The inquirer represented A over the last six years in various litigations, primarily defense of mortgage foreclosure actions and/or confession of judgment actions and other collection actions by creditors. Last year, while still a client, A advised the inquirer that he had property in a foreign country that he was trying to sell, and that the sale price was $300,000. Apparently he had had at least one buyer at that price, but the deal fell through.

The relationship between A and the inquirer ended, with A having an unpaid bill due the inquirer. A has since filed for bankruptcy, and the inquirer filed a Proof of Claim for his unpaid legal services as a creditor in that bankruptcy. None of the parties against whom the inquirer represented A during the course of their attorney-client relationship are creditors or claimants in the bankruptcy. In reviewing the bankruptcy filings, the inquirer has seen that the property in the foreign country was not listed as an asset. He contacted A’s bankruptcy counsel who advised that the inquirer needed to inform the Trustee of the existence of this property immediately. In addition, the inquirer consulted with an ethics attorney who advised that the inquirer “had the right, if not an obligation, to disclose this information to the Trustee in order to prevent any fraud upon the Court and/or creditors.”

It also is of note that, when the inquirer contacted A’s current counsel, A’s current counsel advised inquirer to make the disclosure to the Trustee about the asset, which suggests an implicit waiver by A. The inquirer is now looking for confirmation that he may ethically make the disclosure of the existence of this property to the Trustee. In addition, the inquirer asks for Committee review of his proposed letter to the Trustee providing such notice.

For several reasons, the Committee concludes that the inquirer at his discretion may make the disclosure of the existence of the foreign property to the Trustee.

There are several Pennsylvania Rules of Professional Conduct (the “Rules”) which are relevant to this inquiry.

**Rule 1.6. Confidentiality of Information.**

(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).
(b) A lawyer shall reveal such information if necessary to comply with the duties stated in Rule 3.3.

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

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

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client…

Comment 11 (referring to 1.6c2) states that,

“Second, paragraph (c)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime that is reasonably certain to result in substantial injury to the financial or property interests of another. Disclosure is permitted under paragraph (c)(2) only where the lawyer reasonably believes that such threatened action is a crime; the lawyer may not substitute his or her own sense of wrongdoing for that of society at large as reflected in the applicable criminal laws. The client can, of course, prevent such disclosure by refraining from the wrongful conduct.”

Comment 15 (referring to Rule 1.6c4) states that,

“[15] Sixth, a lawyer entitled to a fee is permitted by paragraph (c)(4) to prove the services rendered in an action to collect it. This aspect of the Rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.”

Rule 1.9. Duties to Former Clients provides in relevant part that,

c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.
Rule 3.3. Candor Toward the Tribunal.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

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

Comment 12 to this Rule provides that,

Preserving Integrity of Adjudicative Process

(12) Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer’s client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Duration of Obligation

(13) A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

Clearly, the information about the property outside of the United States was communicated to the inquirer by A during the course of the inquirer’s representation of A, which representation centered around A’s debts, including mortgage foreclosures. While it might not have directly related to any one particular debtor, temporally it was communicated during the course of the various representations and, in some part, could very well be relevant to the issues that were being considered in defense of the various creditor actions being brought against the defendant at the time. Thus, the information provided was in fact confidential as provided by Rule 1.6.
After much consideration, the Committee believes that the exceptions to Confidentiality as contained in Rules 1.6c2 and 4 relate to the issue at hand and provide the inquirer with the discretion to make the disclosures. Rule 1.6c2 applies to the situation at hand because, here, failure to disclose the asset to the Bankruptcy Court and Trustee is a federal crime that will result in substantial injury to the financial interests of another. There is no question that the client’s failure to disclose is resulting in the shielding of assets.

The same analysis applies to the exception as found in Rule 1.6c4. Comment 15 makes it clear that the purpose of the exception is to allow an attorney to respond to any type of fee dispute brought by the client against the lawyer, or to allow the lawyer in a proceeding to establish his right to a fee. The disclosure relates to the fee and possible assets that are available to protect and pay that fee. The disclosure, if made, will possibly increase the amount of money available to pay all creditors, and therefore benefits all of the creditors including the inquirer.

Turning next to Rule 3.3, the inquirer is not technically before the court in representing his former client in the bankruptcy proceeding. Here, because the inquirer is not providing any representation to the client in that context, the Committee as a whole felt that disclosure in this context was discretionary.

The second question posed by the inquirer is whether the letter that he would like to send to the Trustee is appropriate. We believe that, consistent with our recommendation that the disclosure is permissibly discretionary, a letter is appropriate. We believe that the letter should be modified to be less adversarial and less accusatory, and we recommend that the attached letter be sent.

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1 While at first blush, it would appear that the unpublished opinion in *In re DiLoreto*, Bankr. No. 98-34641F (Bankr. E.D. Pa., May 3, 2002), applies to the situation at hand, the Committee believes that it is distinguishable. There, the Court reasoned and rejected many exceptions to the Confidentiality requirement, including the crime-fraud exception, because the Court believed that the client was not attempting to commit a future crime. Here, it appears that the client is attempting to commit a fraud by concealing significant assets. Also, here, the client’s current counsel has implicitly waived any privilege by advising the inquirer to make the disclosure.
DRAFT LETTER ADDRESSED TO TRUSTEE IN BANKRUPTCY

Re: Name of Former Client A

Dear Trustee:

This office represented A over the last six (6) years in various litigations, primarily the defense of mortgage foreclosure actions, confession of judgment actions and/or other collection actions by various creditors. Last year, A told me that he owned property in Country B; that he was trying to sell the property; that he expected to derive over $300,000 from the sale of the property; and that he intended to use the net proceeds that he received from the sale of the property to pay various creditors, including my legal bill.

I do not handle bankruptcy cases. Prior to filing a Proof of Claim in the pending bankruptcy proceeding, I consulted with private bankruptcy counsel. During the course of that consultation, I mentioned the above information. I was informed that A did not disclose the property in Country B in the pending bankruptcy case; and I was advised that I should bring this information to the attention of the A’s bankruptcy attorney and the Trustee. Thereafter, I called A’s bankruptcy attorney, who immediately stated that I should inform you, the Trustee, in writing, of the above information. In sum, I reviewed the Rules of Professional Conduct and various ethics opinions to the extent readily available to my office. Finally, I consulted with the Philadelphia Bar Association to seek an opinion in order to ensure that the disclosure of the information by my office did not violate any ethical rules or obligations. This due diligence confirmed that my right to disclose this information to you was discretionary, and as such I now do so.

Please allow me to state that the nondisclosure by A may have been inadvertent or mistaken, based upon a belief that he was not required to disclose the property because it is situated in Country B. I do not know, and I take no position on the motives or intent of A. You, as the Trustee, will make the final determination as to whether A does or does not own property in Country B and whether the property is or is not valued at over $300,000. I will leave that issue and any further determinations concerning the property in Country B and its impact upon the pending bankruptcy proceeding to your discretion.

Very truly yours,
Inquirer

cc: A’s bankruptcy attorney