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## Attorney-Client Confidentiality: A Critical Analysis

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# Attorney-Client Confidentiality: A Critical Analysis

WILLIAM H. SIMON\*

## ABSTRACT

*Attorney-client confidentiality doctrine is distinguished by its expansiveness and its rigid or categorical form. This brief Essay argues that the rationales for these features are unpersuasive. It compares the “strong confidentiality” of current doctrine to a hypothetical narrower and more flexible “moderate confidentiality” and concludes that moderate confidentiality is more plausible. It is unlikely that current doctrine yields benefits that justify its costs.*

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## INTRODUCTION

For centuries, confidentiality has been the most prominent of the lawyer’s professional responsibilities. Yet, discussion of it has tended to be dogmatic, and critical examination has been rare. In fact, there is no compelling justification for the distinctive features of confidentiality doctrine. This doctrine is supposed to induce more disclosure by clients to lawyers, and the greater disclosure is supposed to enable lawyers to perform socially beneficial functions. However, it seems unlikely that the confidentiality norms induce greater client disclosure. Even if they did, it is unlikely that the beneficial effects of such increased disclosure *to* lawyers would justify the harmful effects of the reduced disclosure *by* lawyers that confidentiality entails.

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\* Arthur Levitt Professor of Law, Columbia University. Thanks for help and encouragement to Andy Kaufman, Steve Pepper, Eli Wald, and Brad Wendel. © 2017, William H. Simon.

In order to isolate the distinctive features of attorney-client confidentiality, it is helpful to distinguish moderate from strong protection. Moderate confidentiality applies only so long as the interests it protects outweigh competing interests. All professional and most agency relations prescribe at least this much protection. For example, under the common law, an agent owes a presumptive duty to preserve the principal's secrets but may disclose "in the superior interest of himself or of a third person."<sup>1</sup> We can hypothesize a comparable moderate duty for lawyers that would mandate preservation of confidentiality "except where disclosure is clearly necessary to avert substantial injustice."

Virtually everyone would agree that *at least* this level of protection would be warranted, but many would assert that this moderate confidentiality does not go far enough. Current confidentiality doctrine, as defined by both privilege cases and disciplinary rules, provides a stronger duty. The duty is not as strong as it was in the past, but it differs from the hypothetical moderate duty in two respects.

First, its coverage is broader. Current doctrine sometimes requires the lawyer to remain silent in the face of substantial injustice that disclosure might prevent. A famous case holds that the lawyer under subpoena may not disclose client information in order to save a wrongly convicted person from prison even where the information could do no harm to the client (because he is dead).<sup>2</sup> Most current disciplinary rules seem to forbid disclosure in this particular situation.<sup>3</sup> The current rules vary widely in the range of authorization they give in other situations for harm-averting disclosure. However, some jurisdictions, including the biggest—California—have rules that often demand silence in the face of likely deadly harm that does not result from criminal conduct, financial injury from fraud even where the lawyer has unintentionally assisted it, and managerial exploitation of constituents of a corporate client.<sup>4</sup>

Aside from protecting confidentiality more broadly, current doctrine differs from the hypothetical moderate duty in a second respect. The moderate duty is sensitive to context and demands complex judgment on the part of the lawyer. In every case where confidentiality threatens to work injustice, the lawyer must weigh the value of client loyalty against the competing harm disclosure would avert. By contrast, the strong confidentiality of current doctrine is more categorical in form and seems designed to minimize judgment. Once there is a

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1. RESTATEMENT (SECOND) OF AGENCY § 395 cmt. f.

2. *State v. Macumber*, 582 P.2d 162 (Ariz. 1978).

3. Only Alaska and Massachusetts authorize disclosure generally under these circumstances. ALASKA RULES OF PROF'L CONDUCT R. 1.6(b) (2016) (permitting disclosure to prevent "wrongful . . . incarceration"); MASS. RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2016) (same); see James Moliterno, *Rectifying Wrongful Convictions: May a Lawyer Reveal Her Client's Confidences to Rectify the Wrongful Conviction of Another?*, 38 HASTINGS CONST. L.Q. 4 (2011). North Carolina requires (rather than merely permits) disclosure of exonerating information in some (but by no means all) of the circumstances covered by the Alaska and Massachusetts authorizations. See N.C. RULES OF PROF'L CONDUCT R. 8.6 (2017).

4. See, e.g., CAL. RULES OF PROF'L CONDUCT R. 3-100, 3-600(C) (2015) [hereinafter CAL. RULES].

presumptively confidential communication, the lawyer is directed to consult a list of exceptions.<sup>5</sup> If there is no relevant exception, confidentiality prevails over competing considerations, no matter how weighty they are.

## I. THE RATIONALES OF STRONG CONFIDENTIALITY

The moderate duty has one clear advantage over the strong duty of current doctrine. The moderate duty allows the lawyer to act where she perceives that action is necessary to prevent injustice and thus gives palpable meaning to the claim that her role has an immediate connection to values of justice.<sup>6</sup> What are the competing virtues of strong confidentiality?

I will focus on the case for confidentiality with respect to individual as opposed to organizational clients. Although lawyers do more work for organizational clients, confidentiality is usually appraised with respect to individual clients. The case for strong confidentiality is, in fact, weaker for organizational clients, and most of the reservations about strong confidentiality in the individual context apply in the organizational one as well.<sup>7</sup> I omit consideration of criminal defense for different reasons. The case for strong confidentiality is stronger in that sphere, and adopting moderate confidentiality there would raise issues that require more attention than space allows.

Some defenses of strong confidentiality treat it as intrinsically valuable; others treat it as instrumental to some ulterior value. The instrumental arguments are currently dominant, but intrinsic defenses continue to appear.

Confidentiality is sometimes praised as engendering a trusting relation, which some assert is intrinsically valuable.<sup>8</sup> Trust is a fulfilling form of human connection and a haven in a world of competitive striving and bureaucratic coldness. However, it is a mistake to think trust can do much work in rationalizing strong confidentiality. For one thing, the appeal to trust is embarrassed by an important feature of current doctrine—the broad permission for the lawyer to breach confidentiality to protect her own interests, for example, to collect a fee or defend against a claim that her conduct was wrongful.<sup>9</sup> A commitment that can be abrogated at will to serve the lawyer's interests seems a weak underpinning of trust.

Furthermore, although trust is one of many values protected by a well-functioning legal system, it is not a core value. The legal system exists, most fundamentally,

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5. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (2016) [hereinafter MODEL RULES].

6. See MODEL RULES pmb1. 1 (stating that the lawyer is a "public citizen having special responsibility for the quality of justice").

7. See William H. Simon, *Duties to Organizational Clients*, 29 GEO. J. LEGAL ETHICS 489, 518–23 (2016).

8. See, e.g., Albert Altschuler, *The Preservation of a Client's Confidences: One Value Among Many or a Categorical Imperative*, 52 COLO. L. REV. 349 (1981).

9. See MODEL RULES R. 1.6(b)(5). Note that the self-defense exception is available regardless of the importance of disclosure to the lawyer or the magnitude of harm to the client.

to create order and justice. When these core values are in tension with the value of trust, the latter must often yield. In addition, the strong duty often precludes the lawyer from making disclosures to protect third parties from client breaches of trust. Even if it were conceded that trust were a more important value than justice, why should the trust of the client in her lawyer prevail over the trust of the third party in the client?

Another argument for confidentiality as intrinsically valuable sees it as an entailment of liberty. Law is designed to protect liberty by guaranteeing each individual a sphere of autonomy in which he can act as he pleases. This scheme can only work if individuals can discover the boundaries of their spheres, and discovery requires legal knowledge. If attaining legal knowledge involved a risk that the lawyer would make harmful disclosures, access to such knowledge, and hence liberty, would be impaired.<sup>10</sup>

The argument is valid in an important sense, but it fails as a rationale for strong confidentiality. To say that access to legal knowledge is important to liberty is not to say that access must be costless or unqualified. Except for criminal defense and a very small number of other exceptions, a person has no right to legal services that she cannot pay for, and in fact, financial cost precludes access to legal advice for many people in many situations. The possibility of adverse disclosure is just an additional cost, probably for most people a considerably less serious one than financial cost.

Moreover, while it is more plausible to claim liberty than trust as the normative core of the lawyer-client relation, the significance of liberty for confidentiality is ambiguous. Liberty implies client autonomy, but it also implies respect for the autonomy of others. From a liberty perspective, the problem with strong confidentiality is that it often implicates the lawyer in the client's violation of others' liberty. The lawyer's general professional duty to her client is explicitly bounded by a duty to respect the rights of others.<sup>11</sup> The norm that aspires to reconcile individual autonomy with respect for the autonomy of others is justice. It is more helpful to invoke justice than liberty as the foundational value of the legal system because the term connotes both the client's rights and the limits on those rights.

A convincing argument for strong confidentiality must connect confidentiality and the trust it engenders to some interest in the vindication of law, and ultimately, justice. The currently dominant argument is instrumental. It asserts that strong confidentiality serves justice, albeit indirectly. The argument rests on two propositions. First, the disclosure premise: strong confidentiality is necessary

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10. See Stephen Pepper, *Why Confidentiality?*, 23 *LAW & SOC. INQ.* 331, 334–37 (1998).

11. This duty is expressed in such provisions as MODEL RULES R. 1.2(d) (forbidding the lawyer to counsel or assist the client in criminal or fraudulent activity); R. 3.3 (mandating “candor” toward a tribunal); R. 3.4 (containing rules requiring “fairness to opposing party and counsel”); R. 4.1 (forbidding lawyer misrepresentation); R. 8.4(c) (forbidding “dishonesty, fraud, deceit or misrepresentation”).

for informed legal advice. Clients will not fully disclose relevant facts to lawyers without assurances that their disclosures will not disadvantage them. Second, the benefit premise: informed legal advice furthers the rule of law and justice.

Clearly, the second premise is as important as the first. Confidentiality is a subsidy—a socially costly advantage—to clients (and a marketing boon to lawyers). The injustice confidentiality causes is a social cost that must be justified by some more important or weighty justice it might make possible. Where do these benefits come from? Basically, the bar makes two arguments, one with respect to client communication about past facts; one with respect to client communication about future plans.

With respect to past facts, the social benefit of improved disclosure is better rights enforcement.<sup>12</sup> The lawyer needs to know all the material facts to vindicate the client's rights. Regarding future plans, the social benefit is deterrence of unlawful conduct. When the lawyer knows all the material facts, he can explain what the law requires, and that explanation will tend to induce compliance.<sup>13</sup>

These rationales, however, are not convincing. The defense of strong confidentiality requires *net* positive effects. It is not enough that confidentiality provides some benefits of the types hypothesized. It also clearly has costs. Reduced lawyer disclosure means more injustice. The rights of non-clients may be impaired because confidentiality prevents disclosure of relevant information.<sup>14</sup> And client wrongdoing that could have been deterred if confidentiality had not precluded lawyer disclosure will occur where lawyers fail to dissuade. Confidentiality deprives the lawyer of the most potent inducement to client compliance—the threat of disclosure. The question then is whether the positive effects of providing more information to lawyers outweigh the negative effects of precluding lawyer disclosures to mitigate injustice.

## II. EXPANSE

Of course, we have virtually no information on the aggregate effects of confidentiality. The bar has never shown any interest in researching this question. But the intuitive appeal of the rationales erodes on reflection.

First, with respect to past facts, why are assurances necessary to induce client disclosure? Surely the client has no need for assurances to induce her to disclose

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12. See Ronald J. Allen et al., *A Positive Theory of Attorney-Client Privilege and the Work Product Doctrine*, 19 J. LEGAL STUD. 359 (1990); *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450, 1501–02 (1985).

13. MODEL RULES R. 1.6 cmt. 2; *In re Schafer*, 66 P.3d 1036, 1042 (Wash. 2003).

14. Discussions of privilege frequently assert that it should be narrowly construed because it impairs access to evidence needed for accurate fact-finding, and hence, just adjudication. See Paul Rice, *Attorney-Client Privilege: Continuing Confusion About Attorney Communications, Drafts, Pre-Existing Documents, and the Source of Facts Communicated*, 48 AM. U. L. REV. 967, 970 n.14 (1999) (citing cases). This stricture is not asserted about the duty of confidentiality under the disciplinary rules, though that duty produces the same negative effect as the privilege.

facts she knows will help enforce her rights. It is possible that clients will withhold helpful facts because of mistaken understanding of the law. Apologists argue that such mistakes are likely with “contingent claims,” such as self-defense or contributory negligence, where the claimant has to admit facts that, in isolation, might be inculpatory. These examples, however, are likely to be known to lay people, and can be easily explained to those who do not know them. Even with less obvious claims, all the lawyer needs is a general idea of the kind of claim in question in order to explain to the client the kinds of facts that would be helpful to her.<sup>15</sup>

True, lawyers need to know not only the facts helpful to the client’s claim, but also material adverse facts that will be raised by opposing parties. The lawyer needs to know such facts in order to prepare to respond to them. Clients might be reluctant to volunteer these facts. But even strong confidentiality does not enable the lawyer to assure the client that she will not be disadvantaged by disclosure of adverse facts. Adverse facts may indicate that the client lacks a good faith basis to assert a claim or adopt a tactic. For example, if a defendant client admits the authenticity of a key document, the lawyer will have to forego putting the plaintiff to proof on the matter, thus surrendering a potentially valuable strategic move. More importantly, the lawyer will very likely have to disclose adverse facts to the opposing party in discovery. If the opposing party was unaware of such facts or unable to prove them, this required disclosure could entail a major disadvantage.

Second, with respect to client disclosures about future plans, what does the lawyer say that induces the client to conform his behavior to the law? The client who intends to obey the law in any event has no need of confidentiality assurance to disclose his plans to the lawyer. Assurance would only be important to one who thought that he might pursue his plan even after learning that it was illegal. What does the lawyer say to such a client to induce him to abandon an illegal course of conduct? The lawyer could describe the penalties for violating the law. But that information would tend to induce compliance only if the penalties were higher than the client expected. If the penalties were lower than the client expected, the information would tend to have the opposite effect (as observers have often noted in such fields as tax and labor law<sup>16</sup>).

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15. Many criminal defense lawyers interview in a way that tries, iteratively, to communicate to clients what facts would be in their interest to disclose without encouraging them to open up generally. See KENNETH MANN, *WHITE COLLAR DEFENSE* 104–11 (1985). This practice suggests that current doctrine is not strong enough to induce the kind of candor it aims for. But it also suggests that full client disclosure is not necessary for effective rights enforcement. Reports of this practice do not suggest that the lawyers are missing needed facts.

16. In both tax and management-side labor law, the penalties for some misconduct, adjusted for the probability of enforcement, are so low relative to gains from the misconduct that the deterrent effect of the penalties is grossly suboptimal. For clients not previously aware of them, the penalties are more likely to appear more lenient than expected rather than more severe. See, e.g., Michael J. Graetz & Louis L. Wilde, *The*

The lawyer can appeal to the client's long-run self-interest in maintaining relationships or reputation. But the lawyer can honestly appeal to such interests only when the client is likely to suffer net damage from the conduct in question. Where the client has a good prospect of getting away with unlawful conduct, the lawyer must appeal to something other than self-interest. At this point, the lawyer is left to moral appeal. However, because the client's commitment to respecting the law is at best ambivalent (otherwise confidentiality would be unnecessary), and the lawyer has no special training or expertise in moral suasion, there is no reason to expect great success from such efforts.

Indeed, the structure of the disciplinary rule protection suggests that the bar has little confidence that lawyer advice has a substantial deterrent effect. The rules are inconsistent with their rationale. If the legal advice made possible by strong confidentiality had a substantial deterrent effect, confidentiality should be strongest with respect to information about the most serious harms, the harms we most want to deter. The rules provide just the opposite. The only explicit exception for third-party harm provided in all jurisdictions is to prevent death or serious bodily injury.<sup>17</sup> When the exceptions go farther, they tend to relax protection for the next most serious harms, such as criminal harm and harm in which the lawyer's services are implicated.<sup>18</sup>

An encompassing problem with both the rights-enforcement and deterrence rationales is that even the strongest confidentiality norms provide little protection against mandatory disclosure duties that apply to the client. The attorney-client privilege protects only "communications," not the "underlying facts" contained in them.<sup>19</sup> The professional duty of confidentiality yields when some independent law requires disclosure.<sup>20</sup> If the client has a duty to disclose, confidentiality does not license withholding facts. If the lawyer has responsibility for the client's compliance with disclosure duties—for example, in civil discovery, or under the securities laws, or pursuant to an environmental regulation—the lawyer will have

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*Economics of Tax Compliance: Fact and Fantasy*, 38 NAT'L TAX J. 355 (1985); Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983).

17. See CAL. RULES R. 3-100 (providing as the only explicit exception from confidentiality disclosures necessary to prevent death or substantial bodily injury resulting from a criminal act).

18. See N.Y. RULES OF PROF'L CONDUCT R. 1.6(b)(2) (2017) (providing an exception for information necessary to prevent the client from committing a crime); MODEL RULES R. 1.6(b) (providing an exception for information necessary to prevent or rectify serious harm resulting from unlawful client acts in furtherance of which the lawyer's services have been used).

The assumption that the deterrent effect of disclosure by professionals outweighs the deterrent effect of client confidentiality is evident in child abuse reporting statutes. Most states have statutes mandating reporting from a range of professionals. Although lawyers are sometimes exempted, therapists are not exempted even though they are the professionals whose training would most equip them to dissuade the client from harmful conduct. See U.S. DEP'T OF HEALTH & HUMAN SERVS., MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT (2015), <https://www.childwelfare.gov/pubPDFs/manda.pdf> [<https://perma.cc/E9Q9-7MHG>].

19. Rice, *supra* note 14, at 970.

20. See, e.g., MODEL RULES R. 1.6(b)(6) (providing an exception to confidentiality for disclosure required to comply with "other law").



to insist on disclosure even if the client objects and the lawyer learned of the fact in a confidential communication. Thus, if the client is subject to relevant disclosure duties, the lawyer cannot assure her that she will not be worse off for her candor.

Even if the rights-enforcement and deterrence rationales were otherwise compelling, the pervasive presence of mandatory disclosure regimes would undermine them. With the major exception of criminal defendants, most clients are surrounded by disclosure duties. Civil litigants must disclose virtually any relevant information that is asked for. Taxpayers have extensive disclosure duties. Public businesses must make extensive disclosures under the securities laws, and most businesses must make disclosures regarding tax, employment, health-and-safety, environmental, and/or other regulatory matters.

When we add to the limitations imposed by mandatory disclosure duties the confidentiality exceptions under both evidence law and disciplinary rules, current protections seem so debilitated that one wonders how they could have any potent reassuring effect. I have noted, for example, that the lawyer has broad discretion to breach confidentiality for his own protection. And evidence doctrine denies privilege under a variety of circumstances where it deems the client, often quite counterintuitively, to have waived protection.<sup>21</sup>

It is hard to see how an unsophisticated client who was fully informed of the limitations of the privilege would open up to her lawyer more than she would under moderate confidentiality. To the extent clients do disclose potentially compromising information, it may be because lawyers exaggerate the scope of protection by failing to mention the exceptions.<sup>22</sup> Given how extensive and sometimes technical the exceptions are, it would be cumbersome and intimidating to elaborate them fully at the outset of the relationship. But if the disclosure-inducing effect of current doctrine depends on giving clients a misleading impression of its protections, that raises a troubling issue about client loyalty. Moreover, if the misrepresentation, rather than the actual doctrine, is doing the work of inducing client disclosure, there would be no cost to changing the doctrine to moderate confidentiality as long as lawyers continued to misrepresent the actual scope of protection.<sup>23</sup>

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21. For example, the client can waive privilege inadvertently by discussing relevant information with family or friends, by disclosing it to government officials, or by conferring with the lawyer in circumstances where others can overhear. See W. BRADLEY WENDEL, *PROFESSIONAL RESPONSIBILITY: EXAMPLES AND EXPLANATIONS* 190-93 (5th ed. 2016).

22. Fred Zacharias surveyed the Tompkins County, New York, bar about confidentiality and received sixty-three responses (out of 145 lawyers). Seventy-two percent of respondents indicated that they tell clients "only generally that all communications are confidential" and do not mention exceptions. Fred Zacharias, *Rethinking Confidentiality*, 74 *IOWA L. REV.* 351, 379-80, 386 (1989).

23. I do not favor such misrepresentation, but there has been a defense of analogous practices. See generally Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 *HARV. L. REV.* 625 (1984) (describing sympathetically situations in which the officials and lawyers tolerate or encourage an understanding of law among the lay public different from their own).

The growth of mandatory disclosure regimes and lawyers' acceptance of a central role in compliance with them suggests why a shift to moderate confidentiality would not create tension with the "adversary system." The adversary system contemplates a division of labor in which each lawyer concentrates on her client's claims and goals and assumes that, at least when all parties are well represented, justice is better served than when lawyers have demanding responsibilities to non-client interests. This rationale, however, is most plausible with respect to advocacy and planning, as opposed to information control. The currently dominant argument for the adversary system emphasizes the benefits of cognitive specialization in developing separate perspectives that are ultimately pooled and reconciled in the litigation or negotiation processes. By focusing on client interests, lawyers perceive arguments or interests that a broader perspective would obscure.<sup>24</sup> Whatever one thinks of these claims, it is no longer plausible to contend that the benefits of specialization extend to information control. To the contrary, modern disclosure regimes assume that in most contexts decision-making is improved when parties are required to share relevant information. Modern civil discovery was once resisted on the ground that it compromised client loyalty or forced lawyers to do their adversary's job for them. Insofar as they concern information disclosure, these arguments have been decisively rejected in favor of the belief that a level playing field in information makes for better decisions. Thus, the additional disclosure that moderate confidentiality would permit is fully compatible with the adversary system as it is currently practiced.

### III. CATEGORICAL JUDGMENT

This brings us to the second way in which the current doctrinal version of strong confidentiality departs from the hypothetical moderate version—its categorical form. Strong confidentiality is a rule rather than a standard. To be sure, it is a rule with many exceptions and qualifications. Yet, even when these exceptions and qualifications are fully stated, current doctrine is less sensitive to contextual facts and circumstances than the moderate version.

The contextual form of moderate confidentiality might seem to have disadvantages both from the client's perspective and from the lawyer's. For the client, moderate confidentiality might give less reassurance because the client might be uncertain about the meaning of "substantial injustice," or the lawyer's understanding of the term. For the lawyer, a disadvantage of moderate confidentiality is that it carries more uncertainty about what courts and regulators expect of him. Some might also worry that lawyer judgments about "substantial injustice" would be so

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24. *E.g.*, Lon L. Fuller, *The Adversary System*, in *TALKS ON AMERICAN LAW* 42–47 (Harold Joseph Berman ed., 1971) (justifying the adversary system on the basis of cognitive specialization that facilitates better development of arguments).

inconsistent that it would be unfair to the clients who ended up disadvantaged by them.

It is true that a rule that protects confidentiality under all circumstances provides more reassurance to the client than one that permits disclosure when the lawyer believes it will prevent “substantial injustice.” However, that comparison is not relevant because doctrine has never protected confidentiality under all circumstances, and current doctrine is riddled with exceptions and qualifications. A pertinent assessment must compare the moderate confidentiality norm with a strong rule that protects confidentiality unless disclosure is required by mandatory reporting laws, by the lawyer’s own interests, by conduct that inadvertently waives it, by unlawful client purposes, or by one of a half dozen other exceptions. It is unlikely that the legally unsophisticated client for whom strong confidentiality is designed could readily grasp many of these exceptions and qualifications individually, much less all of them together, at the outset of the relationship when she is deciding what to confide to the lawyer.

If we compare the moderate norm with current doctrine on the assumption that the relevant norms are fully disclosed to the client, it is far from clear that the moderate version gives less assurance. The moderate norm sums up all the limitations in a single phase—“substantial injustice”—that is meaningful to lay people. Every client will have some notion of substantial injustice. She may lack confidence that her notion coincides with the lawyer’s, but preliminary discussion may provide some clarification.

Notice that the moderate norm takes the form of a presumption in favor of confidentiality. Confidentiality governs *unless* disclosure is *clearly necessary* to avert substantial injustice. So the question is not whether lawyer and client share the same precise conception of substantial injustice. No doubt there are innumerable marginal cases where there is wide disagreement about what constitutes substantial injustice. Rather, the question is whether the client is likely to feel she can anticipate what the lawyer will view as a clear case of substantial injustice in the circumstances likely to arise from her situation.

The idea of some shared moral understanding between lawyer and client seems implicit in the assumption of current doctrine that, once the lawyer learns the facts, she can induce the client to configure her plans along legally acceptable channels. With respect to future plans, the absence of shared moral understanding would often prevent the lawyer from performing the channeling function that makes legal advice socially valuable. If client wariness impairs the lawyer’s ability to induce client candor under a moderate duty, then so might it impair her ability to channel the client’s behavior under a strong duty.

The lawyer has her own concerns about grounding a duty in “justice.” She may feel it leaves her too uncertain about her obligations. Yet, “justice” seems the best term for this alternative formulation because it connotes legality in its more aspirational dimensions and legal judgment in its more discretionary forms. The term should not be understood as a matter of lay morality or individual subjective

inclination. Rather it bridges legality and morality in circumstances where the ambiguity or inconsistency of legal norms calls for thicker, more complex decisions.

One sector of practice where we expect lawyers to make contextual decisions about justice routinely is prosecution. “To seek justice” is a duty explicitly ascribed to prosecutors in the exercise of their discretion.<sup>25</sup> No one understands this norm as an invitation to the prosecutor to indulge personal or subjective commitments. Prosecutorial decisions are shaped extensively by positive law. But positive law alone does not always provide adequate guidance. There are too many laws relative to the resources available to enforce them, and enforcement is sometimes perceived as harsh or wasteful. So prosecutors need to draw on informal social norms to assess the relative importance of different laws and of laws and non-legal social values. And adjudication depends on norms of procedural fairness that prosecutors are expected to observe even when they are not codified in positive law.<sup>26</sup> The prosecutor thus understands justice as centered around positive law but supplemented by widely shared informal norms and by professional views of procedural fairness. Where private lawyers have discretion with respect to ethically charged matters, as indeed they do even now under the current exceptions to the duty of confidentiality, their duty should be understood in analogous terms.

Of course, there is an important difference between judgments about justice in the exercise of prosecutorial discretion and private lawyer judgments under moderate confidentiality. The prosecutor’s client is the public. So he acts only in the public interest, and justice is an integral component of the public interest.<sup>27</sup> The private lawyer has a duty to advance the private interests of the client. So justice for the private lawyer is often less a client goal than a constraint. This difference is reflected in the most general formulation of ethical duty. The prosecutor is to “seek justice.” By contrast, the private lawyer is to seek the client’s goals *within the limits of justice*. Moderate confidentiality reflects this point. It creates a presumption of confidentiality that is rebutted only when it is *clearly necessary* to avert *substantial* injustice. The burdens of judgment are thus less on the private lawyer. She can rely on the presumption unless there is a clear and compelling reason not to. There is more likely to be consensus about such judgments than about judgments of justice more generally.

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25. “The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict.” STANDARDS FOR CRIMINAL JUSTICE, The Prosecution Function, Standard 3-1.2(b) (Am. Bar Ass’n 4th ed. 2015).

26. *See, e.g.,* *Alcorta v. Texas*, 355 U.S. 28 (1957) (finding a due process violation in a prosecutor’s knowing elicitation of testimony which, though literally true, conveyed a “false impression”).

27. Courts in civil rights cases sometimes distinguish “state” interests in some aggregate benefit from “individual” interests in fairness, but this is misleading. Fairness is a social, and hence public, interest as well as an individual one. *See* Roscoe Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1, 3–5 (1943).

Lawyers should not be heard with much sympathy when they resist duties defined in ways that call for complex judgment. The capacity for complex judgment is one of the defining features of professional expertise. Lawyers typically market themselves to prospective clients as able to deal with uncertain situations. Their own duties to clients are framed in terms of contextual norms, especially the reasonableness norm that constitutes the core of the duty of care. And many basic duties to third parties that lawyers share with clients involve contextual norms. For example, *reckless* failure to verify suspicious facts or clarify ambiguous statements can constitute an element of a fraud claim.<sup>28</sup>

Doctrine has many ways of taking account of the difficulties of judgment for both disciplinary and liability purposes. For malpractice purposes, the reasonableness norm gives lawyers the benefit of the doubt in unclear cases. And in other contexts, such as those governed in corporate law by the business judgment rule or in civil rights by the “qualified immunity” of government officials, we widen the range of latitude by heightening the standard of liability from negligence to recklessness.<sup>29</sup> A move to moderate confidentiality could be accompanied by liability or disciplinary rules that protected lawyers for good faith non-reckless decisions.<sup>30</sup>

Moreover, the claim that we must avoid contextual norms because of lawyers’ limited capacity for judgment has implications that raise doubts about the categorical norms of strong confidentiality. Categorical norms reduce the burdens of judgment on individual lawyers in particular situations, but they increase the burdens of judgment on the institutions that craft the rules (whether courts, legislatures, or bar associations). This difficulty points to a major advantage of contextual norms. A contextual norm delegates to the individual practitioner responsibility to act in accordance with the circumstances of the particular case. While it demands complex judgment, its information demands are relatively modest. The relevant circumstances of the particular case will be relatively accessible to her. By contrast, a rule-maker trying to streamline individual judgment through a categorical rule needs global knowledge of aggregate effects of alternative categorical rules. Such information is inevitably incomplete and speculative. Under a contextual norm, if decisions are reported and reviewed by

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28. *See, e.g.*, *United States v. Benjamin*, 328 U.S. 854 (1964).

29. *See, e.g.*, *Smith v. Van Gorkom*, 488 A.2d 858, 873 (Del. 1985) (liability for corporate director business judgments requires showing of gross negligence); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (liability of government officials for civil rights violations requires that relevant duty be “clearly established”).

The current exceptions to confidentiality in the disciplinary rules seem to contemplate unreviewable discretion on the lawyer’s part when there is a relevant exception. This seems excessive protection, especially with respect to self-interested disclosure.

30. Claims against lawyers for disclosure of client information for unselfish reasons are exceedingly rare, but one notable example seems to suggest that, even without an explicit exception, unselfish disclosure might be permissible if it is not reckless. *See In re Schafer*, 66 P.3d 1036, 1043 (2003) (approving discipline for an apparently unselfish disclosure but only after noting that the lawyer could have accomplished his unselfish purposes through publicly available information without using client confidences).

courts or disciplinary tribunals, precedents can guide future discretion in the fashion of the common law, and if precedents assume a general pattern, they can then be codified into rules. But in our present circumstances of ignorance and opacity, it is less realistic to assume that central rule-makers can formulate categorical rules effectively than it is to assume that individual practitioners have the capacity to make effective judgments under contextual standards.

Lawyers sometimes resist duties to “justice” and other abstract ideals by saying that it is unrealistic and perhaps arrogant for the bar to claim on their behalf deep knowledge of such ideals. But justice is indisputably a basic goal of the legal system. It follows that *some* people *must* have an understanding of its meaning in order to design and operate an effective regulatory regime. As matters now stand, ultimate responsibility for the design of the confidentiality regime lies with judges, but the bar plays a powerful, often preemptive, role. So the key question is not whether lawyers have deep insight into justice, but whether better decisions result when individual lawyers make decisions about justice or when lawyers collectively embody their views of justice in relatively categorical rules. This comparison involves many issues, but consideration of information demands indicates an important advantage of a contextual norm.

### CONCLUSION

The rationales for strong confidentiality are unconvincing. There is no reason to believe that strong confidentiality induces greater disclosure by clients to lawyers, and even if it did, there is no reason to believe that the added disclosure to lawyers produces socially desirable effects sufficient to justify the socially undesirable effects of reduced disclosure by lawyers.

Moderate confidentiality may sound more radical than it would turn out to be in practice. In jurisdictions that have adopted all the exceptions to confidentiality in the *Model Rules*, permission for disclosure already covers much of the territory in which moderate confidentiality would permit disclosure. There are a few categories of potential injustice where the current exceptions do not reach. For example, the *Model Rules* do not permit disclosure to prevent economic harm unless the lawyer is implicated in the harmful acts. But extending exceptions to these areas would not represent radical change.

In these jurisdictions, the main advantage of a move to moderate confidentiality would be twofold. First, the change would give coherence to confidentiality exceptions by unifying them around a single, compelling concept—justice. Second, moderate confidentiality would be responsive to cases that fall in the cracks between the current discrete exceptions, including idiosyncratic but highly compelling cases like the one involving the apparently innocent convict.

In jurisdictions with more restrictive disclosure permission than the *Model Rules*, moderate confidentiality would be a bigger change. However, that change would be consistent with what is arguably a strong trend toward broadened

permission over the past decades. No doubt many would resist the change as unwise. But it would not be radical.

As for privilege doctrine, much of the territory where moderate confidentiality would deny confidentiality is already occupied by the crime-fraud exception and by the doctrine that facts must be disclosed in response to otherwise valid discovery or reporting demands even where the lawyer has learned of them in a privileged communication.