When a Lawyer Can (and Can't) Speak Out

Whistleblowing, Snitching, and the Strategic Use of Silence

DAVID B. PARKER AND JOEL A. OSMAN

The authors are with Parker Shaffie LLP, Los Angeles.

As a profession, attorneys are often constrained from speaking out. Maintaining client confidences (Model Rule of Professional Conduct 1.6) and protecting attorney-client privileged communications (per the rules of evidence in the jurisdiction in which you practice) are prime examples of constraints on attorneys speaking out. Similar examples can be found throughout the Model Rules of Professional Conduct. These include various communications encouraging or facilitating illegal or tortious acts or communications that undermine the justice system or mislead the public.

Constraints on Lawyers Speaking Out

The following are examples of things attorneys may not do:

Attorneys may not counsel a client to engage, or assist a client, in conduct that they know is criminal or fraudulent (Model Rule of Professional Conduct 1.2(d)).

Attorneys may not lie to a court (by omission or commission) (Model Rule 3.3) or offer evidence that they know to be false, regardless of the client's wishes (Model Rule 3.3, comment 5).

Attorneys may not falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law (Model Rule 3.4(b)).

Trial lawyers are prohibited from alluding in trial to any matter that we do not reasonably believe is relevant or that will not be supported by admissible evidence; assert personal knowledge of facts in issue except when testifying as a witness; or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused (Model Rule 3.4(e)).

Relatedly, attorneys are barred from asking a person, other than a client, to refrain from voluntarily giving relevant information to another party (Model Rule 3.4(f)); making extrajudicial statements that would be substantially likely to materially

Published in *Litigation,* Volume 52, Number 2, Winter 2026. © 2026 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

prejudice an adjudicative proceeding (Model Rule 3.6); making a false statement of material fact or law to a third person (Model Rule 4.1); or making a false or misleading communication about themselves or their services (Model Rule 7.1).

Ethical standards also prohibit attorneys from "soliciting" strangers for professional employment for their pecuniary gain except in certain narrowly prescribed circumstances (Model Rule 7.3). In many instances, such communications may be privileged from civil liability based on what is commonly referred to as the litigation privilege. They may, however, still serve as the basis for discipline or even criminal prosecution.

Despite this panoply of constraints on lawyers speaking out, there are certain situations in which lawyers may, and on occasion must, speak out. It is these circumstances that are the focus of this article.

When Lawyers May Speak Out

Notwithstanding the requirements that lawyers preserve client confidences and the attorney-client privilege, there are circumstances in which lawyers may disclose confidential or privileged information. (There are also other circumstances, discussed further below, in which a lawyer must disclose such information.)

Model Rule 1.6, the basic rule regarding preservation of client confidential information, contains a few exceptions. For instance, subsections (1) and (2) of Model Rule 1.6(b) allow a lawyer to be a whistleblower and reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm, or to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services.

While the ethics rules provide for *permissive* disclosures in limited circumstances, they offer little guidance on how a lawyer is to decide whether to disclose or keep mum. One commendable and instructive effort to provide guidance is found in the official comments to California's Rule of Professional Conduct 1.6(b). For example, comment 6 notes that ordinarily the disclosure is a "last resort" and that the lawyer should contact law enforcement only if the lawyer has first made a good-faith effort to dissuade the client. The comment lays out six factors to be weighed. Comment 7 provides guidance on when efforts to dissuade the client are required and how to manage the issue in the context of a non-client's threat. Additional useful guidance is found in comment 8, which explains how much information should be disclosed and to whom, and whether to make an anonymous disclosure to the victim or to law enforcement. Finally, comment 9 confronts whether the lawyer must warn the client about the lawyer's ability to blow the whistle, a step that could increase the level of danger, including to the lawyer.

Another instance when attorneys are permitted to share client information is Model Rule 1.6(b)(4), which authorizes a lawyer to reveal information relating to the representation of a client to secure outside legal advice for the lawyer regarding the lawyer's professional responsibilities (though presumably such disclosures are subject to privilege). The courts have also recognized the "intrafirm privilege" whereby attorneys within a law firm may seek the advice of a general counsel or someone with a similar responsibility for legal ethics compliance—and preserve as privileged those voluntary disclosures, even as against a current client. In short, even lawyers have the right to legal counsel and to disclose otherwise confidential information in aid of that objective.

In the context of legal malpractice claims, fee collection matters, or responding to a client's complaint to a bar disciplinary organization, Model Rule 1.6(b)(5) allows a lawyer to reveal information relating to the representation of a client "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

Illustration by Paul Garland

Published in *Litigation,* Volume 52, Number 2, Winter 2026. © 2026 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client. . . ."

That said, the attorney's right to self-defense disclosures is limited when confronting these situations, and lawyers may find themselves wandering between rocks and hard places. For example, confidentiality and loyalty concerns may restrict the ability of a lawyer to present a self-defense in response to defamatory or fraudulent statements by a client or former client to the media or in social media. Also, when a lawyer is sued by a third party for actions taken on behalf of a client, there is no self-defense exception to the confidentiality owed to the client.

Illustrating this point is Model Rule 1.13, which defines an attorney's duties when an organization is a client:

> If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization. . . .

What this means in practical terms is that if, despite the lawyer's efforts in accordance with this provision, the highest authority that can act on behalf of the organization insists on or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation protected by Model Rule 1.6 to law enforcement or a potential victim, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

Beyond the Model Rules, attorneys must comply with the disclosure requirements of various federal laws, such as the Sarbanes-Oxley Act and certain regulations of the Securities and Exchange Commission. In addition, the Foreign Corrupt Practices Act provides avenues for attorneys to report misconduct within the organizations they represent. This principle is illustrated in the case of *Wadler v. Bio-Rad Laboratories, Inc.*, 916 F.3d 1176 (9th Cir. 2019), in which the Ninth Circuit Court of Appeals upheld, in part, a verdict in favor of a company's former general counsel in a whistleblower retaliation action in which the former general counsel alleged the employer had violated the Sarbanes-Oxley Act, the Dodd-Frank Act, and California public policy by terminating his employment as result of an internal report that the employer had engaged in serious and prolonged violations of the Foreign Corrupt Practices Act in China. Such disclosures may not be permissible under the confidentiality rules of the state, raising issues of which law governs and creating a Hobson's choice for the lawyer.

At times, a lawyer may realize that the attorney for the other party has made an evident mistake of fact in drafting or negotiations. Is there an ethical duty to make a corrective disclosure? This was addressed in an ethics opinion issued by the California State Bar's Standing Committee on Professional Responsibility and Conduct (COPRAC). Formal Opinion 2013-189 opines that so long as the lawyer has not induced the opposing counsel's mistake, there is no duty to disclose it. However, it is unethical if the lawyer makes material changes to a document and passes it to the opposing counsel without disclosing the changes.

Another example of a dilemma faced by attorneys is where a colleague or a client is mentally impaired. COPRAC Formal Opinion 2021-207 explores the situation where an impaired colleague's conduct is in breach of his or her professional obligations. When is an attorney duty bound to disclose the colleague's problem to the firm's management or general counsel? At what point must it be disclosed to a client whose interests are at stake? At what point would the attorney be obligated to blow the whistle with the disciplinary authorities?

A related COPRAC opinion, Formal Opinion 2021-207, addresses the impaired client scenario. How does the attorney preserve the attorney-client relationship where the client makes informed decisions? When must the attorney decline to act on the impaired client's instructions? When can the attorney disclose the impairment to third parties?

Briefly stated, the ethics panel in Formal Opinion 2021-206 concluded that a mental impairment that impedes a lawyer's ability to competently and ethically provide legal services as required under the ethics rules triggers ethical obligations not just for the impaired lawyer but also for other lawyers working on the relevant client matters and supervisory or managerial lawyers who know of the conduct. Although it may be possible to reduce or eliminate the impact of an impairment through internal procedures, often communication to the client may be required and representation by the impaired lawyer may need to end, resulting in the firm's re-staffing or the firm's withdrawal from the representation. In addition, lawyers who know of credible evidence of the impaired lawyer's conduct may have an obligation to report such conduct to the state bar or an appropriate tribunal, depending on the misconduct.

Finally, as to the impaired client, Formal Opinion 2021-207 contains a highly detailed analysis of the lawyer's professional responsibilities. In summary, a lawyer for a client with diminished capacity should attempt, insofar as reasonably possible, to

Published in *Litigation,* Volume 52, Number 2, Winter 2026. © 2026 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

preserve a normal attorney-client relationship with the client, including taking those steps reasonably necessary to fulfill the lawyer's duties of competence, communication, confidentiality, loyalty, and nondiscrimination. Of course, a lawyer must sometimes make difficult judgments relating to the client's capacity. When the lawyer reasonably believes that the client's diminished capacity exposes the client to harm, the lawyer may seek the client's informed consent to take protective measures. If the client cannot or does not give informed consent, the lawyer may be unable to protect the client against harm. However, a lawyer representing a competent client who may later become incapacitated may propose to the client that the client give advance consent to protective disclosure in the event that incapacity occurs. If appropriately limited and informed, such a consent is ethically proper.

When Lawyers Must Speak Out

Model Rule 8.3(a) states: "A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, *shall* inform the appropriate professional authority." (Emphasis added.) "This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program." Model Rule 8.3(c).

Commonly referred to as the "snitch" rule, this provision mandates that a lawyer "shall" report a violation of the Rules of Professional Conduct. A variation of this rule has been adopted by every jurisdiction, with California being the last to adopt a variation of this rule in 2023.

Much has been written over the years about perceived problems in the drafting of this rule: What constitutes knowledge of another lawyer's violation? What constitutes a substantial question as to a lawyer's honesty or trustworthiness? What does "fitness as a lawyer in other respects" in Rule 8.3(b) mean? Does the use of the word "shall" really make such reporting mandatory? If reporting under this rule is in fact mandatory, is a failure to make such a mandatory report a violation of the rule?

The answers to these questions will, of course, vary from jurisdiction to jurisdiction. Comment 3 to Model Rule 8.3 addresses this last question by stating:

If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

When a Lawyer May Choose Not to Speak Out

Given the requirements of Model Rules 3.3 (Candor toward the Tribunal) and 4.1 (Truthfulness in Statements to Others), are there any circumstances in which a lawyer may elect, for strategic reasons or otherwise, not to speak out? Yes, though this option is limited to specific circumstances.

For example, though Model Rule 3.3(a)(3) prohibits a lawyer from offering evidence that the lawyer *knows* to be false, where a lawyer *reasonably* believes, but does not *know*, that a client's testimony will be false, the lawyer may allow the client to offer testimony that the lawyer reasonably believes to be false. See comment 9 to Model Rule 3.3.

Likewise, though Model Rule 4.1 requires attorneys to be truthful in statements to others, comment 1 to that rule makes it clear that a lawyer has no affirmative duty to inform an opposing party of relevant facts.

Comment 2 to Model Rule 4.1 states:

> Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

This issue is discussed at length in California State Bar Formal Opinion 2015-194, distinguishing between statements of material fact and puffery or posturing in negotiations.

The instances in which a lawyer must play whistleblower or snitch are rare. If confronted with such a situation, a lawyer must balance the primary concern of maintaining client confidences and the attorney-client privilege against the circumstances that compel whistleblowing. As the consequences of getting this balance wrong can be severe, lawyers would be well advised to consult with in-house general counsel or outside ethics counsel when considering such a situation. ■

David B. Parker and Joel A. Osman can be reached at parker@parkershaffiellp.com and osman@parkershaffiellp.com, respectively.

Published in *Litigation,* Volume 52, Number 2, Winter 2026. © 2026 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.