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Another Misunderstood Relation: Confidentiality and the Duty to Report

PETER K. ROFES*

INTRODUCTION: THE REPORTING DUTY AND ITS PARADOXES

Over the past two decades, the duty imposed on most American lawyers to report the misconduct of their peers has garnered substantial attention across the professional landscape. From courts and state bar ethics committees to scholars, practitioners, and law students, the duty — once deemed a quaint aspirational guidepost of dubious practical importance — has increasingly engaged the resources of all segments of the profession. In particular, it would be no exaggeration to observe that the treatment of the reporting duty by courts and ethics committees has triggered a cottage industry of commentary, both in scholarly and professional journals and on the continuing legal education circuit.[1]

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A host of people have nurtured my obsession with the topic of this Article over the past few years. Several years back, in response to the Wisconsin Supreme Court's new professional responsibility continuing legal education requirement, colleagues Michael McChrystal and Charles Clausen encouraged me to work up a presentation devoted to the reporting duty; ever since, they have given generously of their time in allowing me to engage them in a steady stream of conversation about issues that grew into this Article. Professor McChrystal also provided valuable comments on an earlier draft of the Article. Lawyers throughout Wisconsin, as well as the institutions that employ them, have passed along a rich variety of experiences that implicate the reporting duty, endowing me with a deeper understanding of the challenges the duty imposes. Sara Beth Lewis, Mary Sue Anderson, and Christine Quinn provided skillful and persistent research assistance. Marquette law librarians, especially Lynn Hartke, tracked down even the most elusive of sources with cheerfulness. Dean Howard Eisenberg supported the project with a summer stipend from the dean's discretionary fund.

1. No footnote whose length law review editors would approve could do justice to the voluminous body of commentary that the reporting duty has spawned. For a sampling of works devoted to general aspects of the reporting duty, *see, e.g.*, Gerard E. Lynch, *The Lawyer as Informer*, 1986 DUKE L.J. 491 (1986); Michael J. Burwick, *You Dirty Rat!! Model Rule 8.3 and Mandatory Reporting of Attorney Misconduct*, 8 GEO. J. LEGAL ETHICS 137 (1994); David R. Ramage-White, Note, *The Lawyer's Duty to Report Professional Misconduct*, 20 ARIZ. L. REV. 509 (1978). For a taste of the commentary that deals with the reporting duty in a distinctive practice area or professional context, *see, e.g.*, Pamela Kentra, *Hear No Evil, Speak No Evil: The Intolerable Conflict for Attorney Mediators Between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct*, 1997 BYU L. REV. 715 (1997); Allan Van Fleet & Edward A. Carr, *Antitrust Audits: Ethical Considerations Upon Discovering a Violation*, 59 ANTITRUST L.J. 917 (1991); Robert F. Housman, *The Ethical Obligation of a Lawyer in a Political Campaign*, 26 U. MEM. L. REV. 3 (1995); Kathryn W. Tate, *The Boundaries of Professional Self-Policing: Must a Law Firm Prevent and Report a Firm Member's Securities Trading on the Basis of Client Confidences?*, 40 U. KAN. L. REV. 807 (1992); Steven S. Gensler, *Wrongful Discharge For In-House Attorneys? Holding the Line Against Lawyers' Self-Interest*, 1992 U. ILL. L. REV. 515 (1992); and Ellen S. Podgor & Jeffrey S. Weiner, *Prosecutorial Misconduct: Alive and Well, and Living in Indiana?*, 3 GEO. J. LEGAL ETHICS 657 (1990).

Unfortunately, the level of attention devoted to a legal issue does not invariably correspond to the extent to which legal decision-makers or those who translate the work of legal decision-makers come to master the issue's subtleties or successfully work through the issue's challenges. So it is with the reporting duty. For, despite all the attention heaped on the reporting duty, two conspicuous problems mar the landscape.

One such problem is that the practical, day-to-day realities of the reporting duty continue to overflow with paradox, undermining the duty's central objectives. The paradox manifests itself along three dimensions, dimensions that implicate matters of disposition, intended beneficiaries, and administration.

The dispositional dimension is that the reporting duty, fashioned originally to elicit the noble, selfless aspect of the lawyer's professional character, instead has come too often to elicit the petty and selfish in that character. Put another way, the reporting duty has evolved from a tool designed to help the community of lawyers weed out scoundrels into a weapon, as often as not unleashed out of spite, tactical tomfoolery, and sheer defensiveness.[2]

A second dimension of the paradox implicates the duty's intended beneficiaries. The reporting duty, grounded principally in the concern for future clients and the image of the legal profession, has come to serve these interests poorly, if at all. Rare in the state disciplinary machinery that chugs along around the nation is the misbegotten lawyer whose misdeeds would not have come to light but for the fact that some *other* lawyer blew the whistle in order to comply with the reporting duty and in so doing kick-started a process that in the end spared future clients harm and indignity they otherwise would not have been spared. Sparse is the evidence to support the proposition that the pervasive existence of the duty to report elevates the public perception of the profession or, correspondingly, that the public perception diminishes in those few jurisdictions that have chosen to liberate lawyers from such a duty.

Still another dimension of the paradox concerns matters of administration. The reporting duty, deemed sufficiently essential to the effective regulation of lawyers that it is included in the most important set of rules governing lawyer conduct,[3] continues to go dramatically under-enforced, fueling the sentiment that lawyers

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2. *See, e.g.*, Geoffrey C. Hazard Jr., *"Squeal Rule" Considered for Change*, NAT'L L.J., Mar. 26, 1990, at 13-14 (noting the escalating practice of "filing a disciplinary charge whenever a dispute between lawyers gets heated. The result has been a surge of petty disciplinary matters . . . motivated by anger or vengefulness.").

3. The reference here of course is to the *Model Rules of Professional Conduct*, promulgated by the American Bar Association in 1983. Each of the principal ancestors of the *Model Rules* – the 1908 *Canons of Professional Ethics* and the *Model Code of Professional Responsibility* – also included some measure of reporting duty obligations. Canon 29 of the 1908 *Canons* provides that "[l]awyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession." CANONS OF PROFESSIONAL RESPONSIBILITY Canon 29 (1908) [hereinafter ABA CANONS]. Canon 28 enumerates particular conduct as unprofessional and then provides that "[a] duty to the public and the profession devolves upon every member of the Bar having knowledge of such practices upon the part of any practitioner immediately to inform thereof, to the end that the offender may be disbarred." ABA CANONS Canon 28. Insofar as the *Code* is concerned, Ethical Consideration

need not take seriously a legal rule not taken seriously by those who administer and enforce rules of lawyer conduct.[4]

These three dimensions of paradox, separately and together, go a long way toward explaining the awkward role the reporting duty continues to play in both law practice and the regulation of lawyer conduct. Each is worthy of extended treatment, and such treatment would illuminate important truths about the reporting duty, the practice of law, and the regulation of lawyers.

That treatment, alas, will not be forthcoming here. Instead, this Article will confront the *other* problem ranging across the landscape of the reporting duty: the fact that a central aspect of the reporting duty requirement continues to bewilder and frustrate those whom the duty is intended to regulate, those who do the regulating, and those who assess the professional performance of each. The aspect of the reporting duty engendering all this trouble is the confidentiality exception.[5] In its own way, this exception has produced yet another paradox, one that needs to be exposed and discussed more urgently than those noted above. This paradox can best be deemed the interpretive paradox, and it dramatically affects the way practicing lawyers as well as those who evaluate the conduct of practicing lawyers approach the reporting duty set forth in Rule 8.3 of the American Bar Association's *Model Rules of Professional Conduct.*[6]

Put simply, the paradox is this. Despite the steady stream of talking and writing occasioned by the reporting duty, it has become apparent that neither practicing lawyers nor those who regulate the conduct of practicing lawyers fully grasp the connection between the two central elements set forth in Rule 8.3: the reporting duty itself and the duty to preserve client confidences[7] set forth as an express exception to the reporting duty. The practical result of this paradox is that neither lawyers who in good faith seek to understand and comply with the reporting duty nor courts, ethics panels, and others who seek to apply the standards of the

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1-4 instructs that "[a] lawyer should reveal voluntarily to those officials all unprivileged knowledge of conduct of lawyers he believes clearly to be a violation of the *Disciplinary Rules.*" ABA CANONS EC 1-4.

4. One commentator has observed that "the imposition of professional discipline for failing to report another lawyer is an event as bizarre and infrequent as being struck by lightening" [sic]. Beverly Storm, *Mandatory Reporting of Lawyer Conduct: Can the Bench & Bar of the Commonwealth Discipline Itself Without It?*, 20 N. KY. L. REV. 809, 810 (1993).

5. As will become abundantly clear, *see* discussion *infra* Part I, the phrase "the confidentiality exception" refers to Rule 8.3(c) of the *Model Rules of Professional Conduct.* Rule 8.3 (c) provides that compliance with the reporting duty obligation set forth in Rule 8.3(a) does not require a lawyer to reveal information otherwise protected by Rule 1.6, the confidentiality rule. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3(c) (1983) [hereinafter MODEL RULES].

6. Allow me to underscore at the outset, so as to avoid engendering any misunderstanding, that this Article concerns itself exclusively with the versions of the reporting duty and confidentiality principle promulgated as Rules 8.3 and 1.6 of the *Model Rules of Professional Conduct*, versions currently the governing law – that is to say, adopted without amendment material to the subject of this Article – in approximately forty American jurisdictions.

7. The phrase "client confidences" will be invoked periodically throughout this Article as a shorthand way to refer to information "relating to representation of a client" within the meaning of Rule 1.6.

reporting duty to lawyer conduct are entirely comfortable navigating their way through the ocean of Rule 8.3.[8] Moreover, even those decision-makers who manage to properly navigate their way through that ocean have taken to lashing out at the destination to which their reasoning has taken them.[9] Joining these decision-makers in their criticism of the confidentiality exception are armchair commentators who likewise denigrate the exception and invite the profession to chip away at it, typically without offering substantial justification for doing so.[10]

This Article seeks to clear away some of the analytic rubble blocking the path to a better understanding of the confidentiality exception. In particular, this Article seeks to accomplish three intertwined objectives. First, it endeavors to expose the disturbing inability of courts and ethics panels to integrate the confidentiality exception successfully into the decisional and advisory law of the reporting duty. Second, it endeavors to fill a conspicuous gap in the literature of the reporting duty by offering guidance as to how lawyers and those who regulate them can be faithful to the confidentiality principle in the context of the reporting duty. Third, it endeavors to remind lawyers and those who regulate lawyers of why the American Bar Association ("ABA") and virtually[11] all states that have

8. This state of affairs prompted one commentator to include, in an enumeration of "the more significant problems" posed by the current status of the law of the reporting duty, the question "What type of information is confidential under Model Rule 8.3(c)?". Burwick, *supra* note 1, at 153.

9. The paradigmatic example of this phenomenon, *In re* Ethics Advisory Panel Opinion No. 92-1, 627 A.2d 317 (R.I. 1993), will be explored at considerable length below. *See infra* text accompanying notes 33-53.

10. This point calls for some elaboration. A recurring irony concerning the reporting duty and its confidentiality exception is the extent to which lawyers, scholars, and journalists who cover the legal profession – folks whom one would think ought to have devoted some professional time to contemplating the meaning and importance of the confidentiality principle – enthusiastically urge the profession to jettison the confidentiality exception whenever it threatens to impose an obstacle to the reporting duty. Rarely do these sentiments find expression within a probing assessment of the respective values served by the reporting and confidentiality duties. For one example of this unfortunate phenomenon, *see* Joanne Pelton Pitulla, *Should Clients Be Able to Veto the Duty to Report?*, 7 PROF. LAW. 2 (Aug. 1996). In a blistering attack on the confidentiality exception, Ms. Pitulla, a lawyer for the American Bar Association, devotes nary a sentence to exploring the values served *either* by the confidentiality principle in general or the hierarchy of values – confidentiality trumping the duty to report – forged by Model Rule 8.3 in particular. Instead, the author peppers the attack on the confidentiality exception with a series of rhetorical questions ("Why should we forbid a lawyer to report unethical conduct absent client consent? Why is it proper to give a client veto power over the vital duty to report unethical conduct? Why should the requirement of confidentiality supersede the obligation to report professional misconduct?") and unsubstantiated allegations ("The confidentiality limitation on the duty to report seems inconsistent with the rationale for the *Rules*." "Surely effective enforcement of the duty to report is vital to preserve the integrity of the disciplinary system." "An ethical code that makes the duty to report contingent upon the client's permission to report serious misconduct seems to be at cross-purposes with itself." "We have an obligation to the public to remove barriers to effective regulation – both in the rule itself and in the attitude of lawyers toward the duty to report."). *See id.* For another example, see the remarks of Wisconsin lawyer Daniel L. Schneidman to the Ethics 2000 Commission urging the Commission to promulgate a change in Model Rule 8.3 that would enable lawyers to report misconduct of other lawyers absent client consent even in some circumstances in which the information that forms the basis for the report is confidential. *See Conference Report – 25th National Conference on Professional Responsibility*, 15 LAW. MAN. ON PROF. CONDUCT 258 (ABA/BNA) (June 9, 1999).

11. Minnesota, for instance, has limited the breadth of its confidentiality exception. *See infra* note 52.

adopted the ABA-impelled reporting duty have self-consciously chosen to liberate lawyers from that duty in circumstances in which discharging the duty would necessitate compromising the confidentiality principle.

I. THE INTERPRETIVE ISSUE

The lawyer's duty to report the misconduct of other lawyers, like much else in the law, represents an effort to accommodate competing interests. More precisely, the duty seeks to accommodate *both* the profession's need to acquire information about misbehaving lawyers *and* the obligation of each individual lawyer to preserve the confidentiality of information relating to clients and client matters. Even a cursory look at the language and structure of the rule that captures the reporting obligation in most of the more than forty states that have adopted it drives home this point:

> RULE 8.3 Reporting Professional Misconduct
>
> (a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform the appropriate professional authority.
>
> . . .
>
> (c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 . . . .
>
> RULE 1.6 Confidentiality of Information
>
> (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
>
> (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
>
> (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
>
> (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

Subpart (a) of Rule 8.3 expresses the reporting obligation through a general rule: in exchange for the privilege of a law license, a lawyer assumes the obligation to report the misconduct of a professional peer in the event that the peer's misconduct coupled with the circumstances surrounding the reporting lawyer's acquisition of information about that misconduct satisfy the core

elements of (1) knowledge, (2) a violation of a rule of professional conduct, (3) substantiality, and (4) honesty, trustworthiness, or fitness.[12] The comment to the rule suggests that the obligation set forth in subpart (a) reflects the largely self-regulating nature of the legal profession, which in turn increases the dependence that the profession otherwise might have on members reporting the misconduct of other members.[13]

Subpart (c) of Rule 8.3 proceeds to carve out a huge exception to the reporting obligation set forth in the general rule. The textual language that captures the exception — striking for its cumbersomeness and imprecision — informs lawyers that their discharge of the obligation set forth in subpart (a) does not require them to reveal information that an analogous rule of professional conduct forbids lawyers to reveal absent client consent or other limited circumstances. The comment to the exception endeavors to drive home the point by observing that "A report about misconduct is not required where it would involve violation of Rule 1.6."[14] Put more directly, the text of the rule — read in conjunction with

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12. Given the limited scope of this Article, it seems wise to refrain from straying too far *from* the confidentiality exception and *into* a range of other problems with the current codification of the reporting duty. Nevertheless, one observation remains difficult to resist. Putting aside entirely the issue of whether an obligation such as that imposed through Rule 8.3 represents a wise choice for the legal profession, it seems to me indisputable that the duty as currently structured in Rule 8.3 renders more difficult the interpretive challenge confronted by lawyers who in good faith seek to discharge that obligation. Indeed, the very title of Rule 8.3 — "Reporting Professional Misconduct" — is downright misleading. This is so because the self-conscious use of the word "professional" belies the fact that the very "misconduct" that more often than not triggers the reporting duty — that is to say, a violation of Rule 8.4, the "misconduct" rule — encompasses a wide range of conduct that occurs in a lawyer's *non-professional* capacity, including *all* conduct "involving dishonesty, fraud, deceit or misrepresentation" and *every* "criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer." Accordingly, a more accurate title for Rule 8.3 would be "Reporting Misconduct."

13. Gerard Lynch, in his now classic analysis of the duty to report, rebuts this platitude with an intricate analysis that has yet to be answered. In part, Lynch observes as follows:

> [A] logical connection between self-regulation and a duty to inform is not immediately apparent. After all, our society is itself self-regulating in the sense that its members are ultimately responsible for the laws that govern conduct. And yet it does not follow from this that there should be a legally enforceable duty to report violations of those laws. But lawyers, it might be noted, are also *self-policing*: if they do not take the lead in uncovering the misconduct of other lawyers, no one else will. Once again, however, it is not clear how to distinguish ordinary civil society. In a democratic society, the actors charged with policing conduct are not members of an outside force, but members of the population who have the special task of enforcing the norms agreed upon by all. Society is thus self-policing, but with specialists performing the police function. The legal system also has its own disciplinary apparatus responsible for investigating and punishing violations of the rules of professional conduct. If these organs of discipline inadequately control lawyers, the bar should certainly act to strengthen them. But the disappointing experience of mandatory informing hardly suggests that such a rule has been or can be the answer to inadequate self-policing.
>
> The rhetorical invocation of the "self-regulating, self-policing" notion is more of a public relations gimmick than anything else. The motives underlying such rhetoric are not likely to inspire compliance with a distasteful obligation.

Lynch, *supra* note 1, at 537-38.

14. The relevant language currently set forth in Rule 8.3 (c) to embody the confidentiality exception — "This Rule does not require disclosure of information otherwise protected by Rule 1.6" — hardly seems the most

the accompanying comment — makes abundantly clear that the framers of Rule 8.3 created a hierarchy in which, when a clash between them emerged, the duty to report would yield to the duty to preserve client confidences, the latter would "trump"[15] the former.

The exception to the reporting duty set forth in Rule 8.3 (c) constitutes a huge one because of the expansiveness with which Rule 1.6 — the confidentiality rule — defines the category of confidential information. Rule 1.6(a) makes clear that, with exceptions typically not germane to the reporting duty, lawyers have an obligation to refrain from revealing *all* "information relating to representation of a client" that their clients have not consented to have revealed. The comments and comparison sections to Rule 1.6 underscore the remarkable breadth of the confidentiality notion, explicitly noting, among other things, that the confidentiality label attaches irrespective of the source of the information,[16] irrespective of whether the client has requested the lawyer to respect the privacy of the information,[17] and irrespective of whether dissemination of the information

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efficacious way to communicate the principle sought to be communicated by the exception. Later on, toward the conclusion of this Article, I will suggest language designed to ameliorate what this Article contends remains a central problem rooted in the language of *both* the rule and comment: the fact that practicing lawyers and legal decision-makers need more substantial guidance in identifying the circumstances to which the exception applies. *See infra* text accompanying notes 105-12. For now, however, it seems appropriate to compare the language of the exception itself with the language chosen for one of the comments to Rule 8.3 — "A report about misconduct is not required where it would involve violation of Rule 1.6" — that endeavors to explain the exception. As between the two, it seems to me apparent that the language of the rule suffers conspicuously from a variety of linguistic maladies, among them a striking lack of clarity and the failure to link the confidentiality exception set forth in Rule 8.3(c) directly to the duty set forth in Rule 8.3(a), the legal principle to which the exception applies. Accordingly, were these two alternatives to exhaust the range of possibilities, the language of the comment should get the nod easily over the language of the rule.

15. Commentators writing and speaking about the reporting duty in the distinctive context of Rule 8.3 and state analogues have deployed for some time now the verb "trump" to characterize the relationship between confidentiality and the duty to report. *See, e.g., Reporting Misconduct*, LAW. MAN. ON PROF. CONDUCT (ABA/BNA) § 101:204 (Sept. 21 1994) ("Courts and ethics committees considering the question have thus held that the obligation to maintain confidentiality 'trumps' the obligation to report another lawyer's misconduct."). The use of the term in this context is not entirely unproblematic. My colleague Michael McChrystal suggests that a more accurate way to express the point would be to say that the confidentiality principle serves to condition the reporting obligation on client consent, to limit the reporting obligation to whatever extent the affected client — along with the potentially reporting lawyer — opt to limit it. Nonetheless, the term "trump" contains sufficient amounts of accuracy and conciseness to render it useful to the task. Accordingly, I use it periodically throughout this Article.

16. Comment 5 to Rule 1.6 observes, among other things, that "[t]he confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." MODEL RULES Rule 1.6 cmt. 5.

17. Paragraph 1 of the section that compares Rule 1.6 with its *Code of Professional Responsibility* analogue notes that, unlike its predecessor, Rule 1.6 "does not require the client to indicate information that is to be confidential, or permit the lawyer to speculate whether particular information might be embarrassing or detrimental." In this respect Rule 1.6 was self-consciously intended to liberate lawyers and those who regulate them from the *Code's* regime of "confidences," on the one hand – that corpus of information protected by the attorney-client privilege – and "secrets," on the other – that additional corpus of information defined as "other information gained in the professional relationship that the client has requested be held inviolate or the

would cause harm to the client.[18] So long as the information "relates to" representation, Rule 1.6 — and thus Rule 8.3(c) — deems the information confidential.[19]

Given the relative simplicity of the text, one would expect that the many states that proceeded to adopt Rule 8.3 with nary a change in punctuation would have grasped the hierarchy of duties forged by the rule. More specifically, one would expect that state courts and ethics panels forced to grapple with Rule 8.3 would find the relationship between the duty to report and the duty of confidentiality one of the less complicated, less nuanced aspects of the law governing lawyers. Likewise, one would expect that the influential observers who devote their careers to assessing these professional decision-makers would be equipped to discern and thoughtfully discuss the structure of that hierarchy and the justifications for it.

A careful look at the principal contexts in which the clash arises does not bear out these expectations. Instead, the legal landscape devoted to this issue is suffused with law, decisional and advisory both, that reflects a persistent inability to integrate the principle of confidentiality into the duty to report. Peppering that landscape as well is commentary *about* that law that reflects an equally persistent inability even to identify the underlying justifications for the hierarchy of duties

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disclosure of which would be embarrassing or would be likely to be detrimental to the client." *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 [hereinafter MODEL CODE].

18. *Id. See also* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 298 (1986) ("Model Rule 1.6 makes information confidential without apparent regard to whether or not revealing it would embarrass or otherwise harm the interests of the client.").

19. The definition of confidential information set forth in Model Rule 1.6 in turn requires an understanding of what precisely it means for information to "relate to" representation of a client. One of the conspicuous lessons to emerge from this study of the reporting duty is that this definition continues to prove elusive for both lawyers and those who regulate them.

One reason for this may be that for more than two decades now, as lawyer regulation has moved from the *Code of Professional Responsibility* to the *Rules of Professional Conduct* to the *Restatement (Third) of the Law Governing Lawyers*, the status of the *exceptions* to confidentiality — currently embodied, among other places, in Rule 1.6(b) — has attracted exponentially more attention than has the *definition* of confidentiality to be found in Rule 1.6(a). Accordingly, the "relating to representation of a client" language of Rule 1.6(a), the language that endeavors to capture the confidentiality principle (and the language to which the reporting duty expressly refers), has continued to obscure some important concerns, concerns to which commentators rarely devote their energies. As one example, the "relating to representation of a client" language — in contrast to the *Code*'s language of "confidences" and "secrets" and, to a lesser extent, the *Restatement*'s definitional effort — does not by its terms require that information be "about" the client. Instead, Rule 1.6 requires only that the information "relate to" — that is to say, be "about" — *the representation of the client*. Despite this unmistakable language, some commentators persist in suggesting that, to receive protection under Rule 1.6, information somehow must be "about" the client. *See, e.g.*, GEOFFREY C. HAZARD JR. & WILLIAM HODES, THE LAW OF LAWYERING, § 1.6:108 (Supp. 1998) ("confidentiality applies to *all* information *about* a client"). Perhaps when all is said and done there is less here than meets the eye; after all, perhaps it can be said that all information about the representation of a client is somehow information about the client.

Another factor appears at work as well. The transition from the *Code of Professional Responsibility* to the *Model Rules of Professional Conduct* has created a professional brew in which some jurisdictions governed by the "new" definition of confidentiality set forth in Model Rule 1.6 nonetheless continue to invoke the "confidences" and "secrets" language of the "old" *Code* regime. *See, e.g.*, *infra* note 73.

forged by Rule 8.3. Sometimes the inability manifests itself through a state supreme court opinion that purports to set out the nuts and bolts operation of the confidentiality exception but nevertheless manages to both bungle even the most rudimentary elements of that operation and, to boot, profoundly misunderstand the role of confidentiality in the lawyer/client relationship.[20] Sometimes the inability emerges through a state ethics committee responding to a lawyer's inquiry with advice grounded in an inadequate understanding of the confidentiality exception.[21] Sometimes the inability appears in the form of an ad hominem attack on the confidentiality exception masquerading as disinterested commentary.[22] Notwithstanding the variety of categories of legal materials through which the inability crops up, the fact remains that treatment of the distinctive tension between the competing duties — reporting peer misconduct and preserving client confidences — continues to be fraught with confusion.

II. THE TENSION IN CONTEXT

The tension between the duty to report — set forth in Rule 8.3(a) — and the duty *not* to report when doing so would necessitate the revelation of information protected by the confidentiality principle — set forth in Rule 8.3(c) — arises most often in four distinctive contexts. The most obvious and least troublesome of these contexts unfolds when a lawyer represents a client who happens to be a lawyer and that lawyer-client has committed some serious act of misconduct, whether in a personal or professional capacity.[23]

In this lawyer-as-client context, the hierarchy of values forged by Rule 8.3 — the duty of confidentiality trumping the duty to report — emerges with singular clarity, liberating the representing lawyer from the obligation to pass along to disciplinary authorities information concerning the lawyer-client's misdeeds.[24]

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20. *See* text accompanying *infra* notes 33–53.

21. *See, e.g.*, text accompanying *infra* notes 54–71.

22. *See, e.g.*, discussion at *supra* note 10.

23. To underscore a point made earlier, *see supra* note 12, I self-consciously use the phrase "personal or professional context" here to remind that reporting duty obligations can and do kick in for any act of lawyer misconduct — regardless of the context in which such misconduct gets perpetrated — that raises "a substantial question" of the misbehaving lawyer's "honesty, trustworthiness, or fitness as a lawyer in other respects." Rule 8.4, the misconduct rule, underscores this point that the disciplinary machinery will hold lawyers *professionally* responsible for a variety of acts undertaken in their *non-professional* roles, including, among other things, any criminal act that "reflects adversely on honesty, trustworthiness, or fitness as a lawyer" and any conduct that involves "dishonesty, fraud, deceit, or misrepresentation." MODEL RULES Rule 8.4.

24. More precisely, this hierarchy of values provides the lawyer an opportunity to consult with the client in an effort to identify the wisest course of action for the representation to pursue. For it sometimes will be the case that the best interests of the client indicate that the lawyer — despite the fact that the principle of confidentiality has suspended the lawyer's reporting obligation — should approach disciplinary authorities with the incriminating information on behalf of the client before anyone else has the opportunity to do so. Then again, it sometimes will be the case that such a strategy would prove unwise. The point remains that, in this and other contexts featuring the confidentiality exception, the facts that trigger the exception do not eliminate the need for client consultation; indeed, such facts magnify the importance of client consultation.

Both the text of Rule 8.3 and two different comments to the Rule underscore the point. As for the text, Rule 8.3(c), as noted earlier, provides that "This Rule does not require disclosure of information otherwise protected by Rule 1.6."[25] Comment 2 — the more generic of the comments concerning the confidentiality exception — echoes the text with the observation that "[a] report about misconduct is not required where it would involve violation of Rule 1.6."[26] Together, these statements from the text and comments leave little doubt that lawyers who represent misbehaving lawyer-clients, rather than being *required* to pass along the incriminating information to disciplinary authorities, find themselves armed with the discretion to use the information relating to those representations in whatever manner they and their clients deem most efficacious, because whatever information representing lawyers have about their misbehaving lawyer-clients falls squarely within the protections of the confidentiality principle set forth in Rule 1.6.[27]

Nevertheless, in the unlikely event that a representing lawyer in the lawyer-as-client situation remained apprehensive about a conceivable reporting duty problem, a second comment serves to remove any lingering concerns. Comment 4, to a considerable extent superfluous in light of Comment 2, drives home the point in the particular context of the lawyer-as-client, observing that "[t]he duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the rules applicable to the client-lawyer relationship."[28] All this adds up to the

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25. *See* text accompanying *supra* notes 12-22.

26. MODEL RULES Rule 1.6 cmt 2.

27. Some may be tempted to counter this statement with the observation that there exists an exception to it, an exception grounded in the exceptions to confidentiality set forth in Rule 1.6(b). The observation would go something like this: a lawyer who represents a lawyer-client about to undertake a criminal act likely to result in "imminent death or substantial bodily harm" nonetheless assumes an obligation to report because such a scenario triggers the controversial Rule 1.6(b) exception to the definition of confidential information, at least in those states in which the exceptions *require* to lawyer to reveal information in an effort to prevent the future potentially harmful act. Such a suggestion, while capturing a central aspect of the confidentiality principle, nevertheless misses the mark because it misses an equally central aspect of the reporting duty. The reporting duty by its terms kicks in only when the misbehaving lawyer already "has committed" the misbehavior. Accordingly, the much-discussed "future bad acts" exception to the definition of confidentiality has no impact on the reporting duty, for such circumstances arise only in contexts in which the reporting duty obligation has not been triggered in the first place.

28. MODEL RULES Rule 1.6 cmt 4. For reasons already noted, *see supra* notes 12 and 23, this comment, the central purpose of which remains indisputable — to remind lawyers who represent other lawyers that the reporting duty does not kick in under such circumstances because under such circumstances whatever information such representing lawyers acquire about their lawyer-clients invariably will trigger the confidentiality exception — nevertheless reflects the distinctive inability of those who framed Rule 8.3 to deploy words appropriate to the task. For the comment's self-conscious use of the phrase "whose professional conduct is in question" suggests that in circumstances in which it is the lawyer-client's *personal* — i.e. *non-professional* — conduct that is in question, the representing lawyer lacks the safe harbor of the comment. *Id.* But that suggestion is entirely incorrect. A lawyer who discovers that her lawyer-client has sexually molested a host of teenage babysitters or repeatedly turned back the odometers on his collection of used cars in an effort to defraud prospective purchasers stands in the same shoes insofar as the confidentiality principle is concerned as the

fact that lawyers who in the course of representing their lawyer-clients learn of egregiously unethical conduct perpetrated by those lawyer-clients nevertheless assume no duty to report that conduct. Indeed, the duties assumed by such representing lawyers run precisely the other way, mandating that the information be revealed only after the lawyer-clients have given their consent.

A striking illustration of the result produced by the clash of reporting duty and confidentiality in the lawyer-as-client situation emerged recently out of North Dakota.[29] Lawyer 2, licensed to practice in North Dakota and a variety of other states, had represented Lawyer 1, licensed in North Dakota, in the latter's efforts to earn admission to the bar of a sister state. Unfortunately for Lawyer 1, his application met with rejection. Even more unfortunate for Lawyer 1 were the findings on which the sister state based its rejection, findings that detailed, among other misdeeds, that Lawyer 1 had a) submitted false information on the application for admission, b) testified falsely to the organization charged with the admission decision, and c) improperly handled client trust funds and improperly coerced a client to accept a settlement offer while practicing in North Dakota. These findings and others prompted the appropriate authorities of sister state, in rejecting the application, to observe that Lawyer 1's record "manifests a significant deficiency in honesty; for that reason, [his] application is denied."[30] Not unexpectedly, these findings also prompted Lawyer 2 to inquire of North Dakota authorities whether he — Lawyer 2 — had an obligation to report Lawyer 1's misdeeds to North Dakota authorities. Properly citing both Rule 8.3(c) and the comments for the proposition that the duty of confidentiality "overrides" the reporting duty in the lawyer-as-client situation,[31] the committee informed Lawyer 2 that no duty to report was triggered by such a situation.

In this most dramatic of contexts, therefore, the decisional and advisory law construing Rule 8.3 reflects little difficulty ordering pursuant to the Rule's instructions the respective duties of preserving client confidences and reporting peer misconduct, relegating the latter to the subordinate position directed by the terms of Rule 8.3. Three other sets of circumstances reveal decision-makers experiencing considerably rougher sailing as they navigate between the competing demands of confidentiality and the reporting duty. The first of these sets of circumstances unfolds when a lawyer undertakes representation of a client and learns of misdeeds perpetrated by a lawyer who previously represented the new client. The second occurs when a lawyer, in the midst of a representation, learns of misdeeds perpetrated by an individual other than the client — an adverse party,

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lawyer whose lawyer-client took the corpus of his client trust account and used it to take a Carribean vacation. In all these scenarios, the confidentiality exception kicks in to extinguish the reporting duty.

29. N.D. State Bar Ass'n Ethics Comm., Op. 95-04 (June 30, 1995) [hereinafter N.D. Ethics Op.]. The committee opinion responds to a May 22, 1995 letter from lawyer Michael J. Naus that sets forth the inquiry.

30. *Id* at 1. Both the inquiring lawyer and the North Dakota committee cite this finding. *See id.*

31. *Id.* at 3.

a non-party witness, or adversary counsel — who happens to be a lawyer. The third emerges when a lawyer learns of misdeeds perpetrated by a lawyer with whom she practices. We can learn much about this interpretive paradox by exploring a single representative example of decisional or advisory law in each of these sets of circumstances.

III. TRIGGERING EVENT ONE: UNCOVERING THE MISDEEDS OF PREDECESSOR COUNSEL

Let us begin with a set of circumstances whose core feature — successor lawyer unearthing misconduct by predecessor lawyer — crops up repeatedly in the experiences of practicing lawyers sucked into the dizzying vortex of the reporting duty.[32] More specifically, let us assume the following undisputed facts. For several years, Lawyer 1 represented Client Corporation in a variety of matters, among them the negotiation of a lease agreement. In time, Lawyer 1 — whose practice consists largely of transactional work — referred out to Lawyer 2 a litigation matter arising out of the lease agreement. In the course of the litigation representation, Lawyer 2 learned that, pursuant to the lease agreement, Lawyer 1 continued to hold in escrow some of Client Corporation's funds. Lawyer 2 proceeded to negotiate a settlement of the litigation, a settlement to which Client Corporation agreed. Lawyer 2 then telephoned Lawyer 1 to arrange for release of the escrowed funds. During the conversation, Lawyer 1 revealed that the funds were no longer available because he had appropriated them to his own use, without Client Corporation's knowledge or authorization.

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32. The "uncovering the misdeeds of predecessor counsel" scenario of course reflects the facts of the watershed case of *In re Himmel*, a case familiar to all students of the reporting duty. *In re* Himmel, 533 N.E. 2d 790 (Ill. 1988). In *Himmel*, the Supreme Court of Illinois held that successor counsel James Himmel violated the reporting duty obligations that then governed Illinois lawyers by failing to report to disciplinary authorities the fact that his client's previous lawyer had converted proceeds arising out of the settlement of a motorcycle accident. *Id.* The court suspended Himmel from practice for one year, despite the fact that the client had instructed Himmel to take no action with the information other than to pursue a lawsuit against the predecessor counsel. *See id.* Because the rule of professional conduct at issue in *Himmel* materially differs from Rule 8.3 — the Illinois rule liberated lawyers from their reporting obligations only if reporting would have required them to reveal "unprivileged" information, a substantially more modest corpus of information than the Rule 8.3(c) exception for information "relating to representation of a client" — the *Himmel* case has little significance for the issue pursued in this Article. *Id.;* MODEL RULES Rule 8.3. Moreover, a widespread consensus among commentators reveals that the application of Rule 8.3 to the facts of *Himmel* would have produced a judgment in favor of, rather than against, James Himmel. For a careful analysis arriving at this conclusion, *see* Richard W. Burke, *Where Does My Loyalty Lie?: In re Himmel*, 3 GEO J. LEGAL ETHICS 643, 654-55 (1990) ("[B]etween the broad definition of confidential communications and the express exemption of such communications from the duty to disclose, even the Illinois court would have ruled in Himmel's favor if it were applying the *Model Rules*"); John J. Gosbee, *Rule 8.3 and the Effect of Himmel on the Practicing Attorney in North Dakota*, 67 N.D.L. REV. 385, 391 (concluding that, "by operation of [the North Dakota analogues to Rule 8.3 and 1.6], Himmel's conduct would not violate [such rules]." *See also* Ariz. State Bar Comm. on R. of Prof'l Conduct, Op. No. 90-13 (Oct. 16, 1990) ("The most striking difference between *Himmel* and the situation in Arizona is the issue of confidentiality . . . . [I]n Arizona, Himmel might have been precluded from reporting what he learned . . . . Absent [client] consent, however, he would be bound by the requirement of confidentiality.").

Lawyer 2 proceeded to advise Client Corporation that Lawyer 1's conduct constituted a crime. In addition, Lawyer 2 advised Client Corporation that she — Lawyer 2 — had an obligation to report Lawyer 1's conduct to the disciplinary authorities of jurisdiction. Unmoved, Client Corporation requested Lawyer 2 to refrain from passing along the information to disciplinary authorities, fearing that such an action would diminish the prospects that Lawyer 1 would replace the converted funds. Sure enough, Client Corporation called it right: Lawyer 2 refrained from filing the report; Lawyer 1 replaced the funds; Client Corporation — eminently satisfied with these developments — persisted in refusing to authorize a report by Lawyer 2 to disciplinary authorities. Indeed, Client Corporation continued to use the services of Lawyer 1 — the wrongdoing lawyer — on a variety of other matters.

Bewildered by these circumstances, Lawyer 2 nevertheless sought advice from the appropriate ethics committee of jurisdiction. What, she inquired, did Rule 8.3 require her to do?

The scenario set forth above contains some facts that on first blush may strain credulity, especially for those unfamiliar with the idiosyncrasies of clients. Nevertheless, the scenario did not spring from the fertile imagination of a cloistered law professor. Instead, it represents the precise set of material facts confronted by Rhode Island's highest court in the most important recent case pitting the duty to report against its confidentiality exception. The case is instructive for a host of reasons. One reason is rooted in the court's strikingly confused explanation of why it resolved the central legal question as it did. Another lay in the palpable dissonance between the manner in which the court resolved the legal question presented — in short, what the court actually *did* — and the institutional displeasure it displayed for the result reached — in short, what it *said*. A third stems from the fact that the case appears to be the only appellate case devoted principally to the clash between confidentiality and the reporting duty under Rule 8.3; citations to the case thus turn up nearly every time the confidentiality/reporting duty issue is joined.

In *In re Ethics Advisory Panel Opinion No. 92-1*,[33] the Supreme Court of Rhode Island essentially held that Rule 8.3 said precisely what indeed it said: that Lawyer 2's 8.3(c) duty to refrain from revealing information relating to the representation of Client Corporation without its consent trumped Lawyer 2's 8.3(a) duty to report the misconduct of Lawyer 1.[34] As a result, the court held that Rhode Island disciplinary authorities could not compel Lawyer 2 to pass along the damaging information that would enable the authorities to identify, investigate, and sanction Lawyer 1. The court's decision contains buried within it three

33. *In re* Ethics Advisory Panel Opinion No. 92-1, 627 A.2d 317 (R.I. 1993).

34. The court puts it this way: "The drafters of the rules anticipated this conflict between Rule 1.6 and Rule 8.3 and concluded that a lawyer's duty of confidentiality owed his or her client supersedes a lawyer's obligation to report attorney misconduct." *Id.* at 323.

essential sets of conclusions: that Lawyer 1's misdeeds, coupled with Lawyer 2's knowledge of them, satisfy the elements of 8.3(a);[35] that, as a result, Lawyer 2 assumes a duty to report unless the facts of the matter trigger the confidentiality exception;[36] and that the facts of the matter do indeed trigger the confidentiality exception, thereby liberating Lawyer 2 from the obligation to report.[37] It is the last of these conclusions — both how the court arrives at it and where the court goes from it — that calls for a closer look.

The determinative legal question confronting the Rhode Island court, as noted above, concerns whether the confidentiality exception embodied in Rule 8.3(c) kicks in on the facts of the case. For, if the confidentiality exception does kick in, Client Corporation has the legal power to prevent Lawyer 2 from revealing information to disciplinary authorities that would enable those authorities to pursue Lawyer 1. If the exception does not kick in, Client Corporation's wishes count for little and Lawyer 2 must pass along to the authorities a report about Lawyer 1's misdeeds. In a unanimous opinion, Rhode Island's highest court holds that the facts of the case indeed do trigger the confidentiality exception, and thus concludes that the principle set forth in Rule 8.3(c) governs the matter. Yet, remarkably, nowhere in that unanimous decision does the court pause to explain the reasoning it deploys to arrive at the conclusion that the confidentiality exception indeed kicks in on the facts of the case. Instead, on the very same page of the decision[38] Justice Murray, writing for the court, quickly offers without any elaboration at all three different — and to a considerable extent mutually exclusive — justifications for the court's conclusion that the confidentiality exception applies.

First, the court reports that the ethics advisory panel whose decision the court is reviewing concluded that Lawyer 2's knowledge of Lawyer 1's embezzlement constituted confidential information "because [Lawyer 2] learned of the embezzlement during the course of his representation of a client."[39] In sum, this first justification seeks to link the confidentiality conclusion with the fact that Lawyer 2 — the successor lawyer whose reporting duty obligations propelled the matter into the disciplinary system — came across the information that triggers the reporting duty while performing legal work on behalf of a client. At no place in its

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35. On this point, the court observes that "none of the parties disputes the suggestion that [Lawyer 1's] embezzlement of client funds is a violation of the *Rules of Professional Conduct* that raises a substantial question regarding [Lawyer 1's] fitness to practice law." *Id.* at 321.

36. As the court puts it, "absent a confidentiality issue, it is clear that the inquiring attorney would be under an ethical obligation to report the embezzlement and indeed would be subject to discipline if the inquiring attorney failed to report the embezzlement." *Id.*

37. The court concludes that the information obtained by Lawyer 2 "falls within the scope of the broad definition of confidential communication under Rule 1.6 . . . The drafters of the rules anticipated this conflict between Rule 1.6 and Rule 8.3 and concluded that a lawyer's duty of confidentiality owed his or her client supersedes a lawyer's obligation to report attorney misconduct." *Id.* at 322-23.

38. *See id.* at 322.

39. *Id.*

opinion does the court express its agreement with this reasoning or indicate that it has chosen to ground its holding in this reasoning. Instead, the court merely notes the explanation in passing, attributing it to the ethics panel whose decision it happens to be reviewing, then proceeds onward.

Several paragraphs later, however, the court fleetingly notes that the information about Lawyer 1's misconduct is confidential within the meaning of the Rhode Island *Rules of Professional Conduct* "because it relates to representation of a client."[40] This second attempt at justification merely spins a judicial tautology, Justice Murray telling us that the information satisfies the "relating to representation of a client" standard because, indeed, the information "relates to representation of a client."[41] Precisely *whose* client the information relates to and precisely *how* the information "relates to" that client's representation are matters over which the court opts not to tarry.

Still further along in the decision the court tries yet another distinct tack, observing that the facts of the case trigger the confidentiality exception because "[Lawyer 1's] admission related to his or her representation of his or her client."[42] This third justification — different from the first in an important way — links the confidentiality conclusion not with anything having to do with *Lawyer 2* — successor counsel who learned of predecessor counsel's misdeeds while representing Client Corporation — but, instead, with the strikingly different fact that *Lawyer 1* — the misbehaving lawyer whose conduct started the dominoes falling to begin with — perpetrated his misbehavior within the confines of a lawyer/client relationship with Client Corporation.[43]

40. *Id.*

41. *Id.*

42. *Id.*

43. To my knowledge, this suggestion by the court — that the reporting duty obligations of Lawyer 2, the inquiring lawyer, are extinguished by virtue of the fact that the information Lawyer 2 has about the misdeeds of Lawyer 1, the misbehaving lawyer, concerns *Lawyer 1's* representation of *Lawyer 1's* client — finds no antecedent anywhere in the ever-burgeoning law or commentary devoted to the reporting duty. No court, ethics panel, or commentator has ever opined that the fact that the misbehaving lawyer misbehaved within the confines of a lawyer-client relationship renders confidential the information obtained by *another* lawyer about that misbehavior. To be sure, if that "other" lawyer learns about the misbehavior from the victimized client who comes seeking assistance, or as a result of assuming legal representation of the victimized client, then the information assumes the status of confidential. But that is not what Justice Murray and his Rhode Island colleagues are saying with this suggestion. *See In re Ethics Opinion,* 627 A.2d at 322. Instead, they are saying that, standing alone, the fact that the misbehaving lawyer committed his misconduct within the confines of a lawyer-client relationship — irrespective of how the inquiring lawyer ultimately gets wind of it — is sufficient to extinguish the reporting duty of the inquiring lawyer. *See id.* Perversely enough, the text of Rule 8.3(c) does not foreclose this unprecedented interpretation. *See* MODEL RULES Rule 8.3(c). The text of the confidentiality exception, after all, provides merely that "This Rule does not require disclosure of information otherwise protected by Rule 1.6." *Id.* On the facts of the case, Lawyer 1's misconduct — his conversion of Client Corporation's funds — does indeed satisfy the "relating to representation of a client" standard set forth in Rule 1.6. *In re Ethics Opinion,* 627 A.2d at 322-23. Such information obviously relates to *Lawyer 1's* representation of Client Corporation.

At the end of court's analytic meal, therefore, Justice Murray and his colleagues have left those at the table still hungry for an explanation. The opinion has tossed out three different explanations, three unfinished and not entirely compatible thoughts, for its legal conclusion that Lawyer 2 need not report the misconduct of Lawyer 1. The first explanation rests on the relationship between Client Corporation and Lawyer 2, the inquiring lawyer. The second merely trumpets the language of the confidentiality rule. The third links the conclusion with the relationship between Client Corporation and Lawyer 1, the misbehaving lawyer. The net result of this judicial bobbing and weaving is that in this most important recent case pitting the reporting duty against its confidentiality exception Rhode Island's highest court never quite gets around to explaining the basis on which it concludes that the confidentiality exception comes into play in the first place.

Careful scrutiny of Justice Murray's opinion for the court suggests that this failure of explanation stems to a considerable degree from the court's failure to reason through fully the legal issue at the root of its challenge: what precisely triggers the confidentiality exception on the facts of the case? Rather than allow this question to engage its attention to the full extent demanded by the facts, the court simply announces its arrival at the conclusion that the confidentiality exception applies without having probed the matter all that extensively, without having undertaken the analytic journey that traditionally accompanies appellate courts to their dialectical destinations. In this respect especially, the oft-cited work product of the Supreme Court of Rhode Island shares much in common with the bulk of cases and ethics opinions that struggle half-heartedly to accommodate the confidentiality exception and the reporting duty. The Rhode Island court's omission, in short, constitutes a missed opportunity all too common to decisional and advisory opinions devoted to the confidentiality exception.

Nevertheless, to charge the court with butchering the opportunity to make helpful law, with failing to reconcile the persistently nettlesome tension between confidentiality and the duty to report in a manner that would empower lawyers and other decision-makers to properly frame and work through the issue, is not to charge the court with manufacturing an answer to the legal challenge it confronted that cannot be supported. For, despite the court's conspicuous failure to justify its holding, a persuasive case was there to be made that the court's application of the law of Rule 8.3 to the facts of the case produced the appropriate legal outcome, the outcome intended to be produced by those who framed and adopted Rule 8.3.[44] Accordingly, had the court left it at that the case likely would be remembered for its straightforward but inadequately justified application of an unambiguous legal principle: when the duty to report the misconduct of another

44. In its own way, this Article endeavors to make that case.

lawyer threatens the duty to preserve client confidences, the former must yield to the latter.

Unfortunately, the court refused to leave well enough alone. Instead, it attached to the conclusion of its largely invisible legal analysis a gratuitous afterthought expressing *both* the extent to which the result troubled it *and* a corresponding instruction to its court-created standing committee to explore the prospects of amending Rhode Island's equivalent of the confidentiality and reporting duty rules.[45] Each dimension of the court's afterthought merits serious attention.

As indicated above, Justice Murray and his colleagues did not deem their judicial responsibilities completed merely by deciding the case. The court opted in addition to express its dissatisfaction with the result at the same time it announced that result.[46] The court expressed that dissatisfaction as follows:

> In this case [Lawyer 1] has engaged in criminal conduct as well as violated the *Rules of Professional Conduct. The failure of the Rules of Professional Conduct to facilitate the investigation and prosecution of [Lawyer 1] is correspondingly a failure of the legal profession to regulate itself effectively.* This failure fuels the perception that under a cloak of confidentiality, the legal profession is engaged in a coverup of attorney misconduct. [emphasis added].[47]

The italicized sentence captures the core of the court's sentiments, and in doing so embodies a central assumption worthy of exploring. In that simple declaration, Rhode Island's highest court makes the bold claim that, applied to the facts before it, the hierarchy of duties set forth in Rule 8.3 — a hierarchy that, as discussed earlier, elevates the duty of confidentiality above the duty to report and thus prohibits Lawyer 2 from revealing information about Lawyer 1 over the objection of Client Corporation — has produced "a failure of the legal system to regulate itself effectively." The court appears to be contending that the result that flows from the application of the relevant sources of law — Rules 8.3(a) and (c), and thus the interplay of Rules 8.3 and 1.6 — to the facts of the case reflects a problem of substantial magnitude, the nub of which is that the disciplinary system will be unable to take appropriate action against Lawyer 1. Strong stuff, to be sure; nevertheless, the charge, whatever its rhetorical appeal, cannot withstand even the gentlest of scrutiny.

45. *See In re Ethics Opinion*, 627 A.2d at 323.

46. *See id.* In the ordinary case, the gratuitous observation of an appellate court (or one of its members) about its level of satisfaction with the result produced after an application of the appropriate legal rule to the facts of the matter would be met with the criticism that the court has overstepped the bounds of the judicial function. Justice Murray's comments, at least in this respect, probably merit a bit more leeway. Given the role played by state supreme courts in the formulation of rules of lawyer conduct, little seems to be lost by allowing these courts and their members to blow off steam about a rule of lawyer conduct that in their view produces unwelcome results.

47. *In re Ethics Opinion*, 627 A.2d at 323.

At the most basic descriptive level, the court gets it seriously wrong when it asserts that the results of the case evince "the failure of the legal system to regulate itself effectively." A comparison drawn from elsewhere in the law helps illustrate the point. The court's lament — by no means an uncommon one to be expressed by decision-makers faced with matters that entangle the duty to report with its confidentiality exception — is at bottom functionally indistinguishable from that of an appellate court concluding that the results of an egregiously unconstitutional search — for instance, exclusion of evidence from the jury and a subsequent acquittal — evince "the failure of the legal system to regulate itself effectively." Unfortunately, neither charge can sustain the rhetorical burden of persuasion without utterly ignoring the values, interests, and policies that occupy one side of the scales. In the context of the Fourth Amendment, of course, those values, interests, and policies consist of the right of individuals to enjoy the security of their persons and property free from unwarranted governmental intrusion. In the context of the reporting duty, the analogous values, interests, and policies consist of the confidentiality principle, the notion that information "relating to representation of a client" — however inadequately defined or understood that standard — belongs to the client and is provided to the lawyer with the expectation that it will be revealed only when doing so is consistent with the instructions or best interests of the client. Accordingly, rather than reflecting "the failure of the legal system to regulate itself effectively," as the Supreme Court of Rhode Island maintains, the reluctance of Rule 8.3 to run roughshod over clients and information relating to their representations could be said to bespeak a legal system operating with wisdom, self-restraint, and appropriate respect for the competing values at stake.[48] The court's inflamed rhetoric to the contrary, to the effect that the system has broken down as a result of Rule 8.3's explicit acknowledgement that Lawyer 2 cannot be compelled to report on Lawyer 1's misdeeds with information Client Corporation has instructed Lawyer 2 not to reveal, amounts to little more than that: inflamed rhetoric.

But the court's dissatisfaction stems from more than merely descriptive sloppiness. Central to its charge that the results of the case reflect a breakdown of the system by which lawyers are regulated is an assumption, one that suffuses the concluding portion of the decision. That assumption is that Client Corporation's unequivocal desire to keep private, to preserve as confidential, the details of its relationship with Lawyer 1 is unworthy of the respect of the rules of professional conduct. Justice Murray's invocation of the "cloak of confidentiality" figure of speech[49] underscores this assumption at work in the court's outburst, suggesting that in the court's view[50] Client Corporation's efforts to keep private its

48. *Id.*

49. *Id.*

50. *See id.* I use the phrase "in the court's view" well aware that the phrase may be met with the reply that such use in inappropriate. After all, Justice Murray purports to ground the court's expression of concern in "*the*

mistreatment by Lawyer 1 amount to little more than insincere, artificial cover. But such an assumption clashes dramatically with one of the central animating principles of the very profession whose governing rules the court purports to be construing, the principle that clients retain substantial authority to determine the ways in which their lawyers may use information the clients have provided to them. Contrary to the court's intimation, the confidentiality principle does not rest on the notion that clients must provide their lawyers, state disciplinary panels, trial and appellate judges, or anyone else with satisfying explanations of why they as clients wish to keep out of the public domain information about their particular representations. Indeed, contrary to the court's intimation, the confidentiality principle does not require clients to do anything at all to secure protection for information concerning their representations. That protection, instead, kicks in automatically, constraining lawyers from revealing any and all information about those representations that clients have not expressly or impliedly authorized those lawyers to reveal.

The court proceeds to exacerbate its flawed logic, descriptive inaccuracy, and counterintuitive assumption with an order to one of its standing committees to explore amending the Rhode Island rules. In particular, the court instructs the committee "to canvass other jurisdictions' versions of the confidentiality principle"[51] so as to determine the prospects for narrowing or eliminating the confidentiality exception to the reporting duty, thereby ensuring that, in the future, lawyers in the circumstances of Lawyer 2 will be unable to elude their obligations to report through the invocation of confidentiality. In connection with this instruction, the court makes reference to the Minnesota rules, which, the court suggests, "would allow an attorney to report to disciplinary authorities the misconduct of another attorney even without client consent, in a limited set of circumstances."[52] The Rhode Island justices hint that such an amendment would be a wise and desirable change. Putting aside for now the merits of that perspective,[53] the court's failure to get to the nub of the tension between the reporting obligation and its confidentiality exception in its consideration of the facts before it creates the distinct impression that the appropriate foundation from which such a recommendation could spring has not been laid.

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perception that under a cloak confidentiality, the legal profession is engaged in a coverup of attorney misconduct." *Id.* (emphasis added). Presumably, therefore, the court wishes to be seen as speaking about how the mandate of the case – liberating Lawyer 2 from reporting the misdeeds of Lawyer 1 – will be viewed by others not within the profession. Nevertheless, it seems clear, at least to this observer, that the court's expression of displeasure stems as much from its own dissatisfaction with the results worked by the interaction of Rules 8.3(a) and (c) as with the predicted reaction of those not within the profession.

51. *Id.* at 323.

52. *Id.* In particular, the Minnesota rules *permit* a lawyer to reveal those client "secrets necessary to inform the [disciplinary authority] of knowledge of another lawyer's violation of [a rule of professional conduct] that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects." MINN. RULES OF PROF'L CONDUCT R. 1.6 (b)(6).

53. *See* discussion *infra* at text accompanying notes 86–114.

IV. TRIGGERING EVENT TWO: UNCOVERING THE MISDEEDS OF A NON-CLIENT WHO HAPPENS TO BE A LAWYER

The clash between the confidentiality and reporting duties exemplified by the Rhode Island case discussed above emerges when a lawyer undertakes a representation and learns in the course of that representation that another lawyer who previously represented the same client victimized that client with serious, otherwise reportable misconduct. Let us now move to another context in which the clash of duties can potentially arise. In this context, a lawyer in the course of representing a client *other than* the misbehaving lawyer acquires information revealing that some individual who happens to be a lawyer but is involved in the matter in any of a range of roles — say, as an adverse party, a witness, or even the lawyer representing some other client in the matter — has committed an otherwise reportable offense under Rule 8.3(a).[54]

In particular, let us suppose the following. Lawyer 1 represents Clients, defendants in a civil litigation matter. The adverse party plaintiff in the matter happens to be a lawyer, LAP. Lawyer 1, in the midst of deposing LAP, poses a series of questions intended to elicit potentially admissible evidence concerning LAP's lost earnings claim against Clients. LAP, responding to one such particular question, testifies that, in all his years of law practice, he has never filed state or federal income tax returns. Lawyer 1, surprised by the revelation, proceeds to inquire of the appropriate ethics committee whether the revelation triggers her 8.3(a) duty to convey the information to the appropriate professional authority.

This precise inquiry, with facts seemingly too bizarre to unfold anywhere but on prime-time television, nevertheless found its way to Arizona's ethics committee.[55] In delivering its response to the inquiry, the committee devotes essentially all of its opinion to the not especially difficult question of whether the willful failure to file income tax returns — a failure the Arizona committee assumed to be criminal under both state and federal law[56] — raises a substantial question as to a lawyer's honesty, trustworthiness, or fitness. After mustering an affirmative answer to that question, the Arizona committee promptly observes that, accordingly, "it would require an extremely unusual set of facts for a lawyer to become convinced . . . that the information should not be reported."[57]

54. For purposes of the confidentiality exception embodied in Rule 8.3 (c), little turns — and little should turn — on whether the misbehaving non-client lawyer happens to be, say, an adverse party, a non-party witness, the opposing lawyer in the matter, or even the opposing party. But the particular context is likely to play a role in *both* the advice that the potentially reporting lawyer doles out to the affected client *and* that client's decision concerning whether to have the lawyer make the report.

55. Ariz. State Bar Comm. R. of Prof'l Conduct, Op. No. 87-26 (Dec. 30, 1987) [hereinafter Ariz. Prof'l Conduct Op.].

56. *Id.* at 2.

57. *Id.*

All well and good, except for one detail: the Arizona committee utterly neglects to confront the potential legal consequences of the fact that Lawyer 1 learned this information in the course of representing Clients. Nowhere in its opinion, for example, does the Arizona committee pause to take stock of the fact that this information concerning LAP's otherwise reportable misdeeds found its way to Lawyer 1 while Lawyer 1 was in the process of deposing LAP on behalf of Clients. Nowhere in the opinion, for example, does the Arizona committee pause to explore the extent to which, if at all, the revelation about LAP's otherwise reportable misdeeds bears on decisions that Lawyer 1 and Clients will confront throughout the conduct of the representation. Nowhere in the opinion, for example, does the Arizona committee pause to consider whether the information obtained by Lawyer 1 about LAP's otherwise reportable misdeeds "relates to" Lawyer 1's representation of Client and thus implicates the confidentiality exception set forth in 8.3(c).[58]

In and of itself, this omission taints the Arizona committee's opinion, engendering skepticism about whether the committee has appropriately contextualized the very question it has been requested to address: is Lawyer 1 required to report LAP's misdeeds? In and of itself, the omission prompts the committee to pass along "advice" to Lawyer 1 — report those misdeeds — that runs the risk of profoundly misstating her professional obligations, indeed, of answering incorrectly the question she poses. But there is a more troubling aspect to the Arizona opinion.

The opinion's sole reference to Rule 8.3(c), the confidentiality aspect of the reporting duty, consists of the following declarative sentence, contained in the opinion's only footnote:

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58. Perhaps a comment is in order to ensure that this strand of my criticism of the Arizona committee's work not be misconstrued. Given the sketchiness of the facts set out in the Arizona opinion, the question of whether the information about the misbehaving lawyer/adverse party ultimately satisfies the "relating to representation of a client" standard of Rule 1.6 remains a question worthy of exploring. *Id.;* MODEL RULES Rule 1.6. To be sure, the inquiring lawyer obtained the information in the course of representing Clients – indeed, in the course of deposing the adverse party in the matter. At the same time, whether the information has anything to do with the representation other than that it arose in response to a deposition question posed by the inquiring lawyer in the representation is not at all clear. Moreover, it does not appear — at least on the facts the Arizona committee provides – that the information has anything directly to do with the inquiring lawyer's clients. Accordingly, the facts of this Arizona opinion seem to offer a paradigmatic example of information that the earlier governing regime set forth in the *Code of Professional Responsibility* would *not* have deemed "confidential" — because the information constitutes neither a "confidence" — defined by the *Code* as information protected by the lawyer/client privilege — nor a "secret" — defined by the *Code* as other information that *either* the client has requested be held inviolate *or* the disclosure of which would prove embarrassing or detrimental to the client — but about which the current regime's "relating to representation of a client" standard set forth in Model Rule 1.6 could reach a different conclusion. At the very least, the facts of the Arizona opinion underscore the conspicuous lack of guidance offered by the prevailing confidentiality definition set forth in Rule 1.6.

> This opinion does not address situations in which the lawyer who obtains such information does so in connection with a client-lawyer relationship between that lawyer and the other lawyer. See [Rule] 8.3(c)[59]

This sentence merits careful scrutiny, for it manages to embody a remarkable range of misconceptions about the confidentiality exception and its appropriate role in reporting duty analysis.

First, the footnoted statement reflects the assumption that the facts of Lawyer 1's *actual* inquiry — as distinguished from the *hypothesized* facts set forth in the footnoted sentence — do not implicate confidentiality concerns and thus do not necessitate a discussion of the reporting duty's confidentiality exception. After all, the committee drops this citation to the confidentiality exception precisely to make the point that some set of facts *other than the one under discussion* would necessitate a discussion of the confidentiality exception. Nowhere in the committee's fleeting reference to Rule 8.3(c) does it acknowledge that the information learned by the inquiring lawyer — information learned in the course of deposing adversary party LAP on behalf of Clients — could conceivably fall within the confidentiality exception precisely because it could conceivably be information "relating to representation of a client."

Second, and closely intertwined with the prior mistaken legal supposition, the Arizona committee's statement likewise assumes that information sufficient to trigger the confidentiality exception to the reporting duty can be learned by a lawyer *only in circumstances in which the misbehaving lawyer happens the be the lawyer's client* — that is to say, only, in the committee's terms, "in connection with a lawyer-client relationship between that [inquiring] lawyer and the other [misbehaving] lawyer." Put somewhat differently, the committee grounds its footnoted observation in the assumption that the only way in which otherwise reportable lawyer misconduct can satisfy the Rule 8.3(c) confidentiality exception — that is to say, the only way in which such information can "relate to representation of a client" and thereby liberate an inquiring lawyer from reporting it — is in circumstances in which the misbehaving lawyer happens to be the client of the inquiring lawyer. On this point, the committee's central purpose in dropping the footnoted hypothetical appears to be to contrast the circumstances of the matter that prompt its opinion-in-chief — circumstances in which the inquiring lawyer learns of LAP's misdeeds in the course of representing some party *other than* LAP, the misbehaving lawyer — with those set forth in the hypothetical — circumstances in which an analogous inquiring lawyer learns of another lawyer's misdeeds while representing *the very misbehaving lawyer whose misdeeds the inquiring lawyer unearths*. For the Arizona committee, the contrast created by the footnote functions to illustrate the proposition that confidentiality concerns arise in one set of circumstances — the

59. *Id.* at 2.

circumstances in which the misbehaving lawyer happens to be the client of the inquiring lawyer — but by definition not in the other — circumstances in which the inquiring lawyer learns of the misconduct in the course of representing someone other than the misbehaving lawyer. Yet the committee's proposition, as even a hornbook grasp of the confidentiality principle makes clear, happens to be mistaken.[60] And a long and respectable line of decisional and advisory law illustrates the point that the confidentiality exception kicks in across a variety of circumstances in which the inquiring lawyer and the misbehaving lawyer have no professional relationship.

One example of the principle, reminiscent of the Rhode Island case discussed above, can be found in a Pennsylvania opinion advising an inquiring lawyer that the Rule 8.3(c) confidentiality exception forbade him from reporting the conversion of estate funds by the estate's lawyer/executor when the inquiring lawyer's client, a beneficiary under the estate, refused to consent to the revelation of such information.[61] The Pennsylvania committee's reasoning proceeded simply and straightforwardly: the inquiring lawyer's information about the misbehaving lawyer's conversion satisfies the "relating to representation of a client" standard; the inquiring lawyer thus assumes a duty to reveal such information only should the client consent; the client has not consented.[62]

An ethics opinion out of Rhode Island echoes both the facts and the legal conclusion of the Pennsylvania opinion.[63] The inquiring Rhode Island lawyer represented an estate for which the misbehaving lawyer served as executor. Inquiring lawyer had come to conclude that the misbehaving lawyer had "diverted funds from the estate."[64] Inquiring lawyer thus sought advice from the committee concerning the extent to which the facts set forth implicated the reporting duty and the confidentiality exception. Citing the "relating to representation of a client" language of Rule 1.6, the Rhode Island committee informed the inquiring lawyer that the confidentiality principle incorporated explicitly into Rule 8.3(c) "prohibits" the inquiring lawyer from disclosing the alleged malfeasance of the defendant-lawyer.[65]

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60. Indeed, the most influential treatise devoted to the law governing American lawyers, in its discussion of the reporting duty, observes that the principle of "confidentiality extends much farther" than to merely situations in which a misbehaving lawyer seeks legal advice from another lawyer. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 685 (1986).

61. Philadelphia Bar Ass'n Prof'l Guidance Comm, Op. No. 93-28 (Jan. 1994).

62. *Id.* at 2. As the Philadelphia Committee concisely notes, "In view of the fact that your knowledge of attorney A's professional misconduct is based solely on 'information relating to representation' it cannot be revealed. *See* [Rhode Island Supreme Court case discussed above]." It will not surprise the reader to learn that, much like the Rhode Island case that it cites, the Philadelphia Committee fails to probe precisely *why* the information it holds confidential satisfies the confidentiality standard.

63. R.I. Ethics Advisory Op., Op. No. 94-78 (Dec. 6 1994).

64. *Id.*

65. *Id.*

Another illustration of the principle, with a slight twist, emerges from Maryland.[66] Inquiring lawyer represented plaintiff in a civil action, alleging breach of fiduciary duty on the part of defendant, plaintiff's former lawyer. Inquiring lawyer sought guidance from the Committee on Ethics of the Maryland State Bar Association as to the implications of the reporting duty for such circumstances, also advising the committee of an express request from plaintiff-client that the inquiring lawyer refrain from filing a grievance with the appropriate disciplinary authority. After observing that the commentary to Rule 1.6 reveals that the confidentiality rule had been "enlarged" in order "to protect more information and make it more difficult for an attorney to reveal such information over the objection of his client,"[67] the Maryland committee noted a distinctive aspect of Maryland's exceptions to confidentiality — an exception giving lawyers discretion to reveal confidential information in order to comply with the *Rules of Professional Conduct*.[68] Accordingly, the committee concluded that because the information satisfied *both* the "relating to representation of a client" definition set forth in Rule 1.6(a) *and* the distinctive Maryland exception set forth in Rule 1.6(b), the inquiring lawyer "should not feel compelled to reveal the information . . . concerning the [misbehaving lawyer-defendant.]"[69]

Yet another manifestation of the principle at work happens to be authored, oddly enough, by the identical Arizona committee, a few short years after committing the analytical errors set forth above. The later opinion addresses the circumstances of an inquiring lawyer who had been informed by his client that a previous lawyer had raped her — and, as a consequence of which, impregnated her — but that she did not wish the inquiring lawyer to divulge the information to anyone because her psychiatrist advised her that it would be harmful to her to reveal the identity of her attacker.[70] This Arizona opinion, much like each of the opinions just noted, concludes that the circumstances by which the inquiring lawyer acquired the information kick-starts the confidentiality exception — citing Rule 1.6 — and that, as a result, the client's refusal to supply the appropriate consent overrides the reporting duty obligation, producing a situation in which the inquiring lawyer must not disclose the information to disciplinary authorities.[71]

66. Md. State Bar Ass'n Comm. on Ethics, Op. 89-46 (Apr. 20, 1989).

67. *Id.*

68. *Id.*

69. *Id.*

70. State Bar of Ariz. Comm. on Prof'l Conduct, Op. 90-13, *supra* note 32.

71. In particular, the Arizona committee observes as follows:

> [W]e are informed that the information is not only confidential but privileged, and that the client has instructed the attorney emphatically not to disclose it. Since we are told that [the inquiring lawyer] has a heavy administrative law practice, there is a suggestion that the information about the rape may not be germane to the subject matter of the representation. But, we do not know this and it is not necessarily the case. Moreover, the information was gained in the course of the representation, is

And, of course, there is the Rhode Island case itself.[72] There the Supreme Court of Rhode Island held that the inquiring lawyer's information about another lawyer's conversion of client funds constitutes confidential information within the meaning of Rules 8.3(c) and 1.6 and that, accordingly, the victimized client retains the power to prevent the inquiring lawyer from revealing such information to disciplinary authorities.

To be sure, nowhere on the face of any of these matters does the legal decision-maker devote much effort to explaining precisely *why* the information about the misbehaving lawyer satisfies the "relating to representation of a client" standard set forth in the confidentiality rule. That shortcoming, reflective of the host of decisional and advisory treatments of the tension between the reporting duty and its confidentiality exception, suggests the need to rework that exception so as to provide a clearer, more definitive statement of the range of circumstances that trigger it. Yet, putting aside for a moment this shortcoming, each matter drives home the point that confidentiality concerns can and do arise in the reporting duty context in situations in which the inquiring lawyer — the lawyer whose reporting duty obligations are in question — has no lawyer/client relationship with the misbehaving lawyer.[73] The Arizona committee's suggestion to the contrary reflects yet another bewildering aspect of the mess being made of the confidentiality exception.

V. TRIGGERING EVENT THREE: UNCOVERING THE MISDEEDS OF A COLLEAGUE IN THE FIRM

Some of the most reprehensible lawyer conduct comes to light because a colleague with whom the misbehaving lawyer practices learns about it and is

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> about the client, and therefore relates to the representation for purposes of [Rule 1.6(a)] . . . . [I]f . . . the client insists upon confidentiality, the inquiring attorney must respect the client's wishes, and there can be no duty to report.

Id. at 17.

72. *See supra* text accompanying notes 33-53.

73. The handful of sources discussed in the text represents a mere slice of the sources that support the proposition. For yet another that drives home the point in an explosive context, *see* Kan. Bar Ass'n Prof'l Ethics-Advisory Comm., Op. 94-13 (1995). The facts giving rise to that opinion are as follows. Lawyer X represented spouses A and B jointly in a bankruptcy matter and B alone in some criminal defense and personal injury matters. At some point during these representations, Lawyer X began a sexual relationship with A. Lawyers Y and Z, X's partners, learned of the affair from B, who requested that Y and Z not reveal the information to anyone, given that B sought to preserve the marriage. Thereafter B terminated the lawyer/client relationship with X, Y, and Z and retained another lawyer, Q, to represent B in divorce proceedings. Q urged Y and Z to report X's misconduct to disciplinary authorities. Y and Z inquired whether they had an obligation to do so. In response to the inquiry, the Kansas committee spins out a confusing analysis that begins with the observation that the Rule 8.3(c) confidentiality exception "does not apply in this fact situation" but concludes with the assertion that it does, and thus that Y and Z may only reveal the information after B consents in writing. Although difficult to discern, it appears as if the opinion rests on the notion that the information about the relationship between X and A, while not a privileged "confidence" under the regime of confidences and secrets, nonetheless constitutes a "secret" vis a vis B and thus, absent B's consent, may not be reported.

forced to grapple with the consequences of having learned about it. Accordingly, some of the most disturbing inquiries implicating the reporting duty emerge from those who practice law with the very misbehaving lawyers whose misdeeds have prompted the inquiries. In such circumstances, confidentiality concerns often loom large; unfortunately, decision-makers sometimes manage to overlook those concerns. Let us consider one such example.

Lawyer 1, a partner in a small law firm, fails to file a complaint in a timely manner, missing the statute of limitations. Apprehensive about both Client's reaction were she to learn of the mistake and the potential fallout from that reaction, Lawyer 1 intentionally conceals the information from Client. Shortly thereafter, Lawyer 1 compounds the deception by forwarding to Client a sum of money that Lawyer 1 falsely represents to be settlement funds from the putative defendant's insurer. Lawyer 2, a partner in the firm, learns of his colleague's misconduct and inquires as to his obligations under the reporting duty.

An inquiry with material facts identical to those set forth in the preceding paragraph found its way to the Connecticut Committee on Professional Ethics.[74] In its response, the Connecticut committee — much like the Arizona committee whose opinion we discussed above — devotes essentially all of its discussion of the reporting duty to the uncomplicated legal question of whether a lawyer who perpetrates the acts that Lawyer 1 is purported to have perpetrated has committed a reportable offense under 8.3(a). Not surprisingly, the committee answers this question in the affirmative, observing that the matter poses "neither a close nor a trivial case"[75] and citing the much-quoted comment to the reporting duty concerning "offenses that a self-regulating profession must vigorously endeavor to prevent."[76] Having reached this eminently reasonable conclusion, the Connecticut committee — echoing the approach of its Arizona equivalent discussed above — rushes to advise the inquiring lawyer that "the acts of [Lawyer 1] must be reported promptly to the Statewide Grievance Committee."[77]

Unfortunately, the similarities between the Connecticut and Arizona opinions do not end there. The Connecticut opinion, too, somehow fails to discern in its midst the presence of the confidentiality exception; it utterly neglects to explore whether the principle of law set forth in 8.3(c) — the principle that confidentiality trumps the reporting duty — kicks in on the facts of the inquiry to circumscribe the reporting duty of 8.3(a). At no point in the opinion, for instance, does the Connecticut committee pause to acknowledge the fact that Lawyer 2, as a

74. Conn. Bar. Ass'n Comm. on Prof'l Ethics, Informal Op. 89-21 (1989). For the sake of analytical simplicity, the hypothetical set out in the text has worked one change from the facts set out in the Connecticut opinion. In the Connecticut scenario, the inquiring lawyer approaches the committee with his inquiry *after* leaving the firm; strictly speaking, therefore, the Connecticut opinion serves to respond to an inquiry from a *former* partner of the misbehaving lawyer. But nothing of significance turns on that distinction.

75. *Id.* at 2.

76. *Id.*

77. *Id.*

colleague who practiced in the same firm with Lawyer 1 at the time of Lawyer 1's regrettable conduct, must treat as confidential all information "relating to" Client's representation, a corpus of information likely to include the manner in which Lawyer 1 chose to carry out the representation. Indeed, nowhere on the face of the Connecticut opinion do the words "confidentiality" or "confidential" even appear. Nowhere on the face of the Connecticut opinion does a reference appear to Rules 8.3(c) — the confidentiality exception to the reporting duty — or 1.6 — the confidentiality rule itself. Nowhere on the face of the Connecticut opinion does a discussion appear of the extent to which Lawyer 1's misdeeds, and Lawyer 2's knowledge of those misdeeds, "relate to" the firm's representation of Client.

In one respect, moreover, the Connecticut opinion represents an even more stunning mistreatment of the confidentiality issue than the Arizona opinion. For, in two brief sections of the opinion that precede its discussion of the reporting duty, the Connecticut committee appropriately acknowledges that, yes, a lawyer who practices together with other lawyers owes obligations to clients even though he has never dealt with such clients[78] and, yes, Lawyer 2 — the inquiring lawyer — owes a host of duties to the defrauded Client — including the duty to keep Client reasonably informed about the status of the matter — that, separately and together, require Lawyer 2 to inform Client of Lawyer 1's misconduct.[79] In particular, the committee observes as follows:

> 1. Does the inquirer have any ethical obligation to the client with whom he has never dealt?
>
> Answer: Yes. Rule 5.1(c) imposes direct responsibility for all partners in a firm for the acts of all other partners.
>
> 2. If the inquirer fails to disclose the misrepresentation to the client, is the inquirer in violation of the disciplinary code?
>
> Answer: The activity is [sic] described is a violation of Rule 8.4(c) (fraud, misrepresentation), and Rule 1.3 (diligence (see comment, which cites failure to file suit as serious offense)). It is also arguably a violation of Rules 1.1 Competence, and 1.4 Communication. By imputed responsibility, the inquiring partner . . . perpetuates the fraud on the client by not rectifying it, and is responsible under the rules for all violations of his partner during the partnership.[80]

Given these observations, the Connecticut committee's failure to confront the confidentiality issue borders on the genuinely bizarre. The committee has concluded, and appropriately so, that the information about Lawyer 1's misdeeds

78. *Id.* at 1.
79. *Id.*
80. *Id.*

is sufficiently intertwined with the firm's representation of Client so as to require Lawyer 2 to pass along the information to Client in order to comply with a host of obligations imposed by applicable rules of professional conduct. Yet it never occurs to the committee that, for much the same reason, the information about Lawyer 1's handling of the matter "relates to" the firm's representation of Client within the meaning of the confidentiality principle, thereby — pursuant to Rule 8.3(c) — constraining Lawyer 2 from passing along such information to disciplinary authorities without Client's consent.

This failure of the Connecticut committee to identify, confront, and explore the extent to which the confidentiality principle infuses the "uncovering the misdeeds of a colleague" scenario has produced more than merely a single instance of incautious advice. The failure has prompted the official journal of the legal profession's most populous membership organization, in an article authored by a commentator deeply hostile to the confidentiality exception,[81] to pass along that (and other) incautious advice to millions of lawyers licensed throughout the nation. That journal, in the aftermath of the Rhode Island case and Connecticut opinion, has instructed lawyers that the current status of the reporting duty obligation is as follows:

> When a Lawyer learns of the misconduct in the course of representing a client, however, the Lawyer, under Model Rule 1.6 . . . may not reveal the information without first obtaining the Client's consent. See *In re* Ethics Advisory Panel Opinion, 627 A.2d 317 (R.I. 1993). But if a lawyer has knowledge of the misconduct of a member of the lawyer's own firm, no exception applies and the misconduct must be reported. [citing as support the Connecticut Bar Association opinion and no other source][82]

This effort to *re*state the law of the confidentiality exception in the wake of this pair of developments arguably *mis*states that law in important respects.

The first quoted sentence purports to summarize the circumstances in which the confidentiality exception kicks in to override the reporting duty. In so doing, that paragraph turns for guidance to the landmark Rhode Island case and proceeds to attribute the ratio decidendi of that case to the single fact that the inquiring lawyer learned of the misbehaving lawyer's conduct "in the course of representing a client." But that explanation, as we have demonstrated at considerable length,[83] remains a dangerous message to extract from the work product of the Rhode Island justices, for at least two reasons. First, that explanation represents but one of three alternative and inconsistent explanations tossed out by the Rhode Island court. Second, Justice Murray's opinion for that

81. Joanne Pitulla, *Firm Commitments*, A.B.A. J., Apr. 1995, at 108. For evidence of Ms. Pitulla's hostility to the confidentiality exception, *see* Pitulla, *supra* note 10.

82. *Id.*

83. *See supra* text accompanying notes 32-53.

court at no point along the way pauses to indicate even the slightest agreement with this explanation. Indeed, the Rhode Island court at no point indicates that it — as opposed to the ethics panel whose decision it happens to reviewing — even buys into the explanation as a reasonable construction of the confidentiality exception.[84]

The second sentence of the excerpt likewise purports to extract a generally applicable principle about the confidentiality exception, this time from the Connecticut opinion. That principle, according to the commentator, appears to be that the confidentiality exception fails to kick in — and thus the obligation to report continues — whenever the misbehaving lawyer happens to be a member of the inquiring lawyer's firm. After all, that is precisely what the commentator says: "*if a lawyer has knowledge of the misconduct of a member of the lawyer's own firm, no exception applies and the misconduct must be reported*" (emphasis added). This purported "principle," however, represents little more than the commentator's wishful thinking stapled to an ethics opinion so poorly conceived that it conspicuously fails to mention the confidentiality duty in the course of exploring facts that centrally implicate that duty. Accordingly, even a cursory consideration of the commentator's proposed "principle" reveals that such a principle has no basis in the rules of professional conduct, the law emerging out of those rules, or the nature of the law firm. That cursory consideration, consisting of an elementary two-step analysis, would proceed something like this.

First, information concerning the manner in which a lawyer (call her Lawyer A) conducts a particular lawyer/client relationship with a client (call her Client 1), including particular decisions that lawyer makes *in* the representation, constitutes information "relating to representation of a client" within the meaning of Rule 1.6, the confidentiality rule. Put differently, a lawyer's conduct and decision-making in a representation falls well within the corpus of information that the comments to Rule 1.6 dub "all information relating to the representation."

To demonstrate this proposition, let us suppose that the misbehaving lawyer from the Connecticut opinion discussed above stood on a street corner in Hartford and informed pedestrians passing by that he had just missed the statute of limitations on Client's claim and, to compound the matter, had proceeded to pull the wool over Client's eyes by concealing the fact from Client. Setting aside the range of other ethical breaches that would be implicated by the facts, there remains little doubt that the conduct of the misbehaving lawyer would violate the core of Rule 1.6 in revealing information relating to the representation of Client without Client's consent.

84. *Id.*

The second link in the chain of reasoning represents little more than a reminder that information that achieves the status of confidential for one lawyer in a law firm retains that status for all lawyers practicing together in that firm. Put differently, rules of lawyer conduct require that lawyers practicing together — regardless of how many lawyers practice together and regardless of how many offices across the globe the lawyers they work with occupy in their practice — respect as confidential for all of them information that the law deems confidential for any one lawyer serving any one client. Indeed, it would be difficult to unearth a more basic and indisputable statement concerning the law governing lawyers who practice together than the principle that information the law deems confidential for one lawyer — that is to say, information "relating to" one particular lawyer's representation of one particular client — is information that the law deems confidential for all lawyers who practice with that one lawyer.

To demonstrate this proposition let us pose an uncomplicated hypothetical. Let us suppose that Lawyer Larry, employed by Smith, Jones & Green, L.L.P., lets slip over dinner one evening with a friend that Client Chuck — a prominent physician whose divorce is being handled by Lawyer Louise, a lawyer whose office is adjacent to that of Lawyer Larry — intentionally "bugged" his soon-to-be ex-wife's cellular telephone in an effort to dig up some dirt on her and her new lover during their separation. Little doubt exists that Lawyer Larry, who revealed the information without Client Chuck's consent, has violated the confidentiality principle; after all, Larry has blabbed information that concerns one of the firm's clients to someone outside the firm, and Larry has done so without the client's authorization.

In sum, it remains difficult to comprehend how a state ethics panel could fail to confront the seemingly inescapable conclusion that information obtained by a lawyer about the manner in which a firm colleague has conducted a lawyer/client relationship — including information about decisions made, actions undertaken, and opportunities missed by that colleague in the representation — constitutes confidential information within the meaning of the rules of professional conduct. This failure of the Connecticut committee to explore the confidentiality aspect of the facts it confronted has encouraged the fiction — and a fiction it is — that the misdeeds of firm colleagues need not be measured against the confidentiality exception set forth in Rule 8.3(c).[85] A sloppy or incomplete state bar ethics

85. It seems likely as well that the much ballyhooed case of *Wieder v. Scala*, 609 N.E.2d 105 (N.Y. 1992), has contributed to the notion that lawyers are required to report the misconduct of their colleagues notwithstanding concerns of confidentiality. Lawyer Howard Wieder had been associated with defendant law firm from 1986 until his sudden termination in 1988. In early 1987, he requested representation from the firm in connection with his purchase of a condominium. The firm assigned a fellow associate, L.L., to represent Wieder. According to Wieder's complaint, the following facts unfolded. L.L. proceeded to neglect the matter and seek to conceal that neglect from client Wieder through false and fraudulent misrepresentations. When Wieder learned of such conduct, he shared the information with two of the firm's senior partners, who conceded to Wieder that L.L. "was a pathological liar [who] had previously lied to [firm members] regarding the status of other pending legal

opinion tends to wreak a limited amount of behavioral havoc. But when the profession's leading journal republishes the fiction in the guise of legal advice, advice that seems to fly squarely in the face of foundational professional principles, the time has come to put some energy into righting the analytical ship.

VI. CLEANING UP THE MESS

Nearly a decade ago, at the conclusion of an article devoted exclusively to the reporting duty and Rule 8.3,[86] Michael Burwick suggested — without significant elaboration — a cluster of recommendations to help ameliorate what he identified as '"the more significant problems"[87] with the duty and the rule that embodies it for the bulk of American lawyers. Burwick contended that, if adopted, such recommendations would produce a rule both better understood and more widely supported than the current incarnation of Rule 8.3.[88]

The Burwick article devoted little more than a brief paragraph to the confidentiality exception embodied in Rule 8.3(c) and the relationship between

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matters. Confronted by Wieder, L.L. acknowledged his misconduct, both orally and in writing." 609 N.E.2d 105 at 106. Wieder thereupon requested the partners to report the misconduct to disciplinary authorities. They declined. Thereafter, in an effort to dissuade Wieder himself from reporting L.L., the partners told Wieder the firm would reimburse him for his losses. Wieder nevertheless met with disciplinary authorities, but shortly thereafter withdrew his grievance, learning that the firm would discharge him if he continued to press the matter. Wieder's persistence eventually led the firm to report L.L.'s misdeeds. Life at the firm then became miserable for Wieder, leading to his ultimate discharge. *Id.* Wieder thereupon sued the firm, claiming, among other things, wrongful discharge. The trial court dismissed the counts and the Appellate Division affirmed, noting that the firm could terminate an at-will employee without cause. 609 N.E.2d at 106-07. The Court of Appeals reversed, holding that Wieder's allegation that the firm discharged him for seeking to honor his reporting duty obligation stated a claim for breach of contract. 609 N.E.2d at 107-10.

The case stands for the proposition that, in New York at least, "in any hiring of an attorney as an associate to practice law . . . there is implied an understanding so fundamental to the relationship and essential to its purpose as to require no expression: that both the associate and the firm in conducting the practice will do so in accordance with the ethical standards of the profession. Erecting or countenancing disincentives to compliance with the applicable rules of professional conduct . . . would subvert the central professional purpose of [an associate's] relationship with the firm — the lawful and ethical practice of law." 609 N.E. 2d at 108. In short, the case holds simply that a law firm has no legal authority to interfere with an associate's decision to report the misconduct of a lawyer/intra-firm colleague. The case does not hold, nor does it even suggest, that lawyers generally have a duty to report the misconduct of intra-firm colleagues notwithstanding confidentiality concerns. Indeed, the case has nothing at all to do with the confidentiality exception because on the facts of the case it happens to be the client himself — Howard Wieder — who wishes to report the misconduct of his lawyer-colleague. Nevertheless, citations to the case often pop up amid arguments of those seeking to defend propositions other than those for which the case fairly can be read to represent. *See, e.g.*, Michael G. Daigneault, *Am I My Brother's Keeper*, 43 FED. LAW. 9 (June 1996) (stating that the case "reiterates the responsibility attorneys have to report professional misconduct despite an existing professional relationship with the errant attorney.") *See also* Pitulla, *supra* note 81 (accurately summarizing the limited holding of the case but suggesting that the concerns triggered by the confidentiality exception do not arise in the lawyer-as-colleague situation.).

86. Burwick, *supra* note 1.

87. *Id.* at 153.

88. *Id.* at 153-54.

that exception and the obligation embodied in Rule 8.3(a).[89] Such fleeting treatment nevertheless did not prevent Burwick from passing along two observations germane to the confidentiality exception. First, Burwick enumerated "What type of information is confidential under 8.3(c)?" as one of "the more significant problems" contributing to poor understanding and haphazard administration of the rule.[90] Second, Burwick recommended, apparently as a solution to that problem, that Rule 8.3 "[u]tilize a broad concept of confidentiality."[91]

Other commentators who have devoted attention to the reporting duty likewise have come away with the view that something continues to be amiss. Professors Geoffrey Hazard and William Hodes, in their much cited handbook concerning the law governing lawyers, conclude that "the current mandatory reporting regime is flawed."[92] Like Burwick, Hazard and Hodes attribute a considerable extent of the problem to the confidentiality exception.[93] Unlike Burwick, however, Hazard and Hodes suggest that the better solution would be to curtail or even eliminate the exception, leaving what they refer to as an "absolute" duty to report.[94]

This Article thus far has endeavored to demonstrate that events unfolding regularly since the promulgation of Rule 8.3, especially the Supreme Court of Rhode Island decision of *In re Ethics Advisory Panel Opinion No. 92-1* and the professional response to that decision, render indisputable the observation that the confidentiality exception continues to plague the understanding and administration of the reporting duty. After all, when the highest court of a state opts to devote its considerable resources to tackling facts that implicate the tension between the reporting duty and its confidentiality exception but, after considerable sound and fury, cannot explain the reason for its holding that such facts do indeed trigger the confidentiality exception, the observation that such circumstances reflect a "significant problem" — to borrow Michael Burwick's characterization — hardly seems exaggerated. Likewise, when state bar ethics panels routinely fail to connect the confidentiality exception with facts that implicate it and in the course of doing so display tentativeness and confusion about the scope of the exception, extracting from such circumstances the conclusion that a "significant problem" plagues the area does not seem unfair.

Yet, at the same time, these developments suggest the inadequacy of what few solutions have been offered. Michael Burwick's enigmatically brief and unfocused recommendation to "utilize a broad concept of confidentiality" as a way to

89. *Id.* at 142.

90. *Id.* at 153.

91. *Id.* at 154.

92. HAZARD & HODES, *supra* note 19, at § 8.3:202-1.

93. *Id.* at §§ 8:3:201–8.3:401.

94. *Id.* at § 8.3:202-1. Given comments made elsewhere by Professor Hazard about the reporting duty — *see, e.g., supra* note 2 — it seems fair to surmise that the proposal to chuck the confidentiality exception and intensify the reporting duty reflects more closely the views of Professor Hodes.

solve the interpretive problems posed by the exception does not measurably advance the ball. After all, a fair reading of the Supreme Court of Rhode Island decision reveals that Justice Murray and his colleagues indeed applied "a broad concept of confidentiality" — whatever precisely that injunction means.[95] By itself, however, the Rhode Island court's invocation of that "broad concept of confidentiality" — unaccompanied by a variety of other factors of central importance to the useful legal rule and the good appellate decision[96] — appears to have exacerbated rather than ameliorated the confusion that pervades the reporting duty landscape.

Nor do the recurring calls from commentators such as Hazard & Hodes[97] to jettison entirely the confidentiality exception pose an attractive alternative. To be sure, such a recommendation would enormously simplify the interpretive challenges to be confronted by lawyers, ethics panels, and courts in the new reporting duty regime — much the same, as we suggested earlier, that repeal of the Fourth Amendment would enormously simplify the challenges of law enforcement and the prosecution of crime. Such a development nevertheless would be profoundly unwelcome, and for a host of reasons rarely even alluded to, let alone confronted, by those who routinely express hostility toward the confidentiality exception.

One such reason is that the sacrifice of confidentiality on the altar of the reporting duty, a suggestion typically clothed in the garb of brief and indignant rhetoric rather than probing consideration of the prospective merits and demerits of such a notion,[98] has yet to emerge from any scholar, practitioner, court, or commentator who has undertaken a sustained effort at exploring the respective merits of the reporting duty, on the one hand, and the confidentiality exception, on the other. Put more directly, the case simply has not been made for creating an "absolute" reporting duty that requires lawyers to reveal confidential information over client objection in order to be faithful to it. Instructing lawyers that they *may* reveal confidential information absent client consent in order to prevent a future crime that threatens a life is one thing.[99] Instructing them that they *must* reveal confidential information absent client consent in order to accomplish little more

95. Despite their collective distaste for the result, Justice Murray and his colleagues did indeed conclude that the facts of the case triggered the confidentiality exception set forth in Rule 8.3 (c). *See supra* text accompanying notes 32-53.

96. In particular, both the rule invoked by the court — Rule 8.3 (c) — and the court's application of the rule to the facts of the case obscured the rationale for the conclusion that the information at issue satisfied the "relating to representation of a client" standard. *See supra* text accompanying notes 32-53.

97. HAZARD & HODES, *supra* note 19.

98. *See, e.g.*, Pitulla, *supra* note 10.

99. This continues to be the position reflected in the current *Model Rules*: that revealing confidential information in an effort to prevent a crime that threatens a life remains optional, discretionary, subject to the non-reviewable whim of the lawyer, rather than mandatory. *See* MODEL RULES Rule 1.6(b). My own state, like some others, has reached a different conclusion on this matter. *See* WI. SUP. CT. R 20:1.6(b) ("A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from

than trigger disciplinary action against a professional peer is quite another. In short, it hardly seems unreasonable to place the burden of persuasion on those who seek to eviscerate the confidentiality exception and leave in its wake a reporting duty more untamed, as noted below, than any American jurisdiction has been willing to enact.[100]

A second reason for harboring skepticism about the wisdom of eliminating the confidentiality exception has to do with the fact that such a development would forge a new hierarchy of professional duties — the duty to report trumping the duty to maintain client confidences — that *no* American jurisdiction and *no* collection of American lawyers has *ever* been willing to accept. Some American jurisdictions have concluded that the lawyers they license remain able to effectively serve the needs of clients and the public without being hamstrung by a reporting duty at all.[101] The remainder of American jurisdictions have concluded that the reporting duty is a professional obligation worthy of imposing only insofar as the obligation remains to some extent subservient to long-standing principles of confidentiality.[102] And no American jurisdiction has concluded that its lawyers can function effectively by dispensing with the professional duty to preserve client confidences. Quite simply, severing the confidentiality exception from the reporting duty would leave American lawyers with an unprecedented professional duty — the unqualified duty to report, even when the discharge of such a duty necessitates disclosure of otherwise confidential information, with the range of harm to clients such a duty would entail — to which they are sure to harbor even less allegiance, for which they are sure to harbor even less respect,

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committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or in substantial injury to the financial interest or property of another.").

100. This allocation of the burden of persuasion strikes me as appropriate for another reason as well. The multi-layered web of justifications that has led to robust protection for client confidences represents perhaps the most enduring canon in the professional arsenal of the American lawyer. *See, e.g.*, MONROE H. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM (1975) and MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS (1990) and HAZARD & HODES, *supra* note 19, at §§ 1.6:100-103 (citing sources). To be sure, quibbles about the precise boundaries of the confidentiality protection have been with us for a long time. Nevertheless, the extraordinary professional consensus about that which lawyers do agree in connection with confidentiality — matters about which commentators seem to speak less often than they do about the appropriate exceptions to the general rules — plays a far more important role in the day-to-day professional life of American lawyers than do the disputes at the margins. For this reason as well, folks who wish to trample on this canon should be required to make the case.

101. California, Kentucky, and Georgia remain three notable examples of jurisdictions that have self-consciously refused to mandate a reporting duty. *See* Julie L. Hussey, Comment, *Reporting Another Attorney For Violating the Rule of Professional Conduct: The Current Status of the Law in States Which Have Adopted the Model Rules of Professional Conduct*, 23 J. LEG. PROF. 265 (1999). Massachusetts recently completed a bruising debate that culminated in the state's highest court adopting the duty. For a discussion of the early chapters of that skirmish and the self-conscious rejection of the duty by Massachusetts lawyers, *see* Burwick, *supra* note 1, at 150-53.

102. Even Minnesota, which *permits* — but does not *require* — lawyers to reveal client "secrets" in order to alert disciplinary authorities to another lawyer's misconduct, does not elevate the reporting duty above principles of confidentiality. *See supra* note 52.

and of which they are sure to harbor even more profound suspicion, than they harbor vis-à-vis the current reporting obligation. And that, after all, is no mean feat.

Instead, the best medicine for what currently ails the confidentiality exception lay in the prescription written by Michael Burwick when he posed the question "What type of information is confidential under Rule 8.3 (c)?" Lawyers and the institutions in which lawyers work very much need more particularized guidance in their efforts to understand the relationship between the reporting duty — a professional obligation that does not fit comfortably in the briefcase of professional obligations carried around by most lawyers[103] — and the confidentiality exception. Indeed, it does not seem far-fetched to suggest that the need to understand the role played by the confidentiality principle in the reporting duty context remains more urgent than the need to understand the principle outside that context. After all, the reporting duty imposes an affirmative obligation on lawyers to undertake an act that, for most of us, remains profoundly counterintuitive;[104] outside of the reporting duty context, the confidentiality principle for the most part merely instructs lawyers *not* to do that which they for the most part are not inclined to do. It should be obvious as well that courts and ethics panels likewise would benefit substantially from such guidance.

Toward that end, consider the following reformulation[105] of the confidentiality exception currently set forth in Rule 8.3(c) :

> *RULE 8.3 Reporting Professional Misconduct*[106]
>
> * * *
>
> (c) The obligation set forth in subpart (a) of this rule does not apply if any of the following circumstances is met:
>
> (1)(a) the reportable lawyer is represented by the reporting lawyer, or the

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103. E. Wayne Thode, one of the first legal academics to address the reporting duty, conceded amidst an otherwise vigorous defense of the duty that "informing on another person" constitutes "an act that seems contrary to the nature of most of us." E. Wayne Thode, *The Duty of Lawyers and Judges to Report Other Lawyers' Breaches of the Standards of the Legal Profession*, 1976 UTAH L. REV. 95, 100 (1976). Empirical studies tend to confirm this intuition. *See, e.g.*, Ramage-White, *supra* note 1, *passim*, and sources cited therein at 512 n.23; and F. Raymond Marks & Darlene Cathcart, *Discipline Within the Legal Profession: Is it Self-Regulation?*, 1974 LAW FORUM 193, 206-08. Gerard Lynch long ago observed that "the heroes of the legal profession tend to be those who keep secrets faithfully rather than those who blow the whistle on wrongdoers." *See* Lynch, *supra* note 1, at 491.

104. *See, e.g.*, Thode, *supra* note 103.

105. These days, "restatement" has become something of an explosive term in the law governing lawyers community. *See, e.g.*, Fred. C. Zacharias, *Fact and Fiction in the* Restatement of the Law Governing Lawyers: *Should the Confidentiality Provisions Restate the Law*, 6 GEO. J. LEGAL ETHICS 903 (1993) (demonstrating that the emerging *Restatement (Third) of the Law Governing Lawyers*, rather than merely "restating" the law of confidentiality, undertakes a substantial amount of advocacy masquerading as restatement).

106. For the reasons set forth above, *see supra* note 12, given my druthers I would change the title of Rule 8.3.

reporting lawyer's firm, in connection with matters germane to the reportable lawyer's misconduct; or

(b) the reportable lawyer discussed with the reporting lawyer, or the reporting lawyer's firm, the prospects of securing representation in connection with matters germane to the misconduct, regardless of whether a lawyer/client relationship ultimately formed.

(2)(a) the reportable lawyer is a current client of the reporting lawyer, or of the reporting lawyer's firm, and the discharge of the obligation set forth in subpart (a) of this rule would otherwise constitute a violation of Rule 1.7 or 1.8(b); or

(b) the reportable lawyer is a former client of the reporting lawyer, or of the reporting lawyer's firm, and the discharge of the obligation set forth in subpart (a) of this rule would otherwise constitute a violation of Rules 1.9 or 1.8(b).

(3)(a) the reportable lawyer is associated in the same firm as the reporting lawyer and the information that satisfies the "knowledge" requirement of subpart (a) of this rule concerns the reportable lawyer's conduct concerning one or more clients or prospective clients of the firm; or

(b) the reportable lawyer was associated in the same firm as the reporting lawyer and the information that satisfies the "knowledge" requirement of subpart (a) of this rule concerns the reportable lawyer's conduct, occurring during the time of the joint association, concerning one or more clients or prospective clients of the firm.

(4) the reporting lawyer obtained the information that satisfies the "knowledge" requirement of subpart (a) of this rule in the course of, or as a result of, representing a client or in the course of, or as a result of, discussing the prospects of undertaking representation of a client, regardless of whether a lawyer/client relationship ultimately formed.

(5) the reporting lawyer, or the reporting lawyer's firm, has a duty imposed by any rule of professional conduct or other source of law to communicate to any current or former client the information that satisfies the "knowledge" requirement of subpart (a) of this rule.

(d)(1) In the event that the obligation set forth in subpart (a) of this rule does not apply because a circumstance set forth in subpart (c)(1) is met, the reporting lawyer shall not reveal the information that satisfies the "knowledge" requirement of subpart (a) to professional authorities. In such event, the reporting lawyer is not required to seek the reportable lawyer's consent to reveal that information but is required to consult with the reportable lawyer about the advantages and disadvantages that could redound to the reportable lawyer in the event the information were reported to professional authorities.

(d)(2) In the event the obligation set forth in subpart (a) of this rule does not apply because a circumstance set forth in subpart (c)(2) is met, the reporting lawyer shall not reveal the information that satisfies the "knowledge" requirement of subpart (a) to professional authorities. The reporting lawyer shall determine the appropriate course of action to pursue consistent with the requirements of Rules 1.7, 1.8(b), 1.9, and 1.16.

> (d)(3) In the event that the obligation set forth in subpart (a) does not apply because a circumstance set forth in subpart (c)(3), (c)(4), or (c)(5) is met, the reporting lawyer shall not reveal the information that satisfies the "knowledge" requirement of subpart (a) of this rule to professional authorities unless the affected client consents after consultation. In such event, the reporting lawyer is not required to seek the client's consent to reveal such information but is required to consult with the client about the reportable lawyer's conduct, the impact that conduct has on the client's interests, and any advantages or disadvantages that could redound to the client in the event the information were reported to professional authorities.
>
> (e) As used in this rule, the term "reportable lawyer" signifies the lawyer about whom the report to the appropriate professional authorities otherwise required under subpart (a) of this rule would be made. The term "reporting lawyer" signifies the lawyer required under subpart (a) of this rule to inform the appropriate professional authorities of the reportable lawyer's misconduct unless from doing so by subpart (c).

The suggested reformulation offers distinct and considerable advantages over the current version embodied in Rule 8.3(c).

First, it enables lawyers endeavoring to work through the thorny issues that pit the reporting duty against the confidentiality principle to do so without having to wade through a multiplicity of rules of professional conduct and a myriad of comments corresponding to those rules. At present, lawyers licensed in a jurisdiction governed by Rule 8.3 must bounce back and forth between and among Rule 8.3(a) (which sets forth the reporting duty itself), Rule 8.3(c) (which sets forth the confidentiality exception by essentially directing lawyers to Rule 1.6), the comments to Rule 8.3 (which convey the message set forth in the Rule differently from the way the Rule conveys it and, indeed, insert additional obligations not suggested by the text of the rule), and Rule 1.6 (which, at the end of the analytic line, sets forth the charmingly imprecise "relating to representation of a client" standard). In short, the reformulation synthesizes and integrates the rules and comments germane to this clash into a single cluster of guidelines that lawyers can use and understand.

Second, the reformulated rule, rather than merely suggesting to lawyers with an air of mystery that the reporting duty does not require them to disclose information protected by Rule 1.6 — a body of information far from self-evident to many lawyers in many jurisdictions, as the decisional and advisory law reveals — enables lawyers to identify precisely those situations in which confidentiality (or other) concerns suspend the duty to report. In short, the reformulated rule *shows* lawyers how they should undertake the process by which they can ascertain whether confidentiality (or other) concerns suspend their reporting duty, as opposed to the current incarnation of Rule 8.3, which merely *tells* them that confidentiality extinguishes the duty and in so doing often leaves them entirely at

sea insofar as the ultimate question — given these facts, must I report? — is concerned.

A brief tour through the particulars of the reformulation will demonstrate these advantages at work.

The reformulation begins by advising lawyers and legal decision-makers that any of five sets of circumstances will suspend the reporting duty currently set forth in Rule 8.3(a) and, in turn, require the lawyer whose reporting obligation is in question to consult with the affected client concerning the appropriate course of action to pursue.

Subpart (c)(1) reveals that the duty is suspended in the event the misbehaving lawyer happens to be a current client whose representation concerns the misconduct that otherwise triggers the reporting duty. The identical principle applies in the event the misbehaving lawyer comes seeking to secure legal representation in connection with the misconduct but a lawyer/client relationship fails to form.[107] Subpart (c)(1) thus codifies the self-evident fact currently addressed most directly in the comments to Rule 8.3 by making explicit that when the misbehaving lawyer happens to be the client represented in connection with the misconduct, long-standing principles of confidentiality and loyalty override the duty to report. Overall, this subpart would govern circumstances such as those explored in the North Dakota ethics opinion discussed above,[108] featuring an inquiring lawyer whose lawyer-client finds himself rejected for admission to the bar of a sister state for reasons rooted in serious acts of misconduct.

Subpart (c)(2) make clear that traditional conflict of interest principles — two in particular — can and do serve to suspend the duty to report. A paradigmatic current client conflict would emerge under Rule 1.7 in the event the reporting lawyer should learn about the misconduct in the course of representing *another* current client at the same time the firm represents the reportable lawyer. A former client conflict would unfold under Rule 1.9 in the event information about the misconduct arose in the course of the reporting lawyer representing another client in a context that transformed that subsequent representation into one "substantially related" and "materially adverse" to the prior representation of the

107. An instructive South Carolina ethics opinion serves to remind lawyers of the breadth of the "seeking to secure legal representation" context. S.C. Bar Advisory Op. No. 95-13 (June 1995). The facts giving rise to that opinion are essentially as follows. Friend, for whom Lawyer 1 had done some legal work in the past, invited Lawyer 1 to lunch. At lunch, Friend advised Lawyer 1 that the principal purpose of the invitation was to seek advice from Lawyer 1 concerning the conduct of Lawyer 2 in connection with a transaction in which Lawyer 2 represented Friend. According to Friend, Lawyer 2 had engaged in a wide range of unethical conduct, conduct assumed to be inconsistent with South Carolina rules of professional conduct. Lawyer 1 inquired of the appropriate committee whether these facts triggered the reporting obligation. After flagging the obvious "knowledge" issue implicated by the facts, the committee went on to suggest that, on these facts, the confidentiality principle would kick in to suspend the reporting obligation because Friend had conveyed the information in the expectation of securing legal advice.

108. *See supra* text accompanying notes 29-31.

reportable lawyer. Each of these circumstances would suspend the obligation to report. Subpart (c)(2) thus codifies a core aspect of the duty of loyalty about which the current version of Rule 8.3 remains dangerously silent, ensuring that the loyalty owed to all current and former clients continues to protect lawyer-clients even in the face of the reporting duty.[109]

Subpart (c)(3) indicates that the reporting duty also gets suspended in a situation in which the misbehaving lawyer happens to be another current or former lawyer in the same firm whose misdeeds implicate one or more clients or prospective clients of the firm. This subpart would govern circumstances such as those set forth in the Connecticut opinion[110] featuring the lawyer whose partner, now former partner, missed the statute of limitations and then lied to the client about it.

Subpart (c)(4) provides that the duty is suspended in circumstances in which the lawyer learns of the misconduct of another lawyer — neither a lawyer-client nor a lawyer-colleague — in the course of, or as a result of, a client representation or prospective representation. This subpart captures a wide variety of facts, such as those featured in the much-cited Supreme Court of Rhode Island opinion[111] as well as those at work in the Arizona ethics opinion in which a lawyer elicited the misconduct information in the course of deposing the adverse party lawyer.[112]

Finally for subpart (c), subpart (c)(5) reminds lawyers that they are liberated at least temporarily from the duty to report in any situation in which the law imposes a duty on them to pass along information about the misconduct of another lawyer to any client or former client. This subpart seeks to address circumstances similar to those encountered by the Connecticut ethics panel, in which the panel advised an inquiring lawyer that the lawyer had *both* a duty to inform the victimized client of the misdeeds of the inquiring lawyer's former partner *and* a duty to report those misdeeds to disciplinary authorities but refused to acknowledge that such circumstances trigger the right of that victimized client to have substantial control over whether the inquiring lawyer ultimately forwards along that information.

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109. To my knowledge, no commentator or decision-maker has yet observed that, given the current codification of the reporting duty in Rule 8.3, there remains unanswered the not insubstantial question of what a lawyer should do when, outside the scope of any representation, she learns information about a misbehaving lawyer who just so happens to be *either* a client in an unrelated matter *or* a former client. The proposed reformulation treats the act of reporting misconduct as if it were any other act undertaken "directly adverse" to a current client within the meaning of Rule 1.7(a), thereby suspending the reporting duty. Likewise, the proposed reformulation offers similar protection for the misbehaving lawyer who happens to be a former client. *See* MODEL RULES Rule 8.3

110. *See supra* text accompanying notes 74-85.

111. *See supra* text accompanying notes 32-53.

112. *See supra* text accompanying notes 54-73.

Subpart (d) of the proposed reformulation proceeds to address the issue of what steps lawyers must or may undertake when one of the exceptions provisions kicks in.

Subpart (d)(1) makes explicit that which should be obvious but which, unfortunately, cannot be found stated directly in the current version of the reporting duty: when the lawyer whose misconduct trips the reporting duty inquiry happens to be the client or prospective client, the reporting lawyer should understand that such circumstances extinguish the mandatory dimension of the duty and foreclose a report absent client consent. Nevertheless, subpart (d)(1) goes on to make explicit that in such circumstances the reporting lawyer should consult with the client about the pros and cons of having disciplinary authorities learn of the information. This reminds lawyers that, in some situations, it may well be in the best interests of the misbehaving lawyer-client to be the vehicle that carries the information about that misbehavior to disciplinary authorities.

Subpart (d)(2), devoted to situations in which the reporting lawyer's acquisition of knowledge about the misconduct triggers a conflict of interests — for instance, a situation in which the information comes to the reporting lawyer in the course of representing some *other* client at the same time the firm represents the reportable lawyer — reminds lawyers that in such circumstances their options are likely to be seriously circumscribed. The rule forbids *revealing* the information to disciplinary authorities, given that such an act would constitute an obvious violation of Rule 1.7. The rule likewise makes clear that the reporting lawyer and the firm must refrain from doing anything with the information that would amount to breaching the loyalty owed to current and former clients. As in all conflict-laden contexts, compliance with rules of professional conduct could well leave no choice but withdrawal.

Subpart (d)(3) deals similarly with three of the other exception-triggering circumstances. In each of these other circumstances, the reformulation offers three guiding principles. The first is that a lawyer in these circumstances shall not reveal the information concerning the misbehaving lawyer to disciplinary authorities without first obtaining the consent of whatever client the exception has kicked in to benefit. The second is that a lawyer in these circumstances is required to consult with the affected client concerning the impact of the reportable lawyer's misconduct on the interests of that client. The third is that in such circumstances the lawyer remains free to decide whether, given the distinctive posture of their particular facts, the lawyer wishes to seek client consent to reveal the information to disciplinary authorities; that is to say, lawyers confronting these circumstances are not *required* to press their clients for such consents. In this respect the reformulation endeavors to clarify the disturbing inconsistency in the current version of Rule 8.3. After all, the text on Rule 8.3 remains absolutely silent on this matter, imposing no duty at all on the lawyer who concludes that the confidentiality exception has been

triggered to approach the affected client for consent.[113] Yet the comment to Rule 8.3 sings a different tune, observing that "a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests."[114] The proposed reformulation does away with these mixed messages, making clear that a lawyer must consult with the affected client about misconduct the lawyer has happened upon as well as the consequences of that misconduct for the client and the representation. But the reformulation places the lawyer under no legal obligation to seek consent from the affected client to reveal the information to disciplinary authorities.

Overall, this proposed reformulation of Rule 8.3(c) takes few if any liberties with the prevailing law, to the extent that prevailing law can be characterized with any degree of confidence. The reformulation instead seeks to assist lawyers with their struggle to understand the instructions being flashed to them as they confront circumstances that challenge them to accommodate the reporting duty with the duty of confidentiality as well as other professionally-imposed duties. Likewise, the reformulation endeavors to offer a source of law to courts, ethics panels, and other legal decision-makers likely to prove better suited than the current version of Rule 8.3(c) to shaping clear and settled expectations in this now bewildering realm.

CONCLUSION

Good and decent intentions no doubt animated the work of those who crafted the current version of the reporting duty. Much the same can be said for those who pressed for adoption of that current version in jurisdictions across the nation. The self-conscious decision of each to refrain from allowing that duty to trample on confidentiality concerns, despite the inartful expression that decision produced, stemmed from sound intuition and wise practical considerations. Above all else, that decision reflected a respect for clients and information about client matters that can only enhance the influence of such a rule.

Unfortunately, both those expected to conform their conduct to the dictates of the rule and those responsible for applying the rule in ways that assist in the endeavor are experiencing considerable difficulties with the current version and its confidentiality exception. Whatever its other strengths and weaknesses, a rule that bewilders both those subject to it and those in charge of its enforcement will not long serve to advance the justifications that prompted it, especially in the wake of voices clamoring for changes that in fact undermine those justifications.

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113. *See* MODEL RULES Rule 8.3(a) and 8.3(c), *supra* Part I.

114. MODEL RULES Rule 8.3 cmt 2.

The time has come to rework the confidentiality exception to Model Rule 8.3. Such a development would enable lawyers, as well as those who regulate lawyers, to truly grasp the hierarchy of duties the reporting duty imposes. And such a development would provide an opportunity for lawyers, as well as those who regulate them, to reaffirm the profession's commitment to foundational principles.