NACDL ETHICS ADVISORY COMMITTEE
Formal Opinion 03-03 (July 2003)

Question Presented:

NACDL's Ethics Advisory Committee has been presented a query from Montana public defenders who report that the practice has developed in several counties in Montana that defendants in court are told that they must check in with their lawyers weekly.[1] We are informed that this requirement is imposed on all criminal defense lawyers, both public defenders[2] and privately retained counsel in those counties, and the courts expect the criminal defense lawyers to advise the court and prosecutor if the client fails to report. The result of a failure to report is a criminal contempt of court, even if the defendant shows for hearings, the trial, and sentencing.

The NACDL member wants to know whether this practice violates the criminal defense lawyer's duties of confidentiality and client loyalty and the attorney-client privilege. And, when asked the next time, how should the lawyer respond?

Digest:

This Montana practice violates the lawyer's duties of confidentiality and client loyalty and the attorney-client privilege. It makes the lawyer a policeman of the client's behavior, and it requires the lawyer to essentially "snitch off" a client who fails to report, thereby subjecting the client to prosecution for criminal contempt for a past act. No exception to the attorney-client privilege applies, not even the crime-fraud exception. It also violates the appearance of impropriety, and it totally undermines the entire foundation of the attorney's duty of loyalty to the client. As a policy matter, in line with the policy of the attorney-client privilege, it also undermines respect for the criminal defense bar and the judiciary as a whole and will create the appearance that the proceedings were not fair and the lawyer not loyal to the client. We further believe that it will chill attorney-client communication because Montana criminal defense clients will not feel they can trust their lawyers, and this is contrary to the very purposes of the attorney-client privilege, confidentiality, and attorney loyalty and fidelity to the client's interest.

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[1] The specific "Release Order" condition (Mont. Code Ann. § 46-9-110) in one county has a place to check off "(   ) Shall remain in weekly contact with his/her attorney."

At the bottom of the Release Order, the defendant acknowledges by signing, *inter alia*: "I HAVE READ THIS ORDER, I understand that if I violate conditions of release I can be arrested and punished for contempt of court."

[2] We are also informed that some Public Defender's offices keep a call-in log. This is a document that is potentially subject to subpoena to prove a criminal contempt. It is NACDL's opinion that this document is not disclosable by subpoena, and production must be resisted for all grounds mentioned in this opinion.

Besides the ethical rules of privilege and the statutory and common law attorney-client privilege, NACDL submits that the questioned practice is also unconstitutional because it requires the lawyer to testify against the client and it violates the unfettered right to counsel. Indeed, it subverts the right to counsel by making the lawyer a necessary witness against the client. It is contrary to the foundation of the constitutional "right to counsel" with absolute loyalty to the client by his or her criminal defense lawyer which is subject to "enhanced importance" and "special vigilance" to protect the interests of the Sixth Amendment. *State in Interest of S.G., infra.* NACDL has always held the position that client confidentiality and loyalty are a Sixth Amendment right of the client.

Ethical Rules, Statutes, and Constitutional Provisions Involved:

Model and Montana Rules of Professional Conduct, Rules 1.6, 3.3, 8.4(a,c)
U.S. Const., Fifth and Sixth Amendments
Mont. Const., Art. 2, §§ 3, 24 & 25
Mont. Code Ann. § 26-1-803 (attorney-client privilege)
Mont. Code Ann. §§ 46-9-108 (conditions on defendant's release) & 46-9-110 (release orders)

Opinion:

I. Introduction

Clients of lawyers have a right to expect that their lawyers will be completely loyalty to their cause and zealously represent their interests. They also have a right to expect that their lawyers will protect their confidences and will act to protect their confidences before the lawyers reveal a confidence.

The Montana practice of requiring criminal defense lawyers to report to the court or the prosecutor that their clients have failed to call in weekly or keep in touch with them as a condition of their release under Mont. Code Ann. § 46-9-108(1)(f),[3] which must be memorialized in the

[3] Section 46-9-108(1)(f) & (2) provides, in pertinent part, as follows:

> (1) The court may impose any condition that will reasonably ensure the appearance of the defendant as required or that will ensure the safety of any person or the community, including but not limited to the following conditions:
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> . . .
>
> (f) the defendant shall report on a regular basis to a designated agency or individual, pretrial services agency, or other appropriate individual;
>
> . . . .
>
> (2) The court may not impose an unreasonable condition that results in

written conditions of release under Mont. Code Ann. § 46-9-110 (note 1, *supra*) violates the client's right of confidentiality, the attorney-client privilege, and the lawyer's duty of loyalty to the client, and creates the appearance of impropriety. We believe that this practice also violates the client's rights under the Fifth and Sixth Amendments to the U.S. Constitution and Mont. Const., Art. 2, §§ 3, 24 & 25. While it may be good practice to direct a client to keep in touch with his or her lawyer to facilitate the rendition of legal services and attorney-client communication, the lawyer cannot be made to disclose whether the client called in.[4]

NACDL further believes that this practice does not satisfy any "required by law" exception to the attorney-client privilege or the "comply with . . . a court order" under the 2002 version of Rule 1.6(b)(4) under consideration but not yet adopted in Montana which still makes confidentiality in this situation a matter of discretion with the lawyer.[5] As will be seen below, this discretion is not judicially reviewable and the criminal defense lawyer may consider him or her self duty bound to honor it to preserve his or her own integrity and the integrity of the system as a whole. In addition, it is a lawyer's duty to seek further review of any order that the lawyer thinks violates a client privilege.

II. Ethical and Privilege Considerations

A. Relationship of the Attorney-Client Privilege and Confidentiality

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> pretrial detention of the defendant and shall subject the defendant to the least restrictive condition or combination of conditions that will ensure the defendant's appearance and provide for protection of any person or the community. At any time, the court may, upon a reasonable basis, amend the order to impose additional or different conditions of release upon its own motion or upon the motion of either party.

[4] Perhaps it would be better for the court to require the client to regularly report to the bail bondsman or a pretrial services officer (as in the federal system).

[5] RPC 1.6, Comment ¶ 13 (2002) makes clear that discretion is still the rule, but it attempts to give guidance on the exercise of that discretion, including under a court order:

> Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(4). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. . . .

In NACDL Ethics Advisory Opinion No. 02-01 at 6-7 (Nov. 2002),[6] we explained the historical basis of the relationship between the attorney-client privilege and confidentiality in discussing the duty of a criminal defense lawyer to prevent eavesdropping on attorney-client conversations and preserve attorney-client confidences:

> The attorney-client privilege is the oldest privilege of confidential communications in the law. *Swidler & Berlin,* 524 U.S. 399, 403 (1998); *Upjohn Co. v. United States,* 449 U.S. 383, 389 (1981), quoting *Hunt v. Blackburn,* 128 U.S. 464, 470 (1888) (privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure"). It existed in Roman Law ten centuries ago, and, thus, under English common law at least since 1577. Hazard, note 8, *infra,* at 1071; 1 MCCORMICK ON EVIDENCE § 87 (5th ed. 1999); 8 WIGMORE, EVIDENCE § 2290, at 542 n. 1 (McNaughton rev. 1961) (collecting authorities). "The privilege is intended to encourage 'full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.'" *Swidler & Berlin,* 524 U.S. at 403, quoting *Upjohn,* 449 U.S. at 389.
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> The attorney-client privilege is evidentiary, and it is the product of litigation. Accordingly, it has developed through judicial interpretation, and it was codified only relatively recently. The ethical requirement of attorney-client confidentiality, however, developed as internal rules of conduct for lawyers, written by lawyers for themselves with the view that states would adopt and formalize them. Both are premised on the same weighty public policy consideration: Attorneys can best serve their clients and represent client interests only with full and frank disclosure between the client and attorney; and freedom from fear of disclosure by the attorney fosters full disclosure by the client.
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> Confidentiality in ethical rules is thus broader than the privilege because it governs the conduct of lawyers everywhere and all the time, not just in court. [quoting Code of Professional Responsibility, EC 4-1] . . . The broader ethical rules do not govern application of the attorney-client privilege. Model Rules of Professional Conduct, Scope ¶ 7. (footnotes omitted)

B. The Attorney's Overarching Duty of Loyalty to the Client

In NACDL Op. 02-01, at 15-16, we discussed the importance of the attorney's duty of absolute loyalty and fidelity to the client starting with the historical basis of the duty of loyalty and how it underlies the duty of candor to the client and conflicts of interest (citing *Holloway v. Arkansas,* 435 U.S. 475, 480-90 (1978), and quoting *Stockton v. Ford,* 52 U.S. (11 How.) 232, 247

[6] This opinion is available at the public section of NACDL's website at http://www.nacdl.org/public.nsf/freeform/attorneyclient?opendocument.

(1850),[7] and *Damron v. Herzog,* 67 F.3d 211, 214 (9th Cir. 1995).

C. Montana Ethical Considerations

Montana Rule of Professional Conduct, 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 paragraph (b).
>
> (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
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> > (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
> >
> > (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.[8]

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[7]

> There are few of the business relations of life involving a higher trust and confidence than that of attorney and client, or, generally speaking, one more honorably and faithfully discharged; few more anxiously guarded by the law, or governed by sterner principles of morality and justice; and it is the duty of the court to administer them in a corresponding spirit, and to be watchful and industrious, to see that confidence thus reposed shall not be used to the detriment or prejudice of the rights of the party bestowing it.

[8] We note that the 2002 version of RPC Rule 1.6(b)(4) under consideration for adoption in Montana provides: "A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary. . . to comply with other law or a court order." That is not yet the law in Montana, or anywhere else. The Comments to the 2002 version of Rule 1.6(b) provide in ¶s 10-11:

> [10] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(4) permits the lawyer to make such disclosures as are necessary to comply with the law.
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> [11] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claim-

The lawyer's decision to disclose is discretionary as under current Rule 1.6 (note the use of the word "may") as recognized in the RPC Scope ¶ 8[9] and RESTATEMENT § 60(1)(b) & Comment, and disclosure would still violate the attorney-client privilege. Just because a court orders an attorney to disclose something does not mean that the attorney shall comply without asserting confidentiality and privilege to test the court order. What if the court is legally wrong in its application of this exception and the lawyer still refuses to disclose? The lawyer must object to providing the information. We further believe that the court is bound by the lawyer's exercise of discretion not to disclose. Moreover, as always, all doubts must be resolved in favor of protecting confidentiality. RESTATEMENT § 60.

Montana cases recognize that attorney-client communications are generally privileged. *State ex rel. United States Fidelity and Guaranty Company v. Montana Second Judicial District Court,* 240 Mont. 5, 783 P.2d 911 (1986). Montana also recognizes implied or express consent to disclosure. *August v. Burns,* 79 Mont. 198, 255 P. 737, 742-43 (1927). In *In the Matter of the Rules of Professional Conduct and Insurer Imposed Billing Rules and Procedures,* 299 Mont. 321, 346-47, 2 P.3d 806, 821-22 (2000), the Montana Supreme Court effectively rejected a claim of implied consent to disclosure in language applicable here:

> [¶ 76] Further, we reject Respondents' argument that insureds' consent by contract to disclosure of detailed professional billing statements comports with Rule

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> ing authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(4) permits the lawyer to comply with the court's order.

Thus, disclosure under the 2002 version of Rule 1.6(b)(4) still remains discretionary with the lawyer, just as any disclosure is under the original version of Rule 1.6, and the exercise of that discretion under original RPC Rule 1.6 is not subject to reexamination. Original RPC Scope ¶ 8 is quoted in the following footnote.

(It should also be noted that the ABA's Presidential Task Force on Corporate Responsibility has also proposed changes to the 2002 version of Rule 1.6(b) in May 2003 that would add two subsections permitting disclosure of serious financial wrongs. It is found on the ABA's website at: http://www.abanet.org/buslaw/corporateresponsibility/delegate_reports/attachment7.pdf, and it makes no changes relevant to this issue.)

[9]

> The lawyer's exercise of discretion not to disclose information under Rule 1.6 should not be subject to reexamination. Permitting such reexamination would be incompatible with the general policy of promoting compliance with law through assurances that communications will be protected against disclosure.

> 1.6, M.R.Prof.Conduct. An insured executing a liability policy with an insurer cannot know at the time he enters the contract what kind of claim will be brought against him, what the issues will be, or what kinds of services will be undertaken by his defense attorney. Nor can an insured know, at the time he contracts for insurance, the legal consequences that may result from the disclosure of billing information to a third-party auditor. Depending on the facts and circumstances, such disclosure may waive a specific privilege. Thus, under Rule 1.6, M.R.Prof.Conduct, for an insured to make a fully informed consent to disclosure of detailed professional billing statements, the consent must be contemporaneous with the facts and circumstances of which the insured should be aware.
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> [¶ 77] We emphasize that by its plain language, Rule 1.6, M.R.Prof. Conduct, extends to all communications between insureds and defense counsel and that this rule is therefore broader in both scope and protection than the attorney-client privilege and the work product doctrine. *Compare In re Advisory Opinion No. 544 of N.J.* (1986), 103 N.J. 399, 511 A.2d 609, 612 (citation omitted) (emphasis added) (concluding "this Rule [of Confidentiality] expands the scope of protected information to include all information relating to the representation, regardless of the source or whether the client has requested it be kept confidential or whether the disclosure of the information would be embarrassing or detrimental to the client"); *Damron v. Herzog* (9th Cir.1995), 67 F.3d 211, 215 (citation omitted) (concluding "[a]n integral purpose of the rule of confidentiality is to encourage clients to fully and freely disclose to their attorneys all facts pertinent to their cause with absolute assurance that such information will not be used to their disadvantage").

Thus, disclosure of billing information to outsiders was a violation of confidentiality and confidentiality was not impliedly waived. The court also held, following the general rule, that confidentiality under Mont. RPC 1.6 is broader than attorney-client privilege. *Id.* at 347, 2 P.3d at 822.

Finally, the act being disclosed is a past act which leads to contempt. It is settled beyond peradventure that attorneys cannot be compelled to testify to admissions by the client or information about the client involving a past act. This is discussed below under the crime-fraud exception.

D. The Lawyer's Duty to Assert Confidentiality for the Client

A lawyer thus has a duty to assert confidentiality to protect the client's interests. NACDL Op. 02-01 at 17:

> When the government seeks information about a client that intrudes upon a client confidence, the lawyer has a fundamental and affirmative duty to act to protect the confidence. *In re Advisory Opinion No. 544,* 103 N.J. 399, 406, 511 A.2d 609, 612 (1986)[[10]]; ABA Formal Op. 94-385 (July 5, 1994). This duty is also recognized in 1 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS

[10] Note that this opinion has been relied on in *In the Matter of the Rules of Professional Conduct and Insurer Imposed Billing Rules and Procedures, supra.*

§§ 60(1)(b), 63 & *Comment* b (2000). (bracketed footnote added)

Since we issued Op. 02-01, the New Jersey Supreme Court amplified its prior holding, relied on above, in the strongest of terms in *State in Interest of S.G.,* 175 N.J. 132, 814 A.2d 612, 617 (2003), a conflict of interest case, holding that "[i]n criminal matters, in which the trust between attorney and client has enhanced importance, special vigilance is required because an attorney's divided loyalty can undermine a defendant's Sixth Amendment right to effective assistance of counsel." Since Montana followed *In re Advisory Opinion 544* in 2000, it would logically follow *State in the Interest of S.G.* from the same court which further explains the prior opinion in criminal cases.

E. Montana's Attorney-Client Privilege

Mont. Code Ann. § 26-1-803 provides for the attorney-client privilege:

> (1) An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him or his advice given to the client in the course of professional employment.
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> (2) A client cannot, except voluntarily, be examined as to any communication made by him to his attorney or the advice given to him by his attorney in the course of the attorney's professional employment.

It is our opinion that the client's act of calling in is a "communication made by the client to him" under this section.

Mont. R. Evid. 504 provides that "A claim of privilege is not defeated by a disclosure which was (a) compelled erroneously or (b) made without opportunity to claim the privilege." Accordingly, the Montana Supreme Court has held that an erroneously forced disclosure is not a waiver of the privilege. *Palmer v. Farmers Ins. Exch.,* 261 Mont. 91, 861 P.2d 895 (1993). Moreover, an attorney's erroneous disclosure does not prevent client from asserting privilege later. *State v. Statczar,* 228 Mont. 446, 743 P.2d 606 (1987). In *In re Wyse,* 212 Mont. 339, 349, 688 P.2d 758, 763 (1984), the court held that "[t]he zeal of a lawyer to protect his client is not a sufficient excuse for the abuse of the confidentiality provisions of section 41-3-205, MCA, without application to the court for permission to disseminate the information." In that case, the lawyer was disciplined for revealing information that was privileged to prosecutors in California.

The NACDL Lawyer's Assistance Strike Force handled a case at trial and on appeal for a Nebraska public defender who refused to testify whether he advised a client of a court date. The practice in Lincoln, Nebraska, was for the court to advise defense counsel of the next court setting, and defense counsel was to advise the client. When the public defender refused to disclose whether he advised the client of a court setting at which the client failed to appear, because it would make the lawyer a witness against his own client, he was held in contempt. The Nebraska Supreme Court reversed, holding that the communication between the lawyer and the client or the client and the lawyer about a court date was privileged and forced disclosure violated confidentiality and the duty of loyalty. *State v. Hawes,* 251 Neb. 305, 309-11, 556 N.W.2d 634, 638 (1996):

The evidential lawyer-client privilege is an old one in the common law, going back to at least 1577, 8 John Henry Wigmore, Evidence in Trials at Common Law § 2290 (1961), and exists through the present day to promote the freedom of consultation of legal advisers by clients, id., § 2291. In the words of Canon 4, EC 4-1, of the Code of Professional Responsibility:

> Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him or her. A client must feel free to discuss whatever the client wishes with his or her lawyer and a lawyer must be equally free to obtain information beyond that volunteered by the client.

Accordingly, we agree with, and adopt, the rule set forth in *Williams v. District Court, El Paso County,* 700 P.2d 549 (Colo.1985), that a prosecutorial subpoena served on an accused's attorney can withstand a motion to quash only if the prosecution demonstrates on the record that the defense attorney's testimony will actually be adverse to the accused, that the evidence sought to be elicited from the attorney will likely be admissible at trial under the controlling rules of evidence, and that there is a compelling need for such evidence which cannot be satisfied by some other source. *See, also, Ullmann v. State,* 230 Conn. 698, 647 A.2d 324 (1994) (in criminal case, compelling need test applies to call attorney professionally involved in case); *Shelton v. State,* 206 Ga.App. 579, 426 S.E.2d 69 (1992); Perez v. State, 474 So.2d 398 (Fla.App.1985).

Although the record contains self-serving statements by the prosecuting attorneys involved in these proceedings that "it is necessary" to make inquiry of defense counsel and that, otherwise, there would be "no way," or at least it would be "very, very difficult for the State" to prove its case, there is no evidential showing that any effort other than subpoenaing Hays was made. Under that state of the record, it cannot be said that the requirements of the foregoing test have been met.

That being the situation, we need not consider Hays' constitutional arguments. It should, however, be remembered that the "courts have a duty to maintain public confidence in the legal system and to protect and enhance the attorney-client relationship in all its dimensions."[[11]] *CenTra, Inc. v. Chandler Ins. Co.,* 248 Neb. 844, 852, 540 N.W.2d 318, 326 (1995). Accordingly, trial courts have a responsibility to employ procedures which minimize, if not eliminate, in cases of this type the need to call defense attorneys to testify against their clients or former clients.

Therefore, for the above-stated reasons, we reverse, and dismiss the contempt citation. (bracketed footnote added)[12]

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[11] Quoted and followed in *State ex rel. Counsel for Discipline of the Nebraska Supreme Court v. Lopez Wilson,* 262 Neb. 653, 661, 634 N.W.2d 467, 474 (2001).

[12] *Hawes* was noted in Rebecca A. Gaines, *Recent Ethics Opinions and Cases of Significance,* 21 J. LEGAL PROF. 317, 319 (1996).

Arkansas faced a similar issue in *Byrd v. State,* 326 Ark. 10, 14-15, 929 S.W.2d 151, 153 (1996), and it too refused to allow counsel to testify to any communication from the client to the lawyer, even involving ministerial matters about court dates because the privilege was not a "one-way one" and protected communications flowing both ways. Virtually any communication concerning the representation was presumed privileged.

Last year, in *In re Grand Jury Subpoena Dated Oct. 22, 2001 (John Doe A v. United States),* 282 F.3d 156 (2d Cir. 2002), it was held that an attorney was not permitted to testify that his client, the general counsel of a corporation, made a false statement in his presence during a meeting with the government because the act was covered by the attorney-client privilege.

Should the state or a trial court argue that the "crime-fraud exception" applies, we submit that it does not, and we discuss that in Point IV, *infra,* on dealing with the request or a demand for disclosure.

F. This Montana Practice Violates Confidentiality and Attorney-Client Privilege

NACDL thus believes that the practice in Montana of requiring criminal defense lawyers to inform the court or the prosecutor whether the client has checked in with counsel violates the criminal defendant's right to confidentiality, the duty of loyalty to the client which the attorney must vigilantly protect, and the attorney-client privilege. The cases in Montana already are clear on this issue and inescapably lead to this result.

Therefore, defense counsel must respectfully refuse to disclose when asked by the court and state the above grounds for that refusal. This may lead to a contempt citation, but we believe that, as in *Hawes,* the contempt citation will be void and reversed on appeal. *See* Point IV, *infra.*

G. This Provision Makes the Attorney a Witness Against the Client and Creates a Conflict

If a contempt citation is prosecuted against a client under this Montana practice, the attorney has been forced to become a witness against his existing client, and this violates every tenet of the rules of confidentiality and loyalty and the prohibition against lawyers appearing as witnesses.[13]

Even if the attorney were to disclose the information when the client was not in court, another lawyer would have to take over the case because it creates a conflict of interest on the contempt citation: Under RPC Rule 3.7, a lawyer cannot appear as a witness except for uncontested matters nor argue his or his law firm's own credibility. The lawyer would thus have a personal conflict of interest with the client and have to be disqualified; Mont. RPC Rule 1.7; and he would have to be disqualified because client loyalty has been breached and the client now inevitably knows that he cannot trust any Montana criminal defense lawyer at all.

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[13] Mont. RPC Rule 3.7(a) ("A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness . . . ."). *See Vestre v. Lambert,* 249 Mont. 455, 817 P.2d 219 (1991).

H. Policy Consideration of the Integrity of the Bar; the Appearance of Impropriety

There is also a virtually overwhelming policy consideration here: having lawyers reveal client confidences will create a widespread belief in persons accused of crime in Montana that criminal defense lawyers cannot be trusted by their clients, and it is a distrust created by the judicial branch of government by imposing this rule. It creates an institutional appearance of impropriety which brings the entire criminal defense bar, and, by extension, the court system as well, into disrepute.[14]

Canon 9 of the superseded Code of Professional Responsibility "provide[s] that 'a lawyer should avoid even the appearance of impropriety.' The fact that Canon 9 is not in the Model Rules does not mean that lawyers no longer have to avoid the appearance of impropriety." *First American Carriers, Inc. v. Kroger Co.,* 302 Ark. 86, 787 S.W.2d 669, 671 (1990). Canon 9 "is a rock foundation upon which is built the rules guiding lawyers in their moral and ethical conduct," and it thus must remain a part of the law even though the Code was superseded by the Rules. *Id.,* 787 S.W.2d at 671 ("While Canon 9 is not expressly adopted by the Model Rules, the principle applies because its meaning pervades the Rules and embodies their spirit. It is included in what the preamble to the Rules refers to as 'moral and ethical considerations' that should guide lawyers, who have 'special responsibility for the quality of justice.' This is why the principle applies here, and not because it was part of the Code.").

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[14] *See In re Grand Jury Subpoena Served Upon Doe,* 781 F.2d 238, 260-61 (2d Cir. 1986) (dissenting opinion), cert. denied, 475 U.S. 1108 (1986):

> The duty of undivided loyalty of counsel to his client, traditionally considered an essential element in according a client his due process rights, is questioned by the client whenever his attorney is summoned before the grand jury–even if only to assert valid privileges–during the course of that representation. *In re Grand Jury Investigation, (Sturgis),* 412 F.Supp. 943 (E.D.Pa.1976). The power to hale an attorney to testify before the grand jury investigating his client–regardless of whether the government has good grounds to believe the attorney possesses any relevant information–gives the government unilaterally the power to destroy that relationship. Once destroyed, a post-indictment preliminary hearing cannot repair the loss of trust brought about after an attorney has appeared as a prosecution witness before the grand jury. . . . Thus, foremost among the consequences of subpoenaing an attorney before the grand jury is that it drives an insurmountable wedge between the attorney and his client, *see In re Grand Jury Matters,* 751 F.2d 13, 19 (1st Cir. 1984). Forcing a client to choose between the Scylla of relying on present counsel who has gone before the grand jury and the Chrybdis of finding new, untested counsel puts a client unfamiliar with grand jury proceedings in a dilemma where whatever the choice made–it is an unsatisfying one. The result for the subpoenaed lawyer is equally inadequate. He has the so-called choice of either resisting disclosure with contempt possibilities–thereby risking his legal career–or resigning from the case.

The appearance of impropriety standard of CPR Canon 9 has thus been re-adopted in criminal cases in states which have adopted the RPC. *People v. Witty,* 36 P.3d 69, 73 (Colo. App. 2001) (disqualifying a prosecuting attorney for appearance of impropriety); *State v. Loyal,* 164 N.J. 418, 753 A.2d 1073 (2000) (public defender's prior representation of significant prosecution witness in drug related homicide case created appearance of impropriety mandating a mistrial (not subject to double jeopardy), even though neither the witness nor the lawyer remembered the lawyer handled the prior case two years earlier; adopting a *per se* rule); *see also State v. Jimenez,* 175 N.J. 475, 815 A.2d 976 (2003) (recognizing rule); *United States v. Oberoi,* 331 F.3d 44, 51-52 (2d Cir. 2003) (quoted *infra;* recognizing rule).

Under *Oberoi,* the lawyer's own views as to the appearance of impropriety carries great weight. There, the federal public defender refused to cross-examine a former client and asked to be relieved, even though the rules technically permitted him to cross-examine. The Second Circuit recognized that cross-examining a former client was distasteful to the lawyer involved and would have brought the system into disrepute and held that the district court erred in not relieving the public defender from the case.

Because of this practice, Montana criminal defendants must justifiably fear that their lawyers are disloyal because the courts require them to be, and that criminal defense lawyers police their conduct and will become snitches and even witnesses against them in contempt proceedings. This is grossly antithetical to the requirement of fairness of the appearance of the criminal justice system and the requirements of the Sixth Amendment, and it must be strongly resisted, even under the threat of contempt to the lawyer.

III. Constitutional Considerations

Besides the ethical rules of privilege and the statutory and common law attorney-client privilege, NACDL submits that the questioned practice is also unconstitutional because it requires the lawyer to testify against the client in violation of the client's privilege against self-incrimination and it violates the unfettered right to counsel. Indeed, it subverts the right to counsel by making the lawyer a necessary witness against the client. It is contrary to the foundation of the constitutional "right to counsel" with absolute loyalty to the client.

A. Montana constitutional law

NACDL submits that the Montana Constitution clearly makes this practice unconstitutional. Three provisions apply: Mont. Const., Art. 2, §§ 3 (citizens "enjoying and defending their lives and liberties"), 23 ("No person shall be compelled to testify against himself in a criminal proceeding.") & 24 ("In all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel; . . . ."). Making counsel report and testify against a client prevents a Montana citizen from "defending their lives and liberties" by exploiting a violation of the right to not be compelled to testify against oneself through the lawyer in an obvious violation of the right to "defend . . . by counsel." The Montana attorney-client confidence and privilege cases are already clear on this—disclosure is barred.

If it violates the federal constitution, *see* the following heading, it clearly violates the Montana Constitution because the state constitution may grant greater, but not lesser, rights to a citizen.

B. Federal constitutional implications

1. Privilege against self-incrimination under Fifth Amendment

The client also has the Fifth Amendment privilege against self-incrimination which would be violated by his lawyer disclosing information about a past act that would subject the client to prosecution. If the client cannot be compelled to testify against himself, then neither can his lawyer provide the same information. *See Fisher v. United States,* 425 U.S. 391, 403-05 (1976).

2. Right to counsel under Sixth Amendment

NACDL has always contended that client confidentiality is a Sixth Amendment issue. As NACDL stated in Op. 02-01 at 8-10:

> It has always been the position of NACDL's Ethics Advisory Committee that maintaining client confidentiality is, in fact, presumptively a Sixth Amendment concern because confidentiality is the foundation of the attorney-client relationship and has always been a fundamental attribute of the right to counsel and the effective assistance of counsel.
>
> The Supreme Court has never expressly held that confidentiality is subsumed within the Sixth Amendment right to counsel, but it has suggested that it might be. *Weatherford v. Bursey,* 429 U.S. 545, 554 n. 4 (1977).
>
> Because confidentiality dates from the common law, it should be a part of the Sixth Amendment right to counsel. Some state courts have held that the attorney-client privilege is a part of the constitutional right to counsel. *State v. Kociolek,* 23 N.J. 400, 413-14, 129 A.2d 417, 424 (1957), citing *In re Seslar,* 15 N.J. 393, 403-06, 105 A.2d 395, 400-03 (1954) (which recites the common law history of the privilege at length). In *State v. Swearingen,* 649 P.2d 1102, 1104 (Colo. 1982), the Colorado Supreme Court stated:
>
>> The purpose of the privilege is to encourage full and frank communications between attorneys and their clients which promote the administration of justice and preserve the dignity of the individual. *Law Offices of Bernard D. Morley v. MacFarlane,* 647 P.2d 1215 (Colo. 1982) (Quinn, J., concurring). Although the privilege is not explicitly grounded in constitutional protections, the inviolability of the privilege in criminal prosecutions is closely interrelated with the individual's right to immunity from self-incrimination under the Fifth Amendment to the United States Constitution and his right to counsel under the Sixth Amendment, which necessarily includes the right to confer in private with his attorney. *Geders v. United States,* 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976); *Law Offices of Bernard D. Morley v. MacFarlane, supra* (Quinn, J., concurring); *State v. Kociolek,* 23 N.J. 400, 129 A.2d 417 (1957); Note, "The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement," 91 Harv.L.Rev. 464 (1977); Note, "The Right of a Criminal Defense Attorney

> to Withhold Physical Evidence Received from his Client," 38 U.Chi.L.Rev. 211 (1970). (footnotes omitted)

In *United States v. Oberoi, supra,* a case where the NACDL Ethics Advisory Committee helped frame the issues in the trial court, the Second Circuit held that a public defender's refusal to cross-examine a former client, even with a waiver from the former client [albeit one likely forced by the government since the former client was a government witness], was grounds to withdraw because it undermined the attorney's loyalty to the former client and brought the criminal defense bar into disrepute, and it reversed the district court's order refusing to allow the public defender to withdraw. Even though the rules may have technically permitted the public defender to have stayed in the case, it was the lawyer's call:

> As we have explained, the pertinent authorities likely would allow the Defender to continue to represent Oberoi in the circumstances of this case. However, as we also have discussed, the Defender did not interpret the disciplinary rule unreasonably when it argued that the rule prohibits the use of a client's confidences and secrets to his disadvantage even with consent and consequently prohibited the Defender from cross-examining Kaid based on his confidences and secrets. Even interpreting the pertinent rule as the government suggests, we note that the disciplinary rules represent the minimum ethical obligations of an attorney and that an attorney does not act unreasonably by maintaining a higher standard. The duty to preserve a former client's secrets is a very important one. *See Emle Indus., Inc. v. Patentex, Inc.,* 478 F.2d 562, 571 (2d Cir. 1973) ("The dynamics of litigation are far too subtle, the attorney's role in that process is far too critical, and the *public's interest in the outcome is far too great to leave room for even the slightest doubt concerning the ethical propriety of a lawyer's representation in a given case.* These considerations require application of a strict prophylactic rule to prevent any possibility, however slight, that confidential information acquired from a client during a previous relationship may subsequently be used to the client's disadvantage."). Thus, an attorney who expresses ethical reservations about cross-examining a former client using his secrets and confidences, even with client consent, acts in the highest tradition of the profession.
>
> As *Lowenthal* points out, use by an attorney of a former client's secrets is degrading for the attorney and humiliating for the witness. Here, the Defender's cross-examination also could affirmatively disadvantage Kaid. The government agreed not to oppose a sentence at the lowest point of the Guidelines range but reserved its right to modify this position if it learned new information. Certainly the possibility that relevant negative information would emerge on cross-examination is not a remote one. And, only the Defender knows with certainty whether it has information of this sort.
>
> In order to avoid lurking potential conflicts and to preserve the public's confidence in the integrity of the judicial system, a district court has discretion to reject a defendant's waiver of an actual or potential conflict. *Wheat,* 486 U.S. at 162-63; *United States v. Falzone,* 766 F. Supp. 1265, 1272 (W.D.N.Y. 1991). Some courts also have rejected a former client's consent or representations that the

> former client will consent. *See United States v. Vasquez,* 995 F.2d 40, 42 (5th Cir. 1993) (affirming district court's rejection of defendant's waiver despite representation by defense counsel that another client who would be a witness against defendant Ahad no problem with his joint representation); *United States v. Messino,* 852 F. Supp. 652, 654, 656-57 (N.D. Ill. 1994) (refusing to accept current client's waiver of conflict and rejecting defense counsel's offer to secure waiver of former client); *United States v. Alex,* 788 F. Supp. 359, 361 (N.D. Ill. 1992) (disqualifying counsel where former clients submitted affidavits consenting to subsequent representation but not consenting to disclosure of confidences).
>
> Given this precedent, we believe that the district court abused its discretion by accepting Kaid's consent as a sufficient basis for denying the Defender's motion to withdraw. The combined circumstances in this case; the Defender's sincere and not unreasonable belief that it could not adequately represent Oberoi given its continued duty of loyalty to Kaid; the significant possibility that effective representation of Oberoi would require the Defender to cross-examine Kaid in a way that might harm Kaid when he was sentenced; the lack of circumstances suggesting tactical abuse; and the district court's failure to question Oberoi concerning his willingness to waive the conflict; created a substantial danger that the proceedings in both cases would not "appear fair to all who observe them." *Wheat,* 486 U.S. at 160. Because "the institutional interest in the rendition of just verdicts in criminal cases" may have been jeopardized by the district court's refusal to excuse the Defender, we have vacated this order and remanded for appointment of new counsel. *Id.* (emphasis added)

NACDL thus believes that this practice undermines public confidence in the criminal defense bar and the judiciary and is thus prejudicial to the administration of justice (Mont. RPC Rule 8.4(a,c)), and it ultimately will chill client communication with lawyers and thus violate the Sixth Amendment right to counsel because clients simply will not trust their criminal defense lawyers, not knowing what it is that the criminal defense lawyer will disclose to the court under court order in the future. The clients and the public need to know that their lawyers will resist.

IV. CAN THE COURT COMPEL AN ANSWER FROM THE LAWYER?

The answer is no.

When the court asks the lawyer the critical question, "has your client been in contact with you?", the answer must be a respectful refusal to respond invoking all the provisions discussed in this opinion.

The court will likely respond that the lawyer has a duty of candor with the court, which the lawyer does. But, it is not applicable. Mont. RPC Rule 3.3 provides, in pertinent part:

> (a) A lawyer shall not knowingly:
> (1) make a false statement of material fact or law to a tribunal;

(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;

. . .

(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.

The question then is whether the court can require "disclos[ure of] a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client" under RPC Rule 3.3(a)(2)?

That answer to that is also no. The failure to report is a past act and the "crime-fraud exception" only applies to future acts. The defendant's failure to report last week is not a continuing offense because no one can predict whether the client will fail to report again. Failure to report for two weeks is not a continuing offense. Failure to report for three weeks is still a past act. Indeed, it is always a past act. The crime-fraud exception is only invoked by the proponent after the attorney-client privilege is successfully invoked. RESTATEMENT § 82, Comment f. Mere suspicion the client will not report in the future is not enough to invoke the crime-fraud exception. *Id.,* Reporter's Note at 623.

In *In re Disciplinary Proceeding Against Schafer,* 149 Wash. 148, 166, 66 P.3d 1036, 1044 (2003), the lawyer disclosed client confidences and received a one year suspension. The lawyer invoked the crime-fraud exception as a defense to discipline.

> However, that exception generally does not apply when an attorney seeks to disclose past wrongdoing. This is because the benefit of revealing a past harm that can no longer be prevented does not outweigh the injury to attorney-client relationships that would result by disclosure. *See United States v. Zolin,* 491 U.S. 554, 562-63, 109 S.Ct. 2619, 105 L.Ed.2d 469 (1989) ("The attorney-client privilege must necessarily protect the confidences of wrongdoers, but the reason for that protection–the centrality of open client and attorney communication to the proper functioning of our adversary system of justice–'ceas[es] to operate at a certain point, namely, where the desired advice refers not to prior wrongdoing, but to future wrongdoing.'") (quoting 8 JOHN HENRY WIGMORE, EVIDENCE § 2298, at 573 (McNaughton Rev.1961)) (citing *Clark v. United States,* 289 U.S. 1, 15, 53 S.Ct. 465, 77 L.Ed. 993 (1933)). This concept is consistent with the rejection in the RPCs of reporting past crimes. *See* RPC 1.6(b)(1) (permitting attorney to reveal confidences or secrets to prevent the client from committing a crime).[15]

As stated above, the lawyer has a duty to assert confidentiality for the client. Therefore, if asked by the court, defense counsel should respectfully refuse to disclose the sought-after informa-

[15] The Hawai'i Supreme Court recently held that putting a criminal defendant's tax attorney before a grand jury without seeking to resolve attorney-client privilege issues before doing so was prosecutorial misconduct. *State v. Wong,* 97 Haw. 512, 40 P.3d 914 (2002).

tion on all of the above grounds and test the court's order by contempt if the court insists on getting the information rather than disclose. It is sometimes the lawyer's lot that he or she must take a contempt citation to protect the client's constitutional rights.[16] When that happens, the lawyer is acting in the best traditions of the American criminal defense bar—risking oneself to uphold loyalty to and to protect the client—and this kind of contempt would not be harmful to the lawyer's reputation.

This is a matter within the mission of the NACDL Lawyer's Assistance Strike Force, and NACDL will assist any member in litigating such a contempt or the validity of this practice.

Notice

This is an opinion only of the Ethics Advisory Committee of the National Association of Criminal Defense Lawyers. NACDL is a voluntary association of nearly 11,000 criminal defense attorneys with more than 80 state and local affiliates. This opinion is intended to be the Committee's best interpretation of the Model Rules of Professional Conduct and the statutes and constitutional provisions involved as they apply to the written facts presented to the Committee, and it is not binding on anyone other than to show the lawyer's good faith in reliance on it.

[16] Even President Carter's Attorney General was held in contempt to test a court order that he believed was unconstitutional. *In re United States,* 565 F.2d 19 (2d Cir. 1977), *cert. denied sub nom., Bell v. Socialist Workers Party,* 436 U.S. 962 (1978).