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Revising the Ethical Rules of Attorney-Client Confidentiality: Towards a New Discretionary Rule

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[*669] Lawyers have an ethical duty to keep all information relating to a legal representation in strict confidence. The lawyer is bound by the ethical duty of confidentiality to preserve client confidences. This duty is the cornerstone of the attorney-client relationship and a major issue in legal ethics. The ethical duty of confidentiality has always been controversial, inspiring many debates and scholarly writings.

In 1983, the American Bar Association (ABA) revised its Model Rules of Professional Conduct. Unlike the previous ABA Code, the drafting of the new Model Rules was accompanied by intensive debate within the profession and outside in the public arena. n1 The confidentiality sections were a main source of controversy, with the various drafts spanning the spectrum from demanding full disclosure to maintaining strict confidentiality. n2 In the aftermath of the Model Rules, the debate and criticism still continue stronger than ever.

[*670] Any suggestion for revision ought to start by dealing with the deficiencies and problems in the current rules, n3 the same rules that the revision wishes to replace. The current rules are dominated by the defensive ethics approach, where the rules do not tackle ethical conflicts, as ethical rules should, but minimize or bypass them. n4 They mostly seek to protect the lawyers themselves from the risk of financial liability even at the expense of important societal and third-party interests, which are left unprotected. n5 These rules deter lawyers from using their discretion when facing ethical dilemmas by not encouraging them to confront such issues and exercise discretion in making their own choices. n6

The "remedy" that this Article supports is a discretionary confidentiality rule. The reluctance to embrace discretionary confidentiality rules is not rooted in lawyers' lack of competency to exercise their own ethical discretion. In fact, lawyers already make discretionary decisions in their daily practice. The legal profession fears that discretionary ethical rules might expose lawyers to increased financial liability because such rules seem vague and incoherent. The Article takes up the main challenge any proposed discretionary rule faces: how to provide for lawyers' independent ethical judgment and still be clear enough to minimize the risk of financial liability.

I: THE MAJOR DEFICIENCIES IN THE CURRENT RULES

A. Defensive Ethics

The purpose behind the ethical rules is to give guidance and direction to lawyers in their daily practice. Lawyers almost constantly face ethical dilemmas. In this sense, practicing law can be described as walking in a mine field where the ethical [*671] rules are the map showing the safe paths. n7 But the legal profession also uses the ethical rules to "clear the mines," meaning that they are formulated to minimize ethical dilemmas and protect lawyers from the risk of financial liability. We do not have rules that contend with ethical conflicts and try to solve them, but a defensive ethics aimed at avoiding financial liability and losses. n8 Ted Schneyer describes the work of one of the ABA committees that examined the Proposed Final Draft as examination with a risk manager's fine-tooth comb in order to find disturbing provisions like those which "invited lawyers and the courts to use the Rules for civil liability purposes." n9

The Model Rules stress their defensive orientation in their "Scope" section, declaring that "violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached." n10 Regarding confidentiality and disclosure, a further paragraph in the Scope section states: "The lawyer's exercise of discretion not to

disclose information under Rule 1.6 should not be subject to reexamination." n11 The two paragraphs contradict each other because if the Model Rules are not a basis for legal duty, a lawyer's decision to disclose according to Rule 1.6 may still be reexamined in order to determine if she has fulfilled her legal duties. Legal duties, as the Scope section itself explains, are separate from the ethical duty stated in the Model Rules. n12 But the Rules pay no attention to this contradiction, because both sections are meant to shield lawyers from financial liability. n13

The most effective way to avoid liability is to avoid provisions that can produce malpractice claims, motions to disqualify, denials of legal fees, and liability under other laws, like securities [*672] law. Having duties to disclose can open the door to many liability claims. If the lawyer discloses confidential material, the client can sue for malpractice, claiming that the disclosure was negligent. On the other hand, if the lawyer decides not to disclose, she is also vulnerable to suits by third parties affected by the concealment. Clearly, a strict confidentiality rule can best protect lawyers from future liability because the lawyer can always argue that the ethical rules prevented disclosure. n14 The bar, under the defensive ethics approach, will object to disclosure duties, while pushing for a strict confidentiality rule. This is exactly what the ABA did in the process of drafting the Model Rules. The ABA House of Delegates rejected three of the exceptions to the ethical duty of confidentiality that were proposed in the Final Draft. The first two were meant to be part of Rule 1.6: disclosure in order to rectify harm and disclosure required by law. The third rejected exception would have permitted disclosure to rectify the client's out-of-court fraud. n15

Another explanation of why defensive ethics objects to disclosure duties is based on what I call "the asymmetry of information between clients and third party." In matters of confidentiality and disclosure, the lawyer is exposed to liability from either her client or from a third party (whether a private individual or authority). In most cases of confidentiality and disclosure, the third party lacks the necessary information about the lawyer's conduct to enable him to sue the lawyer. For example, the third party may not have access to information that indicates that the lawyer refrained from disclosure that could have prevented losses or harm to the third party. Usually, the third party is unaware of the lawyer's ability to disclose. The client, on the other hand, has access to such information since this is mostly information regarding the representation which, as such, belongs to the client.

[*673] Because of this asymmetry of information between clients and third parties, lawyers--in matters of confidentiality and disclosure--are exposed to liability, mostly from clients. Only in rare cases is a third party able to obtain the necessary information to establish a claim against the lawyer. The Kaye, Scholer affair is a good example of this rarity. n16 After the Lincoln Savings & Loan Bank was seized, the Bank Board, which had previously been investigating the bank, became its owner, with access to records of confidential communications among the Keating crowd and their lawyers, the Kaye, Scholer firm. n17 Only this confidential information enabled the Office of Thrift Supervision to file charges against Kaye, Scholer lawyers. n18

Based on this asymmetry of information between clients and third parties, defensive ethics need only prevent client's claims in matters of confidentiality and disclosure. It can remain indifferent to third-party suits in circumstances where no disclosure was made. Clients are likely to sue their lawyers where disclosure had occurred since only disclosure can harm clients' affairs. Moreover, clients rely on attorney-client privilege and confidentiality specifically to avoid revealing important secrets. I can hardly think of an instance where the client sues his lawyer for not disclosing. Thus, if defensive ethics wishes to avoid financial liability, it must avoid a confidentiality rule that increases disclosure--a mandatory disclosure rule. Disclosure obligations imposed on lawyers by the ethical rules or by the legislation increase a lawyer's liability. The defensive ethics approach leads the bar to oppose any type of disclosure, whether permissive or required. Mandatory disclosure is the most dangerous in terms of financial liability because it is most likely that there will be more cases of disclosure under a mandatory duty than under a permissive duty. With a mandatory duty to disclose, once the conditions of the rule are met, the lawyer must disclose, while under permissive disclosure the lawyer can still avoid doing so. As a result, for the most part, the Model [*674] Rules object to disclosure duties, and where the rule cannot avoid disclosure (as in some extreme future criminal cases), it allows for permissive disclosure but never mandatory disclosure.

Another strong manifestation of defensive ethics in the confidentiality rules is the way the Model Rules deal with disclosures required by law. Even if the profession can successfully eliminate disclosure duties from its ethical code, other laws may still impose such obligations, which increase the risk of liability.

The Code allowed a lawyer to disclose a client's confidences and secrets where the law required her to do so. n19 This exception was rejected by the ABA House of Delegates when the new Model Rules came to the vote. n20 Instead, the following comment to Rule 1.6 was added: "a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such supersession." n21 Note that some states still have a specific exception to the ethical duty of confidentiality where the law requires the lawyer to disclose. n22 The Restatement also has such a specific exception. n23

[*675] Beyond the Model Rules themselves, the ABA has always been hostile to laws requiring lawyers to break confidentiality and to disclose a client's information, believing that such a law "should be established only by statute after full and careful consideration of the public interests involved, and should be resisted unless clearly mandated by law." n24 In the ABA's opinion, the disclosure embodied in securities laws, mentioned before, does not warrant an exception to the confidentiality. This law gives the SEC "no power to require disclosure by lawyers concerning their clients beyond what is provided" by the ethical rules. n25

The ABA reaction in the Kaye, Scholer case is another manifestation of the strong defensive ethics approach. This case, which was part of the biggest financial scandal in American history, causing American taxpayers to lose billions of dollars, raised serious questions concerning the lawyers' conduct, coming close, as it did, to deception. n26 The ABA did not support an investigation of any of the charges against Kaye, Scholer. n27 A special working group was appointed by the president of the ABA, but neither its meetings nor the report it issued discussed the merits of the OTS's charges. n28 William Simon describes the ABA's conduct in the Kaye, Scholer affair as self-protective: "the ABA's exclusive concern about the disaster is that it may increase lawyer exposure to liability." n29 The ABA had a unique opportunity to conduct a full discussion about the difficult issue of a lawyer's conduct when faced with a client's fraud. Such an open and frank discussion should have led to major changes [*676] in the Model Rules. However, the bar's attention was aimed at protecting lawyers from future liability while avoiding the real issues. n30

Another interesting example of the strong defensive ethics approach is found in the special report issued in 1991 by the ABA Standing Committee on Ethics and Professional Responsibility. n31 The report recommends adding the "rectify harm" exception to MR 1.6. n32 One of the 1991 Committee's arguments supporting the exception is a typical defensive ethics rationale. The Committee claimed that permitting lawyers to rectify client fraud where their services were innocently involved would protect a lawyer from being sued civilly or charged criminally as a co-conspirator who participated in the client's misconduct. n33 While disclosure is usually seen as exposing lawyers to liability claims, here, in the Committee's view, disclosure in order to rectify client fraud has the opposite effect: it prevents liability claims. n34

B. The Hierarchy of Protected Interests under the Ethical Rules of Confidentiality

The second major deficiency with the current confidentiality ethical rules is that they do not provide adequate protection for important societal interests. When examining the confidentiality provisions in the Model Rules as well as the ABA ethical opinions interpreting them, we can clearly identify which interests are highly protected by the ethical duty of confidentiality and which are almost ignored. I call this "the hierarchy of protection," where the confidentiality rule places the courts and lawyers on top, clients a close second, and society and third parties far behind at the unprotected end of the spectrum.

[*677] Surprisingly, the Model Rules, which largely advocate only zealous representation of and complete loyalty to the client's interests, take a position in favor of the lawyer's duty to the court. The duty to the court stands high in our imaginary "hierarchy of protection." This seems even more peculiar if you compare the Model Rules with their predecessor, the Code. The ethical duty of confidentiality in the Model Rules is broader than in the Code, and the exceptions in Rule 1.6 of the Model Rules are narrower than those in the Code. However, on one issue the exception to the confidentiality rule in the Model Rules is broader than its corollary in the Code, namely the duty to disclose to a tribunal.

Under Rule 3.3(a)(4), the lawyer has an obligation to rectify the situation where false evidence (including client perjury) was offered in a tribunal, even if by doing so she reveals her client confidences. n35 DR 7-102(B) as amended in 1974 does not allow a lawyer to rectify such a situation by disclosing protected information. n36 Oddly enough, while the ABA House

of Delegates rejected much of the Kutak Commission's proposed Rule 1.6, including exceptions regarding disclosure "to rectify harm" and disclosure "required by law" and narrowing the exception regarding "future client fraud," the House of Delegates accepted the proposed Rule 3.3 intact. n37 Thus, while Rule 1.6(b)(1) requires lawyers to protect their clients at the expense of extreme detriment to individuals, Rule 3.3(a)(4) requires lawyers to reveal client confidences in order to "save" the judicial process from false evidence. n38

[*678] The confidentiality rule also provides a high degree of protection for lawyers themselves. The exception in Rule 1.6(b)(2) is the broadest of all, allowing disclosure for lawyers' self-defense in any circumstances needed. The first provision of Rule 1.6(b)(2) permits disclosure "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client." n39 It includes two possible situations: when the client sues his lawyer, and when the lawyer sues her client. The most common examples of the first situation are malpractice cases. n40 Fee-collection is the best example for the second type of situations. The second most controversial provision of Rule 1.6(b)(2) allows a lawyer to disclose confidential information to defend against charges of improper lawyer conduct made by third parties. n41 The third and last provision of Rule 1.6(b)(2) allows disclosure "to respond to allegations in any proceeding concerning the lawyer's representation of the client." n42 The provision applies even where the lawyer is not a formal party to the litigation. n43 A common example is when a convicted former client challenges the result of the criminal trial by claiming ineffective assistance of counsel. Other examples [*679] occur when a third party challenges the lawyer's representation, or when a lawyer faces disciplinary proceedings. n44

Third-party interests are located at the bottom of the "hierarchy of protection," so when disclosure is required in order to defend those interests, the ethical duty of confidentiality remains untouched. The first example is Rule 4.1(b), which applies when the prior conduct or statements by the lawyer or her client have created a false impression in a third party, and the false statement under the circumstances would constitute fraud. n45 Then a duty to correct the misapprehension arises. n46 Whereas Rule 4.1(a) applies to the lawyer's own statement, Rule 4.1(b) may apply when the lawyer is silent or where the client is the one making the false statement. The source of the misleading is not important. The obligation to speak stands whenever the third party has been misled, rather than merely left in ignorance. The protection here for third-party interests is restricted by two important components of the rule. First, the lawyer's obligation to disclose arises only where "substantive law requires [her] to disclose certain information to avoid being deemed to have assisted the client's crime or fraud." n47 The second restriction, which almost eliminates the rule, appears at the end of the section that allows disclosure "unless disclosure is prohibited by Rule 1.6." n48

The House of Delegates rejected a substantial part of the Revised Final Draft of Rule 4.1(b), eliminating a proposed exception [*680] to the confidentiality duty in Rule 1.6. n49 The House of Delegates deleted the proposed last clause, which stated that "the duties stated in this Rule apply even if compliance requires disclosure of information otherwise protected by Rule 1.6." n50 The sentence "unless disclosure is prohibited by Rule 1.6" was added to the previous clause in order to leave no doubt that the ethical duty of confidentiality prevails in cases of client out-of-court fraud. n51 Rule 1.6 overcomes the duty in Rule 4.1(b), making disclosure under Rule 4.1(b) meaningless and without any practical use. n52 This change seems more awkward if you compare Rule 4.1(b) with Rule 3.3(b). Rule 3.3, which creates an exception to confidentiality when a lawyer knows that a witness has committed perjury or a fraud on a tribunal, was not amended and indeed provoked little debate. n53

Another example as to how the ethical duty of confidentiality very easily overcomes third-party interests is Rule 2.3, which deals with evaluation given by the lawyer to third parties. Clients may ask their lawyers to give a legal opinion on a matter for review by a third party. n54 The evaluation is prepared at the client's direction but for the primary purpose of obtaining information for the benefit of third parties. n55 For example, [*681] a client may wish to sell property and requires a legal opinion on the state of the client's title, or a client wishes to borrow some money and the prospective lender asks for evaluation from the borrower's lawyer concerning his financial stability. Rule 2.3(b) states, "Except as disclosure is required in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6." n56 This means that even an evaluative situation falls under the general rule of confidentiality: a lawyer may disclose confidential information with the express or implied consent of the client. n57 Confidential information can be included in the evaluation only if the client has authorized it, and it "should be no greater than actually authorized . . . in order to carry out the evaluation fairly and competently."

n58 Where the client does not agree to include material confidential information, the lawyer must state in the evaluation that there were restrictions. n59 If the lawyer fails to do so, she violates Rule 4.1 concerning misrepresentations to others. n60

The client's interests come second in the hierarchy of protection because the ethical duty of confidentiality is not absolute and few exceptions prevail. I believe that the client will always be second in the hierarchy of protection because the profession's selfinterests are what really dictate the confidentiality rules. n61 These interests will always put the courts and lawyers ahead of the clients. Even though the bar strongly endorses a strict confidentiality rule, absolute confidentiality is against the bar's interest because it means that nobody gets protected, not even lawyers. The bar only pays lip service to endorsing strict confidentiality so that it can reject other exceptions. The bar's tactics are simple: demand the whole cake so you can settle for the [*682] best part of it. In other words, by advocating a strict rule, the bar can "compromise" on a rule that does not include exceptions that might harm the profession's interests. Examples are exceptions that damage lawyers' pecuniary interests or that might erase the defensive ethics the existing confidentiality rule applies.

The confidentiality provisions in the Model Rules ignore societal and third party interests by not providing adequate protection for them. A comparison of these rules with the medical profession's rules of confidentiality makes it more evident that societal and third-parties' interests were purposely shoved to the far end of the hierarchy of protection, leaving almost no protection at all. >From the circumstances where a physician must or may disclose medical confidences, it is clear that the rules of medical information confidentiality protect societal interests in many cases. We find rules that are very attentive to other societal interests at all three levels of medical information confidentiality: the AMA ethical opinions, the legislation, and court decisions.

The AMA Ethical Opinion 5.05, which sets the basic rule for the physician's ethical duty of confidentiality, declares at the outset a broad exception for "overriding social interests." n62 The future-harm exception under this ethical rule allows disclosure where the patient threatens to inflict serious bodily harm, whether such conduct is criminal or not. n63 The exception also imposes an objective standard on a physician to decide whether the patient may cause harm to a third party and to decide what type of precautions need to be taken to protect the endangered [*683] third party. n64 As a result of the exception's broad extenuation and its objective standard, there are more circumstances in which societal and third party interests trump medical information confidentiality. At the second level, both types of legislation provide broad protection for societal interests. The first type, the various states' confidentiality laws, impose disclosure where it is required by law, referring to the mandatory disclosing statutes (the second type) that add more circumstances in which a physician must or may disclose confidential medical information to protect third-party interests. n65 Additionally, at the third level common law imposes an additional duty to warn an identifiable victim of potentially dangerous patient behavior. n66 Taken together, all of these circumstances provide a wide protection of third-party rights and interests, even at the expense of medical information confidentiality.

The interesting question is how we can reconcile the different ways in which confidentiality in the legal profession and in the realm of medical information relates to societal interests. Does it reflect an inherent difference between the two professions' perceptions of the principle of confidentiality, or does it show that the ABA has more political power to impose its own interests on society than the AMA? This author believes that the explanation is consistent with both. The legal profession has always been more influential than the medical profession and the two professions do have different perceptions of the ideal relationship between confidentiality and third-party rights. Consequently, even if the medical profession had the same influence as the legal profession there would, to some extent, still be circumstances where disclosure of medical information would be allowed in order to protect third-party rights and interests.

[*684] Our discussion so far has already exposed us to societal and third-party interests that should receive more weight and protection under any confidentiality rule. The first and most important interest is prevention of harm. This interest encompasses all types and any degrees of harm--physical and financial, minor or grave. A good example of protection of this interest exists in the medical information confidentiality rules, where the future-harm exception includes not only crime but also tortious conduct. Rule 1.6(b)(1), which permits disclosure only where a crime "is likely to result in imminent death or substantial bodily harm," is very narrow, leaving out many instances where prevention of harm should prevail over confidentiality. n67 Most lawyers work for organizations where financial fraud or tax evasion is more likely to occur than murder, yet the exception does not extend to financial harm. Moreover, even with crimes involving physical injury it is not always

clear what "serious bodily harm" will consist of. For example, some child abuse cases which involve only mental but not physical harm might not fall into this category, leaving helpless children with no protection.

The legal profession is no stranger to the societal interest of preventing harm. An important function of the profession is preventing future harm by resolving already existing conflicts in a lawful way, or by counseling people on how to avoid future conflicts. These are a major rationale for the legal profession in our society. Interestingly, lawyers try very hard to show similarities between their own profession and the medical profession by portraying both kinds of practitioners as societal benefactors who prevent harm. Yet although one might hope that the ethical duty of confidentiality will adequately protect the interest of preventing harm, this has not happened.

A second neglected societal interest, which comes into play when prevention has not occurred and harm has already been inflicted, is rectification of harm. The demand to rectify the harmful consequences of a person's behavior is indispensable [*685] in any society where people wish to live in peace. The rationale of this interest is very simple: you should assist the victim of your fraud to recover what she lost because of your conduct. Even where there is no "fault," meaning that you did not know about or agree to participate in the fraud, as long as your conduct contributed to it you ought to rectify the harm caused. Rectification does not mean vengeance. Actually it is far from the biblical notion of an eye for an eye. Rectification does not mean punishment either. Society has a strong interest in punishing the offenders, but this is different from rectification of harm. In this sense the lawyer's duty to rectify is aimed at helping the victim, not punishing the client. This author is strongly opposed to any attempt to use the ethical code as part of the criminal punishment system. n68 However, the ethical duty of confidentiality can, and in my opinion should, help to rectify the situation of innocent fraud victims. Thirteen jurisdictions have acknowledged the importance of this interest by allowing lawyers, in their ethical duty of confidentiality to rectify the consequences of the client's criminal fraudulent conduct in the commission of which the lawyer's services had been used. n69 Another three jurisdictions impose a mandatory duty to rectify. n70

Another neglected interest is seeking and promoting truth. Seeking truth has a moral value within itself. It also benefits society as a whole, and the justice system in particular. The whole notion of confidentiality stands in contrast to this interest because what the principle of confidentiality wishes to shield, the promotion of truth wishes to reveal. Yet confidentiality must yield to the truth, and in certain circumstances disclosure should prevail over keeping confidences. These circumstances are stated in each of the exceptions to the ethical duty of confidentiality, and they can also be dictated by the legislature, accompanied by an exception in the ethical code that will impose a duty to disclose where it is required by law. The civil discovery system is a good example of how this interest can be recognized [*686] and protected. The rules concerning civil discovery impose on lawyers substantial legal responsibility for the accuracy of clients' statements. n71 A variety of information must be revealed through discovery even in the absence of a demand by the other party. n72

The last societal interest that the confidentiality rule can protect is securing lawyers' moral autonomy. Moral autonomy means exercising independent judgment and reaching your own moral decisions. Society has a clear interest in securing the moral autonomy of its members because it advances the integrity and self-esteem of each individual, and it contributes, overall, to a better quality of life in society. In the context of the legal profession, denying lawyers their moral autonomy might lead to the "hired gun" mentality and to the overzealous advocacy, which are both highly censured. n73 People might take different courses of action, which are all morally justified, so moral autonomy does not mean that a lawyer should always seek to impose her conscience on the client. What it does mean is that lawyers should be permitted and encouraged to make ethical decisions by themselves. n74 An ethical code must reject rules which turn the lawyer into a mere technician; it should have rules that direct the lawyer to use her own judgment and conscience. For example, a rule that prohibits disclosure in order to rectify harm where the lawyer's services were used to further the client's crime is incorrect because it takes away the lawyer's ability to make her own ethical decision to disclose or not. It is the same with a rule that requires the lawyer to remain silent while knowing full well that the client is about to commit a financial crime. Both rules ignore the important interest of safeguarding lawyers' moral autonomy.

[*687] Most people do not doubt the importance of preventing harm, rectifying harm, promoting the truth, and securing lawyers' moral autonomy. These are major societal interests that require deep consideration and protection. The question remains, however, as to who should protect these interests. Should lawyers be called upon to proffer that protection? For example, if the public is generally under no obligation to report a crime, n75

why should lawyers be required to do so under the future-harm exception? There are two plausible reasons why. The first emphasizes the unique obligation and responsibility of the legal profession in society. n76 This has not necessarily been imposed by society, but is rather an inherent part of the profession. It is society that grants people the opportunity to receive a legal education and afterwards licenses them to practice law. In exchange, lawyers, schooled in a profession that exercises an influence in society (whether by influencing legislation or by personal representation in the judicial system), should shoulder certain societal responsibilities. The second reason is much simpler: lawyers are a most convenient means to protect societal interests. n77 In certain situations, like the securities law, lawyers are the cheapest and most available source to provide the necessary information; therefore, the confidentiality rule should provide for a disclosure. It is for this reason that the legislature has already imposed on the medical profession the duty to report gunshot wounds or communicable diseases. n78 I believe that a complete answer combines both of the above reasons. The lawyers' ethical duty of confidentiality should provide greater protection for societal interests because of their inherent duty [*688] to society and also because they are a convenient source who can grant that protection via disclosure.

C. The Existing Ethical Rules of Confidentiality Lack Discretion

A discretionary rule has two "inherent values:" one exists in every discretionary rule regardless of the area of law in which it is used, and the other is unique to discretionary rules in legal ethics. I shall start with the general value within every discretionary rule. The appropriate way of responding to an issue that fails to evoke societal consensus is by having a discretionary rule. Where it is impossible to reach one defined solution to a legal issue because there is no broad societal consensus on it, the best way is to enact a discretionary rule that leaves the decision to each player's judgment. A discretionary rule performs well when we reach the "outer limit of societal consensus." n79 I believe that the wide, scholarly debate regarding confidentiality and disclosure shows that it is an issue that lacks societal consensus, so discretionary rules might be suitable. There is, however, one issue of disclosure where societal consensus seems to exist concerning a duty to disclose: when the lawyer has confidential information that would exonerate a defendant falsely accused of a crime. n80 In this case, a discretionary rule is needless and any new rule of confidentiality should take advantage of this consensus to impose a disclosure obligation wherein the information might save another person's life or body.

[*689] A discretionary rule in legal ethics also has a particular value because it forces lawyers to confront ethical dilemmas. Instead of avoiding the ethical dilemma by simply applying a strict rule, the lawyer is required to ponder the issues involved and to resolve them through her own discretion. The dictionary definition of discretion is "freedom or power to act or judge on one's own." n81 The key words in this definition are on one's own. In that sense, a discretionary confidentiality rule can lead to what William Simon calls "personal ethics," n82 where all ethical decisions are made by the lawyer herself and no institution defines the lawyer's obligations in advance; the lawyer herself must solve the dilemma by considering and weighing all the relevant factors. As such, an ethical discretionary rule challenges and might, over time, weaken some of the most disturbing phenomena that exist in legal representation. These phenomena are often characterized as objectivism, non-accountability, and partisanship. I shall summarize each of these three characterizations.

Objectivism or formalism precludes lawyers from considering or evaluating factors that are not specified in a rigid rule. n83 In matters of disclosure, these factors are very often societal interests that the existing confidentiality rule fails to protect. The whole notion of a discretionary ethical rule is contrary to objectivism. A discretionary confidentiality rule is not framed as a closed list of factors but in a way that encourages consideration of any factor that the lawyer thinks is relevant.

The principle of non-accountability, or neutrality, declares that when a lawyer is acting as an advocate for a client she is neither legally nor morally accountable for the means used [*690] by her client or for her client's objectives. n84 Under a discretionary rule, the lawyer is required to use her own judgment and to think ahead about all the consequences of her course of action. In this sense, the client is not the only player: the lawyer's own choices also influence the course of things. The lawyer is no longer detached and unaccountable, but, she is an active participant who must weigh her actions carefully.

The last disturbing phenomenon that a discretionary confidentiality rule can help eliminate is partisanship, or over-zealous advocacy. Legal representation is focused on a client's desires and objectives. A lawyer's sole obligation is to her client, and she can use any legal means to advance her client's ends, including deception or delay. n85 In matters of confidentiality and disclosure, lawyers are called to preserve client confidences even where

their services are being manipulated by the client himself to commit a crime or fraud. A lawyer may choose to remain silent where confidential information can save someone's life. Under a discretionary rule, lawyers must determine their own boundaries of zealous advocacy. Such a rule will force lawyers to take into consideration interests other than the client's, such as the societal interests explained above. Such a rule will force lawyers to face ethical and moral questions that partisanship has made them ignore.

In spite of the dual value of a discretionary rule, the existing confidentiality rules are gravely deficient in this matter. The rules do not encourage lawyers to ponder and confront ethical choices and to make their own choices. Nor do the confidentiality rules give lawyers any guidance in the exercise of their discretion. Even where the rules seem to apply some type of discretion, [*691] it is usually incomplete and one-sided. Perhaps some examples could clarify this point.

Rule 1.6(b)(1) as amended by the ABA narrowed the "future-crime" exception to its minimum, allowing disclosure only in cases of imminent death or substantial bodily harm. This took away the lawyer's discretion and moral judgment in all other cases (including financial injury or fraud) which could be equally devastating to a third party. Moreover, the underlying message this limited rule sends to lawyers who have mere knowledge of an impending crime by a client, but whose silence is not viewed as being an accessory to the crime, is to suffer in silence. n86

There are confidentiality-disclosure situations in which the existing rules do not even acknowledge that ethical dilemmas are created. The rules simply provide no discussion of these situations, leaving the lawyer bound to complete confidentiality. A conscientious lawyer who follows her own morals will find such situations very troubling. Yet no discretion whatsoever is granted to the lawyer facing these tough problems. Take, for example, the following three scenarios.

In the first case, a lawyer represents a big food manufacturer. During the testing of a new food, which is about to be released in the market, the manufacturer has learned that the combination of that food with certain antibiotics causes nausea and vomiting. The manufacturer, contrary to his lawyer's advice, decides to release the new product with no warning on its label. The exception in Rule 1.6(b)(1) does not apply here because the conduct is not criminal. Even if it were criminal, nausea and vomiting are far from being considered "substantial bodily harm." n87

[*692] In the second situation, the lawyer represents a Savings & Loans bank. By coincidence, the lawyer learns that the bank is manipulating an ongoing financial scheme causing customers to lose their money. The lawyer must withdraw from the representation and she can even disavow her prior opinions, assuming that such opinion exists. But, once again, Rule 1.6 remains silent as to any possible ethical conflict here: the lawyer is required to preserve the client's confidence even when she knows the client is perpetrating a financial fraud.

Let us modify this last example: The same bank's lawyer has learned that her services were used in furtherance of a financial fraud after the fraud was completed. The customers who lost their life savings are now suing the bank. Since the bank declared bankruptcy, the customers have no chance of recouping the money they lost. The lawyer, however, knows where some of the money is hidden after she innocently helped the bank's chairperson transfer it. The Model Rules do not permit disclosure in order to rectify harm. n88 The rules simply bypass the possibility of any ethical dilemma that might arise in such a case. Thus, according to the Model Rules, the lawyer must not disclose this confidential information to the fraud victims, and the fraudulent bank chairperson is left to enjoy the fruits of her scheme.

Even where the rules acknowledge and discuss the ethical dilemma, they still provide incomplete guidance for exercising ethical discretion. The comment to Rule 1.6 lists some inadequate factors the lawyer needs to consider when exercising her discretion to disclose future crimes under Rule 1.6(b)(1). The factors listed are: "the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question." n89 All these factors center on the lawyer herself. The comment ignores other important factors, which relates to the future injured party. A full [*693] and adequate discussion must consider factors such as the kind and magnitude of the harm threatened, the irreversibility of its consequences once incurred, n90 and whether there are any other methods to prevent the harm. For example, if disclosure by the lawyer is the only available means to save the injured person, it should almost be automatic. The comment is another good example of how the confidentiality rules do not consider or protect societal and third party interests, only this time ignoring societal interests also means incomplete and one-sided discretion. n91

Another example of incomplete and one-sided discretion is Formal Opinion 92-366 of the ABA Standing Committee on Professional Ethics and Responsibility. Formal Opinion 92-366 discusses the "noisy withdrawal" comment in Rule 1.6. n92 The opinion allowed the lawyer to disavow any of her work-product to prevent its use in the client's continuing or future fraud, even though this may have the effect of disclosing confidential information. n93 On the one hand, the opinion expanded the rule and recognized an implicit exception to the ethical duty of confidentiality. The opinion stands in contrast to the ABA's usual policy, which tries to limit disclosure while providing broad protection for client's confidences. On the other hand, the scope of the "noisy withdrawal" is very limited. The opinion declares that the purpose of such disavowal is "avoiding the lawyer's assisting the client's fraud." n94 The lawyer's discretion to disavow her work product is aimed at protecting lawyers from participating in perpetrating a fraud. Once again, the concern is centered around the lawyer herself, while neglecting other important factors such as the societal interests of preventing harm, or, where the fraud already started, the interest of rectifying harm. The opinion should have directed lawyers to consider societal interests along with their own defense. Thus, even where the [*694] lawyer cannot be seen as participating in the client's fraud, she may still disavow her work if that is the only way available to prevent harm to innocent victims.

There are ethical dilemmas which just about "scream" for lawyers to exercise their discretion. Yet, American lawyers are required to follow a completely technical rule, which includes no shred of discretion. A good example is ABA Opinion 93-375, which interprets Rule 4.1. n95 The opinion discusses six situations that arose while the lawyer was representing his client in a bank audit. n96 In one of the situations, the lawyer's statement included true facts but also omitted certain material information. n97 The opinion discusses whether an omission constitutes a lie under Rule 4.1(a). n98 If the omission is viewed as a lie, and then according to Rule 4.1(a), the lawyer may not make a false statement about a material fact to the other party, even where the truth would reveal a client's confidences. Thus, the decision as to whether the omission is a lie or not is very important because it determines whether the lawyer can disclose the omitted fact to the other party. As the opinion itself explains, this is really a question of the lawyer's obligation to disclose. The opinion bases such a disclosure obligation on a technical distinction: the role the lawyer herself might play in creating any misimpression. The dividing line between disclosure and non-disclosure is based on whether the lawyer was directly or indirectly involved with the fraudulent omission. Where the client does all the talking at meetings and the lawyer stops going to successive meetings with bank examiners on relevant matters, the lawyer is not directly involved with the fraud, so she has no obligation to disclose the omitted fact. But when the lawyer speaks for the client, she does have a direct involvement, and therefore, she has an ethical obligation to disclose. n99

The above distinction is aimed at distancing lawyers from client's frauds. But Rule 1.16 already achieves this result by [*695] requiring the lawyer to withdraw where the representation will result in commission of a fraud. n100 There must be another explanation for the Rule 4.1(a) distinction. A strong moral argument exists for allowing a person to repair the damage that she or he has directly caused to another. In that sense, the rule secures the lawyer's moral autonomy and reputation by permitting disclosure of otherwise confidential information where the lawyer's legal services were directly involved in the omission.

But if Rule 4.1(a) is really meant to secure the lawyer's moral autonomy and reputation, then it should endorse the lawyer's discretion to disclose in all situations of omission. Even where the lawyer is not directly involved in the fraud, she might still wish to disclose either because she is the only one who can assist the fraud's victims or because she feels a moral responsibility for the client's actions. An ethical rule which relies on a technical distinction to disallow lawyers' moral judgments is not, in my opinion, a rule that secures lawyers' moral autonomy. Moreover, even when we weigh the two rationales supporting the ABA distinction, it still does not explain the fact that this distinction ignores the third-party interest in disclosure, even where the lawyer is not directly involved. A disclosure here can be very important for the other party, who might be severely harmed by not knowing the omitted fact. The lawyer might be the only available means to reveal the fraudulent omission. Still, the difference between disclosure and silence is the amount of talking the lawyer did during the meetings. The lawyer is asked to decide whether to disclose and correct the misimpression by only weighing her role in the omission. No consideration is given at all to the interest of preventing harm to the other party or to the important interest of promoting the truth. Once again, the only factor centers on the lawyer herself. Even where the other party might suffer great harm, if the client was the one running the meetings, the lawyer is asked to remain silent.

[*696] D. Addressing the Legal Profession's Fear of Discretionary Confidentiality Rule

As we saw in the previous section, the existing confidentiality requirements in the Model Rules are far from being discretionary. On the contrary, many of the rules do not allow for the use of discretion, and where a rule does call for the use of discretion, it is usually a very narrowly drawn and self-interested type of discretion. Blame for this cannot be ascribed to the legal system itself because the system acknowledges discretionary judgments. The capacity for grounded discretionary judgment is already recognized and exercised in the American legal system. Judicial decision-making is based on judgments applying abstract ideals to particular cases. A judge's capacity for such deliberation has always been considered fundamental to the legal system. n101 Although such judgments are sometimes viewed as controversial, they are nevertheless understood as plausible, not subjective or arbitrary, and always legitimate. The public prosecutor provides another example of successfully using meaningful discretionary judgment in the interests of justice. Here, the Model Rules themselves grant wide discretionary powers by declaring that "[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate." n102

Nor does blame for the lack of discretionary rules lie in the lawyers' intrinsic lack of capacity to exercise discretion; students spend many hours at law school learning how to apply abstract ideas to a particular set of facts, and lawyers regularly use their discretion in various matters. As a matter of practice, lawyers use their discretion to decide which clients to accept, what strategies to follow, how much time and effort to devote to a case, and what settlements to accept, among other things. [*697] These decisions, in one way or another, all involve ethical choices which lawyers reach by exercising discretion.

Lawyers have the capacity to make meaningful discretionary judgments, and they need to exercise this capacity. The reason for not having discretionary confidentiality rules is because the legal profession is unwilling to have them. As one commentator phrased it: "An attorney is capable of making decisions regarding client confidences. He may dislike making such decisions, but he is qualified to make them." n103

The profession's reluctance regarding discretional ethics is connected to the defensive-ethics approach, discussed at length in section A of this Article. As opposed to defensive ethics, discretionary rules dictate personal ethics, where lawyers take responsibility for their actions. Defensive ethical rules fear discretion because it appears that such rules will fail to provide lawyers either with adequate guidance when they face ethical problems or with adequate notice when they face regulatory sanctions. Lawyers believe that discretionary rules expose them to civil liability more than a categorical regime, where they need only follow a rigid rule.

The common belief among lawyers is that under a categorical rule, when a lawyer is confronted with an ethical problem all she need do is apply a rigid rule that dictates a particular response in the presence of a small number of factors. "The decision maker has no discretion to consider factors she might encounter that are not specified or to evaluate specific factors in any way other than that given in a rule." n104 The situation is completely different under a discretionary rule, where the lawyer is obliged to make a complicated judgment based on the specific circumstances and factors of each case. The lawyer in charge continuously adjusts the balance in the course of the case and this, according to this common belief or fear, puts the lawyer at greater risk of civil liability.

[*698] Three arguments address this legitimate belief or fear in the legal profession. First, even with a categorical ethical rule, lawyers can still face civil liability (but not disciplinary liability). Second, the existing categorical confidentiality rules are vague and do not act as a deterrent because the rules are incomplete and need expansion on many important issues. Third, discretionary rules can be clear enough to guide lawyers on how to behave to avoid professional discipline and civil liability.

No ethical rule, categorical or otherwise, can guarantee protection from civil liability because the ethical rules are not the standard by which the court examines the lawyer's conduct in civil litigation. n105 Even where the lawyer acts in accordance with the ethical rule, the court can examine the conduct by a different standard, namely a civil standard, and find liability. True, the court's tendency is to adopt the ethical code as the civil standard for lawyers' liability, but they are not obligated to do so, and there is always the possibility that courts will rule differently.

Let us examine the second argument, that the existing confidentiality rules are incomplete and unclear, and even an honest lawyer who truly wishes to follow these rules might encounter difficulties in doing so. In the

aftermath of the O.P.M. n106 and Kaye, Scholer n107 cases, the Model Rules and the ABA are still ambiguous and unclear as to the question of client fraud. n108 For the future-crime exception in Rule 1.6(b)(1) to apply, two conditions must be fulfilled: first, the client's conduct must be a crime; second, the crime is likely to result in severe physical injury (death or substantial bodily harm). n109 The requirement that these two conditions exist together makes it [*699] difficult to determine the purpose of this exception. Moreover, each of the two possible purposes is inconsistent with the language of the exception. If the exception is aimed at preventing clients from using legal services in furtherance of a crime and to prevent lawyers from taking part in a crime, then the exception should include any crime, regardless of its result. In that case, the exception should be similar to the one that already exists in eight jurisdictions n110 permitting the disclosure of any future or ongoing crime. n111 On the other hand, if the purpose of the exception is to save the life or limb of third parties, the exception should only mention the result of the client's conduct, regardless of whether it is criminal or tortious. In that case, the exception should be similar to the exception for medical information confidentiality, which refers to a crime or tort as long as there is a physical threat. n112

Take, for example, a situation where a lawyer learns that her client is abusing his child. The lawyer might face many troubling questions, such as whether this particular abuse falls under Rule 1.6(b)(1) which refers to crimes likely to result in death or substantial bodily harm, or whether disclosure should be made to the police or to the children's welfare services. It would be almost impossible for that lawyer, and many others like her, to find appropriate guidance in the permissive disclosure provisions of Rule 1.6(b)(1). As we saw above, neither the purpose of the exception nor the factors listed in the comments to Rule 1.6 would be sufficient to guide her. In addition, the ABA usually avoids frank and open discussions about a lawyer's contribution to a client's criminal conduct, so no assistance can come from there either.

[*700] When the lawyer's services were used to further a past crime, the situation is even more problematic. Here, the only available remedy the lawyer has is disavowing her prior opinions and mandatory withdrawal. But what should a lawyer do when there is no opinion to withdraw from, or where withdrawal would not assist the victims of the crime or prevent the client from continuing his crime? In these circumstances, the Model Rules do not grant any other remedies, such as disclosure, to rectify the harm or provisions for the new lawyer to receive a full explanation as to the reasons for the withdrawal.

Under the existing confidentiality rules, the exceptions for disclosure required by law does not receive the appropriate attention and discussion it deserves. Disclosure obligations imposed by law are a major issue in confidentiality-disclosure situations. First, legally imposed disclosure duties empty the confidentiality protections of content and can render the ethical duty of confidentiality meaningless. Second, out of all the existing exceptions to the ethical duty of confidentiality, legally required disclosure is the most common in everyday practice. Lawyers are much more likely to receive a court's subpoena or be confronted by statutory disclosure duties than to be confronted with a client's future deadly crimes. n113 Thus, one might expect to find a separate exception and detailed guidance to help lawyers deal with disclosures required by law. But one does not. Unlike the previous Code, the Model Rules contain no such exception. The only mention is in the comments to Rule 1.6, where it seems that the ABA was trying to avoid any substantial discussion rather than to clarify matters. The comment states that a presumption should exist against the possibility that another law supercedes the ethical duty of confidentiality. n114 The language of the comment, however, leaves unclear the circumstances under which the lawyer may assume that the presumption does not exist, or when, if ever, this presumption may be rebutted. The lawyer is given only a vague indication of how [*701] to handle this common confidentiality-disclosure dilemma and remains without any real solutions for it.

While the Model Rules endorse, for the most part, a broad confidentiality protection with only a few narrow exceptions, they also recognize the duty to disclose to a tribunal. While the ABA House of Delegates rejected the exception under Rule 4.1(b) regarding disclosure of a client's out-of-court fraud and the exception of disclosure in order to rectify harm, the House left intact Rule 3.3, which requires disclosure of a client's criminal or fraudulent act to a tribunal and which demands rectification by the lawyer when such a falsity has already occurred. n115 Moreover, the only instance in which the confidentiality exceptions under the Model Rules are broader than their corollary in the Code is under the duty to disclose to a tribunal. The existence of the exception in Rule 3.3(b) should be credited in favor of the existing confidentiality rules. There is no doubt that this exception in the Model Rules reflects the appropriate balance between confidentiality protection and the societal interest of promoting the truth. Unfortunately, the rule starts off in

the right direction but stops short of reaching a full and comprehensive exception. The comment to the rule and the ABA Opinions, which discusses the exception, leaves many questions unresolved, rendering the rule unclear and incomplete.

The case of Nix v. Whiteside presents a simple client perjury case where the defendant obviously intended to lie on the stand because he clearly changed his version of the story. n116 But in most cases, lawyers will have a difficult time determining whether their client is lying to the court. n117 The rule should provide guidance for lawyers on how to determine whether evidence is false and how to determine how solid the lawyer's conclusion should be in order for the exception to apply. Furthermore, the rule should discuss what the lawyer could do when the client disputes the lawyer's allegations. n118 Additionally, [*702] guidance is needed to determine what amounts to "material evidence." n119 Can the lawyer sit and do nothing until the court reaches its verdict because only then will she know if the evidence was material or not? The duty to rectify the fraud remains incumbent on the lawyer until the end of the proceedings, so the lawyer can make a disclosure even after the verdict is rendered. Under the existing rules, the client may fire the lawyer upon learning about her intention to disclose his perjury, and the lawyer has no further obligation to remedy the situation. Even where it is clear that the new lawyer is not aware of the perjured testimony, the previous lawyer's duty in the case has ended, and she has no obligation to rectify the harm. n120 It would appear that a rule that is aimed at promoting the truth must address this unique situation.

Interestingly, a complete and coherent rule can be found in Rule 1.6(b)(2), which permits disclosure for the lawyer's self-defense. The exception covers all plausible circumstances where disclosure of confidential information can assist the lawyer's cause. The exception is easy to apply: the lawyer is not even required to give the client advance notice about her intended disclosure.

The third argument addresses the legal profession's fear that discretionary rules expose them to civil liability more than a categorical regime by showing that a discretionary rule can be clear enough to guide lawyers' behavior and to allow them to avoid professional discipline and civil liability. This is the main challenge any proposed discretionary rule faces: how to provide for lawyers' independent ethical judgment and still be clear enough for practitioners to follow. The best way, and in my opinion, the only way, to explain this argument is by presenting an alternative discretionary ethical rule of confidentiality. The second part of this Article takes up that challenge by examining possible discretionary confidentiality rules and searching for a coherent rule.

[*703] E. Seeing the Whole Picture--The Connections

Even though the three deficiencies seem separate with their own unique characteristics, they are all connected in various ways. This section very briefly reviews the predominant connections among the three. These connections indicate that one remedy for all three deficiencies is possible; in Part II such a comprehensive solution is offered: a discretionery ethical duty of confidentiality.

The dominant approach of defensive ethics, discussed in section A, is at the same time an example of lawyers' self-interests which conquer the summit of the "hierarchy of protection" while also being a reason for the shape of that scale. As a causation, defensive ethics leads to the "hierarchy of protected interests," discussed in section B, in two ways. First, the profession's own interests simply displace societal interests, which are left neglected. If the profession's own interests stand at the top of the hierarchy, it is at the direct expense of the societal interest.

The second way is shown by the "asymmetry of information" argument, discussed in section A. Asymmetry of information exists between clients and third parties, where only the former have access to information indicating the lawyer's liability in confidentiality and disclosure cases. Because only clients possess this information, they are more likely to sue their lawyers than third parties. This means that the risk of financial liability is from the clients, not society or third parties. Thus, it is better and smarter for the rules to protect client's interests than a third party's, which is exactly what is reflected in the "hierarchy of protection." Since lesser risk in terms of future liability is assumed from society and third parties, their interests can be pushed away to the other less protected end of the scale.

The reluctance to embrace discretionary confidentiality rules, as shown in section C, is deeply rooted in the defensive ethics approach. Lawyers believe that discretionary ethical rules expose them to increased financial liability. The dominant [*704] defensive approach is the main barrier against allowing discretionary rules. If the legal profession views its ethical rules as a

means of bypassing ethical conflicts, instead of addressing them, then discretionary rules are a threat to this. Section D tried to allay this fear, but departure from the defensive approach is essential for successful implementation of discretionary ethics since the defensive ethics approach rejects the use of discretion in the ethical rules. Defensive ethics and discretionary ethics are bitter enemies that cannot abide under the same roof of rules. In this sense, the first drawback--defensive ethics--is one of the reasons for the third drawback--lack of discretion. You cannot solve the third problem without addressing the first.

Another connection can be found between the absence of discretion in the rules and the neglected interest of securing lawyers' moral autonomy. An essential aspect of exercising discretion is using one's own judgment and conscience to make decisions, which is exactly what moral autonomy means. The current rules do not encourage lawyers to exercise their moral autonomy because they ignore the use of discretion in ethical decisions. Rules based on discretionary ethics will automatically lead to the best fulfillment of lawyers' moral autonomy. Moreover, as the second part of this Article intends to show, rules that are based on discretionary ethics provide better protection for all the neglected societal interests and have the potential, if exercised fully, to modify the current "hierarchy of protection."

II: A NEW DISCRETIONARY CONFIDENTIALITY RULE

Exercising discretion means solving problems by applying abstract ideas to a particular case, not by applying a rigid rule. Discretion requires consideration of all the relevant circumstances of a particular case, with various factors and competing interests being weighed. The weighing of each element should produce a decision that can best serve the purpose of the rule. This purpose might be a general one (which exists in all rules), [*705] or it might be specifically relevant only in the case at hand. n121 In the area of confidentiality, finding the right balance between preserving a client's confidences and protecting the societal interests at stake should be the specific purpose directing lawyers when deciding whether to disclose. Exercising discretion when facing confidentiality-disclosure dilemmas means balancing the client's right to confidentiality with the relevant societal interests. With such a balance, the societal interests that are neglected under the current ethical rules of confidentiality will probably receive much more weight and consideration.

While part II seeks to construct a new confidentiality rule, it also demonstrates how the unprotected societal interests, discussed in section B of part I, receive adequate protection. The suggested confidentiality rule can change the current "hierarchy of protection" by moving up the ladder the important societal interests of preventing and rectifying harm, seeking and promoting the truth, and safeguarding lawyers' moral autonomy. As a direct result of this process, the dominant approach of defensive ethics will be weakened since better protection for societal interests is, and should be, at the expense of the lawyers' own interests.

Add to the above the two values inherent in the discretionary-confidentiality rule, discussed in section C of part I. The first is the general value immanent in every discretionary rule through its being the appropriate solution in legal issues that lack societal consensus. The second value, possessed only by ethical discretionary rules, is the superiority of personal ethics to objectivism, non-accountability, and partisanship.

Note that a discretionary rule is not a voluntary rule that the lawyer can choose to follow or not, but rather a compulsory and sanctionary rule. The discretionary rule which this paper [*706] endorses is far from the ethical considerations in the previous Code, which "are aspirational in character and represent the objectives toward which every member of the profession should strive." n122 The rule is discretionary only in the sense that it allows a substantial range of autonomy for a lawyer to exercise judgment. Applying the rule is not discretionary since it remains part of the disciplinary systems and the lawyer is subject to sanctions for violating the rule. Such discipline can be used when the lawyer fails to apply the rules in good faith or with minimal competence. n123 As William Simon aptly notes, it is better to treat a discretionary rule as a contextual rule. A contextual rule, like the negligent rule in our tort system, is without exact and detailed content but is formulated in keeping with the circumstances of each case. n124 The application of a ontextual rule is based on a complex judgment that is made in each case.

Part II of the Article has two main purposes. The first is to challenge the common belief among lawyers that discretionary ethical rules are vague and consequently increase the risk of financial liability. The second is to explore and to present the true and full meaning of "exercising ethical discretion" - regarding client confidences.

Exploring possible discretionary confidentiality rules in a search for a

complete and coherent rule will enable us to understand the true meaning of exercising discretion regarding client confidences. We have already defined "exercising discretion" as solving problems by applying abstract ideas, not a rigid rule, to a particular case. This confusing definition can best be understood through concrete examples of possible discretionary confidentiality rules.

When constructing a discretionary confidentiality rule, we must first discuss the content of the new rule, and only later seek to cast it into a clear and coherent format. Section A of [*707] part II discusses three important exceptions to the duty to preserve a client's confidences. I have chosen only these three because presenting the entire rule would be prolix, and the point of this article can be made by focusing on them alone. They are the future-harm exception, disclosure for lawyers' self-defense, and the duty of truthfulness to a tribunal and others. Section D tries to locate the clearest and most coherent format for that rule so it will be easy to understand and follow in the lawyer's daily practice and the disciplinary system.

A. The Future-Harm Exception

The future-harm exception is no doubt the most problematic exception, where the current rule (Model Rule 1.6(b)(1)) needs major revision. There are three major aspects to the exception that need thorough consideration, leading to a completely new rule. The first aspect is whether the duty to disclose client confidences in future-harm cases should be a permissive or a mandatory duty. The second is the extent of the exception: would it include any harmful conduct, crime or fraud, or only felonies, or do we retain the limited extent of Rule 1.6(b)(2)? Based on the decisions in these two aspects, the type of the duty and the extent of the exception, we should consider whether to have one exception for all cases or whether to divide future-harm situations into several categories and have a different duty in each category. The third aspect concerns the standard a lawyer should apply in determining whether the duty to disclose exists.

If we wish to provide a new confidentiality rule that will be accepted by the legal profession, we must address some of the profession's fears and desires. The "asymmetry of information" argument n125 taught us that mandatory disclosure rules, while clear and easy to follow, might still increase the risk of financial liability, which is what lawyers fear the most. Thus, our proposed rule should try to avoid mandatory disclosure exceptions as much as possible. On the other hand, if we want [*708] to change the current "hierarchy of protected interests" by providing adequate protection for societal interests, we should choose mandatory disclosure since it can provide better protection to societal interests than a permissive duty. Under permissive disclosure there might be cases where the lawyer chooses to remain silent, allowing the harm to occur. This will not happen under a mandatory rule, where the lawyer must always disclose under specified circumstances.

The balance between these two competing rationales should be based on the type of future harm. As the foreseeable harm increases, so does the societal interest in preventing that harm and so should the duty to disclose.

The most severe future harm is undoubtedly death or serious bodily harm. Preserving physical safety is a vital societal interest that requires protection in all cases, which only mandatory disclosure can guarantee. Mandatory disclosure should be imposed where the disclosure of client confidences can save another person's life or limb. Mandatory disclosure should be used only under these limited circumstances, and cannot take over the entire future-crime exception. In all other circumstances of the future-crime exception, permissive disclosure guarantees sufficient protection. n126

Our discussion above regarding mandatory disclosure or permissive duty led to the conclusion that only where the societal interest is at high risk, and a mandatory disclosure can provide the best protection, should a compulsory duty be imposed. We also found that such a case exists where the intended crime will cause death or substantial bodily harm. Accordingly, the exception needs to be divided into two categories: the first imposes a mandatory duty, where the future harm intends death or substantial bodily harm; the second imposes a permissive duty in all other future crimes or fraud intended by the client.

[*709] The first category requiring disclosure should not be limited only to crimes or fraud. The rule should extend to any type of conduct, criminal or not, as long as it threatens to inflict death or substantial bodily harm. n127 This mandatory rule is meant to give the highest protection to the most valuable interest of all, the sanctity of life and body. To this end, criminal and tortious conduct should not be differentiated where they both cause the same bodily harm. If we wish to protect another person's life or limb, the rule should be absolute concerning any harmful conduct. For this reason the

medical profession's rule of confidentiality covers all types of patient's behavior in the case of future harm, n128 and the legal profession's ethical duty of confidentiality should do the same. Many jurisdictions in the United States endorse this approach by having an exception, whether mandatory or permissive, that extends to any crime intended by the client. n129

The RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS has a different view: the rule permits disclosure only where the seriously harmful acts constitute crime or fraud under applicable law. n130 The comment explains that "limiting the exception in the Section to crime or fraud is also a matter of convenience; no other categorical descriptions of harmful acts provides an adequately definite limitation on these exceptions to a lawyer's duty of confidentiality." n131 But the rule we are now suggesting is more convenient to operate than the Restatement. Under the Restatement rule, the lawyer must examine two issues in order to decide whether the exception applies: first, if the conduct [*710] is a crime under applicable law and, second, whether the conduct will cause death or substantial bodily harm. Under the proposed rule, the lawyer need only examine the second issue, the type of the future harm. The first issue is not relevant. As a result, exercising the proposed rule is simpler and easier than applying the exception only to a client's future criminal conduct.

Harry Subin offers another distinction. His mandatory disclosure duty applies where the client's future conduct is a felony. n132 Subin admits that his division between felony and misdemeanor is a little arbitrary, but he claims it has two advantages. First, there is moral support for the division since "felonious acts are generally believed to cause the greatest harm and are the crimes most condemned by society." n133 The second advantage lies in its simplicity. Our proposed rule has the same two advantages, but without the arbitrariness of the Subin rule. The moral support is even stronger here since the suggested mandatory exception protects from the greatest harm of all, death or substantial bodily harm. Further, it protects against any kind of conduct whether criminal or not. Moreover, certain felonies (such as giving or offering a bribe to a judicial officer or money laundering n134) have a far lesser threat of physical harm, and hence, have much less moral support. A rule that covers only serious harm ensures that its moral support always remains high. Our proposed rule also possesses Subin's second advantage of simplicity. As explained above, a mandatory disclosure in all cases of future seriously harmful conduct is very simple and convenient to follow.

We have seen above three arguments supporting a mandatory exception in cases where the client's intended conduct will inflict death or substantial bodily harm, whether that conduct is criminal or not. The first argument shows that such a rule better serves the highly important purpose of protecting life and limb. Secondly, the suggested exception provides the most [*711] simple and convenient rule to follow. And finally, it enjoys wide moral support.

The third aspect concerning this exception is what standard a lawyer should employ in determining whether the duty under both parts of the exception exists. The criminal standard of proof beyond a reasonable doubt, like that in Canon 4 of the Model Code, is too high. n135 Under such a standard, disclosure would be very rare since it is almost impossible for the lawyer to know when a client intends to commit the serious harm or crime. n136 In such a case, the interest of preventing harm would get even less protection than it does under the existing confidentiality rules. The same critique applies to Hawaii's confidentiality rule, which mandates the disclosure of information that "clearly establishes a criminal or fraudulent act of the client." n137 In England and the United States under the attorney-client privilege, the exception can be invoked where there is a prima facie showing of criminal or fraudulent intent. This standard is too low, and in many cases it exposes lawyers to financial liability for failure to disclose. What may be appropriate for the evidentiary privilege might be very risky for the broader ethical duty of confidentiality. What we suggest is an intermediate standard similar to Rule 1.6(b)(1) and the Restatement. n138

Under this standard, disclosure of otherwise confidential information may or must occur if a reasonable lawyer has a reasonable belief that the client intends to engage in the harmful conduct described in the rule. n139 Note that this is a double objective standard: we examine whether a reasonable lawyer under the same circumstances would have a reasonable belief [*712] that her client intends to commit a crime. Thus, the exception applies as long as any reasonable lawyer could establish a reasonable belief that the client intends to commit a crime--even if the actual lawyer in the case lacks the belief.

Consistent with the existing confidentiality rules, our rule should require lawyers to take other steps before disclosure: persuade the client to cease or prevent his threatened behavior, and threaten the client with disclosure if he commits the threatened act. n140 Disclosure must be used as "a last resort

when no other available action is likely to prevent the threatened harm." n141

In sum, the suggested future-harm exception should be divided into two categories that differ in their circumstances and also in the type of duty they require. The first category imposes a mandatory disclosure duty in circumstances in which the lawyer reasonably believes that her client's intended conduct might cause death or serious bodily harm, whether that conduct is criminal or not. In the second category, the lawyer is allowed to disclose when she reasonably believes that her client intends to commit any type of crime. Under both categories, the lawyer can exercise her duty when a reasonable lawyer would reasonably believe that the client intends to engage in the conduct described in the rule.

B. Disclosure for Lawyers' Self-Defense

Disclosure for the lawyer's self-defense has been criticized as self-serving and only advancing the legal profession's pecuniary interest. n142 The criticism resonates because the existing confidentiality rules protect only lawyers, affording little or no protection at all to other societal and third-party interests. As Geoffrey Hazard aptly phrases it, "The point of difficulty is not that a self-defense provision illegitimately protects lawyers, [*713] but that it protects only lawyers." n143 The self-defense exception stands alone among the existing confidentiality rules as they hardly protect third parties that are the target of client misconduct. n144 Protecting lawyers can be justified only under a broader confidentiality rule, which grants the same protection to third parties when both lawyers and non-lawyers are the victims of client misconduct. Since our suggested future-harm exception, and another, the rectify-harm exception, not discussed here, are designed to provide adequate protection to the victims of client misconduct, lawyers should be part of this protected group. As such, most of the self-defense exception is no more than a repetition of these two exceptions. n145 For example, where a third party charges the lawyer as a co-conspirator in the client's fraud, the lawyer is entitled to disclose confidential information in order to rectify any harm furthered by use of the lawyer's professional services.

In all other circumstances of self-defense that do not fall within the future-harm or the rectify-harm exceptions, two other rationales may justify disclosure. The first explains that lawyers, like anyone else, should be given an adequate opportunity to defend themselves and their services. n146 In this sense, not having the exception is discrimination against the legal profession. Where the client raises a dispute or charges of wrongdoing, the second rationale views the disclosure as based on client waiver. The client by his own behavior has waived the confidentiality protection by putting the lawyer's services at issue. n147 These rationales also serve as a partial answer to the first critique concerning the self-defense exception as solely reflecting the legal profession's self-interests.

[*714] Based on the justifications stated above, our proposed exception would also include, as does Model Rule 1.6(b)(2), n148 provisions for comprehensive protection. Similar to the Restatement proposal, the exception should be divided into two sections. The first section should permit disclosure where the lawyer is charged or threatened with being charged by any person claiming that she or her agent acted wrongly in the course of representation. n149 This section includes criminal and non-criminal charges as well as disciplinary proceedings brought by the client or third party. But where the client is not involved, the lawyer must give advance notice so that he may have a fair opportunity to prevent the disclosure of confidential information before it occurs. The second section of the exception refers to disclosure in a compensation or reimbursement dispute with the client n150. The first section already covers all other types of disputes with the client.

C. Truthfulness Towards a Tribunal and Third Parties

The Model Rules have two different rules concerning the lawyer's duty to be truthful. The first is Rule 3.3, which addresses the duty towards a tribunal, n151 and the second is Rule 4.1, which addresses the duty of truthfulness in statements to third parties (negotiation, mergers, securities deals, etc.). n152 The rules differ not only in number but also in content, which is unnecessary. This Article proposes a joint rule that will simultaneously address the lawyer's duty of truthfulness both to a tribunal and to third parties.

There is no reason to differentiate the two because both cases have the same competing interests: on the one hand the interests secured by the ethical duty of confidentiality and on the other the interests secured by disclosure. Interestingly, [*715] all four societal interests, discussed in part I of the Article, are protected here by disclosure: promoting the truth, securing lawyers' moral autonomy, preventing harm, and rectifying harm. n153 Whether the untruthful statement is made in a tribunal or during plea bargain-

ing negotiations is not relevant to the balancing of interests here. Neither is the lawyer's position as "an officer of the court." A lawyer should be "an officer of the truth." The lawyer's duty of truthfulness should equally apply to all her statements and actions, in a tribunal or elsewhere, so long as there is a risk to another party who might be damaged by her actions or words.

The content of such a joint rule should be divided into three categories, according to the source of the misleading statement rather than before whom or where it was uttered. The three sources are (1) the lawyer herself; (2) the other party or the court; and (3) the client.

In the first category, where the misleading statement comes from the lawyer, there should be a flat-out ban against lying. Like today's Model Rule 3.3(a)(1) and Rule 4.1(a), n154 the proposed rule would prohibit lawyers from lying--even when telling the truth means revealing client confidences. The duty of truthfulness where the lawyer's own statement is involved trumps the ethical duty of confidentiality. A lawyer may not make a misrepresentation to a court or to a third party.

The second category is when the other party or the court states information that the lawyer knows to be inaccurate, but correcting the mistake would reveal client confidences. The lawyer is not asked to comment about the information, she is [*716] a mere observer of the scene. n155 Once again, our rule adopts the existing rule that the duty of truthfulness does not apply and the lawyer must remain silent. n156 When neither the lawyer nor her client is the source of the misperception, the duty to preserve client confidences prevails over the societal interests of disclosing. The balance here favors the duty to remain silent because the lawyer has no involvement in the circumstances in which the misrepresentation occurred. She should not be deemed as the one to repair it, especially if it is at the direct expense of client confidences.

The most interesting is the last category, in which the client is the source of the misrepresentation. A situation may arise where a client gives perjurious testimony or conceals an important document during a company merger. In that event, there is no need for a special exception because the situations are included in two other exceptions: the future-harm exception and the rectify-harm exception (not discussed in this Article). When the client plans to mislead but has not yet done so, the future-harm exception should apply. Thus, according to my suggestion in section A, n157 the lawyer is permitted (or required) to disclose, depending on the type of the foreseeable harm.

In the second case, when the misleading by the client has already happened, we should turn to the duty to rectify harm. The duty to rectify harm should apply only where the lawyer's professional services were made the instrument of the client's crime or fraud. n158 Only in these cases is the lawyer at risk of [*717] financial liability, and only in such a situation can we claim that the client has lost confidentiality protection through his own abusive behavior. When the lawyer's services were used as an instrument for the deception, the lawyer is allowed to rectify the harm even by disclosing confidential information to the court or a third party. n159

In sum, our proposed rule constitutes one joint rule dealing with the lawyer's duty to be truthful both to a tribunal and to others. The Model Rules have two separate duties, which result in an asymmetrical duty of confidentiality in cases where it should be the same. Our suggested duty of truthfulness varies, based on the different sources of the misleading statement and not according to whom it was addressed and where it occurred. As with the existing rules, the lawyer must never lie directly even where telling the truth reveals client confidences. She must remain silent when the other party or the court gives information that the lawyer knows to be inaccurate. In the third case (when the client is the source of the misleading), the proposed rule simply refer to the future-harm and rectify-harm exceptions that apply.

D. The Format for a Discretionary Confidentiality Rule

There is no doubt that the content of a rule is what really matters. But for a discretionary ethical rule the format has an importance of its own. Recall that the first purpose of this [*718] part of this Article was to challenge the legal profession's legitimate fear that discretionary ethical rules are vague and difficult to follow and increase lawyers' risk of financial liability. Section A attempted to set forth the most coherent content for three exceptions to the rule, but this task can be accomplished only together with a clear format in which the content can be set. The need for an easily applied and clearly understandable format increases when we have a rule that is based on an independent exercise of judgment.

This section explores several plausible formats for a discretionary confidentiality rule, proposing at the end the appropriate one. The possibilities are (1) a general formula with illustrative examples, (2) a general formula

only, and (3) a comprehensive guide.

1. General Formula with Illustrative Examples

The first suggested format for the discretionary confidentiality rule is similar to the ethical rule of confidentiality for the medical profession: a general balancing formula accompanied by illustrative examples using already recognized exceptions. American Medical Association Opinion 5.05, which sets forth the medical profession's ethical duty of confidentiality, deals with its exceptions in the second paragraph. The Opinion states: "The obligation to safeguard patient confidences is subject to certain exceptions which are ethically and legally justified because of overriding social considerations." n160 The Opinion then cites the future-harm and the required-by-law exceptions as examples, noting, however, that other exceptions might be included under the general formula even if they are not specified in the rule.

We should distinguish this format from Principle 16.02 in the English Solicitors' Guide, which concerns the exceptions to the general rule of confidentiality stated in Principle 16.01. The Principle itself consists of one sentence: "The duty to keep [*719] a client's confidences can be overridden in certain exceptional circumstances." n161 The commentary to the Principle, which follows, discusses the already recognized exceptions. Even though the commentary provides examples of exceptions, the Principle is not a balancing formula. The Principle declares the mere fact that there are circumstances that override confidentiality. It does not include a general formula that directs a lawyer's use of discretion.

The proposed balancing formula provides exactly what we are looking for: free exercise of the lawyer's own discretion in each case. The whole notion of a discretionary rule is based on a balance of interests made on a case-by-case basis. Moreover, the examples accompanying the formula address the most common circumstances the lawyer encounters, and accordingly provide specific guidance for the majority of cases. The rare cases are deliberately not addressed by the examples and are left open to be solved on the basis of the formula. Thus, this format seems to offer the best solution for a discretionary rule: full guidance is given for the common cases and a specific balancing formula is articulated for application in the less frequent cases.

However, this format has two flaws, which render it inappropriate for the purpose of our discretionary confidentiality rule. The first flaw lies in the simple fact that a general balancing formula is still far from being a true exercise of discretion. This format resembles more a categorical rule than a rule that promotes lawyers' moral autonomy. The use of a general formula is still not enough to make lawyers use their own conscience and judgment, while the specific exceptions almost eliminate that possibility.

Recall that the main challenge that any discretional ethical rule must address is the common belief among lawyers that discretionary ethical rules are vague and that they increase the risk of financial liability. The second critique emphasizes [*720] that not only does this format not resolve this issue, it even reinforces this fear by being in itself vague and incoherent. Two key characteristics make the format of a general formula with illustrative examples unclear and hard to follow.

First, the illustrative examples do not provide enough usable guidance. Second, the problem exists of the ability to add new exceptions in the future as long as they match the general formula. This means that in circumstances that are not included in the examples, the lawyer needs to decide on the basis of the general formula whether to carve out another exception, with the understanding that this decision might be reexamined later by other bodies (the court or the bar). It is easy to see how this increases lawyers' risk of financial liability, and for that reason alone, I believe it will be difficult to persuade lawyers to trust a discretionary confidentiality rule. Moreover, a discretionary rule set in this format fails to mitigate the dominant defensive ethics approach.

2. General Formula Only

Another suggested format is that of a confidentiality rule which includes only a general formula with no examples or already specified exceptions. Take, for example, the physician-patient privilege in North Carolina; this states that "the court, either at trial or prior thereto . . . may compel disclosure if in his opinion, disclosure is necessary to a proper administration of justice." n162 Or the Israeli physician-patient privilege and the psychologist-patient privilege, which is upheld "unless . . . the court has found that the necessity to disclose the evidence for the purpose of doing justice outweighs the interest in non-disclosure." n163 Assume that instead of the court, the rule grants discretion to lawyers, declaring that a lawyer may disclose when, in her opinion, it is necessary for a proper administration [*721] of justice or

when the necessity to disclose for the purpose of justice outweighs the interest in non-disclosure.

The format of a general formula suffers from the same flaws as the previously examined format. Furthermore, it does not provide any guidance for lawyers in the exercise of their discretion, not even limited examples that could clarify the formula. As a result, under this format the rule is even more vague and hard to follow and thereby may expose lawyers to financial liability. Accordingly, this format is also inappropriate for a discretionary ethical rule.

3. A Comprehensive Guide

Of all plausible formats this is no doubt the most detailed, giving lawyers complete guidance on how to exercise their discretion. Under this format, the general duty of confidentiality and every exception, separately, should each be formed as a comprehensive guide. The guide should be a four-part rule, taking the form of: (1) a general standard; (2) general principles; (3) a separate discussion for different situations based on the "dividing line," and (4) illustrative cases. n164

The first part, the general standard, states the essence of the rule by featuring its distinctive discretionary characters. These include: the type of duty to disclose (permissive or mandatory), the circumstances in which the exception is applicable, and most importantly, the balancing formula to be used by the lawyer when facing such a dilemma. n165

[*722] The second part, the general principles, discusses the various considerations that must be examined at every stage of the lawyer's decision making. This part deals with the general principles applicable under the general standard stated in the previous part. For example, in disclosure for the lawyer's self-defense exception we can identify two such principles: (1) the duty of confidentiality, and (2) the lawyer's right to defend herself.

In this part, each principle is explained both generally and as it applies in the specific case at hand. The guide should provide a complete presentation of the dilemma by relying on other ethical rules, statutes, and case law. The discussion should also cover all phases of decision making that the lawyer is expected to confront while exercising her discretion. It begins with the basic decision of whether or not to disclose, and if disclosure is the favored option, the possible consequences of disclosure, such as termination of the representation.

The third part of our suggested format divides the circumstances covered by the exception into different situations and discusses each separately. Confidentiality disclosure cases can be very complicated. Even where two scenarios fall under the guidance of the same exception, individual circumstances determine how the rule should be applied and therefore require a slightly different exercise of discretion. For each exception we need to identify the "dividing line" that can help us create distinctions to suit various applications of the rule. The separate discussion according to the "dividing line" provides a coherent rule, which suits a broader range of real-life circumstances.

[*723] For example, in the exception of child abuse in the Solicitors' Guide, the "dividing line" is based on the question of who is the client. Accordingly, the guidance explores five situations: when the client is an adult who asserts that a third party is abusing a child; when the client is the abuser himself or herself; when the client is an adult who has been abused or is being abused; when the client is a mature child who is being abused; and when the client is an immature child who is being abused. For the future-harm exception, such a "dividing line" might be based on the intended crime or the intended harm.

The final part in our suggested format presents illustrative examples in which the lawyer considers whether or not her duty of confidentiality should be breached. n166 The illustrative cases demonstrate how the previous parts operate together, how varying considerations can change the setup in each case, and the full meaning of ethical discretion. These important segments clarify the rule by demonstrating how the discretion is actually applied.

The comprehensive guide succeeds remarkably well in covering almost every possible aspect of the ethical confidentiality duty. It starts with the essence of the rule and moves on to a detailed discussion of the general principles underlying it. It proceeds by dividing the circumstances into groups and devoting a separate discussion to each group, and finally wraps everything up by using illustrative cases. n167 This format offers broad guidance to the full and true exercise of discretion by any lawyer who wishes to follow the rule. In addition, the rule better protects lawyers from the risk of financial liability. Such a format achieves the goal of having a discretionary confidenti-

ality rule that is coherent and easy to follow.

[*724] The only drawback in this format is the fact that it requires much drafting work. Forming each exception in this four-part format is far more complicated and demanding than using the above-mentioned two general formats. However, the thorough drafting phase just ensures a coherent and easily followed rule, which, in sum, guarantees more compliance with the duty of confidentiality and better protection of important societal interests.

FOOTNOTES:

n1 See Ted Schneyer, Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct, 14 L. & SOC. INQUIRY 677, 693-737 (1989).

n2 See id. at 726.

n3 The current rules of confidentiality refer to the ABA Model Rules of Professional Conduct, 1986 and the ABA Ethics Opinions dealing with this issue.

n4 See Schneyer, supra note 1, at 725.

n5 See id.

n6 See id. at 736.

n7 See Schneyer, supra note 1, at 725.

n8 See Deborah L. Rhode, Ethical Perspectives on Legal Practice, 37 STAN. L. REV. 589, 616 & n.97 (1985).

n9 Schneyer, supra note 1, at 727 (quoting ABA Standing Committee on Lawyers Professional Liability, Comments on the Proposed Final Draft 6 (Jan. 20, 1982).

n10 MODEL RULES OF PROFESSIONAL CONDUCT at Scope (6) (1983).

n11 Id. at Scope (8). See also Schneyer, supra note 1, at 728 (explaining that this section is meant to protect lawyers from a civil liability).

n12 See id. at Scope (8).

n13 See Schneyer, supra note 1, at 728.

n14 The Kaye, Scholer defense was based on the argument that disclosure of Lincoln's fraud was ethically prohibited. See Summary of the Expert Opinion of Geoffrey C. Hazard Jr., 8 (Feb. 25, 1992), reprinted in ATT'YS LIAB. ASSURANCE SOC., THE KAYE SCHOLER CASE AND OTHER SELECTED PROFESSIONAL LIABILITY AND ETHICS ISSUES 112 (1992).

n15 See MODEL RULES OF PROFESSIONAL CONDUCT RULE 4.1 (Proposed Draft, June 30, 1982), reprinted in 1 Materials on the Model Rules, item 400 (1982).

n16 See James O. Johnston, Jr. & Daniel Scott Schecter, Introduction: Kaye, Scholer and the OTS--Did Anyone Go Too Far?, 66 S. CAL. L. REV. 977, 977-84 (1993).

n17 See id. at 981.

n18 See id.

n19 MODEL CODE OF PROFESSIONAL CONDUCT DR 4-101(c)(2) (1969) provides for disclosure "when permitted under Disciplinary Rules or required by law or court order." Id.

n20 See Proposed Final Draft, supra note 15, at Proposed Rule 1.6(b).

n21 MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. 20 (1983) (emphasis added). See Schneyer, supra note 1, at 726 (During the debate on the new Model Rules, the SEC general counsel objected to the comment, saying: "The lawyer must obey the law where the law requires, disclosure should be noncontroversial; a 'presumption' to the contrary seems inappropriate.") Some states still have a specific exception for disclosure required by law. See, e.g., UTAH RULES OF PROFESSIONAL CONDUCT, Rule 1.6(b)(4) (authorizing that an attorney may reveal confidential

information if the attorney "believes" such disclosure is required by law).

n22 See, e.g., UTAH RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(4) (an attorney may reveal confidential information if the attorney "believes" such disclosure is required by law).

n23 See THE RESTATEMENT (THIRD) OF THE LAW: THE LAW GOVERNING LAWYERS § 115 (1989) ("A lawyer may use or disclose confidential client information when required by law, . . . [after] the lawyer takes reasonably appropriate steps to assert that the information is privileged or otherwise protected against disclosure.").

n24 Statement of Policy Adopted by American Bar Association Regarding Responsibilities and Liabilities of Lawyers in Advising with Respect to the Compliance by Clients with Laws Administered by the Securities and Exchange Commission, 31 BUS. LAW. 543, 544-45 (1975).

n25 Id. at 547.

n26 See William H. Simon, The Kaye Scholer Affair: The Lawyer's Duty of Candor and the Bar's Temptations of Evasion and Apology, 23 L. & SOC. INQUIRY 243, 243 (1998) (examining in depth the principal specific instances of misconduct alleged in the OTS's Notice of Charges and concluding that some of the OTS's charges were plausible prima facie).

n27 See id. at 263-265.

n28 See id. at 263.

n29 Id. at 265 & n.31 (footnote omitted)(this conclusion is based on the explicit words of the working group in its report).

n30 See Simon, supra note 26, at 264-65.

n31 Report No. 2 of the Standing Committee on Ethics and Professional Responsibility, 116 REP. OF A.B.A. 108 (1991).

n32 See id. This was the same exception which the Kutak Commission included but was later rejected by the ABA House of Delegates. The 1991 report was also rejected by the House.

n33 See id.

n34 See id.

n35 See Report No. 2, supra note 31, at 108; MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(4)(b) (1983).

n36 See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B) (1981).

n37 See 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK OF THE MODEL RULES OF PROFESSIONAL CONDUCT § 1.6:110, 3.3.212 (2d ed. 1990); Schneyer, supra note 1, at 722.

n38 See Schneyer, supra note 1, at 722. Many commentators have tried to resolve this inconsistency in the ethical rules and in the ABA attitude. One explanation suggests that maybe at that time, especially after the 1974 amendment, the ABA believed that as "officers of the court" lawyers have a special duty to protect the decision-making process, a duty unmatched by any duty to third-party victims of a client's fraud. Id. Another explanation is that most members of the House of Delegates were corporate lawyers and not defense lawyers; where the criminal defendant is more likely to commit perjury, the corporate clients would have greater opportunity to engage in securities or other financial frauds. See Ronald D. Rotunda, The Notice of Withdrawal and the New Model Rules of Professional Conduct: Blowing the Whistle and Waving the Red Flag, 63 ORE. L. REV. 455, 473 n.91 (1984); Schneyer, supra note 1, at 722 (explaining that the House of Delegates members considered that personal injury plaintiffs are more likely to commit perjury than the insurers and other business clients they usually represent).

n39 See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (1983).

n40 See HAZARD & HODES, supra note 37, at § 1.6:305. By filing a malpractice action the client waives the protection of the rule simply by voluntarily putting the contents of privileged communications into issue. See Charles W. Wolfarm, Corporate-Family Conflicts, 2 J. INST. FOR STUDY LEGAL ETHICS 295, 310-11 (1999).

n41 See HAZARD & HODES, supra note 37, at §§ 1.6:305-06. The leading case is Meyerhofer v. Empire Fire & Marine Ins. Co., 497 F.2d 1190 (2d. Cir. 1974). Meyerhofer states that a lawyer may reveal confidences necessary to defend himself against accusations of wrongful conduct made by purchasers of stock who sued the attorney for falsifying a registration statement filed with the SEC. Meyerhofer, 497 F.2d at 1194. The provision is controversial because some interpret the words "to establish a defense" in a broad way to include "establishing" a defense even before formal proceedings started. HAZARD & HODES, supra note 37 at § 1.6:305. This means that a lawyer may disclose when he "faces a realistic threat of charges brought by third parties, including governmental authorities, based on conduct which is actually wrongdoing by the client . . . ." See id.

n42 MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (1983).

n43 See HAZARD & HODES, supra note 37, at § 1.6:305.

n44 See In re Robeson, 652 P.2d 336, 340 (Or. 1982). In Robeson, a lawyer was reported to the Oregon Bar disciplinary agency by the state's securities commission. See id. The investigation found disciplinary violations, but the client refused to assist the investigation by waiving the attorney-client privilege. See id. at 344. The court instructed the lawyer to defend himself by using privileged communication based on DR 4-101(c)(4). See id. The lawyer could not refuse to defend himself claiming the confidentiality rule because the Disciplinary Rule allowed disclosure in self-defense. See id. at 346.

n45 See MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.1(b) (1988).

n46 See id. The language is similar to Rule 1.2(d), and it probably was meant to be a specific application of the basic principle set in Rule 1.2(d). Rule 1.2(d) prohibits a lawyer to "counsel a client to engage, or assist a client, in a conduct that the lawyer knows is criminal or fraudulent." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(d) (1983).

n47 MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.1(b) cmt. 3 (1983).

n48 MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.1(b) (1983).

n49 See MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.1 (Proposed Final Draft 1982). The section reads: (a) In representing a client a lawyer shall not knowingly: (1) make a false statement of material fact or law to a third person; or (2) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client. (b) The duties stated in this Rule apply even if compliance requires disclosure of information otherwise protected by Rule 1.6. MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.1.

n50 Id.

n51 MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.1(b) (1983).

n52 See R.W. Nahstoll, The Lawyer's Allegiance: Priorities Regarding Confidentiality, 41 WASH. & LEE L. REV. 421, 437 (1984) (notes that the last clause added by the House of Delegates in 1983 is very similar to the 1974 amendment to DR 7-102(B)(1). The 1974 amendment also made the duty to rectify fraud on a tribunal or a person yield to confidentiality and made DR 7-102(B)(1) meaningless. As to 1983, when the House took the vote, thirty-five states declined to adopt the 1974 amendment. This should have given the House some indication and made it reject the last clause, which did not happen).

n53 See Schneyer, supra note 1, at 722.

n54 See MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.3 (1983).

n55 See MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.3 cmt. 1.

n56 MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.3(b).

n57 See HAZARD & HODES, supra note 37, at 533.

n58 Id.

n59 See MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.3 cmt. 5 (1983).

n60 See HAZARD & HODES, supra note 37, at 533.

n61 See, e.g., Rhode, supra note 8, at 615 n.96; Committee on Professional Responsibility, Ass'n of the Bar of the City of New York, Report on the Debate over Whether There Should Be an Exception to Confidentiality for Rectifying a Crime or Fraud, 20 FORDHAM URB. L.J. 857, 862 (1993) (citing Lester Brickman, Keeping Quiet in the Face of Fraud, L.A. TIMES, Mar. 12, 1992, at B7).

n62 CODE OF MED. ETHICS § 5.05 (1994). "The obligation to safeguard patient confidences is subject to certain exceptions which are ethically and legally justified because of overriding societal considerations." Id.

n63 See id. The exception refers to "harmful conduct" that can either be criminal or tortious. For further discussion see supra chapter 5, section D (comparing the legal profession's confidentiality with the medical information confidentiality). The same applies under the testimonial privilege. See, e.g., CAL. EVID. CODE § 997 (West 1995) ("There is no privilege under this article if the services of the physician were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a tort or to escape detection or apprehension after the commission of a crime or a tort.").

n64 See CODE OF MED. ETHICS § 5.05.

n65 See, e.g., CAL. CIV. CODE § 56.10(b) & (c) (West 1995) (specifying seven circumstances when medical information must be disclosed, for example, when disclosure is required by law.) Note that the Confidentiality of Medical Information Act, 1982 also specifies fifteen additional circumstances where the health care provider may disclose. See § 56.10(c)(1)-(15).

n66 See Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 343 (Cal. 1976).

n67 MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (1983).

n68 Later the Article will address Harry Subin's suggestion for "vicarious immunity" where lawyer's disclosure could not serve as evidence against his client. See Subin, infra note 77.

n69 These states are: Pennsylvania, Texas, Connecticut, Maryland, Michigan, Minnesota, New Jersey, North Dakota, South Dakota, Utah, Virginia, and Wisconsin.

n70 These states are: Georgia, Hawaii, and Ohio.

n71 See FED. R. CIV. P. 26(g).

n72 See FED. R. CIV. P. 26(a).

n73 See John T. Noonan, Jr., The Purposes of Advocacy and the Limits of Confidentiality, 64 MICH. L. REV. 1485, 1491-92 (1966).

n74 See id. at 1492; see also Richard A. McKinney, Comment, Proposed Model Rule 1.6: Its Effect on a Lawyer's Moral and Ethical Decisions with Regard to Attorney-Client Confidentiality, 35 BAYLOR L. REV. 561, 578 (1983).

n75 Most jurisdictions do not impose a duty to report a crime. See WAYNE R. LaFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 203 n.7 (2d ed. 1993). But see WIS. STAT. ANN. § 940.34(2)(a) (West 1996) ("Any person who knows that a crime is being committed and that a victim is exposed to bodily harm shall summon law enforcement officers or other assistance or shall provide assistance to the victim;" this duty only applies to crimes involving bodily harm).

n76 See McKinney, supra note 74, at 580-81; Deborah Abramovsky, A Case for Increased Disclosure, 13 FORDHAM URB. L.J. 43, 47 (1985).

n77 See Harry I. Subin, The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm, 70 IOWA L. REV. 1091, 1173 (1985).

n78 BERNARD LO, RESOLVING ETHICAL DILEMMAS: A GUIDE FOR CLINICIANS 51, 51-52 (Baltimore: Wilkians & Wilkins eds., 1995).

n79 See Edward Imwinkelried, A Sociological Approach to Legal Ethics,

30 AM. U.L. REV. 349, 354-68 (1981).

n80 See Fred Zacharias, Rethinking Confidentiality, 74 IOWA L. REV. 351, 392-95 (1989) (finding that 80 percent of clients surveyed believed that the lawyer should disclose in this situation, and 65 percent of surveyed lawyers would have disclosed here); see also Symposium; An Ethical Fairy-tale, 29 LOY. L.A. L. REV. 1685, 1685 (1996). The symposium reflects uniformity concerning a duty to disclose in this case. See id. Even Monroe Freedman accepts a life-saving mandatory exception to confidentiality. See Monroe Freedman, The Life-Saving Exception to Confidentiality: Restating Law Without the Was, the Will Be, Or the Ought To Be, 29 LOY. L.A. L. REV. 1631 (1996). But see RESTATEMENT (THIRD) THE LAW GOVERNING LAWYERS § 117A (Proposed Final Draft No. 1, March 29, 1996) ("(1) A lawyer may use or disclose confidential client information when and to the extent the lawyer reasonably believes necessary to prevent: (a) death or serious bodily injury.").

n81 WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY (1994).

n82 William H. Simon, The Ideology of Advocacy: Procedural Justice and Professional Ethics, 1978 WIS. L. REV. 29, 131 (1978).

n83 See William H. Simon, Ethical Description in Lawyering, 101 HARV. L. REV. 1083, 1086 (1988). The phenomena of objectivism and formalism in legal reasoning was identified and heavily criticized by the Critical Legal Studies movement. See ROBERTO M. UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 1-4 (1986); DAVID KAIRYS, INTRODUCTION TO THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 1-9 (David Kairys ed., 1990).

n84 Murray L. Schwartz, The Professionalism and Accountability of Lawyers, 66 CAL. L. REV. 669, 673 (1978); accord Murray L. Schwartz, The Zeal of the Civil Advocate, reprinted in THE GOOD LAWYER 150, 161-63 (David Luban ed., 1983). William Simon calls it "the principle of neutrality." Simon, supra note 82, at 35.

n85 See Gerald J. Postema, Self-Image, Integrity, and Professional Responsibility, reprinted in THE GOOD LAWYER 286, 311 (David Luban ed., 1983); Charles Fried, The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relations, 85 YALE L.J. 1060, 1062 (1976) (accusing lawyers of harming the adversarial system because of their partisan zeal); Simon, supra note 82, at 36-38.

n86 See HAZARD & HODES, supra note 37, at 1.6:302, at 167.

n87 MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (1983). This author assumes that the lawyer, based on Rule 1.13, referred the matter to the highest authority in the organization; yet, the product is still about to be marketed.

n88 See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983).

N89 MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. 13 (1983).

n90 These first two factors for consideration are offered in the Restatement itself. See THE RESTATEMENT (THIRD) THE LAW GOVERNING LAWYERS § 117A cmt. g.

n91 See also Subin, supra note 77, at 1175 (stating that the guidelines listed in the comment "invite the wolf to tend the flock").

n92 See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. 15 (1983).

n93 See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 92-366 (1992).

n94 Id.

n95 See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 93-375 (1993).

n96 See id.

n97 See id.

n98 See id.

n99 See id.

n100 See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(a)(1) (1983).

n101 See Simon, supra note 83, at 1090-91.

n102 MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 cmt. 1. The previous ABA Code contained the same approach; the Code EC 7-13 prescribed: "The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict."

n103 McKinney, supra note 74, at 584.

n104 Simon, supra note 101, at 1090.

n105 See MODEL RULES OF PROFESSIONAL CONDUCT Scope (6) (1983).

n106 See Chertrov v. Office of Personnel Management, 52 F.3d 961 (Fed. Cir. 1995).

n107 Lincoln Sav. & Loan Ass'n v. Wall, 743 F. Supp. 901 (D.D.C. 1990).

n108 See Geoffrey C. Hazard, Jr., Disclosure Question Left Unresolved, NAT'L L.J., Apr. 27, 1992, at 15; Committee on Professional Responsibility, Ass'n of the Bar of the City of New York, Report on the Debate Over Whether There Should Be an Exception to Confidentiality for Rectifying a Crime or Fraud, 20 FORDHAM URB. L.J. 857, 862-63 (1993).

n109 See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (1983).

n110 The states are: Alaska, Hawaii, Maryland, Nevada, North Dakota, Pennsylvania, Texas and Utah.

n111 See, e.g., HAWAII RULES OF PROFESSIONAL CONDUCT Rule 1.6(c)(1); MARYLAND RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1).

n112 See CODE OF MED. ETHICS, Principle IV and Rule 5.05 (Am. Med. Ass'n, 1998). The Restatement rejects a similar proposal and continues to adopt the crime and fraud distinction based on the following reasons: (1) society traditionally defined seriously wrongful conduct in terms of crime and fraud, and (2) the crime and fraud distinction "provides an adequately definite limitation" on the exception. See THE RESTATEMENT (THIRD) THE LAW GOVERNING LAWYERS, § 117A cmt. c.

n113 See THE RESTATEMENT (THIRD) THE LAW GOVERNING LAWYERS, § 117A cmt. b (emphasizing that the rules regarding future crime exception "are extraordinary, and occasions for considering them are rarely encountered by lawyers in practice").

n114 MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. 20 (1997-98).

n115 MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a) (2), (4) (1983).

n116 Nix v. Whiteside, 475 U.S. 157, 160-61 (1986).

n117 See HAZARD & HODES, supra note 37, at 612 (citing Dean Norman Lefstein, Client Perjury in Criminal Cases: Still in Search of an Answer, 1 GEO. J. LEGAL ETHICS 521 (1988)).

n118 See HAZARD & HODES, supra note 37, at 614.

n119 MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a) (4). In order for the exception to apply, the false evidence presented in the court must be material.

n120 See HAZARD & HODES, supra note 37, at 614.

n121 For example, William H. Simon, who developed the discretionary approach to legal ethics, chooses a general purpose that is inherent in every legal rule--seeking or promoting justice. This means that in every ethical conflict the lawyer faces, she must use her discretion to reach a judgment that will promote justice in the case at hand. See Simon, supra note 83, at 1090-91.

n122 ABA CODE Preamble and Preliminary Statement.

n123 See Simon, supra note 83, at 1132.

n124 See WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS 197-203 (1998).

n125 See supra Part I, section A.

n126 But see Subin, supra note 77, at 1172-76 (proposes entirely mandatory exception where the client intends to commit a felony (his suggested exception applies only to felonies)).

n127 See Gilda M. Tuoni, Society Versus the Lawyers: The Strange Hierarchy of Protections of the "New" Client Confidentiality, 8 ST. JOHN'S J. LEGAL COMMENT 439, 498 (1993).

n128 See CODE OF MED. ETHICS, Current Opinions with Annotations, American Medical Assn. No. 5.07 (1994).

n129 Thirty-two jurisdictions have an exception which permits or requires disclosure about client's intention to commit any crime. Thirty jurisdictions have a permissive duty, while two (Florida and Virginia) impose a duty to disclose here. See, e.g., ARIZONA RULES OF PROFESSIONAL CONDUCT Rule 1.6(c); COLORADO RULES OF PROFESSIONAL CONDUCT Rule 1.6(b); IOWA CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(3); FLORIDA RULES OF PROFESSIONAL CONDUCT Rule 4-1.6(b)(1); VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(D)(1).

n130 See THE RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 117A cmt. c.

n131 Id.

n132 See Subin, supra note 77, at 1175-76.

n133 Id. at 1175-76.

n134 See, e.g., CAL. PENAL CODE §§ 92, 186.9 (West 1988).

n135 See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. 12 (1983) ("It is very difficult for a lawyer to 'know' when such a heinous purpose will actually be carried out, for the client may have a change of mind.").

n136 See Subin, supra note 126, at 1176.

n137 HAWAII RULES OF PROFESSIONAL CONDUCT Rule 1.6(b) (1999).

n138 See THE RESTATEMENT (THIRD) OF THE LAW: THE LAW GOVERNING LAWYERS, § 117A cmt. h ("A lawyer's discretion to take appropriate measures to prevent harm under this Section is predicated on the lawyer's reasonable belief that the client intends to engage in the described activity.").

n139 But see Subin, supra note 77, at 1176 (offering a more rigorous standard that is closer to the criminal law burden of proof: a substantial likelihood of the crime occurring).

n140 See MODEL RULES Rule 1.6 cmt. 13; THE RESTATEMENT (THIRD) OF THE LAW: THE LAW GOVERNING LAWYERS, § 117A cmt. g & j.

n141 Id. § 117A cmt. g.

n142 See supra Part I, section A.

n143 Geoffrey C. Hazard, Jr., Rectification of Client Fraud: Death and Revival of a Professional Norm, 33 EMORY L.J. 271, 288 (1984).

n144 See id.

n145 See THE RESTATEMENT (THIRD) OF THE LAW: THE LAW GOVERNING LAWYERS, § 116 cmt. b ("Some charges against a lawyer brought by non-clients involve a course situations, the crime-fraud exception to the attorney-client privilege . . . may independently permit the lawyer to defend based on otherwise confidential client information"); Hazard, supra note 143, at 287-91 (stating that the self-defense exception is a justified rectification of client fraud).

n146 See THE RESTATEMENT OF THE LAW: THE LAW GOVERNING LAWYERS, § 116 cmt. b.

n147 See id.

n148 See supra Part I, section B.

n149 See THE RESTATEMENT OF THE LAW: THE LAW GOVERNING LAWYERS, § 116.

n150 See id. § 117.

n151 MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3.

n152 MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.1.

n153 See supra notes 3-84 and accompanying text.

n154 MODEL RULES OF PROFESSIONAL CONDUCT 3.3(a)(1), 4.1(a). The equivalent of Rule 4.1(a) in the ABA Code is DR 7-102(A)(5) which prohibits lawyers from knowingly making a false statement of law or fact. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102 (A)(5). The only difference between the two provisions is that the Code speaks about "fact" while the Model Rules, like the law of misrepresentation, refers to "material fact." Compare MODEL RULES 4.1(a) and MODEL CODE DR 7-102(A)(5).

n155 If, for example, the court asks the lawyer whether the client has a criminal record or whether the court's previous list of the client is accurate, two ABA Opinions recommend that the lawyer decline to answer and then should ask to be excused from answering. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 87-353 (1987); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 287 (1953).

n156 See id. Both opinions concluded that where the judge is told by the custodian of criminal records that the defendant has no criminal record, and the lawyer knows the information is incorrect, the lawyer is prohibited under Rule 1.6 from disclosing the truth because there has been no client fraud or perjury.

n157 See supra notes 89-102 and accompanying text.

n158 See, e.g., UTAH RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (1998) ("A lawyer may reveal such information to the extent the lawyer believes necessary: . . . (2) To rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used."); HAWAII RULES OF PROFESSIONAL CONDUCT Rule 1.6(b) ("A lawyer shall reveal information which clearly establishes a criminal or fraudulent act of the client in the furtherance of which the lawyer's services had been used, to the extent reasonably necessary to rectify the consequences of such act, where the act has resulted in substantial injury to the financial interests or property of another."); Proposed Final Draft, Proposed Rule 1.6(b)(2) (June 30, 1982), in 1 MATERIALS ON THE MODEL RULES, item 400 (1982).

n159 See Rep. No. 2 of the Standing Committee on Ethics and Professional Responsibility, reprinted in 116 REPORTS OF AMERICAN BAR ASSOCIATION 108 (1991) (giving the example of client's past out-of-court fraud as a circumstances in which the suggested rectify-harm exception would apply and the Model Rules do not); see also Victor H. Kramer, Clients' Frauds and Their Lawyers' Obligations: A Study in Professional Irresponsibility, 67 GEO L.J. 991, 996-97 (1977) (gives examples of client's future fraud both in and out of court as circumstances in which the duty to rectify harm should exist).

n160 CODE OF MED. ETHICS, Current Opinions with Annotations, AM. MED. ASS'N No. 5.05 (1999).

n161 THE GUIDE TO THE PROFESSIONAL CONDUCT OF SOLICITORS § 16.02, at 285 (7th ed. 1996) (hereinafter "THE GUIDE").

n162 N.C. GEN. STAT. § 8-53 (1986); accord JOHN W. STRONG, McCORMICK ON EVIDENCE. 149 (4th ed. 1992) (recommending adoption of the North Carolina Rule as the best alternative for the physician-patient privilege).

n163 Evidence Ordinance (New Version), 1971, 18 NOSAH HADASH 420, § 49-50 [Hebrew].

n164 This format is largely drawn from the Solicitor's Guide exception in

child abuse cases. Principle 16.02 in the Guide sets the solicitors' duty to keep client's confidences. The commentary to Principle 16.02 elaborates this duty by discussing its extent and exceptions. Similar is commentary 4, which states the child-abuse exception. This exception is discussed at length in a special section, which accompanies Commentary 4. See THE GUIDE, supra note 161; Guidance-Confidentiality and Privilege-Child Abuse and Abduction (Sep. 1987, rev. Dec. 1995), reprinted in THE GUIDE TO THE PROFESSIONAL CONDUCT OF SOLICITORS 294-98 (7th ed. 1996).

n165 For example, commentary 4 to Principle 16.02, which sets the general standard for the exception in child abuse cases reads: There may be certain exceptional circumstances involving children where a solicitor should consider revealing confidential information to an appropriate authority. This may be in situations where the child is the client and the child reveals information which indicates continuing sexual or other physical abuse but refuses to allow disclosure of such information. Similarly, there may be situations where an adult discloses abuse either by himself or herself or by another adult against a child but is refuses to allow any disclosure. The solicitor must consider [carefully] whether the threat to the child's life or health, both mental and physical, is sufficiently serious to justify a breach of the duty of confidentiality. THE GUIDE, supra note 164, at 285. This general standard includes a reference to the additional guidance which is as much a part of the rule as the commentary itself. The guidance is divided into four sections, but, as a format, there are actually only three parts, because section C, entitled "The decision to disclose and possible consequences," actually belongs in the second part of the comprehensive format (together with the first section of the guidance). See id. at 297.

n166 See Guidance-Confidentiality, supra note 164 (section D) (titled "Working Examples" which discusses four examples at length. This section of the guidance was omitted from the 1996 edition of the Guide but it is still part of the guidance).

n167 It seems that the suggested format would be accepted by William H. Simon, whose own proposal calls for "the form of general standards, rebuttable presumptions, and illustrative cases." SIMON, supra note 124, at 197.