

WATERGATE: MORE ETHICS LESSONS FOR LAWYERS

Materials for *The Watergate CLE II*
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I. Introduction

These materials supplement and build on the extensive outline prepared in connection with the original 2011 series of seminars, *The Watergate CLE*. In 2012, the 40th anniversary year of the Watergate break-in, our seminar's legal ethics focus includes evidentiary issues and other issues that arise when a lawyer is involved in wrongdoing.

II. Background

In July 1970, when 31-year-old John W. Dean became counsel to President Richard Nixon, the legal ethics landscape bore little resemblance to today's. Federal government lawyers admitted to the District of Columbia bar were under the disciplinary jurisdiction of the District Court for the District of Columbia. It was not until 1972 that the District of Columbia Court of Appeals assumed disciplinary jurisdiction, and adopted a version of the American Bar Association's Model Code of Professional Responsibility ("Model Code"). The Model Code consisted of aspirational Canons and Ethical Considerations and normative Disciplinary Rules – a system that had its roots in the ABA's earliest lawyer conduct code, which dated from 1908.

The professional responsibility picture for a lawyer today is quite different. In 1974, the ABA began requiring law schools to teach legal ethics, in direct response to the ethical lapses of the many lawyers involved in the Watergate scandal. The states began to mandate continuing legal education for lawyers, including an ethics or professional responsibility component. (Today, some 40 states require such continuing ethics training.) In 1991, the District of Columbia adopted its version of the ABA's Model Rules of Professional Conduct, a revamped set of mandates that aimed to modernize and clarify lawyer conduct rules. Lawyer disciplinary authorities in almost every jurisdiction in the United States have now adopted some version of the Model Rules (although every jurisdiction has to some extent imposed its own variations). In 2001, another scandal – Enron – sparked more debate about the ethical duties of lawyers, spurring further changes to the Model Rules themselves.

With full recognition of the anachronism (since the Model Rules of Professional Conduct were unknown in the Watergate era), these materials nonetheless primarily refer to today's Model Rules of Professional Conduct ("Model Rules") as a way to again bring the legal ethics issues presented by Watergate into a current setting.

III. Who is the Client?

- A. John Dean felt a high degree of personal loyalty to the President – but in his capacity as White House counsel, who was John Dean’s client? This question, discussed in the previous Watergate CLE, remains critical in this examination of evidentiary and other ethics issues. There are several potential answers.
1. The President as the “client:” Considerations of personal loyalty, and the fact that John Dean served at the pleasure of the President, might have created the mistaken impression that the President himself was the “client.”
 - a. See Michael Stokes Paulsen, *Hell, Handbaskets, and Government Lawyers: The Duty of Loyalty and its Limits*, 61 L. & Contemp. Probs. 83, 101 (Winter 1998) (describing loyalty concerns that might influence this outlook, but rejecting validity of such a view), also available at <http://www.lat.duke.edu/journals/61LCPPaulsen>.
 - b. See also John W. Dean, III, *Watergate: What Was It?*, 51 Hastings L. J. 609, 621 (Apr. 2000) (“Watergate: What Was It?”) (“There is no question that many lawyers committed illegal acts out of loyalty to Richard Nixon, and to a degree that can be said of all who did so.”).
 2. The government agency as client: The District of Columbia’s version of the Model Rules provides that “The client of the government lawyer is the agency that employs the lawyer unless expressly provided to the contrary by appropriate law, regulation, or order.” D.C. Rule of Prof’l Cond. 1.6(k).
 - a. See also *Restatement (Third) of the Law Governing Lawyers* § 97 cmt. (c): “No universal definition of the client of a governmental lawyer is possible. For many purposes, the **preferable approach on the question presented is to regard the respective agencies as the clients ...**”
 3. The Office of the Presidency as the “client:” The most ethically-correct answer.
 - a. “[I]t is clear that the relationship of White House Counsel to the Office of the President is not one of attorney for the President personally, but for the Office of the President as part of the U.S. government.” Paulsen, *supra*, at 99 n.36.

- b. “It is, however, the entity – the United States government – and not the individual making the communication, that is the client.”
Michael Stokes Paulsen, *Who ‘Owns’ the Government’s Attorney-Client Privilege?*, 83 Minn. L. Rev. 473, 474 (1998).
 - 1.) This is the most ethically-correct answer, supported by decisions rejecting Clinton Administration lawyers’ attempt to invoke attorney-client privilege to shield communications between government lawyers and the President relevant to the investigation by the Office of Independent Counsel of possible criminal activity. *See In re Bruce R. Lindsey (Grand Jury Testimony)*, 148 F.3d 1100 (D.C. Cir. 1998)(Deputy White House Counsel could not assert attorney-client privilege to avoid responding to grand jury if he possessed information relating to possible criminal violations in connection with Monica Lewinsky scandal); *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997) (in connection with investigation into Whitewater scandal, White House could not invoke any form of governmental attorney-client privilege to withhold potentially relevant information from grand jury).
- c. *See also* Ronald D. Rotunda & John S. Dzienkowski, *The Lawyer’s Deskbook on Professional Responsibility*, § 1.6-8(a) at 269 (2012-13 ed.) (“*Lawyer’s Deskbook*”) (“the government lawyer represents the government, not any official in his or her personal capacity.”).
- d. *See also* Ronald D. Rotunda, *Lips Unlocked: Attorney-Client Privilege and the Government Lawyer*, 20 Legal Times 21-22, 28 (June 30, 1997); Ronald D. Rotunda, *White House Counsel and the Attorney-Client Privilege*, 1 Prof’l Resp., L. Ethics, & L. Ed. News 1 (Federalist Soc’y, No. 3, 1997).

IV. **Incriminating Physical Evidence: What are the Attorney’s Duties?**

- A. The evidence in Howard Hunt’s White House safe
 - 1. Former CIA operative E. Howard Hunt was one of the White House “plumbers,” a secret group charged with plugging “leaks.” Along with G. Gordon Liddy, Hunt helped engineer the burglary at the headquarters of the Democratic National Committee at the Watergate.
 - 2. After discovery of the break-in, and as the subsequent cover-up began, a focus of concern was the fact that Hunt had office space in the White

House, including a safe. On orders from John Ehrlichman, Nixon's chief of staff, Hunt's White House safe was drilled open and its contents brought to John Dean's office, where Dean proceeded to go through it with Fred Fielding, associate White House counsel:

- a. "We plowed on into what Fred said was material from the safe. 'Wait a minute,' said Fred suddenly ... 'John, this stuff is sensitive. It could be evidence. Don't you think we ought to be careful?' 'Yeah, I guess you're right.' It hadn't occurred to me. I had been caught up by curiosity." John Dean, *Blind Ambition* at 114 (Simon & Schuster 1976).
- b. After putting on latex gloves they got from the office of the White House physician, Dean and Fielding sorted the safe's contents, which included: a revolver; classified State Department cables on the Vietnam War; bugging equipment; and a psychological profile of Daniel Ellsberg relevant to the break-in at the office of Ellsberg's psychiatrist. *Blind Ambition*, 114-15.
- c. Unrecalled by Dean until later, the contents also included several small notebooks with cardboard covers marked "Hermes." The "Hermes notebooks" identified people Hunt had recruited for his covert White House operations, including the Ellsberg break-in. *Blind Ambition* at 182.
- d. John Ehrlichman suggested to Dean that he "'deep-six' the sensitive materials from Hunt's safe by throwing them into the Potomac River." *Blind Ambition* at 121-22.
- e. While not wanting to disappoint Ehrlichman, Dean also "did not want to take responsibility for destroying potential evidence." *Blind Ambition* at 122. Finally, Dean gave the documents from the safe to L. Patrick Gray, the acting FBI director. "By this ruse, we could say we had turned all evidence over to 'the FBI,' and literally it would be true. At the same time, we felt we could count on Pat Gray to keep the Hunt material from becoming public, and he did not disappoint us." *Blind Ambition* at 122.
- f. Eventually, however, during Hunt's criminal trial, he demanded that the government produce the Hermes notebooks from his safe, claiming that they were vital to his defense. *Blind Ambition* at 169-70. But Gray revealed to Dean that he had destroyed the documents from the safe. *Id.* at 171.

- 1.) Dean, however, subsequently found the Hermes notebooks in his own office safe. *Blind Ambition* at 182.
- 2.) The notebooks “were no longer relevant to the trial after Hunt’s guilty plea. But they were certainly dangerous to the cover-up. I would have to get rid of the goddam things, as others had gotten rid of evidence. I put them into my new shredder. The machine tore through the pages but choked on the cardboard covers, and I was afraid it might break down. I felt a wave of paranoia... Finally it ate the last of the documents with a loud growl.” *Blind Ambition* at 182.

B. Much of the commentary about the ethical dilemmas presented when an attorney comes into possession of potentially incriminating physical evidence focusses on the duties that a criminal defense attorney owes to the client. *See, e.g.,* Norman Lefstein, *Incriminating Physical Evidence, the Defense Attorney’s Dilemma, and the Need for Rules*, 64 N.C. L. Rev. 897, nn. 8, 56 (1986) (hereafter “*Incriminating Physical Evidence*”) (discussing the issue from the defense attorney’s point of view, and citing other commentary).

1. As Dean came to recognize, the Watergate burglary and its cover-up involved criminal wrongdoing. *See Blind Ambition* at 168 (“It is uncanny, I thought, how the law prohibits all those little acts that had set off my chemical instincts of guilt ... Now that I had read [the federal obstruction-of-justice statute] in black and white it was clear enough. We were criminals.”). *See also* John Dean, *Watergate: What Was It?*, 51 Hastings L. J. 609, 618 (Apr. 2000) (“*Watergate: What Was It?*”) (“Quite honestly, it never occurred to me that we were obstructing justice, until I began reading the annotations to Title 18 long after the fact.”).
2. If John Dean had believed that Howard Hunt was a representative of the Office of the President – his “client” – what are some of the evidence issues presented by the contents of Hunt’s safe, and what are the related ethics issues?

C. The duty of confidentiality vs. the duty of fairness to opposing parties and counsel

Under the Model Rules of Professional Conduct, “A lawyer *shall not reveal information* relating to the representation of a client unless the client gives informed consent...” subject to several exceptions. (MRPC 1.6, emphasis added.) On the other hand, however, a lawyer may not “unlawfully obstruct another party’s access to evidence or unlawfully alter, *destroy or conceal* a document or other material having potential evidentiary value.” (MRPC 3.4, emphasis added.) These principles have been deemed to be in some tension, and can present dilemmas for lawyers.

1. The duty of confidentiality under MRPC 1.6
 - a. The first five exceptions to the duty of confidentiality do not apply to incriminating physical evidence, under most circumstances; *i.e.*:
 - 1.) preventing reasonably certain death/ bodily harm;
 - 2.) preventing future crime/fraud;
 - 3.) preventing/rectifying financial injury from client's crime/fraud using lawyer's services;
 - 4.) securing legal advice about lawyer's own conduct; and
 - 5.) establishing lawyer's claim/defense in controversy with client.
 - b. The sixth exception to the duty of confidentiality points to authority *outside* the ethics rules, and permits disclosure of information relating to the representation of a client in order "to comply with other law or a court order." (MRPC 1.6(e).)
 - c. A court-issued subpoena for evidence is a common source of such "other law or a court order." Many cases have considered whether attorneys must obey subpoenas seeking production of physical evidence received from clients.
 - 1.) A seminal case is *State v. Olwell*, 394 P.2d 681 (Wash. 1964), in which the defense attorney was served with a subpoena, as part of a coroner's inquest, seeking production of "all knives in [the attorney's] possession relating to Harry LeRoy Gray."
 - 2.) Based on the attorney-client privilege, the attorney refused to comply with the subpoena. The court held that "as an officer of the court," the attorney had to turn over the evidence. But the court also upheld the privilege, holding that in any subsequent prosecution the State would be barred from disclosing that the knife came from the defense attorney. The court essentially separated the client's conduct in giving the physical evidence to the attorney (a privileged "communication") from the evidence itself

(which was not a “communication” subject to the privilege).

- d. Cases analyzing the Fifth Amendment privilege against self-incrimination are in accord with the approach in *Olwell*. For instance, in *Fisher v. United States*, 425 U.S. 391 (1976), the taxpayer had provided his accounting records to his attorneys in order to obtain legal advice; the IRS attempted to compel the attorneys to comply with a subpoena for the records. The Supreme Court held that the taxpayer’s Fifth Amendment privilege, if any, could apply to the documents in the attorneys’ hands. Under the particular circumstances of the case, the documents did not qualify for Fifth Amendment protection, and the attorneys were compelled to produce them. But the Court held that if compliance with a subpoena would (a) acknowledge the documents’ existence and their possession or control, and (b) indicate the taxpayer’s belief that the papers were described in the subpoena, then the attorney’s compliance with the subpoena would involve self-incriminating testimony or communication that *would* be within the scope of the Fifth Amendment.
 - 1.) *See also United States v. Doe*, 465 U.S. 605 (1984) (sole proprietor’s production of financial documents in compliance with federal grand jury subpoena would constitute testimonial self-incrimination, and absent grant of use-immunity preventing government from using fact of production against owner, owner not required to produce documents).

- e. Even apart from the authority of the Model Rules (and their state counterparts), the disclosure of information in order to “comply with other law” also encompasses compliance with the common law. The court in *Olwell*, for example, in *dictum*, discerned a duty to *voluntarily* disclose to the authorities physical evidence in the lawyer’s possession, even if incriminating to the client.
 - 1.) “The attorney should not be a depository for criminal evidence ... which in itself has little, if any, material value for the purposes of aiding counsel in the preparation of the defense of [the lawyer’s] client’s case. Such evidence given the attorney during legal consultation for information purposes ... could clearly be withheld for a reasonable period of time. *It follows that the attorney, after a reasonable period, should as an officer of the court, on his*

own motion turn the same over to the prosecution.” Olwell, 394 P.2d at 684-85 (emphasis added).

- f. Other courts have elevated the *dictum* in *Olwell*, citing it as a “rule.” *See, e.g., Morrell v. State, 575 P.2d 1200, 1210 (Alaska 1978)* (attorney had received client’s written kidnapping plans from third person; from *Olwell* and other cited cases, “emerges the rule that a criminal defense attorney must turn over to the prosecution real evidence that the attorney obtains from the client.”); *State v. Carlin, 640 P.2d 324, 328 (Kan. App. 1982)* (attorney had received client’s incriminating tape recording; citing *Olwell* and other cases, “[s]ince the appellant’s attorney had a duty to turn over the evidence ... there was no error in the court ordering him to do so.”).
- 1.) *See also Restatement Third of the Law Governing Lawyers, § 119* (lawyer may take possession of physical evidence of client crime for time necessary to examine/test it, but after that must notify prosecuting authorities of the lawyer’s possession of the evidence and/or turn the evidence over to authorities).
 - 2.) Commentators have noted that “a substantial majority of decisions assert that defense counsel has a mandatory obligation to turn incriminating physical evidence over to the authorities once any legitimate purpose for possession is extinguished.” David Layton, *Incriminating Physical Evidence, Ethical Codes and Source Return*, J. of the Prof. Law. 59, at text accompanying n. 27 (May/June 2002) (hereafter “*Ethical Codes*”).
- g. Professional discipline has also resulted from a lawyer’s failure to voluntarily turn over incriminating evidence received from the client. For instance, in *In re Ryder, 381 F.2d 713 (4th Cir. 1967)*, the Fourth Circuit Court of Appeals affirmed an 18-month suspension from federal practice for a lawyer who took a bag of money and a shot-gun from a client suspected of bank robbery and put them in a safe deposit box. The court held that “It is an abuse of a lawyer's professional responsibility knowingly to take possession of and secrete the fruits and instrumentalities of a crime. Ryder’s acts bear no reasonable relation to the privilege and duty to refuse to divulge a client’s confidential communication. Ryder made himself an active participant in a criminal act,

ostensibly wearing the mantle of the loyal advocate, but in reality serving as accessory after the fact.”

- h. But commentators have noted that the Fifth Amendment analysis in *Fisher* and its progeny should trump the notion that an attorney must voluntarily produce the client’s physical evidence. See *Incriminating Physical Evidence* at 918-19 (“Surely there cannot be a duty to reveal voluntarily evidence that is constitutionally privileged or evidence that, if ordered produced, must be the subject of an immunity order.”).

2. The duty under MRPC 3.4(a) not to destroy or conceal incriminating evidence

- a. Complicating the picture, MRPC 3.4(a) provides that a lawyer shall not “unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value.”

- 1.) See also *Restatement Third of the Law Governing Lawyers* § 118 (lawyer may not destroy or obstruct another party’s access to evidence when doing so would violate a court order or other legal requirements, or counsel or assist client to do so).

- b. Commentators have noted that Rule 3.4(a)’s bar against “concealing” material of “potential evidentiary value” is “relatively uninformative” in terms of guidance to lawyers who have incriminating physical evidence in their possession. *Ethical Codes* at text accompanying n. 20.

- 1.) In particular, the text of the rule itself is silent about whether the duty not to “conceal” by itself signifies the existence of an affirmative ethical duty to turn the evidence over to authorities.

- 2.) MRPC 3.4(a) cmt. [2] likely constitutes an attempt to harmonize the prohibition against destruction/concealment with both the duty of confidentiality and the duty to voluntarily provide incriminating physical evidence to the authorities. The comment refers lawyers to external “applicable law,” which “may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination ... In such a case, applicable law may require the lawyer to turn

the evidence over to the police or other prosecuting authority, depending on the circumstances.”

- c. At least some authority suggests that Rule 3.4(a) applies even when attorneys are not acting in their professional capacity as advocates. *See, e.g., In re Melvin*, 807 A.2d 550 (Del. 2002) (one year suspension imposed for violating state’s version of MRPC 3.4(a) by concealing or destroying wife’s journal and papers, which might have had aided in lodging criminal complaint against him for violating protection order barring lawyer from contact with his wife); *Atty. Griev. Comm. v. White*, 731 A.2d 447 (Md. App. 1999) (imposing reciprocal discipline after federal district court disciplined attorney for destroying discoverable evidence in her capacity as plaintiff in a civil trial before the federal court).

V. **Lawyers In Trouble: What are the Ethical Duties?**

- A. When John Dean shredded the Hermes notebooks, he called it “a moment of high symbolism.” “This ... act shredded the last of my feeble rationalizations that I was an agent rather than a participant – a lawyer defending guilty clients, rather than a conspirator.” *Blind Ambition* at 182.
- B. Several Model Rules are relevant when a lawyer crosses the line that Dean describes, and becomes an actual participant in wrongdoing.
 1. Model Rule 8.4 provides, in pertinent part, that:

It is professional misconduct for a lawyer to:

 - (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
 - (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
 - (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
 - (d) engage in conduct that is prejudicial to the administration of justice....
 - a. “Rule 8.4 defines what constitutes misconduct for a lawyer. In general it provides that a lawyer may be disciplined for violating a mandatory requirement of the Rules, or for engaging in conduct *forbidden by other laws* if such conduct demonstrates that the

lawyer should not be entrusted with the confidence that clients normally place in a lawyer.” *Lawyer’s Deskbook*, § 8.4-1 at 1293.

- b. *See also* Restatement Third of the Law Governing Lawyers, § 1 (on admission to bar, lawyer becomes “subject to applicable law governing such matters as professional discipline, procedure and evidence, civil remedies, and criminal sanctions.”; *id.*, at cmt. [b] (“The lawyer codes and much general law remain complementary. The lawyer codes draw much of their moral force and, in many particulars, the detailed description of their rules from preexisting legal requirements and concepts found in the law of torts, contracts, agency, trusts, property, remedies, procedure, evidence, and crimes. Thus, lawyer codes particularize some general legal rules in the particular occupational situation of lawyers but are not exhaustive of those rules.”).
- 1.) One of the federal criminal code provisions applicable to documentary evidence is 18 U.S.C. § 1519, which applies to one who “knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States.”
 - 2.) Other criminal statutes can also apply to physical evidence, including, *inter alia*, the general obstruction statute. *See* 18 U.S.C. § 1503 (corruptly influencing, obstructing, or impeding or attempting to influence, obstruct, or impede, the due administration of justice).
 - 3.) Section 1519 is very broad, and (in contrast to § 1503) does not require the existence of a pending proceeding, or a nexus between the defendant’s actions and a pending proceeding, such as a grand jury proceeding. *Compare United States v. Moyer*, 674 F.3d 192 (3d Cir. 2012) with *United States v. Aguilar*, 515 U.S. 593 (1995) (requiring connection between defendant’s conduct and proceeding).
- c. The Watergate scandal resulted in 69 government officials being charged with criminal wrongdoing, and 48 being found guilty. *See* http://en.wikipedia.org/wiki/Watergate_scandal#Final_legal_actions_and_effect_on_the_law_profession (listing principal officials who were convicted). Many of those indicted or convicted, of course, were lawyers. *See also Blind Ambition* at 249 (Dean

commenting to his lawyer regarding his handwritten list of those Dean felt would be indicted by the grand jury investigating the Watergate break-in: “You know, what is incredible is the number of lawyers on the list”).

2. Model Rule 8.3, provides in pertinent part:

(a) 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. ...

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6

Comment [2] to MRPC 8.3 explains that “A report about misconduct is not required where it would involve violation of Rule 1.6.

However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.”

a. “In general, lawyers have an obligation to volunteer information of another lawyer’s serious disciplinable violations unless the information is privileged.” *Lawyer’s Deskbook*, § 8.3-1 at 1278.

1.) The former Model Code likewise required the reporting of lawyer professional misconduct, similarly limited to that based on “unprivileged knowledge.” *See* DR 1-103, cited in *Lawyer’s Deskbook*, § 8.3-2 at 1286 n. 1.

b. Under Model Rule 8.3, Dean and other lawyers involved in Watergate would have had an arguable duty to report each others’ misconduct to disciplinary authorities – subject to the exception for confidential client information protected by Rule 1.6.

1.) The analysis of the duty to report depends on the client-identity analysis discussed briefly above. “[W]hen a lawyer represents another lawyer in the matter that is the subject of the misconduct, the Rules permit ... the attorney-client relationship to override the duty to disclose misconduct to the proper authority.” *Lawyer’s Deskbook* § 8.3-2 at 1287.

- 2.) If Dean, for example, is deemed to have represented Nixon himself, there might have been no duty to report under MRPC 8.3, as the incriminating information would have been subject to the confidentiality requirements of Rule 1.6. Comment [2] would have encouraged Dean to seek consent to report from his client – which would surely not have been given.
 - 3.) If, on the other hand, Dean is deemed to have solely represented the “Office of the President” (discussed above as the analysis most-closely comports with ethics standards under the Model Rules), then the analysis might be altered, with Model Rule 1.13’s “reporting up and out” provisions coming into play. (For a discussion of that analysis, see *Materials for The Watergate CLE*, included herein.)
- c. The confidentiality exception to the duty to report has been criticized as an exception that so weakens MRPC 8.3 that the “duty” is actually “little more than an illusion.” Vincent R. Johnson, *Legal Malpractice and the Duty to Report Misconduct*, 1 St. Mary’s J. on Legal Mal. & Ethics 40, 76 (2011) (hereafter “*Duty to Report Misconduct*”) (also noting that even the comment on seeking client consent to bypass the confidentiality requirement in order to permit reporting is merely a “weak injunction that a lawyer ‘should’ (not ‘shall’) seek client consent...”).
- d. Just as the reporting obligation does not override the duty of client confidentiality, the Constitutional privilege against self-incrimination under the Fifth Amendment must also apply when a lawyer represents another lawyer, although not expressly mentioned in the Rule.
- 1.) See *Lawyer’s Deskbook* § 8.3-2 at 1288-89 (“Clearly the [reporting] rule cannot apply to knowledge protected by a constitutional privilege such as the privilege against self-incrimination; otherwise the rule would be unconstitutional.”).
 - 2.) See also Douglas R. Richmond, *The Duty to Report Professional Misconduct: A Practical Analysis of Lawyer Self-regulation*, 12 Georgetown J. Legal Ethics 175, 201-02 (1999) (hereafter, “*Practical Analysis*”) (noting the applicability of the privilege against self-incrimination and that many serious ethics violations are also crimes; “There

is no point in diluting the Rule 8.3(a) reporting mandate by adding an unrealistic or unreasonable requirement.”).

- e. Significantly, professional discipline for failing to report the misconduct of other lawyers is rare – violating the “rat rule” is very seldom itself a basis for discipline.
 - 1.) *See, e.g., Duty to Report Misconduct* at 47 (in Texas, for example, during 2006-2011, only one lawyer was sanctioned for violating duty to report unprivileged knowledge of another lawyer’s misconduct).
 - 2.) *See also* Heather F. Newton & Nikki A. Ott, *A Current Look at Model Rule 8.3: How is It Used and What are Courts Doing About It?*, 16 *Georgetown J. Legal Ethics* 747, 747 (2003) (calling MRPC 8.3 “one of the most underenforced, and possibly unenforceable, mandates in legal ethics.”).
- f. On the other hand, there are some reported disciplinary cases in which the sanctioned lawyer violated the “rat rule,” although the failure to report is usually one of several instances of misconduct.
 - 1.) *See, e.g., Atty. Grievance Comm’n v Kahn*, 431 A.2d 1336 (Md. 1991) (associate disbarred for failing to report employer’s misconduct; also improperly solicited clients, diverted client funds and misused information from former employer’s files); *In re Rivers*, 331 S.E.2d 332 (S.C. 1984) (lawyer sanctioned for failing to report a partner’s misconduct and improperly communicating with juror). *See also Practical Analysis* at 179 n. 32 (citing additional cases).
- g. In *In re Himmel*, 533 N.E.2d 790 (Ill. 1988), however, widely cited by commentators, the failure to report another lawyer’s misconduct was the sole basis for discipline. The lawyer there – Himmel -- represented an injury victim whose lawyer in the underlying case had converted the victim’s settlement check from the tort-feasor. Himmel’s client had specifically instructed him not to take any other action against her former attorney except to pursue payment of her settlement money. Acting under these instructions, Himmel failed to report the other lawyer to the disciplinary authorities. The Illinois Supreme Court suspended Himmel for one year, holding that he had had “unprivileged knowledge” of lawyer wrongdoing,

because his knowledge was outside the scope of the evidentiary attorney-client privilege.

- h. And notwithstanding the rarity of disciplinary action based solely on violating Rule 8.3, it remains a topic of concern, and even “angst,” among lawyers, who struggle to apply the rule. *See Patricia A. Sallen, Combating Himmel Angst*, J. of the Prof. Law. 55, at text accompanying nn. 1-2 (2007) (Arizona State Bar ethics counsel noted that five percent of the 2,100 calls to state bar’s ethics hotline in 2006 concerned Rule 8.3 reporting requirement).
- i. Duty of lawyer to self-report own professional misconduct
 - 1.) Under the ABA Ethics Committee’s interpretation of the prior Model Code of Professional Responsibility, a lawyer was required to self-report the lawyer’s own misconduct, to the extent that it was based on “unprivileged knowledge or information.”
 - 2.) *See* ABA Informal Op. 1279 (Aug. 29, 1973) (lawyer required to report own violation of ethics rules “where his unethical conduct is not privileged because, for example, he clearly cannot be exposed to criminal sanctions for having engaged in such unethical conduct.”)
 - 3.) However, MRPC 8.3 expressly negates any self-reporting duty, providing that the duty extends only to “a lawyer who knows that *another* lawyer” has committed misconduct.
 - 4.) *See Practical Analysis* at 201 (noting problems with any self-reporting requirement, including self-incrimination issues under the Fifth Amendment, and characterizing as “unreasonable” and “unrealistic” the expectation that lawyers would self-report).
 - 5.) *See also State v. Ankerman*, 2000 Conn. Super. LEXIS 3281, *5-6 (Conn. Super. Ct. Nov. 28, 2000) (lawyer not required to self-report misconduct, but having done so, his self-incriminating statements were not “involuntary” under Fifth Amendment, and would not be suppressed from evidence in disciplinary proceeding; “[E]ven if the rules could be read to mandate self-reporting under certain circumstances, there is no question that the defendant’s fifth amendment privilege”).

- 6.) But state versions of the Model Rules may adopt a different viewpoint on self-reporting of lawyer misconduct.
- 7.) For example, Ohio has retained the self-reporting requirement of the former Model Code. *See* Ohio Rule of Professional Conduct 8.3 (lawyer who possesses unprivileged knowledge of ethical misconduct that “raises a question as to **any** lawyer’s honest, trustworthiness, or fitness as a lawyer in other respects, shall inform a disciplinary authority”) (emphasis added).
 - a.) *See also* Ohio Adv. Op. 2007-1 (Ohio Bd. Comm’rs on Griev. & Discipl. Feb. 9. 2007) (lawyers are required to self-report own professional misconduct).
 - b.) *See also* *Disciplinary Counsel v. Robinson*, 933 N.E.2d 1095, 2010-Ohio-3829, ¶¶ 13, 36 (2010) (attorney self-reported his destruction of evidence, on the day of the hearing, relevant to his disciplinary proceeding; court acknowledged the fact of self-reporting, but accorded it no weight in mitigating the misconduct, which included multiple offenses in addition to the destruction of evidence; one year suspension imposed).

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The Watergate CLE II

Bibliography

A. Leading Historical Accounts of Watergate (chronologically by publication date)

All The President's Men by Bob Woodward and Carl Bernstein (Simon & Schuster 1974). [An account of cub reporters pursuing the Watergate story for *The Washington Post*, a slice of the Watergate story that would take on mythic proportions when made into a film of the same title starring Robert Redford.]

The Final Days by Bob Woodward and Carl Bernstein (Simon & Schuster 1976). [An anonymously-sourced work that appears to accurately reveal the end of the Nixon presidency.]

The Wars of Watergate: The Last Crisis of Richard Nixon by Stanley I. Kutler (Alfred A. Knopf 1990). [The most complete recounting of Watergate, based on solid historical information by a professional historian.]

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Excerpts From Hunt/Colson Dictabelt

Undated (November, 1972)

COLSON: Hello.

HUNT: Hi.

COLSON: How we doing?

HUNT: Well, ah, about as can be expected. How are you?

COLSON: Ah, just about the same. Christ, trying to hold the pieces together.

HUNT: Yeah. Congratulations on your victory.

COLSON: Thank you. Ah, you, ah, I'm sorry that ah, we haven't been celebrating it together with, ah, good champagne and, ah, good scotch, but ah, we'll have ...

HUNT: (Laughs) Well there may yet come a time. Who knows?

COLSON: It'll come, I assure ya. Let me, ah, let me, before you say anything, let me say a couple of things. One, ah, I don't know what's going on here other than, I am told that, ah, ah, everybody's gonna come out all right. That's all I know ...

HUNT: Ah huh

COLSON: And, ah, I've deliberately not asked any specific questions.

HUNT: Right.

COLSON: For this reason: that, ah, I have my own ideas about how things'll turn out...

HUNT: Ah huh.

COLSON: but-and I'm not worried about 'em and you shouldn't be-but...

[Later in the conversations.]

HUNT: Well, the reason I called you was to make, ah--get back to the beginning, here-- is because of commitments to, ah, that were made to all of us at onset, have not been kept. And there's a great deal of unease and concern on the part of seven defendants and possibly, well I'm quite sure, me least of all. But, ah, there's a great deal of ah, of ah, financial expense here that is not been covered and what we've been getting has been coming in, ah, very minor dribs and drabs. And, ah, Parkinson, who's been the go-between with my attorney doesn't seem to be very effective and we're now reaching a point at which, ah...

COLSON: Okay. You've told me all, all, that, that--don't tell me any more...

HUNT: Okay

COLSON: ...'cause I, I understand that, lemme, lemm just, ah...

HUNT: Because these people have really got to dig, this is a long haul thing but stakes are very, very high...

COLSON: That's right...

HUNT: ...and I thought that you would want to know that this thing must not break apart, ah, for, for foolish reasons.

COLSON: I agree. Yeah. Oh, no, Christ no. Everybody gets...

HUNT: Yeah.

COLSON: ...gets, ah...

HUNT: Well, and while we get, ah, you know, third, fourth-hand reassurances, still, the, "the ready" is not available.

COLSON: Um hmm.

HUNT: (laughs)

COLSON: I follow...

HUNT: That's the basic problem.

COLSON: I follow ya. I follow ya. Okay we ...

American Bar Association:

**Model Rules
1.6 and 1.13
of the Professional
Rules of Conduct**

Client-Lawyer Relationship

RULE 1.6: CONFIDENTIALITY OF INFORMATION

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
 - (1) to prevent the client from committing a criminal act;
 - (2) to prevent reasonably certain death or substantial bodily harm;
 - (3) 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;
 - (4) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
 - (5) to secure legal advice about the lawyer's compliance with these Rules;
 - (6) 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; or
 - (7) to comply with other law or a court order.

Client-Lawyer Relationship

RULE 1.13: ORGANIZATION AS CLIENT

- (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
- (b) 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 which 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, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

- (c) Except as provided in paragraph (d), if,
 - (1) despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon 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
 - (2) 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 whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.
- (d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee

or other constituent associated with the organization against a claim arising out of an alleged violation of law.

- (e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.
- (f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.
- (g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

The Watergate CLE II

The “Cancer on the Presidency” Conversation

[Excerpts From Draft Transcript]

March 21, 1973

Time: Between 9:15 am – 11:55 am

Oval Office

President, John W. Dean and H.R. “Bob” Haldeman

Conversation 886-8

Segment 1: Introduction [01:14]

DEAN: Ah, the reason I thought we ought to talk this morning is because in, in our conversations, ah, ah, I have, I have the impression that you don't know everything I know...

PRESIDENT: That's right.

DEAN: - and it makes it very difficult for you to make judgments that, ah, that only you can make...

PRESIDENT: That's right.

DEAN: ...on some of these things and I thought that...

PRESIDENT: You've got to, in other words, I've got to know why you feel that, ah, that something...

DEAN: Well, let me...

PRESIDENT: - that, that we shouldn't unravel something.

DEAN: - let me give you my overall first.

PRESIDENT: In other words, your, your judgment as to where it stands, and where we're gonna go?

DEAN: I think, I think that, ah, there's no doubt about the seriousness of the problem we're, we've got. We have a cancer -- within -- close to the Presidency, that's growing. It's growing daily. It's compounding, it grows geometrically now, because it compounds itself. Ah, that'll be clear as I explain, you know, some of the details, ah, of why it is, and it basically it's because (1) we're being blackmailed; (2) ah, people are going to start

perjuring themselves very quickly that have not had to perjure themselves to protect other people and the like. And that is just -- And there is no assurance...

PRESIDENT: That it won't bust?

DEAN: That that won't bust.

Segment 2: Liddy's Original Plans: First Report-Up [02:18]

DEAN: ... Magruder called me in January and said, "I'd like to have you come over and see Liddy's plans."

PRESIDENT: January of '72.

DEAN: January of '72. Like, "You come over to Mitchell's office and sit in on a meeting where Liddy's gonna lay his plan out." I said, "Well, I don't really know as I'm the man, but if you want me there, I'll be happy to." [Clears throat] So I came over and Liddy laid out a million dollar plan that was the most incredible thing I have ever laid my eyes on: all in codes, and involved black bag operations, kidnapping, providing prostitutes, ah, to weaken the opposition, bugging, ah, mugging teams. It was just an incredible thing. [Clears throat]

PRESIDENT: But, ah...

DEAN: And...

PRESIDENT: - that was, that was not, ah...

DEAN: No.

PRESIDENT: - discussed at the...

DEAN: No.

PRESIDENT: (unclear)

DEAN: No, not at all. And...

PRESIDENT: (unclear)

DEAN: - ah, Mitchell, Mitchell just virtually sat there puffing and laughing. I could tell 'cause after he, after Liddy left the office, I said, "That's the most incredible thing I've ever seen." He said, "I agree." And so he was told to go back to the drawing board and

come up with something realistic. So, there was a second meeting. Ah, they asked me to come over to that. I came into the tail end of the meeting. I wasn't there for the first part of it. I don't know how long the meeting lasted. Ah, at this point, they were discussing again bugging, kidnapping and the like. And at this point I said, right in front of everybody, very clearly, I said, "These are not the sort of things (1) that are ever to be discussed in the office of the Attorney General of the United States," where he still was, "and I am personally incensed." I was trying to get Mitchell off the hook, ah, 'cause...

PRESIDENT: I know.

DEAN: - he's a, he's a nice person, doesn't like to say no under-- when people he's gonna have to work with.

PRESIDENT: That's right.

DEAN: So, I let, I let it be known. I said, "You all pack that stuff up and get it the hell out of here I 'cause we just, you just can't talk this way in this office and you shouldn't, you should re-examine your whole thinking." I came back...

PRESIDENT: Who else was present besides you?

DEAN: It was Magruder, Magruder...

PRESIDENT: Magruder.

DEAN: - ah, Mitchell, Liddy and myself. I came back right after the meeting and told Bob, I said, "Bob, we've got a growing disaster on our hands if they're thinking this way," and I said, "The White House has got to stay out of this and I, frankly, am not gonna be involved in it." He said, "I agree, John." And I thought, at that point, the thing was turned off. That's the last I heard of it, when I thought it was turned off, because it was an absurd proposal.

PRESIDENT: Yeah.

Segment 3: Colson Applies Pressure from the White House [01:14]

DEAN: ... So Liddy went back after that and was over, over at, ah, 1701 with the Committee, and I, this is where I come into having put the pieces together after the fact as to what I can put together of what happened. Liddy sat over there and tried to come up with another plan that he could sell. (1) They were talking, saying to him he was asking for too much money, and I don't think they were discounting the illegal points at this, after, you know, Jeb is not a lawyer. He didn't know whether this was the way the game was played or not, and what it was all about. They came up with, apparently, another plan, ah, but they couldn't get it approved by anybody over there. So Liddy and

Hunt apparently, came to see Chuck Colson, and Chuck Colson picked up the telephone and called Magruder and said, "You all either fish or cut bait. Ah, this is absurd to have these guys over there and not using 'em, and if you're not gonna use 'em, I may use 'em." And things of this nature.

PRESIDENT: When was this?

DEAN: This was apparently in February of '72.

PRESIDENT: That could be. Did Colson know what they were talking about?

DEAN: I can only assume, because of his close relationship with...

PRESIDENT: Hunt.

DEAN: ... with Hunt, that he had a damn good idea what they were talking about.

Segment 4: Break-In—Confrontation of Liddy [01:28]

DEAN: Now, so the information was coming over here and then, ah, I finally, after the next point in time where I became aware of anything was on June 17th, when I got the word that there had been this break-in at the Democratic National Committee and somebody from the Committee had been caught, ah, from our Committee had been caught in the DNC. And I said, "Oh, my God, that, I can only," you know, me essentially putting the pieces together [Coughs].

PRESIDENT: You knew what it was?

DEAN: I knew what it was. So, I called Liddy, ah, on that Monday morning, and I said, "Gordon," I said, "first, I want to know if anybody in the White House was involved in this." And he said, "No, they weren't." I said, "Well, I want to know how in God's name this happened." And he said, "Well, I was pushed without mercy by Magruder to get in there, get more information, and the information, it was not satisfactory. Magruder said, "The White House is not happy with what we're getting"

PRESIDENT: The White House?

DEAN: The White House. Yeah. Ah...

PRESIDENT: Who do you think was pushing him?

DEAN: Well, I think it was probably Strachan thinking that Bob wanted things, and (unclear) because I've seen that happen on other occasions where things have been said to be of very prime importance when they really weren't.

PRESIDENT: Why (unclear) I wonder? I am just trying to think as to why then. We'd just finished the Moscow trip. I mean, we were...

DEAN: That's right.

PRESIDENT: The Democrats had just nominated McG, McGovern. I mean, for Christ's sakes, I mean, what in the hell were we, I mean, I can see doing it earlier but I mean, now, let me say, I can see the pressure, but I don't see why all the pressure would have been on then.

Segment 5: Perjury Committed [01:18]

DEAN: Alright, now, we've gone through the trial. We've- I don't know if Mitchell has perjured himself in the Grand Jury or not. I've never...

PRESIDENT: Who?

DEAN: Mitchell. I don't know how much knowledge he actually had. I know that Magruder has perjured himself in the Grand Jury. I know that Porter has perjured himself, ah, in the Grand Jury.

PRESIDENT: Porter (unclear)

DEAN: He's one of Magruder's deputies.

PRESIDENT: Yeah.

DEAN: Ah, that they set up this scenario which they ran by me. They said, "How about this?" I said, "Look, I don't know. I, you know, if, if this is what you are gonna hang on, fine." Ah, but they...

PRESIDENT: What did they say before the Grand Jury?

DEAN: They said, they said, as they said before the trial and the Grand Jury, that, that, ah, Liddy had come over as, as a counsel...

PRESIDENT: Yeah.

DEAN: - and we knew he had these capacities to...

PRESIDENT: Yeah.

DEAN: - you know...

PRESIDENT: Yeah.

DEAN: - to do legitimate intelligence. We had no idea what he was doing.

PRESIDENT: Yeah.

DEAN: He was given an authorization of \$250,000...

PRESIDENT: Right.

DEAN: - to collect information, because our surrogates were out on the on the road. They had no protection. We had information that there were gonna be demonstrations against them, that, ah, ah, we had to have a plan to get information as to what liabilities they were going to be confronted with.

PRESIDENT: Right.

DEAN: And Liddy was charged with doing this. We had no knowledge that he was gonna bug the DNC. Ah...

PRESIDENT: Well, the point is, that's not true.

DEAN: That's right.

PRESIDENT: Magruder did know that...

DEAN: Magruder specifically instructed him to go back in the DNC.

PRESIDENT: He did?

DEAN: Yes.

Segment 6: Clear Instructions Not to Investigate—Containment [00:35.5]

DEAN: ... Now, [clears throat] what, what has happened post-June 17th. Well, it was, I was under pretty clear instructions [laughs] not really to investigate this. That this was something that just could have been disastrous on the election if it had, all hell had broken loose, and I worked on a theory of containment...

PRESIDENT: Sure.

DEAN: ...to try to hold it right where it was.

PRESIDENT: Right.

DEAN: There is no doubt I, I, ah, that, ah, I was totally aware what the Bureau was doing at all times. I was totally aware of what the Grand Jury was doing.

PRESIDENT: Do you mean...

DEAN: I knew-what witnesses were gonna be called. I knew what they were gonna be asked, and I had to....

Segment 7: Payment of Money [01:13]

DEAN: Alright. Now, post-June 17th: ... Ah, Liddy said, said that, you know, if they all got counsel instantly and said that, you know, "We'll, we'll ride this thing out." Alright, then they started making demands that, "We've gotta have attorneys' fees. Ah, we don't have any money ourselves, and if you're asking us to take this through the election-" Alright, so arrangements were made through Mitchell, ah, initiating it in discussions, and I was present- that these, guys had to be taken care of. Their attorneys' fees had to be done. Kalmbach was brought in. Ah, Kalmbach raised some cash. Ah, they we're obv-, ah, you know...

PRESIDENT: They put that under the cover of the Cuban Committee (unclear)

DEAN: Yeah, they, they had a Cuban Committee and they had- some of it was given to Hunt's lawyer, who in turn passed it out. This you know, when Hunt's wife was flying to Chicago with ten thousand, she was actually, I understand after the fact now, was going to pass that money to, ah, one of the Cubans, to meet him in Chicago and pass it to somebody there.

PRESIDENT: (unclear) Maybe – Well, whether it's maybe too late to do anything about it, but I would certainly keep that, [laughs] that cover for whatever it's worth.,

Segment 8: The Most Troublesome Part [01:00]

DEAN: Well, well, yes, that, that's...

PRESIDENT: (Unclear)

DEAN: - the most troublesome post-thing, ah, because (1) Bob is involved in that; John is involved in that; I am involved in that; Mitchell is involved in that. And that's an obstruction of justice.

PRESIDENT: In other words, the fact that, ah, that you're, you're, you're taking care of witnesses.

DEAN: That's right. Ah...

PRESIDENT: How was Bob involved?

DEAN: well, th- they ran out of money over there. Bob had three hundred and fifty thousand dollars in a safe over here that was really set aside for polling purposes. Ah, and there was no other source of money, so they came over here and said, "You all have got to give us some money."

PRESIDENT: Right.

DEAN: I had to go to Bob and say, "Bob, you know, you've got to have some -- they need some money over there." And he said, "What for?" And so I had to tell him what it was for 'cause he wasn't about to just send money over there willy-nilly. And, ah, John was involved in those discussions, and we decided, you know, that, you know, that there was no price too high to pay to let this thing blow up in front of the election.

Segment 9: Continual Blackmail Operation [00:55]

DEAN: But, now, here, here's what's happening right now.

PRESIDENT: Yeah.

DEAN: What sort of brings matters to the—This is the one that's gonna be a continual blackmail operation, by Hunt and Liddy and the...

PRESIDENT: Yeah.

DEAN: ...Cubans. No doubt about it. And McCord...

PRESIDENT: Yeah.

DEAN: ...who is, who is another one involved. McCord has asked for nothing. Ah, McCord did ask to meet with somebody, and it was Jack Caulfield, who is his old friend who'd gotten him hired over there. And when, when, when Caulfield had him hired, he was a perfectly legitimate security man. And he wanted to know, well, you know, [coughs] he wanted to talk about commutation, and things like that. And as you know, Colson has talked to, indirectly to Hunt about commutation. [Clears throat] All these things are bad, in, in, in that they are problems, they are promises, they are commitments, and the very sort of thing that the Senate's gonna be looking for. I don't think they can find them, frankly.

PRESIDENT: It's pretty hard.

DEAN: Pretty hard. Damn hard. It's all cash. Ah...

Segment 10: Hunt's Demands: \$122,000 [00:57]

DEAN: ... Now, the blackmail is continuing. Hunt called one of the lawyers from the Re-election Committee on last Friday to meet with him on, over the weekend. The guy came in to me, to see me to get a message directly from Hunt to me, for the first time.

PRESIDENT: Is Hunt out on bail?

DEAN: Pardon?

PRESIDENT: Is Hunt on bail?

DEAN: Hunt is on bail. Correct. Ah, Hunt now is demanding another seventy-two thousand dollars for his own personal expenses; another fifty thousand dollars to pay his attorneys' fees; a hundred and twenty, some thousand dollars. Wants it, wanted it by the close of business yesterday. 'Cause he says, "I'm gonna be sentenced on Friday, and I've got to be able to get my financial affairs in order." I told this fellow O'Brien, "You came, alright, you came to the wrong man, fellow. I'm not involved in the money. Ah, I don't know a thing about it, can't help you." I said, "You better scramble around elsewhere." Now, O'Brien is, O'Brien is, is a ball player. He's been, he's carried tremendous water for us. Ah...

PRESIDENT: He isn't Hunt's lawyer?

DEAN: No. He is, he is our lawyer at the Re-election Committee. ... So, he's safe. There's no problem there.

Segment 11: Threat to Ehrlichman [00:30]

DEAN: ... But it raises the whole question of Hunt now has made a direct threat against Ehrlichman, as a result of this. This is his blackmail. He says, "I will bring John Ehrlichman down to his knees and put him in jail. Ah, I have done enough seamy things for he and Krogh, ah, that they'll never survive it."

PRESIDENT: What's that, on Ellsberg?

DEAN: Ellsberg, and apparently, some other things. I don't know the full extent of it. Ah...

PRESIDENT: I don't know about anything else.

DEAN: I don't know either, and I [laughs] almost hate to learn some of these...

PRESIDENT: Yeah.

DEAN: ...things.

Segment 12: Soft Spots: Too Many People Know, Nixon Acknowledges Clemency Conversation Regarding Hunt [02:17]

DEAN: ... So that's, that's that situation. Now, where are the soft points? How many people know about this? Well, ah, well, let me go one step further in this, this whole thing. The Cubans that were used in the Watergate were also the same Cubans that Hunt and Liddy used for this California Ellsberg thing, for the break-in out there.

PRESIDENT: Yeah.

DEAN: So, they're, they're aware of that. How high their knowledge is, is something else. Hunt and Liddy, of course, are totally aware of, of, of it, and the fact that, ah, it was right out of the White House.

PRESIDENT: I don't know what the hell he did that for.

DEAN: I don't either.

PRESIDENT: What in the name of God, did that...

DEAN: Mr. President, there's been a couple of things around here that I have gotten wind of. Uh, there was at one time, a desire to do a second-story job on the Brookings Institute where they had the Pentagon Papers. Now, I flew to California because I was told that John had instructed it and he said, "I really hadn't. It's a misimpression, but for Christ sakes, turn it off." ... Well, who knows about this all now? Alright, you've got [clears throat] the Cubans' lawyer, a man by the name of Rothblatt, who is a no good, publicity-seeking, son-of-a-bitch, to be very frank about it. He has had to be turned down and tuned off. He was canned by his own people 'cause they didn't trust him. They were trying to run a different route than he wanted to run. He didn't want them to plead guilty. He wants to represent them before the Senate. So, F. Lee Bailey, who was the partner of one of the, of one of the men representing McCord, uh, got in and, and cooled Rothblatt down. So, that means that Lee Bailey's got knowledge. Uh, Hunt's

lawyer, a man by the name of Bittman, who's an excellent criminal lawyer from the Democratic era of Bobby Kennedy, he's got knowledge. Uh...

PRESIDENT: Do you think, do you think, that he's got some? How much?

DEAN: Well, everybody not only, all the, all the direct knowledge that Hunt and Liddy have, as well as all the hearsay they have.

PRESIDENT: I see.

DEAN: Ah, you've got the two lawyers over at the Re-election Committee who did an investigation to find out the facts. Slowly, they got the whole picture. They're, now, they're solid, but they're...

PRESIDENT: But they know.

DEAN: But they know. Ah, you've got then, an awful lot of - all the principals involved know. Ah, Hunt- Some people's wives know.

PRESIDENT: Sure.

DEAN: Ah, there's no doubt about that. Mrs. Hunt was the savviest woman in the world. She had the whole picture together.

PRESIDENT: Did she?

DEAN: Yeah, it's Ah, - Apparently, she was the pillar of strength in that family before the death, and, ah...

PRESIDENT: Great sadness. The basis, as a matter of fact [clears throat] there was some discussion over here with somebody about, ah, Hunt's problems after his wife died and I said, of course, commutation could be considered on the basis of his wife, and that is the only discussion I ever had in that light.

Segment 13: Raising Money, \$1 Million Dollars: "We could get that" [01:33]

DEAN: ... So that's, that's it. That's the, the extent of the knowledge. Now, where, where are the soft spots on this? Well, first of all, there's the, there's the problem of the continued blackmail...

PRESIDENT: Right.

DEAN: ...which will not only go on now, it'll go on when these people are in prison, and it will compound the obstruction of justice situation. It'll cost money. It's dangerous.

Nobody, and I think people around here are not pros at this sort of thing. And this is the sort of thing Mafia people can do: washing money, getting clean money, and things like that. Ah, we're, we just don't know about those things, because we're not used to, you know, (laughs) we're not criminals and not used to dealing in that business. It's, ah, it's, ah...

PRESIDENT: That's right.

DEAN: ...it's a tough thing to know how to do.

PRESIDENT: Maybe we can't even do that.

DEAN: That's right. It's a real problem as to whether we could even do it. Plus, there's a real problem in raising money. Ah, Mitchell has been working on raising some money. Ah, feeling he's got, you know, he's got one, he's one of the ones with the most to lose. Ah, but there's no denying the fact that the White House, and, ah, Ehrlichman, Haldeman, and Dean are involved in some of the early money decisions.

PRESIDENT: How much money do you need?

DEAN: I would say these people are gonna cost, ah, a million dollars over the next, ah, two years.

PRESIDENT: We could get that.

DEAN: Um hmm.

PRESIDENT: You, on the money, if you need the money, I mean, ah, you could get the money. Let's say...

DEAN: Well, I think that we're going...

PRESIDENT: What I meant is, you could, you could get a million dollars, and you could get it in cash. I, I know where it could be gotten.

DEAN: Um hmm.

PRESIDENT: I mean, it's not easy, but it could be done. But, ah, the question is who the hell would handle it?

DEAN: That's right. Ah...

PRESIDENT: Any ideas on that?

DEAN: Well, I would think that would be something I that Mitchell ought to be charged with.

PRESIDENT: I would think so, too.

Segment 14: Perjury Threat [01:25]

DEAN: Alright. Let, let me, ah...

PRESIDENT: Go ahead.

DEAN: ...continue a little bit here now. The, ah, I, when I say this is a, a growing cancer, ah, I say it for reasons like this. Bud Krogh, in his testimony before the Grand Jury, was forced to perjure himself. Ah, he is haunted by it. Ah, Bud said, "I haven't had a pleasant day on the job."

PRESIDENT: Hah? Said what?

DEAN: He said, "I have not had a pleasant day on my job." Ah, he talked, apparently, he said to me, "I told my wife all about this," he said. "The, ah, the curtain may ring down one of these days, and, ah, I may have to face the music, which I'm perfectly willing to do." Ah...

PRESIDENT: What did he perjure himself on, John?

DEAN: His, did, ah, did he know the Cubans? He did. Ah...

PRESIDENT: He said he didn't?

DEAN: That's right. They didn't press him hard on this.

PRESIDENT: He might be able to, I'm just trying to think. Perjury's an awful hard rap to prove. He could say that I, well, go ahead.

DEAN: [Coughs) Well, so that's, that's the first, that's one perjury. Now, Mitchell and, and, ah, Magruder are potential perjurers. There's always the possibility of any one of these individuals blowing. Hunt. Liddy. Liddy's in jail right now. He's serving his—trying to get good time right now. I think Liddy is probably, in his, in his own bizarre way, the strongest of all of them....

Segment 15: Options? Dean Recommends Complete Disclosure, Go to the Grand Jury, Nixon Appears to Consider [02:26]

DEAN: ... What really troubles me is, you know, (1) will this thing not break some day and...

PRESIDENT: Yeah.

DEAN: ...the whole thing...

PRESIDENT: Yeah.

DEAN: ...you know, the domino situation. You know, they just, I think if it starts crumbling, fingers will be pointing. And...

PRESIDENT: That's right.

DEAN: ...ah...

PRESIDENT: That's right.

DEAN: ...Bob will be accused of things he's never heard of...

PRESIDENT: Yeah.

DEAN: ...and then he'll have to disprove it, and it'll just get nasty and it'll be a...

PRESIDENT: Yeah.

DEAN: ...real, uh...

PRESIDENT: Yeah.

DEAN: ...real bad situation. And the person who will be hurt by it most will be you and...

PRESIDENT: Of course.

DEAN: ...the Presidency, and I just don't think...

PRESIDENT: First, because I am expected to know this, and I am supposed to, supposed to check these things, and so forth...

DEAN: That's right.

PRESIDENT: ...and so on. But let's, let's, let's come back. Go further. Sure. Yes, indeed. But what are your feelings, yourself, John? Because you know pretty well what they'll all say. What are your feelings about the options?

DEAN: I am not confident that, ah, we can ride through this. I think there are th, I think there are soft spots.

PRESIDENT: You used to feel comfortable.

DEAN: Well, I feel, I felt, I felt comfortable for this reason. I've noticed of recent, since the publicity has increased on, on this thing again, with the Gray hearings that everybody is now starting to watch out for their own behind. Ah...

PRESIDENT: That's right.

DEAN: ...everyone's pulling in. They're getting their own counsel. More counsel are getting...

PRESIDENT: Right.

DEAN: ...involved.

PRESIDENT: Right.

DEAN: Ah, you know, "How do I protect my ass?"

PRESIDENT: Well, they're scared.

DEAN: They're scared and that's just, you know, that's bad. We were able to hold it for a long time.

PRESIDENT: Yeah, I know.

DEAN: Ah, another thing is, you know, my facility now to deal with the multitude of people I've been dealing with has been hampered because of Gray's blowing me up into the front page.

PRESIDENT: Your cover is broken.

DEAN: That's right and it's with, it was...

PRESIDENT: (Unclear) cover. Alright. Now. so on, so, so what you really come down to is what in the hell will you do? Let's, let's suppose that you and Haldeman and Ehrlichman and Mitchell say, ah, "We can't hold this." What, what then are you gonna say? Are you going to put out a complete disclosure? Isn't that the best plan?

DEAN: Well, one way to do it is to...

PRESIDENT: That'd be my view on it.

DEAN: ... one way to do it is for you to in, tell the Attorney General that you, that finally, you know, really, this is the first time you're getting all the pieces together. Ah...

PRESIDENT: Ask for another grand jury?

DEAN: Ask for another grand jury. The way it should be done though, is a way that, for example, I think that we could avoid ah, criminal liability for countless people and the ones that did get it, it could be minimal.

PRESIDENT: How?

DEAN: Well, I think by just thinking it all through first as to how, you know, some people could be granted immunity, ah...

PRESIDENT: Magruder?

DEAN: Yeah. To come forward.

Segment 16: Some People Going To Jail, Obstruction, Clemency [03:15]

DEAN: ... Ah, but some people are gonna have to go to jail. That's the long and short of it, also.

PRESIDENT: Who? Let's talk about that.

DEAN: Alright. Ah, I think I could, for one.

PRESIDENT: You go to jail?

DEAN: That's right.

PRESIDENT: Oh, hell no. I can't see how you can. But I don't...

DEAN: Well, because...

PRESIDENT: ... I can't see how this, let me say, I can't see how a legal case could be made against you, J,ah, John.

DEAN: It'd be, it'd be tough but, you know, ah...

PRESIDENT: Well...

DEAN: ... I can see people pointing fingers, you know, to get it out of their own, put me in the impossible position of disproving too many negatives.

PRESIDENT: No way. (Unclear), but let me say I- not because you're here- but just looking at it from a cold legal standpoint: you are a lawyer, you were counsel, you were doing what you were doing as a counsel, and you were not, ah...

DEAN: [Clears throat]

PRESIDENT: ...doing anything like that. I mean, (unclear) go to jail on what they did?

DEAN: The obstruct, the obstruction of justice.

PRESIDENT: The obstruction of justice?

DEAN: That's the only thing that bothers me.

PRESIDENT: Well, I don't know. I think that one, I think that, I feel, could be cut off at the pass. Maybe the obstruction of justice...

DEAN: It could be a, you know, how one of the, that's, that's why [sighs]...

PRESIDENT: Sometimes it's well to give them...

DEAN: [Sighs]

PRESIDENT: ...something and they don't want the bigger fish then.

DEAN: That's right. I think that ah, I think that with proper coordination with the Department of Justice, Henry Petersen is the only man I know that's bright enough and knowledgeable enough in the criminal laws and the process that could really tell us how this could be put together so it did the maximum to carve it away with a minimum damage to individuals involved.

PRESIDENT: Petersen doesn't know...

DEAN: That's what I think.

PRESIDENT: ...the whole story?

DEAN: No, I know he doesn't now. I know he doesn't now. I'm talking about somebody who I have over the years grown to have enough faith in. [Clears throat] It's possible that he'd have to, he'd have to ah, it would put him in a very difficult situation as the

head of the Criminal Division of the United States Department of Justice, and the oath of office.

PRESIDENT: So, when we, about your obstruction of justice role, I don't see it. I can't see it. You're...

DEAN: Well, I've been a con, I have been a conduit for information on, on taking care of people out there who are guilty of crimes.

PRESIDENT: Oh, you mean like the, ah, oh, the blackmail?

DEAN: The blackmail. Right.

PRESIDENT: Well, I wonder if that part of it can't be, I wonder if that doesn't, let me put it frankly, I wonder if that doesn't have to be continued.

DEAN: [Clears throat]

PRESIDENT: Let me put it this way: Let us suppose that you get, you, you get the million bucks, and you get the proper way to handle it, and you could hold that side.

DEAN: Um hmm.

PRESIDENT: It would seem to me that would be worthwhile.

DEAN: [Clears throat]

PRESIDENT: Now, we have...

DEAN: Well, that's, that's the problem.

PRESIDENT: That's a problem. You have the problem of clemency for Hunt.

DEAN: That's right. And you're gonna have the clemency problem for the others. They all would have expected to be out and that may put you in a position that's just...

PRESIDENT: Right.

DEAN: ...untenable at some point. You know, the Watergate Hearings just over, Hunt now demanding clemency or he's gonna blow. And politically, it'd be impossible for, you know, you to do it. Because, you know, after everybody...

PRESIDENT: That's right.

DEAN: I'm not sure that you'll ever be able to deliver on the clemency. It may be just too hot.

PRESIDENT: You can't do it, till after the '74 elections, that's for sure. But even then ... your point is that even then you couldn't do it.

DEAN: That's right. It may further involve you in a way you shouldn't be involved in this.

PRESIDENT: No, it's wrong. That's for sure.

Segment 17: It Is Not Going To Go Away [00:45]

DEAN: ... You know, there've been some bad judgments made. There've been some necessary judgments made. Ah...

PRESIDENT: Before the election?

DEAN: Before the election and, in a way, and there have been necessary ones, you know, before the election. There, you know, we've, this was...

PRESIDENT: Yeah.

DEAN: ...to me there was no way...

PRESIDENT: Yeah.

DEAN: ...that, ah...

PRESIDENT: Yeah.

DEAN: ...but to burden this second Administration

PRESIDENT: We're all in on it.

DEAN: ...was something that, it's something that's not gonna go away.

PRESIDENT: No, it isn't.

DEAN: It is not going to go away, sir.

PRESIDENT: Not gonna go away. This, the idea that, ah, that ah, well, that ah, that people are gonna get tired of it and all that sort of thing...

DEAN: Anything will spark it back into life. It's got to be, ah, it's got to be...

PRESIDENT: Well, it's too much to the partisan interest of others to spark it back into life.

Segment 18: More Jousting With the President [03:15]

PRESIDENT: ... Who else uh, who else, who else do you think has, ah, problem?

DEAN: Potential criminal liability?

PRESIDENT: Yeah.

DEAN: I think Ehrlichman does. I think that, ah...

PRESIDENT: Why Ehrlichman? What'd he do?

DEAN: Because this conspiracy to burglarize the, ah, ah, Ellsberg office.

PRESIDENT: You mean, that, that is, provided Hunt breaks.

[Edited out 40 seconds with Dean explaining investigative leads making Ehrlichman vulnerable.]

PRESIDENT: So, Ehrlichman on the, ah, burglary...

DEAN: But what I'm coming to you today with is: I don't have a plan of how to solve it right now, but I think it's at the juncture that we should begin to think in terms of, of how to cut the losses; how to minimize the further growth of this thing, rather than further compound it by, you know, ultimately paying these guys forever.

PRESIDENT: Yeah.

DEAN: I think we've got to look...

PRESIDENT: But at the moment, don't you agree that you'd better get the Hunt thing? I mean, that's worth it, at the moment.

DEAN: That, that's worth buying time on, right.

PRESIDENT: And that's buying time, I agree.

DEAN: Ah, the, the Grand Jury is gonna reconvene next week after Sirica sentences. Ah, but that's why I think that, you know, that, John and Bob have met with me. They've never met with Mitchell on this. We've never had a real down and out with everybody

that ah, has the most to lose. And the most, and it's the most danger for you to have them have criminal liability. I think Bob has a potential criminal liability, frankly. I think, in other words, there are, a lot of these people could be indicted. They might never...

PRESIDENT: Yeah.

DEAN: ... might never ah, be convicted, but just the thought of...

PRESIDENT: Suppose...

DEAN: ...indictments...

PRESIDENT: ... suppose that they are indicted in this. Suppose...

DEAN: I think that would be devastating.

PRESIDENT: Suppose the worst, that Bob is indicted and Ehrlichman is indicted. And, I must say, maybe we just better then try to tough it through. Do you get my point?

DEAN: That's right. That...

PRESIDENT: If, if, if, for example, our, ah, our, say, well, let's cut our losses and you say we're gonna go down the road, see if we can cut our losses, and no more blackmail and all the rest, and the thing blows and they indict Bob and the rest. Jesus, you'd never recover from that, John.

DEAN: That's right.

PRESIDENT: It's better to fight it out instead. You see, that's the other thing, the other thing. It's better just to fight it out, and not let people testify, and so forth and so on. Now, on the other hand, we realize that we have these weaknesses, that, ah, we, we've got this weakness in terms of blackmail.

DEAN: It's, what if we, you know, there, there are two routes, you know? One is to figure out how to cut the losses and, and, and minimize the, the human impact and get you up and out and away from it, in a way ah, in, in a way that would never come back to haunt you. Ah, that's one, one general alternative. The other is to go down the road, and just hunker down, fight it at every corner, every turn, ah, don't let people testify, cover it up is what we're really talking about. Just keep it buried, and just hope that we can do it, hope that we make good decisions at the right time, and keep our heads cool, ah, we make the right moves, ah...

PRESIDENT And just take the heat.

DEAN: And just take the heat.

PRESIDENT: Now, with the second line of attack. You did discuss this, though I do want you to still consider my scheme of having you brief the Cabinet, just in very general terms, and the leaders, very general terms, and maybe some, some very general statement with regard to my investigation. Answer questions, and to, basically, on the question of what they told (unclear).

DEAN: Right.

PRESIDENT: Haldeman was not involved. Ehrlichman...

DEAN: Well, I can, you know, if, if we go that route, sir, I can, I can give a show that, you know, ah, we can sell, you know, just about like we were selling Wheaties on our position.

End March 21, 1973 Excerpts