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Withdrawal When a Lawyer's Services Will Otherwise Be Used to Perpetrate a Fraud

A lawyer who knows or with reason believes that her services or work product are being used or are intended to be used by a client to perpetrate a fraud must withdraw from further representation of the client, and may disaffirm documents prepared in the course of the representation that are being, or will be, used in furtherance of the fraud, even though such a "noisy" withdrawal may have the collateral effect of inferentially revealing client confidences.

When a lawyer's services have been used in the past by a client to perpetrate a fraud, but the fraud has ceased, the lawyer may but is not required to withdraw from further representation of the client; in these circumstances, a "noisy" withdrawal is not permitted.

The Committee has been asked its views on what the ABA Model Rules of Professional Conduct (1983, amended 1991) require, and what the Rules permit, a lawyer to do when she learns that her client has used her work product to perpetrate a fraud, is continuing so to use it, or plans so to use it in the future. The answers to these questions require a somewhat difficult reconciliation of the text and commentary of three Rules: Rule 1.6, imposing a broad requirement of confidentiality; ¹ Rule 1.2(d), prohibiting a lawyer from assisting client crime or fraud; ² and Rule 1.16(a)(1), requiring withdrawal from a representation where continued representation would result in a violation of the Rules. ³

¹ 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).

(b) 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 and the client, to establish a defense to a criminal charge or civil claim conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

² Rule 1.2 Scope of Representation

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(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

³ Rule 1.16 Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

(1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(2) the client has used the lawyer's services to perpetrate a crime or fraud;

(3) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;

(4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(6) other good cause for withdrawal exists.

(c) When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.

As more fully explained below, the Committee's conclusions are these:

First, the lawyer *must* withdraw from any representation of the client that, directly or indirectly, would have the effect of assisting the client's continuing or intended future fraud.

Second, the lawyer *may* withdraw from all representation of the client, and must withdraw from all representation if the fact of such representation is likely to be known to and relied upon by third persons to whom the continuing fraud is directed, and the representation is therefore likely to assist in the fraud.

Third, the lawyer may disavow any of her work product to prevent its use in the client's continuing or intended future fraud, even though this may have the collateral effect of disclosing inferentially client confidences obtained during the representation. In some circumstances, such a disavowal of work product (commonly referred to as a "noisy" withdrawal) may be necessary in order to effectuate the lawyer's withdrawal from representation of the client.

Fourth and finally, if the fraud is completed, and the lawyer does not know or reasonably believe that the client intends to continue the fraud or commit a future fraud by use of the lawyer's services or work product, the lawyer may withdraw from representation of the client but may not disavow any work product.

The facts we have been asked to assume by the instant inquiry are as follows: The client is a small, non-public company specializing in the business of providing lighting fixtures in new office buildings and other new commercial structures. Its principal assets are receivables and work in progress. For the past three years, the lawyer has been the principal outside counsel to the client, handling a variety of general corporate matters. A year ago, the lawyer acted as counsel for the client in negotiating and drafting loan documents pursuant to which the client obtained from a bank a \$5 million unsecured loan for office expansion and working capital. The loan was for a three-year term during which only interest was payable, on a monthly basis, the principal being payable at the end of the three years. At the loan closing, the lawyer as counsel for the client issued a formal opinion to the bank in the customary form to the effect that (i) the client had been duly organized and was in good standing as a foreign corporation in every state where the nature of its business required such qualification; (ii) the loan transaction had been duly authorized by all necessary corporate action and the loan documents had been properly executed on behalf of the client by its duly authorized officers; (iii) all obligations cited in the loan documents were enforceable against the client in accordance with their terms (subject only to the application and effect of bankruptcy and insolvency laws and the like); and (iv) all installation contracts were enforceable obligations under applicable law against the client's customers.

The bank at closing relied not only on the lawyer's opinion but in addition on the client's audited financial statements which were accompanied by an unqualified opinion in the usual form from the client's independent auditors. The audited financial statements showed the client as a sound enterprise financially, with a net worth in excess of \$15 million, and with no outstanding indebtedness other than to trade creditors. The treasurer of the client executed and submitted to the bank a certificate accompanying the audited financial statements warranting that, at the date of the loan closing, there had been no material adverse change in the financial condition of the client, and that the audited financial statements accurately reflected its financial condition at the date of the loan closing. The bank thereupon closed the loan and advanced the full \$5 million loan proceeds to the client.

Unknown to the lawyer, and also to the accounting firm, the chief executive officer and the treasurer of the client have for the past three years been engaged in a fraud, manufacturing millions of dollars worth of false lighting installation contracts. In many cases, the fraud was facilitated because the client actually did some work in the building in question. The fraud essentially consisted of altering the original contracts, or forging change orders, so as to inflate the contract amount. As a result, the client's audited financial statements for the past three years (including the statements on which the bank relied in closing the loan) were materially misleading. In fact, the company's net worth is less than the \$5 million borrowed from the bank.

The CEO and the treasurer have now confessed the fraud to the lawyer but not to the independent auditors or anybody else. They have represented to the lawyer that they have ceased creating bogus contracts. However, they are unwilling to issue corrected financial statements, which of course would disclose the prior fraud. In addition, they have told the lawyer that they are planning to retain a new law firm as outside counsel and do not intend to disclose the prior fraud to that firm, so that the new firm will be available to use for certain future assignments

involving the false financial statements that they believe the lawyer would be ethically precluded from handling by virtue of what she has learned about the client's true financial situation. These assignments may include new loan transactions, but they may also simply consist of ongoing dealings with the bank from which the first loan was fraudulently obtained, *e.g.*, maintaining a line of credit. Further reliance by the bank on the fraudulent financial statements would of course necessarily entail reliance as well on the lawyer's opinion vouching for the principal asset reflected therein. Implicit in the proposed substitution of counsel is recognition by the CEO and the treasurer that a lawyer who knew of their intention to continue a fraudulent course of conduct against the bank and represented the company in dealing with the bank, would be knowingly assisting the fraud, in violation of her ethical responsibilities.

The CEO and the treasurer have said they will do everything within their power to strengthen the company financially during the two years remaining before the \$5 million debt to the bank matures. The lawyer believes that they are sincere. She also believes their assertions that, although there is a serious threat of insolvency, the client company ultimately will survive because it is slowly developing a good volume of honest business. All agree, however, that even if the client survives, it is unrealistic to expect that the full \$5 million indebtedness to the bank can be repaid at maturity. The CEO and the treasurer have asked the lawyer to remain publicly and officially as counsel to the company, so that she may assist the company's survival efforts in ways that would not directly implicate the opinion in which she expressed confidence in the fabricated installation contracts on which the company's false financial statements are based.

As permitted by Rule 1.13, the lawyer has informed the third member of the client's board of directors, who was not involved in the fraud, of all these facts. After discussing the matter with the CEO and treasurer, the third board member advised the lawyer that he believes the company will survive, and that for the time being he intends to take no action with respect to the fraud other than to assist the CEO and treasurer in avoiding the company's insolvency.

Thus it is that the lawyer knows that so much of her opinion as certifies to the enforceability of the installation contracts is false and its use by the client has been fraudulent. The lawyer also knows, by virtue of the client's representations to her, that the client intends further use of her opinion to defraud the bank and/or other third parties. The lawyer recognizes that in these circumstances, even if the client had not proposed to replace her as counsel, she would be required by Rule 1.16(a)(1)⁴ to withdraw from further representation of the client in matters directly involving her opinion, the fraudulent contracts to which her opinion referred, or the false financial statements that rest upon the fraudulent contracts. She believes that she would also be required to withdraw from representation of the client in any matters involving a continuing relationship with the bank from which the \$5 million loan was fraudulently obtained, since her very presence as a representative of the client could lull the bank into a continuing reliance on its erroneous view of the company's financial condition, as reflected in her false opinion that the installment contracts were enforceable obligations. In either case she believes she would be put in the position of assisting the client's continuing fraudulent course of conduct in violation of Rule 1.2(d).⁵ Her "assistance" would stem in material part from an invited, and assumed, reliance by the bank on her prior representations about the enforceability of the client's installation contracts, and, by extension, about the client's financial situation generally. Her remaining in the role of counsel to the client in matters involving the bank would discourage inquiry into the soundness of the loan and perhaps even encourage the bank to make further extensions of credit. Indeed, the lawyer is persuaded that her remaining as counsel to the company in any capacity, knowing what she does about the company's true financial situation and its intention to continue to deal with third parties as if the fraudulent statements were genuine, is likely to bring her into conflict with Model Rule 1.2(d).

⁴ See note 3, *supra*.

⁵ See note 2, *supra*.

The Committee agrees that Rule 1.16(a)(1) compels the lawyer to "withdraw from the representation" of the company in any matters involving her opinion, the fraudulent contracts, the erroneous financial statements or the bank, since continued representation would constitute assisting the client in a course of conduct known to be fraudulent in violation of Rule 1.2(d).

It is not clear from the facts presented to the Committee whether severance of the *entire* relationship is ethically compelled in this case, as the lawyer apparently believes, or whether she is ethically required to withdraw from representation of the client only in matters relating to the fraud. We do not believe that knowledge of a client's ongoing fraud necessarily requires the lawyer's withdrawal from representation wholly unrelated to the fraud, even if the fraud involves the lawyer's past services or work product. On the other hand, complete severance may be the preferred course in these circumstances, in order to avoid any possibility of the lawyer's continued association with the client's fraud. We would simply point out, however, that withdrawal from matters totally unrelated to the fraud is more likely to be permissive, and governed by Rule 1.16(b), than mandatory under Rule 1.16(a)(1).

The question then arises, what if anything may or must the lawyer do, beyond the simple silent act of ceasing further activity on behalf of the client, if she is obliged to withdraw under Rules 1.16(a)(1) and 1.2(d)?⁶ Specifically, may she withdraw or disaffirm opinions or other documents that she has issued in the course of her representation?

⁶ Withdrawal by counsel, without more, may put the bank on notice that something is wrong, and engender additional inquiries that would discourage further reliance on the fraudulent opinion letter. If withdrawal alone does have this effect, then the lawyer may not do anything further. However, since a silent unexplained withdrawal is far less likely to prevent a violation of Rule 1.2(d) than a “noisy” one, see note 9 *infra*, in most instances a lawyer who wishes to avoid a Rule 1.2(d) violation will have to consider more than a silent withdrawal.

The lawyer is subject to the general prohibition of Rule 1.6⁷ against disclosing information relating to her representation of the company, and the text of this Rule itself contains no exception that would permit her to reveal the fraud to the bank, to the client's stockholders, to the new law firm the company has retained, or to anyone else. Nor is disclosure explicitly authorized by any other ethical rule.⁸ Therefore, the lawyer may not, as a general matter, reveal the client's fraud even in order to save innocent third parties from being victimized or herself from potential civil or even criminal liability. The question we address is whether the lawyer may nonetheless in the circumstances here in question accompany her withdrawal from the representation with disaffirmance of the formal opinion on which the bank relied in making the loan, and which she now knows to be based upon false information provided her by the client, in order to avoid providing assistance in violation of Rule 1.2(d). Such a “noisy” withdrawal is, of course, likely to have the collateral consequence of disclosing, inferentially, information relating to the representation that is otherwise protected as a client confidence under Rule 1.6.⁹

⁷ See note 1, *supra*.

⁸ The provisions of Rules 1.13 (Organization as Client) and 4.1(b) (Truthfulness in Statements to Others) are expressly limited by reference in their text to the prohibitions of Rule 1.6. Rule 3.3 (Candor Towards the Tribunal), whose text contains an explicit exception to the confidentiality requirement of Rule 1.6, is inapplicable in this situation, since the fraud is not implicated in any matter presently before a tribunal. Any argument that Rule 4.1(a) (a lawyer may not “knowingly” make a false statement of material fact) applies in this situation fails in the face of the fact that the lawyer did not know at the time she vouched for the installation contracts that they were false.

⁹ Unlike a silent, unexplained withdrawal, see note 6 *supra*, a lawyer's explicit disaffirmance of work product prepared by the lawyer in the course of the representation, may well be understood as amounting to a representation by the lawyer that the client information on which the disaffirmed document relied is untrustworthy, thereby necessitating the withdrawal. That follows from the fact that it is only in those very circumstances that the lawyer may disaffirm the documents prepared in the course of the representation. Indeed, the whole point of a “noisy” withdrawal is to ensure that those to whom it is communicated understand that the lawyer will no longer take responsibility for the contents of the documents which were prepared in reliance on client representations. Every lawyer and every individual or entity involved in the transaction which has had occasion to rely upon those documents is likely to so interpret their unilateral disaffirmance by the lawyer who prepared them. It must be recognized, therefore, that a “noisy” withdrawal may result in a disclosure of “information relating to representation” that is generally prohibited by Model Rule 1.6.

For reasons discussed below, we believe that Rule 1.6 should not necessarily and in every case “trump” other ethical rules with which it collides, at least to the extent that a lawyer should be allowed (if indeed she should not be required) to withdraw assistance that has unknowingly been provided to a continuing or future fraudulent project in order to comply fully with her obligation to “withdraw” so as to avoid “assisting” client fraud under Rules 1.16(a)(1) and 1.2(d).

Such a “noisy” withdrawal, with its potential for indirectly signaling the client's past wrongdoing, notwithstanding the strict obligation of confidentiality otherwise imposed by the black letter text of Rule 1.6, is clearly contemplated in the following Comment to that Rule:

Withdrawal

If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1).

After withdrawal the lawyer is required to refrain from making disclosure of the client's confidence, except as otherwise provided in Rule 1.6. Neither this rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and *the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.*

Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b). (Emphasis added)

The questions presented by the Comment are, first, in just what circumstances it contemplates a “noisy” withdrawal; and second, whether the Comment correctly interprets the confidentiality requirements of Rule 1.6 in stating that a “noisy” withdrawal is permissible in any circumstances.

As to the first question, we think it clear that the Comment would allow disaffirmance only in circumstances where the lawyer's withdrawal is ethically *required* because of the client's intention of using the lawyer's services (absent effective withdrawal) in a continuing or future fraud. The first of the three paragraphs of the Comment addresses the situation in which “the lawyer's services will be used by the client in materially furthering a course of criminal or

fraudulent conduct," a situation in which the lawyer "must withdraw, as stated in Rule 1.16(a)(1)." The third paragraph concerns the lawyer's doubt as to the client's intention to carry out "contemplated conduct," plainly a reference to the "criminal or fraudulent conduct" referred to in the first paragraph. It would strain common rules of construction to conclude that the middle of three related paragraphs of text, containing the disaffirmance provision, was intended to address broader circumstances than those to which the first and third paragraph are limited: *viz.*, the situation in which withdrawal is mandatory. Disaffirmance is, thus, not contemplated by the Comment where the lawyer's withdrawal from representation is only optional, under Rule 1.16(b).¹⁰ It follows that disaffirmance is not allowed where the fraud is completed, and the client does not, so far as the lawyer knows or reasonably believes, intend to make further fraudulent use of the lawyer's services.

¹⁰ To the extent that the annotations to Model Rule 1.6 may be read to suggest that a "noisy" withdrawal is authorized in circumstances governed by Rule 1.16(b), where withdrawal from representation is not mandatory but merely permissible, we disagree. See *Annotated Model Rules of Professional Conduct* at 100 (1992). That said, however, we note that Rule 1.16(b) permits (but does not require) withdrawal if (1) "the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent," or (2) "the client has used the lawyer's services to perpetrate a crime or fraud." The difference between the situation described in 1.16(b)(1) and that contemplated by 1.16(a)(1), where failure to withdraw would violate the prohibition in Rule 1.2(d) against assisting client fraud, appears to lie in the extent to which the lawyer is persuaded that her client's intended course of conduct is in fact wrongful. (Note that the degree of certitude here at issue relates to the wrongfulness of the client's intended conduct, and *not* the likelihood that the conduct will actually occur—as to which the lawyer need only have a "reasonable belief" to trigger the mandatory withdrawal obligation of Rule 1.16(a)(1).) Once she knows that what her client intends to do is fraudulent, as opposed to merely "reasonably believing" that it is, as contemplated under 1.16(b)(1), her duty to resign the representation under Rule 1.16(a)(1) becomes clear, as does her obligation to disaffirm if necessary. Disavowal of work product is not permissible in cases where withdrawal is voluntary under Rule 1.16(b)(1) rather than mandatory under Rule 1.16(a)(1) precisely because voluntary withdrawal occurs by definition in circumstances where the lawyer does not know that the client's intended course of conduct is fraudulent, and hence does not have the same need to make her withdrawal effective so as to avoid assisting that fraud.

A more difficult question is whether the "Withdrawal" Comment to Rule 1.6, asserting in effect that the confidentiality requirement of the Rule is subject to an exception for "noisy" withdrawals, correctly interprets the text of that Rule in its interplay with the other pertinent Rules. We are cognizant, in this connection, of the observation in the "Scope" section of the Rules that Comments "are intended as guides to interpretation, but the text of each Rule is authoritative." See *Annotated Model Rules of Professional Conduct* at 10 (1992) (hereafter 1992 Annotated Rules). We are also mindful of the fact that the House of Delegates, which adopted this Comment (along with the entire body of Commentary to the Rules) at its Annual Meeting in 1983, had six months earlier rejected a proposal of the Commission on Evaluation of Professional Standards (known as the "Kutak Commission") that would have included in Rule 1.6 a provision giving a lawyer the discretion to reveal information relating to the representation of a client to the extent the lawyer reasonably believed necessary "to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services had been used" (proposed Model Rule 1.6(b)(2), Final Draft of the Proposed Model Rule of Professional Conduct, May 30, 1981).¹¹ The effect of the two actions of the House of Delegates, taken together, was to reject an explicit exception to the obligation of confidentiality with respect to client fraud in the text of Rule 1.6, but to adopt a statement in the Comment to the effect that an exception relating to that general subject—albeit a substantially narrower one—was to be implied.

¹¹ In 1991 this Committee proposed an amendment to Rule 1.6 that would have incorporated the "rectification" provision defeated in 1983 into the text of Rule 1.6. The proposal was again defeated after sharp debate in the House of Delegates. See 60 U.S.L.W. 2122 (August 20, 1991). A number of states adopting the Model Rules have amended their rules to allow or require disclosure of client fraud. See G.C. Hazard & W.W. Hodes, *The Law of Lawyering*, App. 4, 1259-66 (2d ed. 1990). See also *Restatement (Third) of the Law Governing Lawyers* §§117(A), 117(B) (Tent. Draft No. 3, 1990) (duty of confidentiality permits disclosure of crime or fraud threatening substantial financial loss; one proposed alternative would permit disclosure only where the lawyer's services have been used, the other would not).

The question before us is, at heart, whether the "Withdrawal" Comment is appropriately to be given meaning—i.e., viewed as legitimate interpretation of the Rules—or instead simply ignored. We think the former: that the Comment correctly reflects the need to interpret Rule 1.6's requirement of confidentiality in light of what Rules 1.2(d) and 1.16(a)(1) require of a lawyer in a situation where continued representation of the client will entail the lawyer's assisting in the client's continuing or future fraud and withdrawal is therefore mandatory.

We note that neither Rule 1.16(a)(1) nor Rule 1.2(d) is qualified, as are other possibly relevant provisions of the Rules, *see* note 8, *supra*, by a caveat that compliance is subject to the obligation to protect client confidences contained in Rule 1.6. While it is also true that neither Rule contains language explicitly overriding the confidentiality requirement of Rule 1.6 (as do Rule 3.3 and, of course, Rule 1.6 itself), the absence from their text of a preemption clause does not seem to us necessarily determinative of the proper course of conduct in a situation where compliance with Rules 1.16(a)(1) and 1.2(d) appears to require conduct that may have the collateral consequence of disclosing client confidences. In the absence of a clear textual indication of how such a conflict should be resolved,¹² the Committee believes that the confidentiality requirement of Rule 1.6 should not be

interpreted so rigidly as to prevent the lawyer from undertaking to the limited extent necessary that which is required to avoid a violation of Rules 1.2(d) and 1.16(a)(1).

¹² The commentary to these Rules sends somewhat confusing and even contradictory messages about how they should be interpreted in relationship to one another. For example, a Comment to Rule 1.2(d) ("Criminal, Fraudulent and Prohibited Transactions") suggests that the obligation to protect client confidences should take precedence over the obligation not to assist a client's fraud: "The lawyer is not permitted to reveal the client's wrongdoing, except where permitted by Rule 1.6." On the other hand, a Comment to Rule 1.6 ("Disclosure Adverse to Client") somewhat cryptically appears to negate this suggestion: in discussing the general duty not to disclose, the Comment "distinguishes" several situations, the first of which is a lawyer's counseling or assisting a client in conduct that is criminal or fraudulent in violation of Rule 1.2(d), the necessary implication being that this is a situation in which disclosure adverse to the client may be permissible. This Comment notes that a lawyer's "innocent involvement" in "past conduct" by the client that was criminal or fraudulent does not violate Rule 1.2(d). Again, the implication is that a lawyer's "involvement" in ongoing conduct that she "knows" is fraudulent may permit or require disclosure. This same Comment to Rule 1.6 also identifies the lawyer's duty not to use false evidence in violation of Rule 3.3(a)(4) as a "special instance" of the Rule 1.2(d) duty not to assist. The question then arises whether the provision specifically overriding the confidentiality requirement of Rule 1.6 in Rule 3.3, see note 8, *supra*, should also be read into Rule 1.2(d). We need not, for purposes of this opinion, resolve all of these ambiguities and uncertainties.

We also note that the exception from the requirement of confidentiality that we recognize in this case is different from the exceptions spelled out in the text of Rules 1.6 and 3.3, which explicitly authorize revelation of client confidences. ¹³ The exception here (if "exception" is an appropriate term to describe the inevitable consequences of one rule's operation upon another) simply results from a recognition that fulfillment of the lawyer's obligations under Rules 1.16(a)(1) and 1.2(d) may have the collateral effect of inferentially revealing a confidence. Under these circumstances, we are comfortable concluding that the lawyer should not be prevented from fulfilling those two obligations by a construction of Rule 1.6 as necessarily imposing a categorical bar. ¹⁴

¹³ Professor Hazard has suggested that the "noisy" withdrawal provision in the Comment to Rule 1.6 could also be interpreted as a "modest but significant" attempt to "enlarge" the "self defense" exception to Rule 1.6(b)(2). See Hazard, "Rectification of Client Fraud: Death and Revival of a Professional Norm," 33 Emory L.J. 271, 290 (1984). Paragraph (b)(2) allows disclosure of confidences "to the extent the lawyer believes necessary ... 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 allegation in any proceeding concerning the lawyer's representation of the client." The Committee does not share, or for purposes of this opinion rely on, the view that the permissibility of a "noisy" withdrawal rests upon Rule 1.6(b)(2).

¹⁴ The two other Rules referred to in the second paragraph of the "Withdrawal" Comment overlap Rule 1.6 in suggesting a duty of confidentiality in more narrowly defined situations: Rule 1.8(b) (Conflict of Interest: Prohibited Transactions) provides that a lawyer shall not use information relating to representation of a client to the disadvantage of a client without consent of the client, "except as permitted or required by Rule 1.6 or Rule 3.3 [Candor Toward the Tribunal];" Rule 1.16(d) provides that after termination of representation a lawyer shall take steps reasonably necessary to protect a client's interests, such as giving reasonable notice and surrendering papers or property to which the client is entitled. Our conclusion respecting the need to interpret the confidentiality requirement of Rule 1.6 in light of the requirements imposed by Rule 1.2(d) and 1.16(a)(1) applies as well to any implied obligation of confidentiality deriving from these two other Rules.

This reading of Rule 1.6 finds ample support in the text of Rules 1.16(a)(1) and 1.2(d). Under the mandate of Rule 1.16(a)(1) that a lawyer shall withdraw if the "representation will result in a violation," the term "representation" must be read to include a lawyer's permitting the client's continued use of the lawyer's pre-existing work product. Similarly, under the injunction in Rule 1.2(d) that a lawyer shall not "assist a client in conduct the lawyer knows is criminal or fraudulent," the term "assist" must be reasonably construed to cover a failure to repudiate or otherwise disassociate herself from prior work product the lawyer knows or has reason to believe is furthering the client's continuing or future criminal or fraudulent conduct. It would follow from such a construction of these key terms in Rules 1.16(a)(1) and 1.2(d) that a lawyer's disavowal of work product would be an essential accompaniment to the lawyer's withdrawal from representation. Indeed, it would also follow that such a disaffirmance might be necessary in order to make the withdrawal effective; that is, the lawyer may be required to do more than simply decline to perform further services in order to fully effectuate a "withdrawal" from representation under Rule 1.16(a)(1) and to avoid "assistance" under Rule 1.2(d). In this view, where the client avowedly intends to continue to use the lawyer's work product, this amounts to a *de facto* continuation of the representation even if the lawyer has ceased to perform any additional work. The representation is not completed, any more than the fraud itself is completed. ¹⁵ In order to fully effectuate the withdrawal mandated by Rule 1.16(a)(1), and to avoid assisting client fraud as mandated by Rule 1.2(d), the lawyer may have to repudiate her preexisting work product in addition to refusing to perform any further work for the client.

¹⁵ We do not mean to suggest that disaffirmance would be similarly appropriate long after the lawyer has ceased her association with the client. The possibility of disaffirmance of work product arises in the first place precisely because the work product is perceived as a continuation of the representation, and its repudiation is therefore part and parcel of the mandatory withdrawal. We express no view on a lawyer's

obligations when she discovers long after she has ceased to represent a client that the client intends to make use of her work product to the detriment of third parties. In any event, as a practical matter, we doubt that such a situation is likely to arise.

Such a construction of these key terms in Rules 1.16(a)(1) and 1.2(d) reinforces this conclusion that a lawyer's disavowal of work product may be an appropriate accompaniment to the lawyer's withdrawal from representation; indeed, it may be necessary, in order to make the withdrawal effective.

Two consequences flow from this interpretation of these key terms in Rules 1.16(a)(1) and 1.2(d). First, it provides a rationale for limiting a "noisy" withdrawal to circumstances where the withdrawal is mandatory. Absent imperatives imposed by these other two Rules, that a lawyer disassociate herself from a client's ongoing wrongdoing in order to avoid assisting it, it is neither necessary nor appropriate to permit disavowal of work product and possible consequent revelation of client confidences.

The second conclusion logically to be drawn from this construction of the Rules is that the lawyer's ability to disaffirm work product, and thus attempt to disassociate herself from further client fraud based upon that work product, cannot depend upon whether the client or the lawyer is the first to act in discontinuing the representation. The possibility of a noisy withdrawal cannot be preempted by a swift dismissal of the lawyer by the client. Whenever circumstances exist that would otherwise require a lawyer to withdraw, disaffirmance may be in order even if the client fires her before she has a chance to do so.

Applying Rule 1.6, so construed, we conclude that the instant inquiry presents a situation in which a "noisy" withdrawal would be proper since the client has declared itself determined to engage in further fraudulent conduct that will implicate the lawyer's past services, and the lawyer knows it. Withdrawal from further representation of the client is therefore mandated by Rule 1.16(a)(1). And, if the lawyer reasonably believes that her withdrawal in silence will be ineffective to prevent the client from using the lawyer's work product to accomplish its unlawful purpose, in order to avoid violating Rule 1.2(d), she may take the additional step of disaffirming her work product, with the hope and expectation that this will prevent reliance on that work product by future victims of the client's continuing fraud. Indeed, disavowal of her opinion may be the only way of making her withdrawal effective.

But disaffirmance should be a last resort, and should in any event go no further than necessary to accomplish its purpose of avoiding the lawyer's assisting the client's fraud. Before taking this drastic step, the lawyer should determine whether the circumstances are such that disaffirmance is necessary to disassociate herself from the client's fraud, or whether measures short of disaffirmance will suffice. We can envision situations in which the lawyer's simple silent withdrawal from representation would be sufficient to accomplish this end.¹⁶ We can also envision situations in which the lawyer's intention to disaffirm, announced to the client, would accomplish the same result as actual disaffirmance. And even where disaffirmance is necessary, it may be enough to take measures short of notifying the bank. For example, it may be sufficient for the lawyer to notify the client's new lawyers that she can no longer stand behind the opinion she gave at the loan closing about the enforceability of the installation contracts. Finally, if the bank must be notified, in disaffirming her work product the lawyer should take only such steps as are reasonably necessary to accomplish the intended purpose of preventing use of her work product in the client's fraud. The lawyer may and indeed must decline to discuss or otherwise reveal anything about the disaffirmed work product beyond the simple fact that she no longer stands behind it.

¹⁶ See note 6, *supra*.

It bears emphasis that the conclusion of this Opinion has not been easily reached. It has required clarification and reconciliation of contradictory text and conflicting directives from different parts of the Rules and their commentary, a byproduct of the ambivalence with which the legal profession has historically approached the problem of a client determined to engage in illegal conduct.¹⁷ We are keenly aware of, and support, the high importance placed by the profession on the duty to keep client confidences. And in finding an implied exception to this duty, we are mindful of the fact that limited exceptions to it are spelled out explicitly in the text of Rule 1.6 itself and in the text of Rule 3.3. See note 8, *supra*. Moreover, it has not escaped us that on two occasions, one as recent as a year ago, the ABA's House of Delegates flatly rejected a proposal to make explicit in the text of Rule 1.6 an exception that would permit disclosure in circumstances involving client fraud.

¹⁷ See note 12, *supra*. It may also be noted that the two sentences of the second paragraph of the "Withdrawal" Comment appear flatly inconsistent since a "noisy" withdrawal will almost certainly be viewed as a signal by the lawyer that third parties should no longer trust the client information upon which the disaffirmed document relied. See note 9, *supra*, and accompanying text.

It should be pointed out, however, that the proposal to amend Rule 1.6 that was twice rejected by the House of Delegates would have carved out a much larger exception to Rule 1.6's obligation of confidentiality than is presented by the foregoing interpretation of the Rules: the Kutak Commission's "rectification" provision would have permitted a lawyer to disclose explicitly and directly, and not merely inferentially, a client's fraud, in order to rectify its consequences and not merely to prevent its continuation, regardless of whether it was ongoing or entirely a thing of the past.¹⁸ Our present Opinion reads the Rules as permitting limited disclosure *only* where the client is determined to continue the fraudulent conduct which the lawyer has unwittingly facilitated, or to make use of the lawyer's services or work product in a future fraud, and there is no other way for the lawyer to avoid giving

assistance to such continuing or future fraud in violation of Rule 1.2(d). In these limited circumstances, where silence would result in a violation of the lawyer's duty under Model Rule 1.2(d) not to assist a client's ongoing or intended future fraud, we are persuaded that her duty to keep client confidences must give way to the extent necessary to avoid this result.

¹⁸ See text accompanying note 11, *supra*.

Dissent

We dissent. This opinion attempts to reach a result considered desirable, while at the same time according deference to the text of the Rules which serve as our road map. We think the effort founders on the shoals of the English language as employed in the Rules and as understood when given its common and ordinary meaning.

At the outset, several aspects of the hypothetical fact situation incorporated in the opinion bear mention. The client has told the lawyer that it intends to use in the future the "false financial statements" unwittingly created by the auditors. It has not told the lawyer that it intends to use her past work product—her opinion letter—in the future. The intent to use again that year-old opinion letter is thus no more than an inference the hypothetical lawyer is said to have drawn. That inference, however, is crucial in the reasoning of the opinion that the lawyer's "services" will be employed (interpreting "services" as including "past completed work product", as the majority does). Thus, on the facts in the opinion's own hypothetical, the client's future use of the lawyer's old opinion letter is merely an inference on her part, not something she knows or has been told (or as to which she has even inquired).

Under the hypothetical fact situation, too, the client is taking the initiative in removing the lawyer from any representational activity with respect to the banks involved in the earlier loan transaction. While she is being asked to continue as counsel to the company, she will have *nothing* to do with these banks. The professional services she will be rendering the Company in the future will deal solely and exclusively with *non*-bank-related matters; and it is not even clear that the bank will know that she is still counsel to the Company, since the bank will be dealing with a new law firm representing the Company.

The opinion, however, ignores the premise that the client has said nothing about using again the year-old opinion letter, and treats as irrelevant the fact that the client has taken the initiative to remove the lawyer from all bank-related work.

The flaws in the opinion are many. Chief among them, however, is the lack of a consistent set of reasons for the conclusion.

The opinion bases its conclusion that a "noisy withdrawal" is permissible upon the lawyer's duty to withdraw under Rule 1.16(a)(1) when read in conjunction with Rule 1.2(d). Under that combined reading the lawyer must "withdraw from the representation of a client if the *representation will*" "assist [that] client in conduct that the lawyer knows is criminal or fraudulent."

The first stated conclusion, however, is that withdrawal is mandatory if the representation "directly or indirectly, would have the *effect* of assisting the client's continuing or intended future fraud." This imports into Rule 1.2(d) an *effect* test nowhere found in the Rule's text. (When the Model Rules intend to impose an "effect" test, they do so expressly. See, e.g., Model Rule 3.6 (a) and (b)). This novel gloss requires a lawyer to anticipate every conceivable effect her facially-unexceptionable representation could have, in order to determine whether a client intent upon crime or fraud could directly or indirectly be assisted in its nefarious schemes by her otherwise benign work product or services.

The second stated conclusion requires withdrawal from *all* representation under Rule 1.16(a)(1)—triggering the right (or duty) to "noisily withdraw" the opinion letter—upon a totally *different* ground. This time the opinion shifts to mandatory withdrawal "from all representation if the fact of such representation is *likely* to be *known to and relied upon by* [the bank], and the *representation* is therefore likely to assist in the fraud." (emphasis supplied).

This, presumably, implicates the opinion's "lulling" argument (though, confusing, *that* argument only expressly surfaces once in the opinion, where it is limited to "lulling" by continued representation on *bank*-related matters; more on this anon). The new "lulling" argument appears to be that the "likely" known presence of the lawyer doing *any* work for the client will "lull" the bank into a false sense of security as to her feelings about her client, and the bank will therefore not carefully question any future transaction involving the auditors' false financial statements.

This "lulling" argument ignores the language of the Rules. Rule 1.16(a)(1) mandates withdrawal from representation only if the *representation* will result in the lawyer's assisting a client in committing a fraud. The opinion, however, mandates withdrawal based upon the *likelihood* of the bank's knowledge of and reliance upon the lawyer's continuing but *unrelated* representation. Yet the "representation" on non-bank-related matters will be the same whether the bank *knows* of it or not. The "representation" on non-bank-related matters will be as irrelevant to the client's feared future fraud on the bank whether it is *known* by the bank to exist or *not known*.

The opinion, therefore, has imported the likelihood of the bank's knowledge of and reliance upon the fact of *unrelated* continuing representation; has assumed conclusively that such knowledge will "lull" the bank; and has assumed further that this lulling *effect* of the bank's *knowledge* will result in the lawyer's unwitting *assistance* in the client's future fraud on the bank; and that that "assistance" will violate Rule 1.2(d), triggering mandatory withdrawal under Rule 1.16(a)(1). Aside from the practical impossibility of the lawyer's being able to know or rationally predict the likelihood of the bank's experiencing all these sensations, that simply is not the Model Rule.

In order to reach what clearly appears to be the goal which drives the opinion—the “noisy withdrawal” of a long-since-issued written opinion now known to have been based on false data from the client—one must first find that counsel’s representation of the client, in the words of Model Rule 1.16(a)(1) “will result in violation of” an ethical rule and therefore counsel under that Rule *must* withdraw. The imminently-violated Rule upon which the majority has fastened is Model Rule 1.2(d), which states that a lawyer “shall not ... assist a client, in conduct that the lawyer knows is criminal or fraudulent.” Under Model Rule 1.16(a)(1) the lawyer *must* withdraw from the representation if that representation “will result in violation of” Model Rule 1.2(d). And if she *must* withdraw, the comment to Model Rule 1.6 permits a “noisy withdrawal”.

Clearly, on the facts posited in the opinion the lawyer no longer will have *any* contacts with lenders or others who might know or learn of her old opinion letter. She will be doing *other* things for her client. Under these facts, therefore, she will be doing *nothing* to assist her client in committing a fraud (the fraud being use of her old letter as if it were accurate). Therefore, she will not be violating Model Rule 1.2(d). Therefore, she is not *required* to withdraw from representation under Model Rule 1.16(a)(1). Therefore, the “noisy withdrawal” permitted by the Comment to Model Rule 1.6 in cases of mandatory withdrawal would be impermissible here.

Faced with the plain meaning of the Model Rules (a meaning reinforced by the refusal of the House of Delegates in 1983 to adopt a Rule 1.6 permitting disclosure to prevent client fraud resulting in substantial financial harm to another, and refusal again in 1991 to amend Model Rule 1.6 to permit disclosure of completed matters like the opinion letter to rectify client fraud), the opinion is reduced to the stratagem so felicitously limned by Lewis Carroll:

“When I use a word,” Humpty Dumpty said, in rather a scornful tone, “it means just what I choose it to mean—neither more nor less.”

“The question is,” said Alice, “whether you *can* make words mean so many different things.”

The opinion achieves this lexicographic coup by interpreting Model Rule 1.2(d)’s “assistance” prohibition—“A lawyer shall not ... assist a client...”—to mean that a lawyer shall not keep silent while her client uses the completed product of her *past* services (here, a year-old opinion letter), to perpetrate further crimes or frauds.

“Assistance”, the opinion states, “must be reasonably construed to cover a failure to repudiate or otherwise disassociate herself from prior work product the lawyer knows or has reason to believe is furthering the client’s continuing or future criminal or fraudulent conduct.” That is another way of saying that “assistance” is the failure to undertake a “noisy withdrawal”.

Nowhere in Model Rule 1.2(d) is there a syllable of suggestion that “shall not assist” includes a prohibition upon maintaining the confidentiality enjoined by Rule 1.6 when the lawyer knows of a client’s intent to use the *completed work product* of *past completed* professional services for fraudulent purposes.

The opinion next proceeds to revise the plain meaning of Model Rule 1.16(a)(1). That Rule applies only if the lawyer’s “*representation* will result in violation of” Model Rule 1.2(d). Its meaning is further clarified by the comment to Model Rule 1.6 which permits mandatory withdrawal under Model Rule 1.16(a) only “if the lawyer’s *services will be used* by the client in materially furthering a course of criminal or fraudulent conduct.”

Model Rule 1.16(a)(1), thus, clearly contemplates mandatory withdrawal *only* if *future ongoing* representational services will be improperly used by the client. Only *then* would a “noisy withdrawal” be permissible.

But these words are no impediment. The opinion simply ignores the plain meaning of Model Rule 1.6’s Comment, and reads “representation will result” in Model Rule 1.16(a)(1) to mean the past completed representation in dealings with the bank, which is miraculously resurrected and revived into a *current* representation on banking matters by the client’s decision to make use of the year-old past completed work product of the lawyer, her opinion letter. Lazarus-like, the long-since-interred bank representation is raised from the dead, becoming a *present* representation, and hence capable of having the *future* effect (“representation will result”, “services *will be used*”) the language of the Rules contemplates. (Specifically, the opinion defines “representation” in Rule 1.16(a)(1) as including “a lawyer’s permitting the client’s continued use of the lawyer’s pre-existing work product.”)

Thus the opinion, faced with the intractable problem that the lawyer’s *real future* proposed representation—on non-bank matters—cannot possibly lead her to assist the client in fraud through use of her *past* bank-related opinion (except by the “lulling” argument), is compelled to resort to an act of linguistic prestidigitation: an old opinion letter is transformed into a current representation whenever it is used.

This highlights one of the central problems with the opinion. It vacillates between bank-related representation (from which the client has already excused its old lawyer) and non-bank-related representation (the only representation the client wants the lawyer to undertake). To make sense, the opinion needs to tie *some* “representation” to the feared future fraud so the lawyer can withdraw from it mandatorily and trigger a “noisy” withdrawal. Since clearly the *bank* representation was concluded a year ago, the opinion must resuscitate it by the expedient of the client’s presumed intended future use of the opinion letter. But if no one is persuaded by that miracle of representational resurrection, the opinion shifts ground to the “lulling” effect on the bank that its “likely” *knowledge* of the lawyer’s *non-bank-related* representation will have on it. This, apparently provides the necessary nexus to the imminent fraud that would mandate withdrawal from the *non-bank-related* representation (which is the only representation the lawyer has left). The gelatinous consistency of this reasoning is nowhere more apparent than in the struggle to find a “representation” from which the lawyer can mandatorily withdraw.

The consequences of the representation-resurrection theory are not explored by it beyond its usefulness as something from which the lawyer may mandatorily withdraw, but they bear pondering. If a dead representation is resurrected by the client's decision to use old work product, that result presumably obtains for proper *non-fraudulent* use of work product as well. What duties does the lawyer owe to the revived client during this second representation period? What if the lawyer does not know the client is using the old work product? Under the opinion's theory, the representation is resurrected by the *client's decision* to use it. How can the lawyer fulfill her duties if she does not know she is representing the client again? How long does this second representation last, especially in non-fraud situations where no mandatory withdrawal is possible?

The opinion in footnote 12 refers to Model Rule 3.3(a). While that Rule applies to the lawyer's role as advocate, it is instructive to note that Rule 3.3(b) terminates the lawyer's duties under Rule 3.3(a) at "the conclusion of the proceeding". If the analogous "proceeding" in the opinion's fact situation is not the original long-since-completed loan transaction, what is it?

What about old work product that was produced with the *expectation* it would be frequently used long after the representation had ceased? Does the revival of the representation make the old client a current client for conflict of interest purposes? These and other significant issues are inevitably raised by the theory that a completed representation can be miraculously revived and made into a current representation whenever a former client decides to use again work product prepared and delivered during the past representation.

The *only* virtue of this theory is utilitarian: it gives *some* current representation connected to the bank-fraud issue from which the lawyer can proceed to withdraw. (And as a fall-back position the opinion states that even where, as here, the representation has been *terminated* by the *client*, the lawyer still can mandatorily withdraw from it as if it were still alive if she learns her pre-existing work product will be used fraudulently in the future, conjuring up the hoary scene of old Broadway melodramas: A: "You're fired". B: "You can't fire me, because I quit".)

The problem with this treatment is that it is an artificial construct divorced from the reality predicated by the opinion's own hypothetical. The lawyer *in fact* ceased all work on the loan matter a year ago when the loan was made. The client *in fact* is using a *new* law firm in all dealings with that bank. *In fact* the *only* current representation the lawyer will be handling for the client is that which has nothing whatsoever to do with the bank. Such a non-bank representation will *itself* have *in fact* absolutely no effect on the perpetration of any future fraud on the bank. Only the desire noisily to disaffirm the opinion letter drives the opinion to contrive an alternative theory of artificial resurrection related to the bank from which the lawyer can mandatorily withdraw with a straight face.

Having thus redefined the words of the Model Rules to support its goal of finding a way to disavow the old letter, the opinion is not reticent to permit what it hopes will be a loud and clear signal to others that the client is a defrauder—"information relating to the representation" and hence protected by Model Rule 1.6 (while, of course, maintaining that the lawyer is not really engaged in disclosure of client data, but only in frantic signalling and flag-waving). The fact that the "noisy withdrawal" option is a clear departure from the strictures of Model Rule 1.6, and yet is found only in the Comment to that Model Rule and not in its text, has been no deterrent here. Neither is the fact that, as Professor Geoffrey C. Hazard—the Reporter of the Model Rules project—has conceded in his treatise, the option is

buried disingenuously in the final version of the Official Comment, [and] has potentially broad scope. Indeed, unless it is narrowed by interpretation in light of the general principle of Rule 1.6, it threatens to create an exception broader than any ever proposed by the Kutak Commission.¹

¹ G. C. Hazard and W. W. Hodes, *The Law of Lawyering* 185 (2d ed. 1990).

The opinion, not content with celebrating the disingenuousness of the Comment—a Comment which, like all comments, the "Scope" section of the Rules reminds us is "intended as guides to interpretation, but the text of each Rule is authoritative"—transforms what even the Comment makes a merely *permissive* right to disaffirm under certain circumstances into a *requirement* of disaffirmance in various circumstances (though it nowhere gives guidance on when that option may become a requirement). Throughout, the opinion notes that a lawyer—apparently in order "effectively" to withdraw and save herself from "assisting" in violation of Model Rule 1.2 (d)—may be *required* to "noisily withdraw". Suddenly, this admittedly "disingenuous" *option* becomes transformed into the *only* effective way of accomplishing withdrawal at all.

Apparently, the opinion is interpreting the phrase "may also withdraw or disaffirm any opinion, document..." in the Comment to Model Rule 1.6 to read "may, and under appropriate circumstances *must*, also withdraw..." Presumably, therefore, if this is to be a *duty*, and tied to effective mandatory withdrawal under Model Rule 1.16(a) (1), the lawyer's *failure* to disaffirm documents would be an occasion of disciplinary action against her (and, presumably, admissible evidence against her in any suit by third parties claiming reliance upon her letter).

Might it also permit the lawyer to be subpoenaed by the government in a subsequent prosecution of her former client to answer questions about why she withdrew? Has her "noisy withdrawal" served to waive or breach the attorney-client privilege?

By making mandatory what is at most permissive, the opinion has thus given aid and comfort to those who would increase the exposure of otherwise innocent lawyers to both disciplinary and civil penalties, and perhaps to compelled testimony as well.

Thus, in the face of a fact situation hypothesizing no further professional services by the lawyer on banking matters but *only* on non-banking matters, the opinion is reduced to reviving a dead bank representation—by the inference that the client intends to use a year-old opinion letter—which has the effect of making the bank representation a *de facto* current representation. This provides a representation connected with the bank from which to withdraw (though the lawyer had long since ceased dealing with the bank and the client had hired a new law firm), lest her continued bank work “lull” the bank into crediting her old opinion letter, thus exposing her to the Rule 1.2(d) charge of assisting a further client fraud. Hence, her “noisy withdrawal” option (or duty).

Alternatively, the mere *likelihood* of the bank’s knowledge of and reliance upon the lawyer’s *non-bank* representation is found to produce a lulling effect on an otherwise perceptive bank, requiring mandatory withdrawal from that representation lest the lulling it induces assist the client in its fraudulent purposes.

It must be intuitively obvious to even the most casual observer that the real, actual, non-bank future *representation*—the subject of 1.16(a)’s concern—will have no such effect. Only the lawyer’s silence—or failure to disaffirm her opinion letter—would or could have that effect. But disaffirmance is only possible if withdrawal is mandatory. Withdrawal is mandatory only if continued *representation* will violate Model Rule 1.2(d) by assisting the client in committing a fraud on the bank. But the assistance comes only from the silence resulting from failure to withdraw noisily.

The fatal flaw in the opinion is clear. It has placed the cart of noisy disaffirmance before the horse of mandatory withdrawal and has reasoned backwards. Intent upon finding a way to signal the bank that something is amiss, the opinion reasons that failure to signal would assist the client in perpetrating a fraud, and such assistance would violate a rule, and therefore withdrawal is mandatory.

Especially where, as here, the “noisy withdrawal” result would clearly and ineluctably flow from a *different* Rule 1.6—one with a rectification provision such as many jurisdictions have adopted or one like the rejected Kutak Commission proposal—and especially in light of the firm rejection of just such a Rule twice by the House of Delegates, most recently in 1991, we believe that however desirable might be the result for which the opinion contends, the words of the Model Rules as they presently exist will not bear the weight of the opinion’s construction.

The Rules of Professional Conduct are enacted by the House of Delegates. This Committee’s charge is to interpret those enacted rules. It is not the role of this Committee, however laudable the goal, so to torture the plain meaning and obvious intent of the Rules reflected in their language and legislative history as to supply by interpretation a result clearly and repeatedly rejected in enactment. If the House of Delegates wishes to have the result espoused in the opinion, it has but to amend Rule 1.6.

Accordingly, we dissent.

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