not to assist his client because he disapproves of his client's proposed actions. However, the suggestion that the lawyer should do anything to harm or embarrass his client is offensive. This sense of the loyalty owed by lawyers to their clients was reflected in the old Pennsylvania Code of Professional Responsibility's (the Code) prohibition against revealing secrets—"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."17 The new Rules' prohibition against the revelation of any "information relating to representation of a client" continues this duty of loyalty.18

15. Id. at 154, 338 A.2d at 590-91.
16. See Fried, The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation, 85 Yale L.J. 1060 (1976). Professor Fried makes a somewhat different point than the one I am making. He finds social utility for lawyer's actions on behalf of their clients because lawyers are uniquely capable of providing assistance in legal matters. Id. at 1072. My point is that lawyers do, in fact, develop friendships with their clients and that, as a result, lawyers and their clients are emotionally torn when the lawyer is compelled to act in ways which appear to be disloyal.
18. Pennsylvania Rules of Professional Conduct Rule 1.6(a) (1987). This sense of the duty of loyalty is not expressly mentioned in the Rules. It is rarely mentioned in cases, but the court in Slater v. Rimar, Inc., 462 Pa. 138, 358 A.2d 584 (1975), expressed a similar idea when it stated: "[i]t[o] permit the attor-
The goal of promoting loyalty is a worthy one. The feelings of friendship which lawyers feel for their clients and the feelings of satisfaction which lawyers derive from helping their clients are among the reasons why men and women enter the profession and why they remain in it. Clients and the community-at-large are benefitted by attorney-client relationships which are based upon this foundation of loyalty. The Rules advance this goal by instructing lawyers about how they are to behave toward their clients and by providing sanctions for those lawyers who do not live up to the standards. But this goal of loyalty, with its requirement of nondisclosure, is not an absolute value. Nondisclosure, to some extent, conflicts with the duty of the courts to make accurate fact-findings and to render justice among competing litigants. The obligation of the judge as defined by the Privileges, is thus quite different from the obligation of the lawyer, as defined by the Rules. The final result is that the Privileges provide a narrower zone of protection for client information than do the Rules. This can be observed by once again looking at the language of the Privileges and the Rules.

ney to reveal to others what is so disclosed, would be not only a gross violation of a sacred trust upon his part, but it would utterly destroy and prevent the usefulness and benefits to be derived from professional assistance." Id. at 148, 338 A.2d at 589. (emphasis added).

Similarly, McCormick has stated:

Our adversary system of litigation casts the lawyer in the role of fighter for the party whom he represents. A strong sentiment of loyalty attaches to the relationship, and this sentiment would be outraged by an attempt to change our customs so as to make the lawyer amenable to routine examination upon the client's confidential disclosures regarding professional business. Loyalty and sentiment are silken threads, but they are hard to break.

C. McCormick, supra note 10, § 87, at 205-06.

Wigmore has also discussed this duty:

If the counselor were compellable to disclose, 'no man... of a noble or elevated mind would stoop to such an employment.' Certainly the position of the legal adviser would be a difficult and disagreeable one, for it must be repugnant to any honorable man to feel that the confidences which his relation naturally invites are liable at the opponent’s behest to be laid open through his own testimony. He cannot but feel the disagreeable inconsistency of being at the same time the solicitor and the revealer of the secrets of the cause. This double-minded attitude would create an unhealthy moral state in the practitioner. Its concrete impropriety could not be overbalanced by the recollection of its abstract desirability.

8 J. Wigmore, supra note 10, § 2291, at 553 (footnote omitted).

19. See Pennsylvania Rules of Professional Conduct preamble; C. Wolfram, supra note 1, § 6.7.3.

20. See C. McCormick, supra note 10, § 87; 8 J. Wigmore, supra note 10, § 2291.
To facilitate a discussion on how these different zones of protection are reflected in the differing language of the Privileges and the Rules, it would be useful to consider the facts of two leading Pennsylvania cases. In *Brennan v. Brennan*, the defendant had taken his children from his wife and removed them to another state. His wife, the plaintiff in the case, petitioned for custody. The defendant did not appear at the hearing and temporary custody was awarded to the wife. This order was not carried out because the defendant's whereabouts were unknown. The defendant, through counsel, then petitioned for a continuance on the grounds that he had not received notice of the earlier hearing and that the court lacked personal jurisdiction over him. At the hearing to resolve these issues, counsel was asked to disclose the whereabouts of his client and the children. Counsel refused. He asserted the attorney-client privilege and alleged that his client had specifically requested that he not disclose this information. The trial court ordered disclosure. The Superior Court reversed and held that, on these facts, the attorney-client privilege protected the information. The court referred to the Code of Professional Responsibility, but only as support for its ruling with regard to the privilege.

In *Commonwealth v. Maguigan*, the lawyer represented a client who had been charged with rape and related offenses. The client had been released on bail. When he failed to appear on the day of trial, the court forfeited bail and issued a bench warrant. The District Attorney, believing that defense counsel knew the defendant's whereabouts, asked her to reveal them. The lawyer refused, asserting the attorney-client privilege. The court ordered the attorney to answer and, when the attorney continued to refuse, imposed a fine of $100 per day until she complied. The Superior Court reversed this order and the case went to the Supreme Court on appeal. The Supreme Court found that the information as to the client's whereabouts was not privileged and reinstated the order of the trial court. The court made a number of references to the Code of Professional Responsibility, but again it is not clear what, if any, real impact the Code had on the decision.

In *Maguigan* it is not clear how the lawyer learned of her client's whereabouts. By hypothesizing various ways the lawyer

might have acquired this information, the differing zones of protection under the Privileges and the Rules become apparent.

First, the Privileges apply only to "communications;" the Rules apply to "information." The word "information" creates a larger zone of protection because it protects knowledge which the lawyer has acquired from sources other than communications. For example, assume that the client had been released on bail and that the lawyer were to suggest to the client that she would like to see his records relating to the incidents involved in the case. The client suggests that he will pick up the lawyer and drive her to the place where he has the records. The lawyer is picked up and sees that the client has driven her to a home in New Jersey. It is obvious when they arrive that the client is living at the home. The lawyer's observations would give her "information," but that information would not be learned through "communications" and, therefore, would not be protected by the attorney-client privilege. The Rules, however, would protect that information.

Second, the privilege statutes apply only to communications from the client to the lawyer. On the other hand, since the Rules apply to all information, they would also protect communications from witnesses and third persons. Thus, if the lawyer had learned where the client was living from a third person, the Privileges would not protect the information, but the Rules would. In addition, communications from the lawyer to the client are not protected by the Privileges if they do not reveal the client's communications. However, communications from the lawyer to the client are protected by the Rules. Thus, if the lawyer were asked in court whether she had told her client that he was required to appear in court on a given day, that communication would not be protected by the Privileges, but it would be protected by the

23. See Pennsylvania Rules of Professional Conduct Rule 1.6 comment (1987); C. Wolfram, supra note 1, § 6.7.2.
26. See C. McCormick, supra note 10, § 89; C. Wolfram, supra note 1, § 6.3.5.
27. See United States v. Woodruff, 383 F. Supp. 696 (E.D. Pa. 1974) (neither communications from defense counsel to defendant nor from defendant to defense counsel regarding time and place of trial are protected by attorney-client privilege).
Third, although the privilege statutes do not say on their face that they are limited to communications made for the purpose of obtaining legal services, it is quite clear that they have been so interpreted. The Rules, however, protect information "relating to representation of a client." The effect of this difference in language is unclear at this point because the courts have not given a uniform reading to the term "made for the purpose of obtaining legal services." In *Brennan*, the Superior Court held that information about the client's whereabouts was privileged and suggested that the communication was protected if it "relates to a fact of which the attorney was informed for the purpose of securing either a legal opinion, legal services, or assistance in some legal proceeding." In *Maguigan*, the Pennsylvania Supreme Court said that communications made to a lawyer "for the purpose of obtaining his professional aid or advice" were privileged. The *Maguigan* court held that the information about the client's whereabouts was not privileged because it was not given for the purpose of obtaining legal services. The court seemed to say that only the facts relating to the initial crime were privileged.

The Rules, however, might have extended protection to the client's whereabouts in *Maguigan*. For example, assume that the client, who has been released on bail, calls the lawyer to talk about his case. At the end of the conversation he says to the lawyer, "if anything develops give me call at this phone number." On the day of the trial the client fails to appear. The judge asks the lawyer whether she knows where her client is. That information is not protected by the Privileges because the client's whereabouts have nothing to do with the facts of the matter about which the lawyer was consulted. However, since the information relates to the representation, the lawyer would be prohibited by the Rules from revealing the information.

Fourth, the Privileges apply only to confidential communications. "Confidential" communications are those which the cli-
ent attempts to keep confidential—those which the client expressly instructs the lawyer to keep confidential or which the client would reasonably expect the lawyer to keep confidential. In Brennan, the client specifically asked his lawyer to keep his whereabouts confidential. The Superior Court held that under these circumstances the client's whereabouts were protected by the privilege. In Maguigan, there is no indication that the client had made such a request, but it is safe to assume that the client did not wish his whereabouts to be disclosed. The Supreme Court held that the information was not privileged.

For purposes of our hypothetical situation, assume that the client had not indicated that he wanted the information to be kept confidential. In fact, suppose he had told his lawyer that if any of his friends called about him, that the lawyer should give them his phone number. That communication would not be privileged, but it would be protected by the Rules. The Rules protect all information relating to representation unless the client consents to disclosure after consultation or unless it is implied that disclosure is permitted in order to carry out the representation. Since the client did not consent to disclosure to anyone but his friends, the information is protected by the Rules.

Fifth, the exceptions to the privilege statutes are different than the exceptions to the Rules. The Privilege exceptions are not expressed in the statute, but have been established by judicial interpretation. They include situations in which the lawyer provides joint representation to two or more clients, situations in which the client sought legal advice to assist in a crime or fraud, situations in which there are controversies between the lawyer and client or in which there is an attack on the lawyer's perform-

A.2d 510; C. McCormick, supra note 10, § 91; C. Wolfram, supra note 1, § 6.3.7.

32. See C. McCormick, supra note 10, § 91.

33. 511 Pa. at 128, 511 A.2d at 1335. The court stated that the client "did not have the right to refuse to disclose his whereabouts to the court, nor could he have had a legitimate expectation that any information in this regard transmitted by him to his attorney would remain confidential." Id.

34. PENNSYLVANIA RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (1987).


ance of his duties,\textsuperscript{37} and situations in which the privilege would not serve the interests of justice.\textsuperscript{38} In \textit{Brennan}, none of these exceptions were applicable. In \textit{Maguigan}, however, the court seemed to indicate that the client's communications fell within the crime or fraud exception and, therefore, were not privileged.

However, these communications would have been protected under the Rules. Although the Rules do not \textit{require} such disclosure, they do \textit{permit} the lawyer to disclose information if disclosure would "prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm or substantial injury to the financial interests or property of another,"\textsuperscript{39} or "prevent or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services are being or had been used."\textsuperscript{40} Neither of these exceptions appear to apply to the situation presented in \textit{Maguigan}.\textsuperscript{41}

Having established that the Rules provide a wider zone of protection than do the Privileges, the question becomes, what should the court do when the information sought is not protected by the Privileges, but falls within the wider zone of protection provided by the Rules? At first blush, this appears to be a difficult question. If the judge orders the lawyer to answer, and she disobeys the order, she may be subject to contempt sanctions. If she obeys the order, she may be subject to professional discipline. The Pennsylvania Code of Professional Responsibility permitted a lawyer to reveal information when required by court order.\textsuperscript{42} Although this provision is not in the new Rules, one commentator has said that it is implicit in them because a lawyer cannot be disciplined for obeying the lawful order of a court.\textsuperscript{43}

This leads to the question of whether it is lawful for a court to


\textsuperscript{39} \textbf{PENNSYLVANIA RULES OF PROFESSIONAL CONDUCT} Rule 1.6(c)(1) (1987).

\textsuperscript{40} \textbf{PENNSYLVANIA RULES OF PROFESSIONAL CONDUCT} Rule 1.6(c)(2) (1987).

\textsuperscript{41} In \textit{Maguigan}, the court relied upon the Pennsylvania Code of Professional Responsibility DR 4-101(C)(2), which permitted disclosure when required by law or court order, and DR 4-101(C)(3), which permitted disclosure of the intention of a client to commit any crime. The Rules appear more protective in this situation.

\textsuperscript{42} See \textbf{PENNSYLVANIA CODE OF PROFESSIONAL RESPONSIBILITY} DR 4-101(C)(2) (1974).

order a lawyer to violate the requirement of confidentiality which is imposed by the Rules? The answer to that question is yes—it is lawful to order a lawyer to reveal unprivileged information even though it is protected by the Rules. The Preamble to the Rules provides: "[t]hese Rules are not intended to govern or affect judicial application of either the attorney-client or work product privilege." 44 I suggest, however, that courts should look to the Rules and the principles behind the Rules before they order a lawyer to disclose unprivileged material which is protected by the Rules.

As noted previously, the Privileges are an attempt to strike a balance between the goals of confidentiality and truth seeking. But the narrow zone of protection provided by the Privileges may leave the client with the feeling that he has been betrayed by his lawyer. Moreover, the lawyer may feel that she has not been the loyal friend that she believes she should be. Those concerns are legitimate and are worthy of consideration. A court could respond to these concerns in several ways. The court could say that the client was responsible for his disappointment; he chose to disobey the law requiring him to appear for trial, so he cannot now complain. In keeping with this response, a court could also say that the lawyer is responsible for her own disappointment; she should either have warned her client of the kinds of information that would not be protected, or have taken steps to assure that she not obtain the information. But, perhaps the best response is to say that these concerns have already been weighed in the balance struck by the Privileges—the determination has been made that the judge’s duty to seek the truth in litigation prevails over the lawyer’s concerns about the lawyer-client relationship. While it is certainly correct to subordinate these concerns to the judge’s duty, there are situations in which the court may be able to accommodate these concerns. In such situations, I submit that it is within the court’s discretion to do so. Although there is no direct authority supporting this proposition, there is no authority which precludes the court from exercising its discretion to make accommodations in cases where the information is not privileged but is

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44. Pennsylvania Rules of Professional Conduct preamble. A similar idea was expressed in Estate of Pedrick, 505 Pa. 530, 482 A.2d 215 (1984), where the court held that the Code of Professional Responsibility did not alter substantive law, evidentiary rules, presumptions or burdens of proof. Id. at 543, 482 A.2d at 223. See also In re Search Warrant B-21778, 513 Pa. 429, 521 A.2d 422 (1987) (attorney-client privilege not broad enough to deny enforcement of valid warrant to search attorney’s office for client business records).
protected by the Rules. Neither the text of the current Rules nor the cases construing the Code suggest that the Rules are irrelevant in the courtroom. Consequently, there is room for the courts to work out some accommodation between the Privileges and the Rules.

Two forms of accommodation come easily to mind. First, the court could postpone disclosure from the lawyer until less intrusive steps have been taken to accomplish the court's duties. In Maguigan, the information pertaining to the client's whereabouts was not privileged but, as illustrated previously, the information would be protected by the Rules. When the trial court concluded that the information was not privileged, it immediately ordered the lawyer to disclose the client's whereabouts. At that point, the court could have taken an intermediate step, one routinely taken in many courts, which might have accommodated the interests involved. The court could have asked counsel if she thought that she could bring the client to court. If the court receives what it considers to be reasonable assurances, the court could defer action with regard to disclosure. If the lawyer cannot give reasonable assurances or if the lawyer fails to produce the client, then disclosure should be ordered.

Second, the court could limit disclosure. In Brennan, the Superior Court held that the information concerning the whereabouts of the client and his children was privileged. However, if the lawyer had not discovered this information through a confidential communication, then it would not have been protected. Even if this were the case, there might be some situations where the court could exercise its discretion to protect the information. For example, if the court were convinced that there was some reason to fear that the wife might abduct the children it could order disclosure to the court only.

The proposal which I have made is discussed in Matter of Kozlov.\textsuperscript{45} In Kozlov, a police chief was convicted by a jury in a criminal case. The jurors had been questioned in voir dire prior to trial and all had denied that they knew the defendant. Some time later, a lawyer named Kozlov was consulted by a client whom he had represented for a number of years in business matters. The client wanted to know whether he had any duty to divulge information which he had learned accidentally and which affected the validity of the defendant's conviction. The lawyer and his cli-

ent were not connected in any way with the criminal case except that the client had accidentally overheard one of the jurors boast that he had gotten even with the defendant for the arrest and conviction of a member of the juror's family. This information tended to indicate that the juror had lied in the voir dire. The client gave this information to his lawyer on the condition that the client's identity not be revealed. The lawyer advised the defendant's lawyer, who brought the information to the trial court in an application to have the juror interviewed. The trial court did not interview the juror, but instead questioned the lawyer about the identity of his client. The lawyer asserted attorney-client privilege, but the trial court held that the privilege did not protect the identity of the client and held the lawyer in contempt when he persisted in his refusal to reveal the identity of the client. This result was consistent with the majority of decisions to the effect that the identity of a client is not privileged. The Supreme Court of New Jersey reversed and held that the identity of the client was privileged and therefore, the lawyer was not compelled to reveal the identity of the client, at least until less intrusive means of investigating the juror's actions had been tried. Justice Handler, in a concurring opinion, concluded that identity of the client was not privileged but then he went on to say:

While there is no legal impediment grounded upon a privilege which would prevent the disclosure of the client's identity, it does not follow that such disclosure would come about in every case as a matter of course. It would be wrong to assume that the revelation of a party's identity, even in the absence of a privilege, would be automatic regardless of circumstances. Whether disclosure occurs must be addressed to the sound discretion of the trial judge. As with all demands for the production of evidence or for discovery to find evidence, the court must weigh the need for such evidence or discovery with the countervailing concerns of individuals resisting such demands. It must determine under the

46. See C. McCormick, supra note 10, § 90; C. Wolfram, supra note 1, § 6.3.5. It is probable that the client's identity would not be privileged under Pennsylvania law because the client had been known to the lawyer long before this incident. Therefore, his identity was not learned through a confidential communication. Yet, the client's identity would be protected under the Rules since it is information relating to representation of a client. The Pennsylvania Code would have treated the client's identity as a confidence or secret. Pennsylvania Code of Professional Responsibility DR 4-101(B)(1) (1974).
circumstances of the particular controversy whether such resistance is reasonable and whether safeguards should be erected to protect against unnecessary harassment, unfairness, or oppression.

At this juncture in the present case, it would appear entirely reasonable to require the pursuit of evidence of jury impropriety through alternative means other than compelling disclosure of the client's identity. The Court's opinion explains the reasons for this choice, and even though couched in the terminology of privilege, they nevertheless reflect salutary considerations which should guide a court in the exercise of a sound discretion. In the event there is a continued demand to reveal the client even after the production of other evidence, the trial court should then balance the impact and the intrusiveness upon the client-witness of requiring such disclosure with the adequacy of the available evidence in terms of arriving at the truth. Although a witness' sincere desire for anonymity to avoid personal embarrassment, inconvenience and the like does not in a criminal case weigh as heavily as it might in a civil case, it should nonetheless invite conscientious consideration by the court. The court should look down the road and, if possible, avoid following the route leading to contempt. Moreover, while the client's wish for anonymity may not count for much against the needs of a defendant or the State in the context of criminal proceedings, such anxieties may be entitled to greater solicitude in civil controversies involving only private litigants. While the search for truth is always a paramount value, the struggle between contending private interests in a civil action, whether involving a privilege or not, is more evenly balanced.47

Although Justice Handler's concurrence has no precedential significance in Pennsylvania, I believe that it does point the way to a sensible accommodation of interests in those cases in which a court is called upon to order a lawyer to disclose information which is not protected by the privilege statutes but which is protected by the Rules.

Although the Rules state that they are not intended to govern or affect judicial application of the attorney-client privilege, in the cases of client perjury and fraud in civil litigation the Rules may affect the application of the attorney-client privilege. There are very few problems which are as difficult for lawyers as the problem of what to do when they learn that their client has committed perjury or fraud. The problem is made even more difficult when the information revealing the perjury or fraud was learned through a confidential client communication. The position of the organized bar on this issue has not been consistent, nor has the law. For this reason it is most important to be aware of the provisions of the new Rules.

Under the Code of Professional Responsibility a lawyer had an obligation to reveal fraud by the client "except when the information is protected as a privileged communication." The American Bar Association (ABA) concluded that this language was intended to protect a lawyer from disciplinary action for failing to reveal a client's perjury when that information had been learned through a communication which was subject to the attorney-client privilege. The ABA also took the position that disclosure was not required even if the information revealing the client perjury or fraud had not been learned through a client confidence so long as the information was secret—"information gained in the professional relationship that the client requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."

Pennsylvania law has been unclear on whether or not a lawyer is obligated to disclose client perjury or fraud in civil litiga-

48. For a discussion of these issues in criminal proceedings, see Brogan, Responses to Client Perjury Under the New Pennsylvania Rules of Professional Conduct: The Lawyer's Continuing Dilemma 34 VILL. L. REV. 63 (1989).
49. PENNSYLVANIA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B)(1) (1974). This section of the Code provides:
A lawyer who receives information clearly establishing that:
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 except when the information is protected as a privileged communication.
Id.
51. Id.
52. PENNSYLVANIA CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(A) (1974).
tion. In Commonwealth v. Alderman, the Superior Court noted that this was an unresolved issue in criminal cases and that there was an intense debate on the subject. If we assume that Pennsylvania would have followed the clear language of DR 7-102(B)(1) and the opinion of the ABA, then the new Rules are clearly intended to affect a change. They now require disclosure of client perjury or fraud even if the information revealing the client perjury or fraud was learned through a protected attorney-client communication. This interpretation of the Rules is supported by the ABA's most recent opinion on the issue.

The effect of this rule change is best demonstrated by analyzing cases under both the Code and the Rules. Committee on Professional Ethics and Conduct v. Crary involved a client who lied at her deposition. The client, who was seeking a divorce from her husband, lied when asked about her whereabouts at certain times. Apparently, she had been involved in a meretricious relationship with Crary, one of the lawyers representing her at the deposition. Rather than admit her relationship with Crary, she lied. Crary was disbarred for, among other things, knowingly permitting his client to perjure herself. The court did not specifically rule on the question of whether the lawyer had a duty to disclose the perjury. Had the court proceeded under DR 7-102(B)(1), the lawyer

54. PENNSYLVANIA RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1987). Rule 3.3, under the heading "Candor Toward the Tribunal," provides:

(a) A lawyer shall not knowingly: 
(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

Id.

55. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 87-353 (1987). In its opinion, the Committee described the new approach to client perjury under the Rules as follows:

Model Rule 3.3(a) and (b) represents a major policy change with regard to the lawyer's duty as stated in Formal Opinions 287 and 341 when the client testifies falsely. It is now mandatory, under these Model Rule provisions, for a lawyer, who knows the client has committed perjury, to disclose this knowledge to the tribunal if the lawyer cannot persuade the client to rectify the perjury.

Id.

56. 245 N.W.2d 298 (Iowa 1976).
would have been required to disclose the perjury. The information regarding perjury had not been learned through a protected attorney-client communication. Moreover, the information would not have been protected as a secret because it had not been gained in the professional relationship. If the lawyer had not been involved in the meretricious relationship, but had learned about his client’s participation in such a relationship from a confidential communication by his client, then the lawyer would not have been obligated to disclose by DR 7-102(B)(1).

This result is changed by rule 3.3(a)(2) which requires disclosure when necessary to avoid assisting a client’s criminal or fraudulent act. It may be questioned whether, on these facts, failure to disclose is “assistance of a criminal or fraudulent act.” But ABA Opinion 87-353 indicates that the term “assisting a criminal or fraudulent act”

is not limited to the criminal concepts of aiding and abetting or subornation. Rather, it seems clear that this language is intended to guide the conduct of the lawyer as an officer of the court as a prophylactic measure to protect against client perjury contaminating the judicial process. Thus, when the lawyer knows the client has committed perjury, disclosure to the tribunal is necessary, under Rule 3.3(a)(2) to avoid assisting the client’s criminal act.57

Furthermore, rule 3.3(b) makes it clear that this duty applies “even if compliance requires disclosure of information otherwise protected by Rule 1.6.”58

In In re A,59 the client again was a party in a divorce action. The court asked the client several questions about a fund which the client held as a guardian for his mother. Unknown to the court, the mother had passed away and the client was now the owner of the fund. The client responded to the questions from the court in a way which did not disclose his mother’s death. The client’s statements were not, strictly speaking, perjurious because he never stated that his mother was living. What he did, however, was knowingly take advantage of the fact that the court was making that assumption. The lawyer knew prior to the hearing that

59. 276 Or. 225, 554 P.2d 479 (1976).
the mother had died because his client had told him; therefore, the information was privileged. The court concluded that, in view of DR 7-102(B)(1), the lawyer was not required to disclose the information which he had learned from his client.60

The new Rules also change this result. Although it might be argued that the client's conduct was not criminal or fraudulent because the testimony was not perjurious, the Rules define fraudulent as "conduct having a purpose to deceive."61 Clearly the client's testimony here was intended to deceive. The lawyer would probably also be guilty of offering evidence that he knew to be false, even though the lawyer had not elicited the testimony during his examination. At least one commentator has suggested that the offering language should be interpreted broadly and should extend to those "situations in which most perjurious testimony is probably given, such as in response to cross-examination of the lawyer's own client by an opposing lawyer."62

Although rule 3.3(a)(4) does not specifically mention disclosure as a remedial measure, rule 3.3(b) provides that the duties outlined in 3.3(a) "apply even if compliance requires disclosure of information otherwise protected by Rule 1.6." The official comment provides that disclosure is required if necessary to rectify the situation.63

Earlier I referred to the duty of loyalty which a lawyer owes to his or her client and to the feeling of betrayal which a client might sense if his lawyer were compelled by the court to disclose information which the client would not want revealed. The feeling of betrayal might be most acute if the disclosure were of information learned in an attorney-client communication. The official comment to rule 3.3 recognizes that the client may feel a sense of betrayal but also recognizes that "the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement." The drafters have clearly chosen not to accept this alternative. A lawyer is now subject to professional discipline if he fails to disclose client fraud or perjury, at least where the situation cannot be rectified short of disclosure.

Many lawyers have viewed the attorney-client privilege statutes and the rules governing the profession as giving the client

60. Id. at 240, 554 P.2d at 487.
62. C. WOLFRAM, supra note 1, at 659.
63. PENNSYLVANIA RULES OF PROFESSIONAL CONDUCT Rule 3.3 comment.
almost complete protection against disclosure by the lawyer of client information. The purpose of this article was to review the present status of the law in Pennsylvania with regard to attorney-client confidentiality. This review indicates that Pennsylvania's attorney-client privilege statutes and the new Rules of Professional Conduct provide a much narrower zone of protection than many lawyers think. The new Rules do provide a broader zone of protection than is provided by the privilege statutes, but the Rules only protect the client from misuse of the information by the attorney. They do not prevent a court from compelling a lawyer to disclose information which is not protected by the privilege statutes. The new Rules, in fact, narrow the protection provided by the privilege statutes in that the Rules require disclosure by the lawyer of information protected by the attorney-client privilege statutes when the client has committed fraud or perjury in civil litigation.