

1990

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### Recommended Citation

Lee A. Pizzimenti, *The Lawyer's Duty to Warn Clients About Limits on Confidentiality*, 39 Cath. U. L. Rev. 441 (1990).

Available at: <https://scholarship.law.edu/lawreview/vol39/iss2/6>

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## ARTICLES

### THE LAWYER'S DUTY TO WARN CLIENTS ABOUT LIMITS ON CONFIDENTIALITY

*Lee A. Pizzimenti* \*

*Remember, whatever you tell me is strictly confidential. I cannot and will not divulge anything you say to anyone else without your express permission.*<sup>1</sup>

*You should confide in [your] lawyer . . . . But you should also realize that if your lawyer believes you intend to commit perjury, your lawyer can report this to the judge . . . .*<sup>2</sup>

*A lawyer may reveal . . . [c]onfidences or secrets necessary to establish or collect his fee or to defend himself . . . against an accusation of wrongful conduct.*<sup>3</sup>

Although the duty to maintain confidences of a client is universally recognized,<sup>4</sup> limitations on that duty do exist.<sup>5</sup> Yet, lawyers sometimes say noth-

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\* Associate Professor of Law, University of Toledo College of Law; B.G.S., University of Michigan, 1977; J.D., Wayne State University, 1981. I would like to thank Daniel Steinbock for educating me concerning criminal procedure, and Richard Wright for providing me with the framework for a discussion of deontological reasoning. I would also like to thank Nancy Moore and Thomas Shaffer for their review and criticism of an earlier draft, and David Luban for his helpful hypotheticals. I am especially grateful to my colleague, Susan R. Martyn. We have engaged in so many conversations regarding this topic that I am unsure where my ideas end and hers begin. I would also like to express my appreciation to H. Terrence Smith for his encouragement, understanding, support, and editing skill. Finally, I would like to thank Cassandra Phillips and Stephen DiNolfo for their invaluable research assistance.

1. D. BINDER & S. PRICE, *LEGAL INTERVIEWING AND COUNSELLING: A CLIENT CENTERED APPROACH* 108 (1977) (suggested statement to be given to clients to facilitate discussion).

2. Ogletree, *The Future of Defense Advocacy*, 136 U. PA. L. REV. 1903, 1904 (1988) (suggested "Miranda" warning to arrestees).

3. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(4) (1980) (footnote omitted) [hereinafter MODEL CODE].

4. See *infra* notes 9-20 and accompanying text.

5. See *infra* notes 30-36, 103-15 and accompanying text.

ing to clients about these limitations,<sup>6</sup> or misstate the scope of protection confidentiality rules provide.<sup>7</sup> As a result, a client may make statements he would not have made had he known that his lawyer might later disclose them.<sup>8</sup> The ensuing client vulnerability to possible disclosures without his permission has both legal and moral implications.

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6. In a recent survey of attorneys, Professor Zacharias of Cornell Law School found that 22.6% "almost never" informed clients about confidentiality, and 59.7% stated they informed clients in less than 50% of their cases. Of clients surveyed, 72.9% stated that their first attorney did not tell them about confidentiality. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 382-83 (1989). Inadequately informed clients seeking information from other sources (such as friends, books or television) become misinformed. *Id.* at 383. In fact, 42.4% of those surveyed believed that confidentiality requirements were absolute. *Id.* Although Professor Zacharias points out that his survey is not dispositive given his small and homogeneous subject group, his results clearly illustrate that some lawyers fail to inform clients or actively misrepresent the law. *See infra* note 7.

7. Professor Zacharias' survey disclosed that 72.1% of lawyers surveyed "admitted that they tell their clients 'only generally that all communications are confidential.'" Zacharias, *supra* note 6, at 386. Only 27.8% routinely tell their clients that exceptions to the confidentiality rules exist. However, of the 59.7% of lawyers reporting that they inform clients about confidentiality in less than 50% of their cases, 84.6% say only that "all communications are confidential." *Id.* Of those lawyers who discuss confidentiality in response to direct questions or to combat client reticence, 82.8% overstate the protection that statements will receive. *Id.* Zacharias notes that lawyers should be especially sensitive to possible deception if clients have expressed concern about confidentiality. *Id.* at 382-86. Because informed consent is required when facts are material, Professor Zacharias is right. *See infra* notes 135-84 and accompanying text. A client would probably not inquire about confidentiality unless he deemed it material to his decisionmaking.

8. *See* Zacharias, *supra* note 6, at 386 n.174 (11.3% of uninformed clients would withhold information.) *But see id.* (11.8% of informed clients would withhold information). Binder and Price explain that some clients only reluctantly discuss certain topics. If the lawyer determines that she should pursue an issue, she may overcome the client's reluctance through using "motivational" statements that express the lawyer's empathetic understanding. D. BINDER & S. PRICE, *supra* note 1, at 105. Next, the lawyer should make statements that Binder and Price have coined as "facilitators," which outline the "reward" or benefit the parties stand to gain by sharing information. *Id.* at 106. The following represents a typical facilitating statement: "The way you can best help yourself is by letting me know what happened. Only if I have all the information can I adequately protect your interests." *Id.* Binder and Price expressly state that assurances of confidentiality such as the above quoted facilitating statement serve their purposes well. *Id.* at 108. *See, e.g., supra* note 1 and accompanying text. *See also* A. AMSTERDAM, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES 106-10 (1988) (stating that assurances of confidentiality help the lawyer assure client of her loyalty). While this Article does not suggest that Binder and Price advocate deception, their attempts to gather information from clients by facilitating conversation can mislead clients about the scope of confidentiality. *See also* K. MANN, WHITE COLLAR CRIME 37 (1985) (criminal lawyers use assurances of confidentiality to create rapport). Of course, it is not misleading to tell clients no disclosures will be made if the attorney does not intend to make any disclosures. Although Professor Amsterdam does not expressly state that he does not believe any disclosures should be made, one can infer that view from his proposed statements that he will not share anything the client reveals. A. AMSTERDAM, *supra*, at 106-10. This view will result in violation of the ethical rules in those jurisdictions which mandate disclosures, *see infra* notes 34, 67, but some

Section I of this Article outlines the current scope of confidentiality rules and their exceptions. Sections II and III establish that failure to inform a client about potential limitations on confidentiality and subsequent disclosure by an attorney of information garnered during conversations with a client probably do not raise constitutional questions or create civil liability. However, active deception, or even negligent failure to provide sufficient information to assure informed consent, raises serious issues at the heart of the attorney-client relationship. Section IV considers these issues of informed consent and advocates that lawyers should presume that a discussion of the limits on confidentiality is necessary. Attorneys should generally assume that clients consider such information material to their decisionmaking and inform clients of the potential for disclosure. The Article concludes with the assertion that failure to inform should, where appropriate, provide a basis for discipline or malpractice liability.

## I. THE JUSTIFICATION AND LIMITS OF CONFIDENTIALITY

The requirement that a lawyer refrain from disclosing the confidences of her client is a cornerstone of the attorney-client relationship.<sup>9</sup> Legal ethics codes include rules prohibiting disclosures within the narrow confines of the attorney-client privilege<sup>10</sup> and impose a broad ethical duty to refrain from divulging nonprivileged information that the client would want withheld.<sup>11</sup>

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lawyers may conclude the view is the best moral alternative. *See infra* notes 12, 32-33 and accompanying text.

9. Michael Bayles outlined the basic duties of a professional: trustworthiness, honesty, candor, competence, diligence, loyalty, fairness, and discretion. M. BAYLES, *PROFESSIONAL ETHICS* 77-99 (2d ed. 1989). He noted that discretion is a broader requirement than maintaining confidences, the underlying value of which is protection of privacy. *Id.* at 96. Bayles' view runs parallel to the view of legal professional codes. *See infra* notes 10-11.

10. A court may not compel a lawyer to testify regarding matters protected by the attorney-client privilege. WIGMORE, *EVIDENCE* § 2292 (McNaughton Rev. 1961). Yet, this privilege only exists:

- (1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived.

*Id.* The attorney-client privilege exists in some form in every United States jurisdiction. C. WOLFRAM, *MODERN LEGAL ETHICS* 250 (1986). For a discussion of the attorney-client privilege and its limitations, see Zacharias, *supra* note 6, at 355 n.18; *see generally* C. WOLFRAM, *supra*, at 250-301; Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 IOWA L. REV. 1091, 1106-19 (1985).

11. *See, e.g.*, CANONS OF PROFESSIONAL ETHICS, Canon 37 (1908); MODEL CODE, *supra* note 3, at DR 4-101; MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983) [hereinafter MODEL RULES]. Disciplinary Rule (DR) 4-101 prohibits the revelation of "confidences," which are matters covered by the attorney-client privilege, and "secrets," which include "other

Many commentators have written about the central importance of such rules.<sup>12</sup>

Scholars offer both deontological<sup>13</sup> and utilitarian<sup>14</sup> justifications for maintaining client confidences. The classic deontological support for confi-

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information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." MODEL CODE, *supra* note 3, at DR 4-101(A). Thus, for example, disclosures by third parties regarding the client, while not protected by the attorney-client privilege, may be protected from disclosure as a secret. Model Rule 1.6(A), similarly broad, prohibits a lawyer from revealing information "relating to the representation," whether privileged or not. As the comment to Rule 1.6 states:

The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The 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. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.

MODEL RULES, *supra*, at Rule 1.6 comment 5. For a discussion of how the parallel development of the privilege and of ethical duties has complicated analysis of disclosure of crimes and frauds, see Subin, *supra* note 10, at 1106-19.

12. See, e.g., M. FREEDMAN, *LAWYER'S ETHICS IN AN ADVERSARIAL SYSTEM* (1975); Landesman, *Confidentiality and the Lawyer Client Relationship*, in D. LUBAN, *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* 191 (1985); Abramovsky, *A Case for Increased Confidentiality*, 13 *FORDHAM URB. L.J.* 11 (1985); Callan & David, *Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct in an Adversary System*, 29 *RUTGERS L. REV.* 332 (1976); Kramer, *Clients' Frauds and Their Lawyers' Obligations: A Study in Professional Irresponsibility*, 67 *GEO. L.J.* 991 (1979); Lipman, *The SEC's Reluctant Police Force: A New Role For Lawyers*, 49 *N.Y.U. L. REV.* 437 (1974); Moore, *Limits to Attorney-Client Confidentiality: A "Philosophically Informed" and Comparative Approach to Legal and Medical Ethics*, 36 *CASE W. RES. L. REV.* 177 (1985); Subin, *supra* note 10; Zacharias, *supra* note 6; Note, *Client Fraud and the Lawyer - An Ethical Analysis*, 62 *MINN. L. REV.* 89 (1977).

13. A deontological theory is based on the notion that the "right, the obligatory, and the morally good" are not determined by reviewing the consequences of an action, but by reviewing the intrinsic morality of the act itself. W. FRANKENA, *ETHICS* 15 (2d ed. 1973); see Moore, *supra* note 12, at 188-99. There are two types of deontological theories: act deontology and rule deontology. W. FRANKENA, *supra*, at 16-17. Act deontological theorists maintain that one can make a judgment about morality only regarding individual situations and that no generalized rules can be articulated. *Id.* Rule deontologists recognize that the standards of right and wrong may be articulated through general rules. *Id.*

Kant is perhaps the best known rule deontologist. He has articulated a basic principle, the categorical imperative, as the standard by which to determine which acts are moral: "Act as if the maxim of your action were to become through your will a UNIVERSAL LAW OF NATURE." I. KANT, *GROUNDWORK OF THE METAPHYSIC OF MORALS* 89 (H. Paton trans. 1964) (emphasis in original). Further, Kant adds to the imperative, "Act in such a way that you always treat humanity . . . never simply as means, but always at the same time as an end."

dentiality rests upon the premise that, given our increasingly regulated and

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*Id.* at 96 (footnotes omitted). Kant posits that human beings have a *duty* to act in a manner consistent with the categorical imperative. *See id.* at 19.

The formula, simply put, asks whether the proposed rule may be equally applied to everyone, without exception, and whether the proposed rule treats persons as ends in themselves and not only as means to some end which is not their own. That is, we must ask whether the proposed rule uses people . . . and whether the rule applies to everyone . . . .

R. WRIGHT, *HUMAN VALUES IN HEALTH CARE: THE PRACTICE OF ETHICS* 32 (1987). One should note that to pass this test, the actor must will the rule to be applied recognizing that he may be on the "receiving end" of such a rule on some occasion. *See W. FRANKENA, supra*, at 25. For an excellent explanation of the categorical imperative, see T. MAPPES & J. ZEMBATY, *BIOMEDICAL ETHICS* 17-22 (2d ed. 1986).

Other deontological theorists have articulated somewhat more specific duties consistent with the requirement of universal generalization and respect for persons. For example, W. D. Ross finds duties of fidelity (based on implicit promises to tell the truth); reparation (based on a previous wrongful act); gratitude (based on previous services on actor's behalf); justice (distribution of happiness according to merit); non-maleficence (duty to refrain from harming others); beneficence (duty to promote good, based on possibility we can improve the lives of others); and self-improvement (based on ability to improve our own lives). W.D. ROSS, *THE RIGHT AND THE GOOD* 21 (1930).

The notion that human beings must be treated with respect and as ends in themselves leads naturally to the idea that we have some inherent rights because of our status as human beings. R. WRIGHT, *supra*, at 37. *See also* R. FADEN & T. BEAUCHAMP, *A HISTORY AND THEORY OF INFORMED CONSENT* 3-22 (1986); W. FRANKENA, *supra*, at 45 (moral rights and duties are correlative). Medieval scholars first articulated rights-based theories as resting on the notion that God gives inherent rights and man cannot take them away. R. WRIGHT, *supra*, at 36-37. The primary nontheological basis for inherent rights is found in the notion of autonomy: because human beings have the inherent right to self determination, it is improper to interfere with that process. *Id.* at 37; *see also* R. FADEN & T. BEAUCHAMP, *supra*, at 7-9. For a discussion of limits to the exercise of autonomous choice, *see infra* notes 25-29 and accompanying text.

14. Utilitarianism centers upon the view that one determines the morality of an act with reference to the principle of beneficence or utility, which provides that the moral end to be sought is the greatest balance of good over evil. W. FRANKENA, *supra* note 13, at 34-35; *see also* Moore, *supra* note 12, at 187. Act utilitarians posit that each act must be analyzed for its excess of good over evil, and no generalizations from past experience can be made. W. FRANKENA, *supra* note 13, at 32. Rule utilitarians emphasize the centrality of generalized rules but, unlike deontological theorists, ask which rules promote the greatest good. *Id.* at 29. Thus, act utilitarians consider the utility of an act, while rule utilitarians ask which rule has the greatest utility. Among the problems with act utilitarianism is that it is simply impracticable to calculate anew each time one performs an act. *Id.* at 36. (Of course, a similar argument may be raised concerning act deontological theories.) Frankena concludes that rule utilitarianism is also problematic because rules that have a net positive "goodness to badness" ratio may nonetheless have an unjust impact upon certain individuals. *Id.* at 41. In other words, it is possible that the principle of justice may trump the principle of utility. *Id.* Frankena suggests a mixed deontological theory, that recognizes the importance of both beneficence and justice, which he defines as equality of treatment. *Id.* at 43-52. *Cf.* Moore, *supra* note 12, at 189 n.61 (discussing social contract theory of Rawls, who posits that justice requires that no person should be disadvantaged by natural fortune or social circumstance).

Some describe utilitarian justifications as teleological or consequentialist justification. *See* W. FRANKENA, *supra* note 13, at 13 (teleological moral theories state that the ultimate crite-

complex society, attorneys are integral to clients' ability both to exercise their right to autonomy and to avoid encroachment on that autonomy by the state or third parties.<sup>15</sup> Moreover, clients cannot fully exercise that autonomy unless they provide their lawyers with all relevant information, which clients will not do absent the comfort of knowing that the attorneys will hold their secrets inviolate.<sup>16</sup>

Furthermore, some have argued that clients have the inherent right to privacy regarding their innermost thoughts and that those thoughts should not lose their private character simply because clients are forced to exchange information with an attorney to ensure the autonomy to which they are entitled.<sup>17</sup> Finally, lawyers may have a duty to remain silent because they have made a promise, either explicitly or implicitly because of their fiduciary relationship to clients, to keep client secrets.<sup>18</sup>

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tion of the morality of an act is the result brought about by that act). I prefer not to use "consequentialist" nomenclature, because consequences are relevant, although clearly not dispositive, to all but the most strict deontological theorists. See *infra* notes 25-29 and accompanying text. As Frankena states:

[I]t is not easy to deny, as pure deontologists do, that one of the things we ought to do, other things being equal, is to bring about as much of a balance of good over evil as we can, which even Ross . . . [and others] allow. I find it hard to believe that any action or rule can be right, wrong, or obligatory in the moral sense, if there is no good or evil connected with it in any way, directly or indirectly. This does not mean that there are no other factors affecting their rightness or wrongness, or that our only duty is to pile up the biggest possible stockpile of what is good, as utilitarians think; but it does imply that we do have, at least as one of our *prima facie* obligations, that of doing something about the good and evil in the world.

W. FRANKENA, *supra* note 13, at 44.

15. See, e.g., A. DERSHOWITZ, *THE BEST DEFENSE* xv (1982) (as an appellate attorney, the author is often a client's last resort); M. FREEDMAN, *supra* note 12, at 5; Fried, *The Lawyer as Friend: The Moral Foundation of the Lawyer-Client Relation*, 85 *YALE L.J.* 1060 (1976); Landesman, *supra* note 12, at 198-99. Landesman argues that maintaining confidences is also based upon a duty to refrain from harming the speaker. *Id.* at 194; Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem and Some Possibilities*, 1986 *AM. B. FOUND. RES. J.* 613.

16. See *supra* note 15 and sources cited therein.

17. R. WRIGHT, *supra* note 13, at 67, 73. Some controversy exists regarding the source of the right to privacy. Professor Moore indicates that most scholars agree that this right is derived from the right to autonomy. Moore, *supra* note 12, at 190-91. Moore notes that differing levels of protection of private matters may exist, depending on how close the information is to the inner, core self. *Id.* For another explanation of the connection between privacy and maintenance of individuality, see Wasserstrom, *The Legal and Philosophical Foundations of the Right to Privacy*, in R. WRIGHT, *supra* note 13, at 169, 175. See also Landesman, *supra* note 12, at 197-98 (a speaker who shares embarrassing, guilty or dangerous information makes the hearer part of his "extended self" because he needs a listener and wants to limit the use of the information).

18. See R. WRIGHT, *supra* note 13, at 169-74. This created duty serves as an example of a duty-based deontological theory. See *supra* note 13. See also Landesman, *supra* note 12, at

Scholars also offer utilitarian justifications that focus on the consequences of a rule requiring absolute protection of confidential information. They argue that clients will not receive competent legal services unless they provide their attorneys with all relevant information.<sup>19</sup> Some suggest that promises of absolute confidentiality will avoid harm to third parties. Such promises allow clients to confide information regarding planned harmful acts; lawyers may then dissuade clients from carrying them out.<sup>20</sup>

Yet, recent scholarly literature challenges the legitimacy of deontological arguments supporting an absolute prohibition of disclosure of confidences, and it illustrates that empirical assumptions supporting utilitarian arguments are overstated. For example, the utilitarian view that clients will not fully unburden themselves absent a promise of confidentiality has dubious empirical support.<sup>21</sup> A recent study indicates that, although most attorneys believe clients will not confide information absent assurances of confidentiality, many clients would reveal secrets to an attorney even if confidentiality did not absolutely bar disclosure.<sup>22</sup> Indeed, some scholars posit that clients would talk freely to lawyers, despite limits on confidentiality, because of a need to get competent legal service or for the cathartic effect of disclosure.<sup>23</sup> Moreover, the argument that information is critical to competent representation loses force when one considers that some lawyers deliberately instruct their clients to refrain from disclosing some information to them; yet, those lawyers do not report that the quality of representation has been hampered by their lack of knowledge.<sup>24</sup> Thus, utilitarian arguments in support of an absolute rule of confidentiality are not compelling.

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200; Moore, *supra* note 12, at 191 n.67 (using social contract theory, one may argue that patients promise to disclose private information in exchange for a promise of confidentiality).

19. MODEL CODE, *supra* note 3, at EC 4-1; MODEL RULES, *supra* note 11, at Rule 1.6 comment; M. FREEDMAN, *supra* note 12, at 4-5; Abramovsky, *supra* note 12, at 11-15; Moore, *supra* note 12, at 197. See Zacharias, *supra* note 6, at 356-75. For complete and insightful discussions of justifications for confidentiality and limits of those justifications, see Landesman, *supra* note 12, at 197-201; Subin, *supra* note 10, at 1159-72. These scholars recognize the importance of confidentiality but believe an absolute rule is inappropriate.

20. See Zacharias, *supra* note 6, at 359 n.35.

21. See Subin, *supra* note 10, at 1163; Zacharias, *supra* note 6, at 378, 386.

22. See Zacharias, *supra* note 6, at 378 (earlier study); 380-81 (Zacharias study).

23. Subin, *supra* note 10, at 1166-67. See Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1142-43 (1988) (clients may disclose information because they are honest, they cannot determine what should be withheld, or they fear liability absent legal advice). Some clients do not believe assurances of confidentiality and do not confide in lawyers. Subin, *supra* note 10, at 1164; see also K. MANN, *supra* note 8, at 40-52 (clients withhold information due to embarrassment, mistrust, or view that attorney should not have information); Burt, *Conflict and Trust Between Attorney and Client*, 69 GEO. L.J. 1015, 1020-22 (1981) (listing reasons why clients mistrust attorneys); Zacharias, *supra* note 6, at 364 n.58, 367 n.70.

24. K. MANN, *supra* note 8, at 103-23 (white collar criminal defense lawyers discourage clients from confiding some information to avoid the requirement of making disclosures and to



Criticisms may also be raised regarding the deontological support for an absolute requirement to keep confidences. Although client autonomy is a "prima facie" right entitled to great respect,<sup>25</sup> it may conflict with equal or more compelling rights.<sup>26</sup> In such cases, a careful review of the legitimacy and weight of competing claims must be undertaken to determine the moral validity of an act.<sup>27</sup> Thus, sophisticated deontological arguments recognize that, although increasing individual autonomy is good in the abstract,<sup>28</sup> it is not justified in cases where autonomous decisionmaking leads to immoral acts and results.<sup>29</sup> As a result, deontological reasoning does not support an unqualified right to confidentiality.

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allow lawyers to proclaim client innocence to government investigators). *See also* Zacharias, *supra* note 6, at 366-67.

25. Deontological theories were problematic because theorists viewed both formulating a universalized rule with no exceptions and developing rules which do not conflict with one another as impossible. W. FRANKENA, *supra* note 13, at 23. W. D. Ross attempted to deal with this problem through a theory of "prima-facie" duties. W.D. ROSS, *supra* note 13, at 20. Ross posits that there may be exceptions to rules regarding "actual duties," which prescribe what should be done in a particular situation. *Id.* Prima facie duties, however, are essentially presumptions that certain duties are morally required to be performed absent some countervailing interest. *Id.* The author also explains that "prima-facie" terminology is not intended to connote an illusory or easily ignored right. *Id.* The prima facie rules are universal and do not have exceptions; however, they might conflict with other prima facie duties. W. FRANKENA, *supra* note 13, at 24. As Ross explains, a "prima-facie duty . . . [is] a brief way of referring to the characteristic . . . which an act has . . . of being [one] which would be [an actual duty] if it were not at the same time [another act] which is morally significant." W.D. ROSS, *supra* note 13, at 19. For example, keeping a confidence regarding a client's intent to murder a third party contemplates two acts with moral significance: maintaining client autonomy (a fiduciary's prima facie duty), and arguably giving aid to a person causing death (which violates the prima facie duty of non-maleficence). Both duties are compelling; the question becomes how to balance those duties. *See infra* note 29. The notion of prima facie rules can also be applied to rights. Deontological moral philosophers have generally accepted the notion that certain duties and rights are prima facie moral demands which can be overridden only in the most compelling of circumstances. *See also* T. BEAUCHAMP & J. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS 345-47 (1979); R. FADEN & T. BEAUCHAMP, *supra* note 13, at 16-17; R. WRIGHT, *supra* note 13, at 36-38; Landesman, *supra* note 12, at 200; Moore, *supra* note 12, at 159 n.62, 192 n.68. *See also* W. FRANKENA, *supra* note 13, at 35 (moral rights and duties are correlative). In fact, the example provided above could be phrased in terms of prima facie rights: The prima facie right of client autonomy conflicts with the prima facie right of the third party to life.

26. *See infra* notes 116-34 and accompanying text.

27. *See infra* note 29.

28. *See* Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 AM. B. FOUND. RES. J. 637, 639.

29. *Id.* Because an act can be simultaneously both prima facie wrong and right, *see supra* note 25, one must determine which performance would result in the greatest balance of right over wrong. W.D. ROSS, *supra* note 13, at 41. Recognizing that one should consider immoral results as well as the intrinsic features of an act in judging morality is not an adoption of a utilitarian theory. Ross explained the difference:

Courts and codes of ethics apparently recognize that an absolutist view regarding confidentiality is wrong and unworkable because they have established several exceptions to confidentiality rules. Generally, courts tend to view the attorney-client privilege as an impediment to truth seeking and to construe its reach narrowly.<sup>30</sup> Both the Model Code of Professional Responsibility (Model Code) and the Model Rules of Professional Conduct (Model Rules) include exceptions to the rule of confidentiality.<sup>31</sup> Commen-

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If I have promised to meet a friend at a particular time for some trivial purpose, I should certainly think myself justified in breaking my engagement if by doing so I could prevent a serious accident or bring relief to the victims of one. And [utilitarians] hold that my thinking so is due to my thinking that I shall bring more good into existence by the one action than by the other. A different account may, however, be given of the matter, an account which will, I believe, show itself to be the true one. It may be said that besides the duty of fulfilling promises I have and recognize a duty of relieving distress, and that *when I think it right to do the latter at the cost of not doing the former, it is not because I think I shall produce more good thereby but because I think it the duty which is in the circumstances more of a duty.*

W.D. ROSS, *supra* note 13, at 18 (emphasis added). See also *id.* at 33 (an act is right only with reference to its "whole nature"). One can see the distinction by keeping in mind the idea that the failure of utilitarianism is its inability to recognize a just result in a particular case. See *supra* note 14. As Ross explains:

The essential defect of the 'ideal utilitarian' theory is that it ignores, or at least does not do full justice to, the highly personal character of duty. If the only duty is to produce the maximum of good, the question who is to have the good — whether it is myself, or my benefactor, or a person to whom I have made a promise to confer that good on him, or a mere fellow man to whom I stand in no such special relation — should make no difference to my having a duty to produce that good. But we are all in fact sure that it makes a vast difference.

W.D. ROSS, *supra* note 13, at 22. Ross did not attempt to attach priority to any of his prima facie duties, which are listed at note 13, *supra*. He did, however, suggest a methodology for resolving conflicts. One must consider the situation as carefully and fully as possible until he forms "the considered opinion . . . that one duty is more incumbent than any other." *Id.* at 19; see also *id.* at 43 (considered reflection may be fallible but it is the only guide to our duty). See R. FADEN & T. BEAUCHAMP, *supra* note 13, at 16-17; (autonomy is a prima-facie right equal to beneficence and justice); Moore, *supra* note 12, at 191-92, 194-95 (the confidentiality presumption should be stronger as information approaches the private, "core" self). For a discussion of justifications for various exceptions to the confidentiality rule, see *infra* notes 103-34 and accompanying text.

30. See, e.g., *Fisher v. United States*, 425 U.S. 391, 401-03 (1976). The Supreme Court held that the attorney-client privilege did not prevent the disclosure of documents in the attorney's possession because those documents were discoverable prior to the transfer, and, therefore, not privileged. *Id.* at 403.

31. Model Rule 1.6(b) provides:

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

tators disagree as to the extent of such exceptions,<sup>32</sup> especially regarding the issues of past fraud and perjury.<sup>33</sup> Perhaps as a result, individual states have adopted several alternative versions of the confidentiality rule.<sup>34</sup> The generally recognized exceptions to confidentiality are: client consent, statements required by law, future crimes, client fraud, claims against attorneys, and suits for fees.<sup>35</sup> These exceptions enjoy varying levels of moral justification.<sup>36</sup>

Regardless of the propriety of the various exceptions to the confidentiality rules, such exceptions exist. As a result, some circumstances may dictate that an attorney share confidential information with others. Yet, the client may be unaware of the possibility that his secrets will be exposed.

Some clients might find the exceptions material to determining which confidences to share with an attorney. Attorneys may deprive those clients of information critical to intelligent decisionmaking if they fail to apprise clients of those exceptions, thereby limiting client's ability to choose rationally whether to confide in counsel. Such a deprivation does not implicate consti-

respond to allegations in any proceeding concerning the lawyer's representation of the client.

MODEL RULES, *supra* note 11, at Rule 1.6(b). Disciplinary Rule 4-101(C) provides:

A lawyer may reveal:

- (1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.
- (2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.
- (3) The intention of his client to commit a crime and the information necessary to prevent the crime.
- (4) Confidences or secrets necessary to establish or collect his fee or to defend himself . . . against an accusation of wrongful conduct.

MODEL CODE, *supra* note 3, at DR 4-101(C). *See also* MODEL RULES, *supra* note 11, at Rule 3.3 (disclosure of fraud to tribunal).

32. Compare M. FREEDMAN, *supra* note 12, at 27-41; Abramovsky, *supra* note 12, at 14-15; Callan & David, *supra* note 12, at 342-43; with Landesman, *supra* note 12, at 191; Subin, *supra* note 10, at 1114-19; Zacharias, *supra* note 6, at 359, nn. 33-34.

33. *See supra* note 32 (articles cited therein).

34. Attorneys Liability Assurance Society Ltd. (ALAS), an insurer for law firms, compiled a report comparing confidentiality rules. ATTORNEYS LIABILITY ASSURANCE SOCIETY, CONFIDENTIALITY/ATTORNEY-CLIENT PRIVILEGE 45-51 (1989) [hereinafter ALAS REPORT]. Although its chart format may miss some nuances of confidentiality rules, and some state laws have changed since ALAS made the report public, it nevertheless provides ample evidence of the disarray among states regarding the rules. For example, attorneys in 34 states may report any crime; those in 14 must not; those in 2 (Virginia, Florida) must report. *Id.* at 46, 51. In the case of a crime involving death or serious bodily harm, 10 states require disclosure; 40 states allow it. No states forbid such disclosure.

35. *See supra* note 31. There is great controversy regarding the appropriateness of reporting past fraud against third parties where lawyers' services were used, *see infra* note 126, and regarding disclosure of perjury, *see infra* note 67.

36. *See infra* notes 118-34 and accompanying text.

tutional rights, and the attorney's subsequent disclosure probably does not create civil liability. Failure to provide an opportunity for informed consent, however, should be actionable or provide a basis for discipline.

## II. CONSTITUTIONAL CONSIDERATIONS

Many clients would not give attorneys incriminating information if they knew that attorneys might disclose it to the government.<sup>37</sup> Thus, some may argue that an attorney violates a client's fifth amendment right against self-incrimination<sup>38</sup> or his sixth amendment right to effective assistance of counsel<sup>39</sup> if the attorney discloses statements elicited under an erroneous impression of confidentiality. Information most likely to raise those problems would involve plans to commit future crimes or perjury.<sup>40</sup>

Despite some scholarly commentary to the contrary,<sup>41</sup> it is unlikely that a lawyer's disclosure of future crimes or perjury implicates any constitutional rights.<sup>42</sup> In both fifth and sixth amendment contexts, the United States Supreme Court has held that asserted rights are protected by the Constitution only to the extent protected by traditional attorney-client privilege and other ethical rules.<sup>43</sup> Thus, disclosures of perjury or other crimes not precluded by the privilege do not give rise to any constitutional claims. Moreover, in litigation that may arise as a result of disclosure, a court would likely focus on the absence of a client's right to commit perjury or other future crimes, rather than upon his right to be warned about possible disclosure.<sup>44</sup> Therefore, it is doubtful a court would find that defendants have a constitutional right to be informed of limits to confidentiality.

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37. See *supra* notes 16-20 and accompanying text.

38. U.S. CONST. amend. V states in relevant part: "No person . . . shall be compelled in any criminal case to be a witness against himself."

39. U.S. CONST. amend. VI states in relevant part: "[T]he accused shall . . . have the Assistance of Counsel for his defence."

40. Past crimes may be reportable as future crimes if of a continuing nature. See *infra* notes 52, 78-79 and accompanying text.

41. See, e.g., Appel, *The Limited Effect of Nix v. Whiteside on Attorney-Client Relations*, 136 U. PA. L. REV. 1913, 1927-28 (1988); Freedman, *Client Confidences and Client Perjury: Some Unanswered Questions*, 136 U. PA. L. REV. 1939, 1946-55 (1988) [hereinafter Freedman, *Client Confidences*]; Freedman, *Are the Model Rules Unconstitutional?*, 35 U. MIAMI L. REV. 685, 692-93 (1981).

42. For an excellent discussion of confidentiality and the fifth amendment, see Subin, *supra* note 10, at 1120-27.

43. See *infra* notes 44-49, 57-69 and accompanying text.

44. See *infra* notes 86-92 and accompanying text.

### A. The Fifth Amendment Challenge

*Fisher v. United States*<sup>45</sup> is an example of the Supreme Court's disinclination to extend constitutional protections beyond those contemplated in ethics rules. The Court determined that a lawyer may not assert a client's fifth amendment right against self-incrimination to prevent seizure of client records, unless the information sought was protected by the attorney-client privilege.

In *Fisher*, the Internal Revenue Service subpoenaed an attorney to produce his client's tax documents.<sup>46</sup> The Court ordered production of the documents, finding that the right against self-incrimination applies only to "personal compulsion *against the accused*" and does not excuse an attorney or other agent from the requirement of production.<sup>47</sup> The Court noted, however, that if the attorney-client privilege protected a particular piece of testimonial evidence, the attorney would not have to produce it. Otherwise, clients would know that the government could get information from lawyers more readily than from the clients themselves and would therefore refrain from confiding to lawyers.<sup>48</sup> Simply stated, fifth amendment protection extends to privileged information, but a client cannot create protection for otherwise unprotected evidence by handing it over to an attorney.<sup>49</sup>

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45. 425 U.S. 391 (1976).

46. *Id.* at 394.

47. *Id.* at 396 (quoting *Couch v. United States*, 409 U.S. 322, 329 (1973) (emphasis added)). The Court held that the accused "is privileged from producing evidence but not from its production." *Id.* at 399 (quoting *Johnson v. United States*, 228 U.S. 457, 458 (1913)). The *Fisher* Court rejected an argument that the client has an expectation of privacy in discussions with an attorney and that he cannot be expected to forfeit his fifth amendment rights in order to receive legal advice. The Court refused to "cut the Fifth Amendment completely loose from the moorings of its language" and create a general protection for privacy. *Fisher*, 425 U.S. at 406. It added that the warrant requirement of the fourth amendment amply protected privacy. The Supreme Court later applied *Fisher* to "private" business records in *United States v. Doe*, 465 U.S. 605 (1984) (O'Connor, J., concurring). Clearly then, notwithstanding earlier case law suggesting a contrary result, see *Boyd v. United States*, 116 U.S. 616, 630 (1886), the fifth amendment is now viewed as being limited to protection against incriminating testimonial acts and not extended to enforcing a general notion of privacy. See Subin, *supra* note 10, at 1120-27.

48. *Fisher*, 425 U.S. at 403-04. The Court found that the privilege did not protect the documents because an accountant prepared them. Hence, the Court concluded that the lawyer had to produce the documents. *Id.* at 409.

49. *Cf. In re Ryder*, 263 F. Supp. 360 (E.D. Va.), *aff'd*, 381 F.2d 713 (4th Cir. 1967) (privilege does not encompass an attorney, on his own initiative, taking custody of instrumentalities and fruits of crime). *Accord* *People v. Meredith*, 29 Cal. 3d 682, 631 P.2d 46, 175 Cal. Rptr. 612 (1981); *State ex rel. Sowers v. Olwell*, 64 Wash. 2d 828, 394 P.2d 681 (1964). For a discussion of *Ryder* and other cases regarding disclosure of tangible evidence, see Subin, *supra* note 10, at 1123-27.

As a result, lawyer disclosures regarding future crimes also do not create a fifth amendment problem. The attorney-client privilege has never protected discussions about future crimes.<sup>50</sup> Similarly, the Supreme Court has concluded that disclosure of perjury to a tribunal does not implicate the fifth amendment, stating that the right to avoid incrimination does not include the affirmative right to lie.<sup>51</sup> Moreover, perjury can be viewed as a crime continuing until the conclusion of trial and thus covered by the future crime exception to the privilege.<sup>52</sup> Consequently, no fifth amendment prohibition attaches to lawyers who provide incriminating information regarding future crimes, including perjury, to the government.<sup>53</sup>

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50. The privilege does not protect such statements because the client seeks to abuse the attorney-client relationship rather than seek legitimate legal advice. See *Clark v. United States*, 289 U.S. 1, 14 (1933) (privilege does not apply where relationship a sham or pretense) (citing *Regina v. Cox*, 14 Q.B.D. 153 (1884) (client who commits crime based on an attorney's advice either deceives or conspires with him)); Subin, *supra* note 10, at 1114-18 (rationale for crime-fraud exception is that purposes of attorney-client privilege—assisting client in pursuing legally acceptable goals or defending rights by legal means—are not at stake).

The privilege similarly leaves future fraud unprotected. Subin, *supra* note 10, at 1114-18; see *Fisher*, 425 U.S. at 403. Although most codes allow disclosure of future crimes, only seven states allow disclosure of future frauds. ALAS REPORT, *supra* note 34, at 45-51; see *supra* notes 10-11 and accompanying text (ethics rules broader than attorney-client privilege).

51. *Nix v. Whiteside*, 475 U.S. 157, 173 (1986) (analogizing perjury to crimes of bribing jurors or threatening witnesses). Whether the sixth amendment is violated by the disclosure of perjury remains an open question. See *infra* notes 57-79 and accompanying text. Professor Freedman argues that perjury should be viewed as different from bribery or threatening a witness, because those crimes threaten the integrity of the system, while cross-examination will reveal perjury. Freedman, *Client Confidences*, *supra* note 41, at 1950. This distinction, however, is not compelling. The appropriate question is whether the privilege should be used to allow abuse of the system or of the attorney-client relationship, not whether it is likely that a client will be caught. See *supra* note 50 and accompanying text. Moreover, acceptance of the distinction presumes defendant is a bad liar and the prosecutor is a good advocate.

52. See, e.g., *C. WOLFRAM*, *supra* note 10, at 280-81; *Nix*, 475 U.S. at 174. See also *infra* notes 78-79 and accompanying text.

53. One might argue that, just as police must give a *Miranda* warning that incriminating comments can be used against a defendant, so must an attorney warn a client they can be so used. *Miranda v. Arizona*, 384 U.S. 346 (1966). The Supreme Court would probably not accept such an extension of *Miranda*, because the Court based a requirement of *Miranda* warnings upon the notion that custodial interrogations conducted by law enforcement agents are inherently coercive. *Id.* at 456-58; see Ogletree, *Are Confessions Really Good for the Soul?: A Proposal to Mirandize Miranda*, 100 HARV. L. REV. 1826, 1838 (1987). Thus, *Miranda* mandates that law enforcement officials provide warnings to subjects in custody prior to interrogation.

Law office interviews between lawyer and client fail to meet any of the *Miranda* criteria. First, lawyers are not law enforcement officials. The emphasis in *Miranda* on law enforcement officials and the general requirement of state action combine to indicate that *Miranda* does not apply to interrogations by private citizens. W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 6.10, 540-41 (1984). Although some courts have applied *Miranda* to interrogations by private persons who are agents of the police, LaFave and Israel state that:

### B. The Sixth Amendment Challenges

Given the Supreme Court's reluctance to extend constitutional protections beyond those articulated in ethics codes, it is similarly unlikely that it would

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unless a person realizes he is dealing with the police, their efforts to elicit incriminating statements from him do not constitute "police interrogation" within the meaning of *Miranda*. It is the impact on the suspect's mind of the interplay between police interrogation and police custody—each condition *reinforcing* the pressures and anxieties produced by the other—which creates "custodial interrogation" within the meaning of *Miranda*.

*Id.* at 542 (citing *Kamisar, Brewer v. Williams, Massiah and Miranda: What Is "Interrogation"?* *When Does it Matter?*, 67 GEO. L.J. 1, 50-53, 63-69 (1978). Some argue that the lawyer acts as a state official if ordered by the court to disclose information. See *Estelle v. Smith*, 451 U.S. 454 (1981) (*Miranda* applies to interrogation by court appointed psychiatrist); *Mathis v. United States*, 391 U.S. 1 (1968) (*Miranda* applies to interrogation by civil IRS investigator); *cf.* *Minnesota v. Murphy*, 465 U.S. 420 (1984) (*Miranda* requirements might apply to interrogations by parole officer if defendant in custody). However, it seems unlikely that the Supreme Court would view an attorney-client meeting as creating the same potential for coercion as an interrogation by a known government agent, which clearly supplied the basis for imposition of *Miranda* requirements in *Mathis* and *Estelle*. 391 U.S. at 4; 451 U.S. at 469. *Cf.* *People v. Younghanz*, 156 Cal. App. 3d 811, 202 Cal. Rptr. 907 (1984) (psychologist required by statute to report child abuse held not a state agent because the statute required only that the psychologist make an initial report and did not require assumption of investigative duties). Next, interrogation occurs only with "express questioning or its functional equivalent;" *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980). The threshold test for interrogation would require a showing that the attorney should have known that a general promise of confidentiality or failure to warn of its limits was "reasonably likely to elicit an incriminating response." *Id.* at 302. See W. LAFAVE & J. ISRAEL, *supra*, § 6.7 at 503, 513. Although a few instances exist where a lawyer might be aware of such a probability, such as the long-term representation of habitual criminals, one generally should not assume clients will disclose future crimes or perjury. Finally, the attorney clearly does not hold the client in custody. Again, one could argue that the legal counselling context presents an equally coercive situation, because the lawyer emphasizes the essential nature of full disclosure to assure competent representation. *Cf.* *Fleming & Maximov, The Patient or His Victim: The Therapist's Dilemma*, 62 CALIF. L. REV. 1025, 1059 (1974) (interviews with psychologists coercive); see *supra* note 8 and accompanying text (promises of confidentiality and statements that candor is critical to competent representation are "facilitators" of client disclosure). However, the Supreme Court has required *Miranda* warnings only in the situation where a suspect has been formally arrested or the suspect's freedom of action has been circumscribed in a significant way. The Court has consistently rejected arguments that police must warn whenever a reasonable person might feel coerced. See *Oregon v. Mathiason*, 429 U.S. 492 (1977) (defendant not in custody because he came voluntarily to police station in response to a written request and he was not told he must remain); *Beckwith v. United States*, 425 U.S. 341 (1976) (IRS interview at defendant's house not custodial). If the Supreme Court would accept the notion that the lawyer was working for the state, which is unlikely, an interesting question would be presented regarding attorney-client interviews while the client is in custody. See *Mathis*, 391 U.S. at 4-5 (*Miranda* requirements apply regardless of whether police hold a defendant in custody for purposes unrelated to interrogation).

Thus, attorney-client conferences meet none of the *Miranda* requirements, and the Supreme Court is disinclined to extend *Miranda*. See *Moran v. Burbine*, 475 U.S. 412, 424-25 (1985) (declining invitation to extend *Miranda* to forbid police deception of attorney, finding that such activity has no relevance to compulsion experienced by defendant in custody). See *Ogle-*

find that disclosures of client information implicate a sixth amendment ineffective assistance of counsel issue. In *Strickland v. Washington*,<sup>54</sup> the Supreme Court articulated a two part test for determining whether ineffective assistance occurred. Assistance of counsel is ineffective if an attorney's conduct did not fall within the range of reasonable professional assistance, and the faulty representation had a prejudicial impact upon the trial.<sup>55</sup> A defendant may raise three alternative arguments to claim ineffective assistance of counsel in the context of disclosure of future crimes or perjury. First, the disclosure itself may render assistance ineffective. Next, a presumption of ineffective assistance may arise because the potential of disclosure creates an untenable conflict between attorney and client. Finally, a failure to apprise the client of the possibility of disclosure can abridge the right to effective assistance of counsel.<sup>56</sup>

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tree, *supra*, at 1839-42 (outlines cases where *Miranda* narrowly applied). Although state courts may adopt broader *Miranda* protections, *see Note, Miranda and the State Constitution: State Courts Take a Stand*, 39 VAND. L. REV. 1693 (1986), it is unlikely they would adopt rules inconsistent with their own ethics code requirements. *See infra* notes 110-11 and accompanying text. The California Supreme Court considered a similar issue in *Younghanz*. There, a defendant told a counselor he had sexually abused his daughter. 156 Cal. App. 3d at 814, 202 Cal. Rptr. at 909. The court rejected the defendant's argument that *Miranda* applied, stating that a public policy to treat the child, rather than the enforcement of the law, represented the overriding purpose of the statute. *Id.* at 816-17, 202 Cal. Rptr. at 910.

An argument that a confession to an attorney was not informed and therefore involuntary would also be rejected. Confessions are involuntary only if coerced. *See Colorado v. Connelly*, 479 U.S. 157 (1986) (confession by defendant found to be voluntary although he suffered from psychosis that interfered with his right to make free and rational choices). Even assuming some violation of *Miranda* were found, all that would be required to protect the defendant is that the attorney's testimony be excluded in a future trial. Subin, *supra* note 10, at 1120-21 (use of exclusionary rule would resolve constitutional issues).

54. 466 U.S. 668 (1984).

55. *Id.* at 689, 694; *see Appel, supra* note 41, at 1925.

56. It may also be argued that assistance of counsel is denied because the state interferes with the attorney-client relationship if it elicits the attorney's aid in procuring information. The Supreme Court in several cases has found that, once the right to counsel arises, a state may not lull a defendant into complacency and subsequent disclosure by using one who is seemingly a friend to elicit evidence. *Massiah v. United States*, 377 U.S. 201 (1964) (improper for codefendant to elicit information because defendant thereby unaware that government agent is interrogator). Cases following *Massiah* include *United States v. Henry*, 447 U.S. 264, 274 (1980) (improper to use cellmate as informant because defendant likely to talk to person sharing a "common plight"); and *Maine v. Moulton*, 474 U.S. 159, 176 n.13 (1985) (improper for codefendant to elicit statements which defendant "would not intentionally reveal — and had a constitutional right not to reveal — to a person known to be a police agent.").

Using *Massiah* and its progeny in the attorney-client context has a strong appeal because the lawyer is a fiduciary who is even more likely to elicit trust than a codefendant or cellmate might be. *See Freedman, Client Confidences, supra* note 41, at 1943-48. It thus seems particularly unseemly that an attorney would function in the dual capacities of counsel and informant. However, there can be no sixth amendment right to counsel regarding future crimes or regarding perjury, even if it has already occurred, because no indictment or its equivalent has



yet been issued for those crimes. Kirby v. Illinois, 406 U.S. 682 (1972) (right to counsel arises when judicial proceedings commence); United States v. Wade, 388 U.S. 218, 224 (1967) (sixth amendment implicated at "'critical' stages in the judicial process 'where the results might well settle the accused's fate and reduce the trial itself to a mere formality.'" See W. LAFAYE & J. ISRAEL, *supra* note 53, § 6.4. Moreover, a defendant may not raise a sixth amendment challenge to information regarding unindicted crimes by claiming that information was elicited in connection with an investigation of crimes regarding which the sixth amendment right had attached. See *Moulton*, 474 U.S. at 180 (information elicited regarding pending prosecution was protected by sixth amendment, but information concerning future related crime of murdering a witness was not; to hold otherwise would unnecessarily frustrate public interest in investigation of criminal activities).

One issue remains open after *Moulton* regarding crimes other than those presently being prosecuted. The Court stated that "incriminating statements pertaining to pending charges are inadmissible." *Id.* Statements about future crimes generally would not be relevant to the original trial, so no *Massiah* problem exists regarding those statements. Statements indicating that a defendant plans to perjure himself at the original trial are arguably ones "pertaining" to the original crime. *Moulton* could be read to require that such statements are inadmissible at the original trial though they may be admitted at a later trial for perjury. Because the trial court admitted statements about the original crime in *Moulton*, the court did not reach the question of whether admitting only statements about a fabricated defense would violate the sixth amendment.

A distinction can be drawn, however, between *Massiah* and disclosures regarding future crime or perjury so that one could use those statements at the original trial without violating sixth amendment rights. An attorney can lawfully help a client by advising him not to incriminate himself regarding past crimes. Thus, as *Massiah* indicates, a third party should not be able to elicit that information. Conversely, the lawyer may not assist in future crime or perjury, so informants do not interfere with any legitimate aim of the attorney-client relationship.

Moreover, the Supreme Court consistently has made clear that *Massiah* rests upon the notion that one may not circumvent "the accused's right to have counsel present in a confrontation between the accused and a state agent." *Moulton*, 474 U.S. at 176 (emphasis added). That is, *Massiah* recognizes a right of the accused to rely on the fact that the state will deal with him only through his attorney. When the defendant has an attorney present, the state deals with the client through the attorney, and the state does not deny the right to counsel. Thus, attorney disclosures do not implicate *Massiah* rights.

Analogous to *Massiah* are cases finding a constitutional violation where attorney-client conversations are unknowingly intercepted. See, e.g., *O'Brien v. United States*, 386 U.S. 345 (1967); *Black v. United States*, 385 U.S. 26 (1966). See also *Weatherford v. Bursey*, 429 U.S. 545 (1976) (codefendant/informant does not violate sixth amendment right to counsel by attending conference with defendant and his attorney so long as conversations overheard do not directly or indirectly produce evidence offered at trial by the prosecutor). Attorney disclosures of future crimes or perjury do not violate the principle of those cases. *Bursey* seems to indicate that disclosures by an informant who has infiltrated the defense camp are permissible so long as those disclosures are not protected by the attorney-client privilege. See *id.* at 554-55, n.4, (citing *Hoffa v. United States*, 385 U.S. 293 (1966) (sixth amendment violated if informant gives privileged information)); *Fisher v. United States*, 425 U.S. 391, 402-05 (1976) (only those communications covered by the purpose of the privilege protected)). The attorney-client privilege does not apply to future crimes or perjury, see *supra* notes 50-53 and accompanying text; see also *infra* notes 60-62 and accompanying text. Moreover, the danger of an informant in the defense camp is the same as that contemplated in *Massiah* and its progeny: the intrusion, without the attorney's knowledge, into the attorney-client relationship. If the attorney is unaware of government involvement, she is unable to assist at all. Cf. *Estelle v. Smith*, 451 U.S. 454, 462 (1981) (sixth amendment violated where client unable to confer with attorney before

### 1. Disclosure as Ineffective Assistance

The Supreme Court considered ineffective assistance of counsel and attorney disclosures in *Nix v. Whiteside*,<sup>57</sup> and once again articulated that the Constitution is not violated if ethics rules are followed. In *Nix*, counsel for defendant Whiteside successfully dissuaded the defendant from offering perjurious testimony.<sup>58</sup> The Court referred to various codes of legal ethics to resolve the issue of whether the attorney acted within the parameters of reasonableness.<sup>59</sup> The Court stated that “virtually all sources speak with the same voice”<sup>60</sup> and require disclosure of perjury.<sup>61</sup> In addition, the Court noted that those “sources” exempt future crimes from the protection of the attorney-client privilege.<sup>62</sup> Thus, one may use the *Nix* analysis to conclude that the sixth amendment does not preclude disclosure of perjury or future crimes because disclosure in either instance comports with ethics codes and represents reasonable attorney conduct.<sup>63</sup>

Justice Blackmun concurred in *Nix* specifically to indicate that the majority’s discussion of perjury revelation was mere dicta.<sup>64</sup> Moreover, the majority opinion included some inaccurate statements. The lawyer in *Nix* kept the

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submitting to psychiatric examination). Conversely, if the attorney feels compelled to disclose, she is aware of the fact the government will receive information. She may be disloyal and provide ineffective assistance because she compromises the interests of the client, but assistance is not absent. For a discussion of ineffective assistance of counsel, see *infra* notes 57-93 and accompanying text.

57. 475 U.S. 157 (1986).

58. In *Nix*, the Supreme Court gave a state court finding regarding the falsity of the proposed testimony a presumption of correctness as required by 28 U.S.C. § 2254(d) (1988). *Id.* at 180 (Blackmun, J., concurring). Commentators following *Nix* have discussed at length the requirement that the attorney “know” the client intends to lie. Freedman, *Client Confidences, supra* note 41, at 1940-46; Kimball, *When Does a Lawyer “Know” Her Client Will Commit Perjury?*, 2 GEO. J. LEGAL ETHICS 579 (1988). Scholars recognized problems with finding knowledge of impending client perjury prior to *Nix*. See, e.g., M. FREEDMAN, *supra* note 12, at 51-58; Wolfram, *Client Perjury*, 50 S. CAL. L. REV. 809, 842-43 (1977).

59. *Nix*, 475 U.S. at 166-71.

60. *Id.* at 166.

61. *Id.* at 168.

62. *Id.*

63. In *United States v. Henkel*, 799 F.2d 369 (7th Cir. 1986), the United States Court of Appeals for the Seventh Circuit considered whether a lawyer’s attempt to withdraw because he could not “professionally proceed” violated the sixth amendment. *Id.* at 370. Although the trial judge clearly understood that defendant intended to lie, and commended counsel for not aiding the client, the Seventh Circuit held that no violation had occurred. In so doing, the court cited *Nix* for the proposition that an attorney may make “an explicit statement to the court of the fact that perjury is about to be committed.” *Id.* But see *Lowery v. Cardwell*, 575 F.2d 727, 730 (9th Cir. 1978) (due process violated where counsel effectively notifies factfinder of perjury).

64. *Nix*, 475 U.S. at 189 (Blackmun, J., concurring) (noting that majority implicitly endorses state codes of ethics).

defendant from testifying falsely. Consequently, it never became necessary to divulge any client communications.<sup>65</sup> Although the sources do "speak with one voice" that the attorney must attempt to talk the client out of lying,<sup>66</sup> great controversy exists regarding whether to disclose the lie if the attorney does not prevail in her attempt to dissuade.<sup>67</sup> At least where authorities conflict, the Court should hesitate to attach constitutional significance to the various codes of ethics.<sup>68</sup> Given the Court's deference to ethics

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65. *Id.* at 172. *Nix* also left open the question whether the Constitution permits an attorney to preclude the defendant from testifying in those situations where all his testimony would be perjurious. The circuits split on this issue prior to *Nix*. Compare *United States ex. rel. Wilcox v. Johnson*, 555 F.2d 115 (3d Cir. 1977) (violation) with *United States v. Curtis*, 742 F.2d 1070 (7th Cir. 1984) (not a violation). Justice Blackmun noted that the parties did not present the issue in *Nix*. 475 U.S. at 186 n.5 (Blackmun, J. concurring.) Since the *Nix* decision, one court has indicated that the sixth amendment is violated where defendant is completely precluded from testifying. *United States v. Butts*, 630 F. Supp. 1145 (D. Me. 1986). For a discussion of whether defendants have the "right to lie," see *infra* notes 75-79 and accompanying text.

66. See, e.g., MODEL CODE, *supra* note 3, at DR 7-102(B)(1); MODEL RULES, *supra* note 11, at Rule 3.3; see also ABA STANDARDS FOR CRIMINAL JUSTICE, Standard 4-7.7 (1986) (Standard for the Defense Function); ABA Formal Op. 287 (1953); ABA Formal Op. 87-353 (1987). Professor Freedman, perhaps the most ardent critic of the requirement to disclose perjury, advocates that the lawyer should attempt to dissuade the client. See M. FREEDMAN, *supra* note 12, at 31.

67. Compare MODEL CODE, *supra* note 3, at DR 7-102(B)(1); ABA Formal Op. 314 (1965); ABA Formal Op. 287 (1953) (attorney may not disclose fraud upon the tribunal when information is a confidence or secret) with MODEL RULES, *supra* note 11, at Rule 3.3; ABA Formal Opinion 87-353 (1987) (stating that ABA position has changed and attorney must disclose). State supreme courts have the ultimate responsibility (absent a constitutional impediment) to determine what ethics rules must guide members of their bar. See STANDARDS FOR LAWYER DISCIPLINE AND DISABILITY PROCEEDINGS Rule 2.1; *Nix*, 475 U.S. at 177 (Brennan, J., concurring); *Id.* at 189-90 (Blackmun, J., concurring). States have varying views regarding whether it is appropriate to disclose perjury. See ALAS REPORT, *supra* note 34 (35 states require disclosure; 15 prohibit it). See also *infra* note 126 and accompanying text.

68. As Justice Burger observed in *Nix*:

In some future case challenging attorney conduct in the case of a state-court trial, we may need to define with greater precision the weight to be given to recognized canons of ethics, the standards established by the state in statutes or professional codes, and the Sixth Amendment, in defining the proper scope and limits on that conduct.

*Nix*, 475 U.S. at 165-66. Cf. *Lowery v. Cardwell*, 575 F.2d 727 (9th Cir. 1978) (due process violated where counsel effectively notifies factfinder of perjury). State bar rules regarding advertising, solicitation, and limitations on practice enjoy a comparative lack of deference to those rules regarding disclosures of crimes or frauds. See, e.g., *Supreme Court of Va. v. Friedman*, 487 U.S. 59, 67 (1988) (state bar residency requirement violates privileges and immunities clause); *Shapiro v. Kentucky Bar Ass'n*, 108 S. Ct. 1916 (1988) (direct mail solicitation prohibitions violate first amendment); *In re RMJ*, 455 U.S. 191 (1982) (many advertising limitations violate first amendment). Of course, some may see the object of those rules as the protection of lawyers rather than of clients or the system.

rules in both fifth and sixth amendment contexts,<sup>69</sup> however, the rules will likely continue to provide the outside limits to constitutional protection.

The question whether the attorney has provided ineffective assistance of counsel if she discloses client perjury or future crimes arguably remains open after *Nix*. Nevertheless, the Supreme Court probably would not conclude assistance is ineffective in such cases. Although the Model Rules do not allow disclosure of future crimes unless they involve death or substantial bodily harm,<sup>70</sup> disclosures of future crimes have long been recognized as an exception to the attorney-client privilege.<sup>71</sup> Therefore, the Court would most likely find such disclosures reasonable. Also, disclosure of future crimes has no prejudicial impact on the trial of the original charge.<sup>72</sup>

The question of ineffective assistance due to disclosure of perjury is not quite as straightforward, given the greater likelihood of prejudice on a pending charge, but the result would probably be the same. The majority in *Nix* stated that the range of reasonable attorney responses to perjury encompasses disclosure.<sup>73</sup> The concurring opinion, which did not reach this question, nonetheless presented the view that a defendant suffers no cognizable prejudice from disclosure. Justice Blackmun noted that "the touchstone of a claim of prejudice is an allegation that counsel's behavior did something to deprive the defendant of a fair trial, a trial whose result is reliable."<sup>74</sup> He added that avoiding conviction by perjury is fundamentally unfair, and that the right to testify does not include the right to lie.<sup>75</sup> Moreover, Justice Blackmun reasoned, to the extent a defendant's claim rests upon the notion a jury would have acquitted him if he had lied successfully, "a defendant has no entitlement to the luck of a lawless decisionmaker."<sup>76</sup>

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69. See *supra* notes 43-44 and accompanying text.

70. See *supra* note 31 and accompanying text.

71. See *supra* note 50 and accompanying text.

72. There may be prejudicial impact if the future crime relates to the charge, however, such as where the client confides that he intends to kill a witness or bribe a juror and the court admits that statement into evidence. However, the client's act rather than the attorney's disclosure is the cause of prejudice. See *infra* notes 91-92 and accompanying text.

73. *Nix v. Whiteside*, 475 U.S. 157, 170 (1986).

74. *Id.* at 184 (Blackmun, J. concurring) (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

75. *Id.* at 186 (quoting *Harris v. New York*, 401 U.S. 222, 225 (1971)).

76. *Id.* (quoting *Strickland*, 466 U.S. at 695.) It may be an overstatement to say that the client has no right to lie. Nothing requires a court to screen a defendant's testimony to determine, prior to the testimony, whether defendant will lie on the stand, and enacting such a requirement may be unconstitutional. Cf. *Rock v. Arkansas*, 483 U.S. 44 (1987) (per se rule excluding all hypnotically induced testimony infringes defendant's right to testify in her own behalf despite argument such testimony is unreliable); *Nix*, 475 U.S. at 184 (Blackmun, J., concurring) (Supreme Court has assumed that defendant has right to testify in his own behalf). Thus, defendant may have the right to present his testimony; then the cross-examiner

Thus, the Supreme Court would not find prejudice because of a disclosure of perjury, especially in light of Justice Blackmun's comment that the defendant had "identified no right to insist that [his lawyer] keep confidential a plan to commit perjury."<sup>77</sup> Moreover, if the Court follows the view articulated in the Model Rules that perjury is a crime continuing until the end of legal proceedings,<sup>78</sup> perjury will be viewed as within the future crime exception to confidentiality and accordingly would be unprotected.<sup>79</sup>

## 2. *Presumption of Untenable Conflict as Ineffective Assistance*

The *Nix* court rejected a second and related argument that a court should presume prejudice because an untenable conflict arose between attorney and client regarding client perjury.<sup>80</sup> Both the majority and concurring opinions in *Nix* concluded that, while a client is entitled to undivided loyalty, such loyalty does not extend to aiding perjury.<sup>81</sup> Instead, a court may reverse

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must prove it false. Professor Freedman posits that, although defendants do not have the "right" to lie, the consequence of such a lie should not be waiver of fifth amendment rights, but instead should be the normal consequences of rigorous cross-examination, longer sentences, or perjury prosecution. Freedman, *Client Confidences*, *supra* note 41, at 1951-52. In support, Freedman relies upon *New Jersey v. Portash*, 440 U.S. 450 (1979). In *Portash*, the prosecutor gave defendant use immunity for testimony before a grand jury. *Id.* at 451. The Supreme Court held that the prosecutor could not use the grand jury evidence to impeach a perjurious statement at the later trial because the grand jury testimony was the "essence of compelled testimony." *Id.* at 459.

However, any coercion in the attorney-client context does not arise to a constitutional level; see *supra* note 53. Moreover, a defendant clearly does not have the right to counsel's aid in that endeavor. Cf. *supra* note 56 (attorney may lawfully advise the client not to incriminate himself regarding past crimes but may not assist in perjury or future crime). However, an interesting question is raised when an attorney dissuades a client from committing perjury by telling the client that she will inform the court, and the client thereafter refrains from offering both perjurious testimony and truthful testimony he fears the attorney will not believe. To avoid this situation, attorneys should tell clients they have a duty to disclose only if they know the client is lying. See *infra* note 58. Of course, the danger lies with the intelligent client, who may refrain from sharing any information with the lawyer so that he may lie and the lawyer will not report it. See *infra* note 188-98 and accompanying text.

77. *Nix*, 475 U.S. at 187 (Blackmun, J., concurring). Freedman reaches the opposite conclusion: he believes that the Supreme Court will conclude that the attorney may not disclose perjury after the fact. Freedman, *Client Confidences*, *supra* note 41, at 1955.

78. Model Rule 3.3 states that the duty to disclose perjury to a tribunal continues until the conclusion of the proceeding, supporting the notion that the fraud on the court is continuing. MODEL RULES, *supra* note 11, Rule 3.3(b). Cf. *In re A*, 276 Or. 225, 554 P.2d 479 (1976) (court continues to rely upon misleading testimony throughout trial).

79. See *supra* note 50 and accompanying text.

80. See *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980) (court will not presume prejudice from mere existence of conflict of interest); Appel, *supra* note 41, at 1926. This is the crux of the argument made in the *Massiah/Burse* context: The state has encroached upon the attorney-client relationship by requiring disclosure, thereby creating a conflict between loyalty to the client and loyalty to the judicial system. See *supra* note 56.

81. *Nix*, 475 U.S. at 176, 187.

convictions only if a conflict of interest infringed upon a defendant's "legitimate interests in vigorous protection of his constitutional rights."<sup>82</sup> Just as both the majority and concurrence in *Nix* concluded that a defendant had no right to testify falsely, the Court unsurprisingly did not find a violation due only to a strain on the attorney-client relationship that resulted from a client attempting to lie.<sup>83</sup> The same rationale would apply to other future crimes. Moreover, the Court has continually stated that the sixth amendment does not entitle the client to any particular counsel of choice.<sup>84</sup> The lawyer may simply withdraw as counsel when a conflict arises.<sup>85</sup>

### 3. *Failure to Inform the Client About Disclosure as Ineffective Assistance*

If the Supreme Court intends to use ethics rules as the guide to determining whether counsel has rendered ineffective assistance, one could argue that, by failing to advise the client about limits on confidentiality, the attorney has violated the rules by breaching her duty to provide the client with information necessary to make an informed decision.<sup>86</sup> As ethics codes unanimously require the attorney to provide information material to client choice,<sup>87</sup> perhaps the attorney who does not inform the client about limits

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82. *Id.* at 187 (Blackmun, J., concurring) (emphasis added).

83. Justice Blackmun also found no actual prejudice to defendant Whiteside because he most likely benefitted his case by refraining from presenting perjured testimony. *Id.* at 187-88. As Justice Blackmun observed, a lie could have presented the basis for a perjury conviction, and the jury might have assumed Whiteside also lied about other issues if the court caught him lying on one issue through cross-examination. *Id.* One cannot be as sanguine about the beneficial impact of a lawyer reporting a client's past, undiscovered perjury. It clearly would be harmful. In response, the Court would probably state that the client has no right to rely on the hope that the jury would accept his perjurious testimony and acquit him. See *supra* notes 74-76 and accompanying text.

84. See *Wheat v. United States*, 486 U.S. 153 (1988) (affirming judicial ruling that overrode client consent and disqualified attorney when a conflict of interest existed, but holding refusal of counsel of choice did not violate the sixth amendment); *cf.* *Caplin & Drysdale v. United States*, 109 S. Ct. 2646 (1989) (forfeiture provisions of criminal law that may result in client being unable to have and pay counsel of choice does not violate sixth amendment). For a discussion of *Caplin & Drysdale*, see Note, *Caplin & Drysdale v. United States and United States v. Monsanto: Forfeiture of Attorney Fees and Constitutional Rights*, 39 CATH. U.L. REV. 269 (1989).

85. Subin, *supra* note 10, at 1130-32 (sixth amendment not violated by destruction of attorney-client relationship if client has opportunity to retain another attorney).

86. MODEL RULES, *supra* note 11, at Rule 1.4. For a discussion of the scope of the informed consent requirement, see *infra* notes 135-84 and accompanying text.

87. The Model Rules explicitly require that information be shared; earlier codes included the requirement but stated it with less clarity. MODEL RULES, *supra* note 11, at Rule 1.4. See also MODEL CODE, *supra* note 3, at EC 7-7; 7-8.

on confidentiality does not act within the range of reasonable behavior and renders ineffective assistance.<sup>88</sup>

There are several responses to this argument. First, the Supreme Court has been reluctant to create a requirement of a "meaningful relationship" with one's lawyer.<sup>89</sup> Thus, the Court may draw the line at an attempt to constitutionalize informed consent and may determine that breach of an ethics rule does not automatically result in ineffective assistance of counsel.<sup>90</sup>

Moreover, the initial failure to inform does not cause prejudice. Before disclosing future crimes or perjury, a lawyer has the responsibility to attempt to dissuade the client from such a course of conduct.<sup>91</sup> Part of that discussion should include a statement that the lawyer has a responsibility to make appropriate disclosures if the client persists. At that point, the client may choose to act or to refrain from acting as originally planned. Thus, the act of the client, rather than the initial failure to inform, is the cause of any ensuing prejudice. A defendant could argue that if he had been informed of his lawyer's responsibility to disclose perjury he would not have told the lawyer of his plans and would have proceeded with the unlawful act without the lawyer's knowledge. However, an argument that prejudice results from his inability to act in that manner looks remarkably like the argument rejected in *Nix* that a client has the right to hope he can fool a jury through illegal means.<sup>92</sup>

The discussion in this section may be reduced to a single point. Future crimes and perjury are viewed as beyond the scope of the attorney-client privilege.<sup>93</sup> It is highly unlikely that the present Supreme Court will extend fifth or sixth amendment protections to keep such confidences inviolate, or to require an attorney to warn her client about limitations on the privilege. Therefore, no basis exists for a constitutional challenge to a resulting criminal conviction based on such disclosures. The next section, then, focuses on

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88. Informed consent requires an attorney to disclose all material information to the client. See *infra* notes 135-38, 147-55 and accompanying text. At least some clients would like to know about the potential for attorney disclosures but are never so informed. Cf. *Maness v. Myers*, 419 U.S. 449 (1974) (assertion of testimonial privilege depends on legal advice as it is not self executing; laypersons may not be aware of the scope, nuances and boundaries of the privilege).

89. *Morris v. Slappy*, 461 U.S. 1, 14 (1983). In fact, the sixth amendment does not require assistance of any particular lawyer. See *supra* note 84 and accompanying text.

90. See *Nix v. Whiteside*, 475 U.S. 157, 165 (1986).

91. See MODEL CODE, *supra* note 3, at DR 7-102(B)(1); MODEL RULES, *supra* note 11, at Rule 3.3 comment (1983); ABA Formal Op. 87-353 (1987) (Standing Comm. on Ethics and Prof. Resp.) (Lawyer's Responsibility with Relation to Client Perjury).

92. See *supra* notes 74-76 and accompanying text.

93. See *supra* notes 50-52 and accompanying text.

whether any civil liability arises from disclosure or failure to inform about the possibility of disclosures.

### III. CIVIL LIABILITY FOR BREACHING CONFIDENCES

Because keeping confidences remains an integral part of the attorney-client relationship, a state disciplinary board may discipline an attorney for violating the ethical responsibility to remain silent.<sup>94</sup> Moreover, clients can maintain various civil causes of action for disclosure of those confidences.<sup>95</sup> For example, clients could allege a breach of an express or implied promise to maintain confidentiality.<sup>96</sup> Alternatively, they could sue for breach of statutory duty, using ethics codes or an attorney-client privilege statute in support.<sup>97</sup> Clients could also maintain claims of invasion of privacy<sup>98</sup> and malpractice.<sup>99</sup>

Perhaps the most appropriate cause of action involving an improperly shared confidence is for breach of fiduciary duty.<sup>100</sup> Such a claim focuses on

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94. See, e.g., *Kentucky Bar Ass'n v. Meredith*, 752 S.W.2d 786 (Ky. 1988); *In re Pool*, 401 Mass. 460, 517 N.E.2d 444 (1988); *In re Nelson*, 327 N.W.2d 576 (Minn. 1983); *Matter of Wyse*, 688 P.2d 758 (Mont. 1984), modified 697 P.2d 94 (1985); *Bar Ass'n of Greater Cleveland v. Watkins*, 68 Ohio St. 2d 11, 427 N.E.2d 516 (1981).

95. See R. MALLEN & J. SMITH, *LEGAL MALPRACTICE*, § 11.5, at 664 (3d ed. 1989); see generally Note, *Breach of Confidence: An Emerging Tort*, 82 COLUM. L. REV. 1426 (1982) [hereinafter Note, *Breach of Confidence*]; Note, *To Tell or Not to Tell: Physician's Liability for Disclosure of Confidential Information About a Patient*, 13 CUMB. L. REV. 617 (1983) [hereinafter Note, *To Tell Or Not To Tell*]; Note, *The Illinois Parental Notice Abortion Act: Legal and Ethical Ramifications of a Physician's Decision to Give Parental Notification*, 18 J. MARSHALL L. REV. 475 (1985) [hereinafter Note, *Parental Notice*]; Note, *Duty to Warn Versus Duty to Maintain Confidentiality: Conflicting Demands on Mental Health Professionals*, 20 SUFFOLK U.L. REV. 579 (1986) [hereinafter Note, *Duty to Warn*]. Most breach of confidence cases involve physicians and banks. Note, *Breach of Confidence, supra*, at 1428.

96. See, e.g., *Goldberg v. American Home Assurance Co.*, 80 A.D.2d 409, 439 N.Y.S.2d 2 (1981); *Citizens State Bank v. Shapiro*, 575 S.W.2d 375 (Tex. Civ. App. 1978); see generally Note, *Parental Notice, supra* note 95, at 485. Claims of breach of contract are subject to contractual limitations such as inability to collect punitive damages or damages for emotional distress. Note, *Breach of Confidence, supra* note 95, at 1446.

97. See, e.g., *Goldberg*, 80 A.D.2d at 409, 439 N.Y.S.2d at 2; see generally Note, *Breach of Confidence, supra* note 95, at 1447; Note, *To Tell or Not to Tell, supra* note 95, at 631-34.

98. Patients have sued physicians for breach of privacy in this context. See, e.g., *Horne v. Patton*, 291 Ala. 701, 287 So. 2d 824 (1973) (citing *Hammonds v. Aetna Casualty*, 243 F. Supp. 793 (N.D. Ohio 1965)); *Doe v. Roe*, 93 A.D.2d 201, 400 N.Y.S.2d 668 (Sup. Ct. 1977); see generally Note, *Breach of Confidence, supra* note 95, at 428-30; Note, *To Tell or Not to Tell, supra* note 95, at 630-61; Note, *Parental Notice, supra* note 95, at 487-90.

99. See R. MALLEN & J. SMITH, *supra* note 95, § 11.5, at 644.

100. See, e.g., *Zimmerman v. Kallimopoulou*, 56 Misc. 2d 828, 290 N.Y.S.2d 270 (1967); *Lott v. Ayres*, 611 S.W.2d 473 (Tex. Civ. App. 1981); see also Note, *Breach of Confidence, supra* note 95, at 1448-49, 1459-60; Note, *Parental Notice, supra* note 95, at 485, 493.



the nature of the attorney-client relationship and recognizes the duty of the attorney to refrain from abusing the trust the client placed in her.<sup>101</sup>

A breach of confidence for personal gain or where no competing considerations exist represents an egregious abuse of the attorney-client relationship and is actionable.<sup>102</sup> However, an attorney may be justified in making disclosures to protect herself or third parties from harm.

Courts have fashioned affirmative defenses to breach of confidence suits that are consistent with the exceptions listed in professional legal ethics codes. For example, in those states that require disclosure of future crimes or perjury, the attorney would have an absolute privilege because the law compels her to speak.<sup>103</sup>

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101. See *supra* notes 9-20 and accompanying text. A suit for lack of informed consent is based upon a notion of breach of fiduciary duty. See *infra* notes 135-98. One author advocates the designation of a new tort — breach of confidence. Note, *Breach of Confidence*, *supra* note 95, at 1426. The author notes that maintenance of such a claim protects two interests. First, fostering the security of a confidential relationship presents a general societal interest, because it assures communication. *Id.* at 1434. Second, a more specific interest lies in avoiding the injuries which foreseeably flow from disclosure. *Id.* The author recognizes that more traditional theories can be used to support a finding of liability but suggests that such recognition requires an overt consideration of the fact that the relationship has been compromised. *Id.* at 1437-48.

A tort action for breach of confidence may be necessary in order to assure that nonfiduciaries will maintain confidences. *Id.* at 1459. It is unnecessary in the context of attorney disclosures, because a party would have to predicate a claim for breach of fiduciary duty upon an abuse of the relationship, and that claim protects the same interests the author seeks to protect through a breach of confidence claim. See, e.g., *In re Nelson*, 327 N.W.2d 576 (Minn. 1983) (discipline for bad faith, unauthorized disclosure).

102. Cf. *Richardson v. Hamilton Int'l Corp.*, 333 F. Supp. 1049 (E.D. Pa. 1971) (disclosures may be basis for discipline or civil liability), *aff'd*, 469 F.2d 1382 (3d Cir. 1972), *cert. denied*, 411 U.S. 986 (1973); *In re Pool*, No. 83-87 (Mass. Supp. (Jan. 18, 1984)) (attorney disbarred for divulging confidence to get access to client funds) (reinstated 401 Mass. 460, 517 N.E.2d 444 (1988)).

103. A lawyer would have the same defense available if a court orders her to speak. See MODEL CODE, *supra* note 3, at DR 4-104(C)(2); MODEL RULES, *supra* note 11, at Rule 1.6(a). Cf. *Hope v. Landau*, 21 Mass. App. Ct. 240, 486 N.E.2d 89 (1985) (summary judgment in favor of psychologist who reported child abuse as required by statute). Note, *Breach of Confidence*, *supra* note 95, at 1462; Note, *Parental Notice*, *supra* note 95, at 499-500. No cases have arisen in which a client sued for breach of confidence when the lawyer had a legal compulsion to disclose. See Note, *Attorney-Client Privilege — Contempt: The Dilemma in Nondisclosure of Possibly Privileged Information* *Dike v. Dike*, 75 Wash. Dec. 2d 1, 448 P.2d 490 (1968), 45 WASH. L. REV. 181, 185 (1970) (no appellate cases reported of client recovery for attorney disclosures pursuant to court order). However, at least one court has contemplated such a defense. See *In re Gillham*, 704 P.2d 1019 (Mont. 1985). In *Gillham*, the client petitioned for post-conviction relief alleging ineffective assistance of counsel. *Id.* at 1019. The Attorney General ordered the attorney to submit "an affidavit relating to the allegations." *Id.* at 1020. The attorney refused, stating he feared breaching confidences. *Id.* The court ordered the attorney to be named as respondent and to submit a response. In affirming the order, the Supreme Court of Montana found that the client had opened the door to consideration of

In many more cases, however, the ethics rules merely allow the attorney to exercise her discretion and to disclose information when she thinks a particular situation requires disclosure.<sup>104</sup> Thus, an attorney will receive protection only where she can show that, on balance, her interests or those of third parties outweigh the client's right to confidentiality.<sup>105</sup>

Moreover, it is well established that professionals may disclose confidences to avoid danger to a third party or to the public health.<sup>106</sup> In fact, professionals may be liable to third parties if they do not disclose and any harm results.<sup>107</sup> Crimes not involving a substantial likelihood of physical

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confidential information by alleging ineffective assistance of counsel. *Id.* The court made clear that the attorney would not be subject to discipline or a claim of malpractice as a result of any required disclosures. *Id.*

104. See *supra* note 31.

105. RESTATEMENT (SECOND) OF AGENCY § 395 comment f (1958); see Note, *Parental Notice*, *supra* note 95, at 496-97.

106. See, e.g., *Tarasoff v. Regents of Univ. of Calif.*, 17 Cal. 3d 425, 440-42, 551 P.2d 334, 346-48, 131 Cal. Rptr. 14, 26-28 (1976) (confidential relation outweighed by potential harm to third party); *Simonsen v. Swenson*, 104 Neb. 224, 228-29, 177 N.W. 831, 832 (1920) (physician may disclose to hotel owner that guest has contagious disease); *Bryson v. Tillinghast*, 749 P.2d 110, 113-14 (Okla. 1988) (doctor may disclose fact that patient was treated for injury similar to that of rape suspect to protect public welfare); *Peck v. Counseling Serv.*, 146 Vt. 61, 67-68, 499 A.2d 422, 426-27 (1985) (mental patient's threat of serious harm to an identified victim presented the appropriate circumstances under which the physician-patient privilege may be waived); see also Note, *Breach of Confidence*, *supra* note 95, at 1464; Note, *Parental Notice*, *supra* note 95, at 496.

107. See, e.g., *Lipari v. Sears, Roebuck & Co.*, 497 F. Supp. 185, 193 (D. Neb. 1980) (psychotherapist's affirmative duty to initiate reasonably necessary precautions to protect potential victims of patient); *Hedlund v. Superior Court*, 34 Cal. 3d 695, 705-06, 669 P.2d 41, 46-47, 194 Cal. Rptr. 805, 810-11 (1983) (psychotherapist's duty to warn extended to minor son of woman injured by psychotherapist's patient); *Tarasoff*, 17 Cal. 3d at 436-37, 441, 551 P.2d at 343-44, 347, 118 Cal. Rptr. at 20 (psychotherapist obligated to take whatever steps reasonably necessary under the circumstances to prevent harm to third party); *McIntosh v. Milano*, 168 N.J. Super. 466, 489-90, 403 A.2d 500, 511-12 (1979) (psychiatrist's duty to take reasonable steps to protect intended or potential victim of patient); *Littleton v. Good Samaritan Hosp. & Health Center*, 39 Ohio St. 3d 86, 99, 529 N.E.2d 449, 460 (1988) (psychiatrist may be held liable for the violent acts of a voluntarily hospitalized mental patient subsequent to the patient's discharge); *Peck*, 146 Vt. at 66-67, 499 A.2d at 425-26 (mental health professional has a duty to take reasonable steps to protect third persons from threatened physical harm posed to them by his or her patient); cf. *Cole v. Taylor*, 301 N.W.2d 766, 768 (Iowa 1988) (*Tarasoff* duty runs only to intended victim and not to the patient); *Hawkins v. King County Dep't of Rehabilitative Serv.*, 24 Wash. App. 338, 345-46, 602 P.2d 361, 365-66 (1979) (attorney not liable for failure to warn of client propensity for violence because victims knew of dangerousness and she had no knowledge that client intended to assault anyone). Several commentators have criticized *Tarasoff*, both because of the impact of disclosure on the psychotherapist/patient relationship and the difficulty of determining that a patient is dangerous. See, e.g., *Abramovsky*, *supra* note 12, at 20-22 (lawyers cannot predict dangerousness, and disclosure may violate fifth and sixth amendments); *Merton, Confidentiality and the "Dangerous" Patient: Implications of Tarasoff for Psychiatrists and Lawyers*, 31 EMORY L.J. 263 (1982) (Merton also urges caution in extending *Tarasoff*). Others do not find those concerns compel-

harm may have a less compelling basis for disclosure, as reflected by the fact that the Model Rules do not provide for such disclosure.<sup>108</sup> However, lawyers have been advised that they may breach confidences involving those crimes without legal consequence.<sup>109</sup> In those states where the professional legal ethics code provides that an attorney may report all crimes, their supreme courts have already performed the balancing test and have made the policy determination that such disclosures are appropriate.<sup>110</sup> Consequently, those same courts would not hold a lawyer liable for following the suggestion in the Model Code.<sup>111</sup>

For this reason, disciplinary boards probably would not hold a lawyer responsible for disclosures made to protect herself against claims by clients<sup>112</sup> or others,<sup>113</sup> or to help her collect a fee.<sup>114</sup> To reduce the likelihood that unnecessary harm would result from such disclosures, courts have lim-

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ling. See Givelber, Bowers & Blitch, Tarasoff, *Myth and Reality: An Empirical Study of Private Law in Action*, 1984 WIS. L. REV. 443. Some commentators advocate that Tarasoff liability be extended to attorneys. See Anderson, *Lawyers: A Call to Duty*, 17 MEM. ST. U.L. REV. 33 (1986); Sands, *The Attorney's Affirmative Duty to Warn Foreseeable Victims of a Client's Intended Violent Assault*, 21 TORT & INS. L.J. 355 (1986); Note, *The Attorney's Duty to Reveal a Client's Intended Future Criminal Conduct*, 1984 DUKE L.J. 582.

108. Compare MODEL RULES, *supra* note 11, at Rule 1.6(b)(1) (exception to confidentiality only where future crime involves likelihood of substantial bodily harm or death) with MODEL CODE, *supra* note 3, at DR 4-101(C)(3) (exception for any future crime).

109. See, e.g., Ill. State Bar Ass'n Comm. on Professional Responsibility, Op. 87-9 (Mar. 11, 1988) (lawyer may disclose client's intention to remove child from jurisdiction in violation of a court order); Mich. State Bar Comm. on Professional Ethics, Op. CI 1084 (Mar. 15, 1985) (lawyer must disclose criminal activity prohibited by federal food and drug laws).

110. The supreme court of a state is ultimately responsible for promulgating ethics rules. See *supra* note 67.

111. Of course, if the lawyer clearly abused her discretion and disclosed for improper purposes, she could be held responsible. See *supra* notes 95-102 and accompanying text.

112. Cf. *Tasby v. United States*, 504 F.2d 332 (8th Cir. 1974) (lawyer may disclose in proceeding alleging ineffective assistance of counsel), *cert. denied*, 419 U.S. 1125 (1975); *In re Gillham*, 216 Mont. 279, 704 P.2d 1019 (1985) (same). See generally C. WOLFRAM, *supra* note 10, at 307-08; Levine & Committere, *Self-Interest or Self-Defense: Lawyer Disregard of the Attorney-Client Privilege for Profit and Protection*, 5 HOFSTRA L. REV. 783 (1977).

113. See, e.g., *Meyerhofer v. Empire Fire & Marine Ins. Co.*, 497 F.2d 1190 (2d Cir. 1974) (attorney may disclose confidences of corporation to purchasers of stock suing law firm for breach of fiduciary duty), *cert. denied*, 419 U.S. 998 (1975); *First Fed. Sav. & Loan Ass'n v. Oppenheim, Appel, Dixon & Co.*, 110 F.R.D. 557 (S.D.N.Y. 1986) (attorney may disclose confidences in suit against him brought by third party); *In re Friend*, 411 F. Supp. 776 (S.D.N.Y. 1975) (attorney target of grand jury may disclose); *General Realty Ass'n v. Walters*, 519 N.Y.S.2d 530 (N.Y. Civ. Ct. 1987) (lawyer may testify against client in eviction action although he is not defendant, because tenant's claim he did not notify her of eviction implies he neglected his responsibilities); *Maine Bar Ass'n Prof. Ethics Comm. Op. 55* (1985) (lawyer may reveal germane confidence to grievance commission). See C. WOLFRAM, *supra* note 10, at 309-10; Levine & Committere, *supra* note 112, at 804-06 (noting that Model Code exception as applied to challenges by third parties or challenges prior to indictment or other litigation is broad extension of common law rule).

ited disclosures for these purposes to only those confidences necessary to achieve the result contemplated by the rules.<sup>115</sup>

More interesting than the tautological argument that the balance must be struck in favor of disclosure where an exception to the rules has been crafted is the question of whether those exceptions make sense. A deontological analysis would suggest that disclosure of confidences should not be lightly undertaken. As indicated above, the right to autonomy, which lawyers arguably compromise by disclosure,<sup>116</sup> is a *prima facie* right entitled to great deference.<sup>117</sup> Thus, a heavy burden of justification rests with the person advocating disclosure.<sup>118</sup>

Disclosure of future crimes involving death or serious bodily harm is most clearly justified and should be mandated.<sup>119</sup> The right to life or bodily integrity is immediate and substantial. By contrast, the client has a less substantial interest in autonomy or the related right to privacy, because any right to

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114. See, e.g., *Nakasian v. Incontrade, Inc.*, 409 F. Supp. 1220 (S.D.N.Y. 1976) (lawyer not prevented by ethical canons from disclosure in order to attach client funds); *Zimmerman v. Kallimopoulou*, 56 Misc. 2d 828, 290 N.Y.S.2d 270 (Civ. Ct. 1967); *Griffith v. Geffen & Jacobson*, 693 S.W.2d 724 (Tex. Ct. App. 1985) (fee agreement not induced by duress because lawyer threatened to disclose information and to withhold files absent payment because he had right to do both); State Bar of Ga. Advisory Op. 49 (1985) (attorney may disclose necessary client confidences to collection agency); see also C. WOLFRAM, *supra* note 10, at 308; see generally Levine & Committere, *supra* note 112.

115. See, e.g., *First Fed. Sav.*, 110 F.R.D. 557 (reasonably necessary disclosures for self defense appropriate); *Florida Bar v. Ball*, 406 So. 2d 459 (Fla. 1981) (attorney suspended for disclosing confidences to social worker following fee dispute); *Conduct of Jordan*, 300 Or. 430, 712 P.2d 97 (1985) (attorney disbarred for, among other things, using client confidences to aid other creditors as well as himself in collecting fees). Cf. *Levin v. Ripple Twist Mills, Inc.*, 416 F. Supp. 876 (E.D. Pa. 1976) (denying motion to disqualify but disapproving of use of privileged materials from unrelated suits tending to show ex-client's propensity to perceive improprieties).

116. See *supra* notes 13-16 and accompanying text.

117. See *supra* notes 25-29 and accompanying text.

118. R. WRIGHT, *supra* note 13, at 98. See Subin, *supra* note 10, at 1159-60. Professor Freedman has asserted that the drafters of the Model Rules had misplaced priorities and has offered his own suggestion regarding confidentiality exceptions: disclosure should be required to save human life; it should be permitted to obey rules or court orders after all efforts to challenge the validity of the order have been exhausted, and to defend the lawyer against formal charges brought by the client. Disclosure should be forbidden to avoid third party monetary loss, to rectify a fraud on the court, or to collect a fee. Freedman, *Lawyer-Client Confidences Under the A.B.A. Model Rules: Ethical Rules Without Ethical Reason*, CRIM. JUST. ETHICS, summer/fall 1984, 3, 7-8 (1984).

119. The Model Rules require disclosure only regarding perjury. MODEL RULES, *supra* note 11, at Rule 3.3. This indicates an alarming misplacement of priorities. See Freedman, *supra* note 118, at 7-8 (advocating mandatory disclosure of future crimes involving death or serious bodily harm); Landesman, *supra* note 12, at 209 (same); Subin, *supra* note 10, at 1172-75 (disclosure of all felonies should be mandatory).

autonomy in dealing with the constraints of the legal system should not apply to illicit acts that the law forbids the client to perform.<sup>120</sup>

A utilitarian analysis produces the same result. Courts should strike the balance in favor of preventing imminent danger to life or bodily integrity as against the possibility that, in the future, fewer clients may confide.<sup>121</sup>

Further, courts should permit discretion regarding exposing other future crimes or frauds.<sup>122</sup> A refusal to allow the lawyer to exercise her discretion rests on an abstract notion that no set of circumstances exists under which the rights of others outweigh the rights of clients. Allowing the attorney discretion to determine whether she should make disclosures would enable her to evaluate the strength of the rights of third parties in concrete and varied circumstances, as a deontological approach would require.<sup>123</sup> Further, it would reaffirm the notion that clients are not entitled to make certain autonomous choices when those choices infringe on the autonomy of others. Thus, an attorney should not be civilly liable or subject to discipline absent an abuse of her discretion.<sup>124</sup>

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120. As Professor Subin observed:

The absolutists' rejection of the exception compels them to defend the ludicrous proposition that to preserve the individual's access to the legal system, the individual must be protected against disclosure of his attempts to subvert it. The client may have the 'power' to subvert the process, but surely has no 'right' to do so.

Subin, *supra* note 10, at 1162 (footnote omitted). See also Moore, *supra* note 12, at 207 (autonomy within the law suggests lawyers ought not interfere unless client intends act he has no legal right to perform).

121. See *supra* note 21 and accompanying text. For an economic analysis of maintaining confidences, see Shavell, *Legal Advice About Contemplated Acts: The Decision to Obtain Advice, Its Social Desirability, and Protection of Confidentiality*, 17 J. LEGAL STUD. 123 (1988). See Landesman, *supra* note 12, at 208 (challenging utilitarian argument that clients will not confide and harm will occur).

122. Landesman, *supra* note 12, at 209; Moore, *supra* note 12, at 225 (discretion regarding crimes not involving substantial bodily harm); Subin, *supra* note 10, at 1175-76 (discretion regarding minor crimes is advocated). Although the confidentiality requirements generally do not exempt future frauds from confidential protection, the attorney-client privilege does exempt them. See *supra* note 50 and accompanying text. Some jurisdictions do allow disclosure of future frauds. *Id.*

123. It is very difficult, if not impossible, for one to analyze conflicting rights in the abstract. See *infra* note 191. Cf. Moore, *supra* note 12, at 224 (distinction Model Rules draw between crimes involving serious bodily harm and those involving other substantial harm is not philosophically sound). One should note, however, that a recognition of the relevance of consequences does not imply an adoption of a utilitarian theory. See *supra* notes 25-29 and accompanying text.

124. One may argue it is unfair to lawyers to adopt a vague, discretion-based test. This standard already applies to lawyers, however, because most confidentiality exceptions are permissive, and case law is unanimous in providing that where the professional is permitted but not required to disclose, she must show that a balance should be struck in favor of disclosure. See *supra* notes 104-05 and accompanying text.

If one employs a utilitarian analysis, discretion would allow the lawyer to compare carefully the consequences of a future act to the short and long-term harm caused by exposure of information. In fact, some future acts, such as adoption of a defective product design, may be neither criminal nor fraudulent but nevertheless may have a severe impact upon the rights of third parties.<sup>125</sup> Lawyers should, therefore, have discretion to report those acts as well.

Most legal ethics codes prohibit the disclosure of past crime or fraud, even if the client used the attorney's services, unless the client perpetrated the fraud on a tribunal.<sup>126</sup> The lawyer should have discretion to disclose past crimes or frauds in which she played a role. Attorneys as well as clients are autonomous moral agents;<sup>127</sup> they should have the right to choose to rectify harm they have caused or in which they have participated.<sup>128</sup>

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125. Professor Zacharias provides two examples of such behavior. Clients and lawyers were asked whether a lawyer should disclose if a client produces a metal alloy for planes which meets government standards but may explode at high altitudes. They were also asked if the lawyer should disclose that the client knows that a certain percentage of its gas tanks will explode, but decides that it can pay off claims more efficiently than fix the defect. Interestingly, only 24% of lawyers surveyed thought that a lawyer should disclose the defective alloy, yet over 85% of the clients thought that the parties should disclose. Zacharias, *supra* note 6, at 389-96. In a case of this nature, Moore concludes that the balance tips toward disclosure. Moore, *supra* note 12, at 231-33.

126. See ALAS REPORT, *supra* note 34, at 45-51. There are varying rules regarding past fraud on a tribunal. Model Code DR 7-102(B) was originally drafted to require disclosure, as does Model Rule 3.3. Some commentators believed such a rule went too far and indicated that the Model Code should not require disclosure where the attorney-client privilege protected information. The ABA drafted a clause excepting privileged material from disclosure, but later read the rule as precluding disclosure of both confidences and secrets. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 341 (1975). See Moore, *supra* note 12, at 218 n.192. The attorney may be required to withdraw, see *In re A*, 276 Or. 225, 554 P.2d 479 (1976), or at least to refrain from using perjured testimony. ABA STANDARDS FOR CRIMINAL JUSTICE, Standard 4-7.7 (1986) (Standard for the Defense Function). For a description of various states' positions regarding perjury, see *supra* note 67 and accompanying text. Landesman and Moore appear to agree that lawyers should generally disclose perjury, either because the client has no right to engage in such behavior, or because the rights of third parties or the system outweigh client rights. Landesman, *supra* note 12, at 209-10; Moore, *supra* note 12, at 219.

127. Luban, *supra* note 28, at 637-43; Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 130-44; Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1 (1975).

128. Of course, the lawyer may be subject to discipline or to civil liability if she abuses her discretion. The right to disclose is most compelling where the client uses the unwitting lawyer to carry out fraud on a tribunal, both because the client affected the lawyer's autonomy and because the client did not repose the confidence in her that is supposedly protected by the privilege. Moore, *supra* note 12, at 238-39. Even if the lawyer knew of the fraud, the system should allow her to rectify the harm she has caused.

Arguments for disclosure to avoid attorney malpractice liability or to collect fees are less compelling. Commentators, however, have justified both arguments by stating that the client has waived his rights by suing or refusing to pay a fee.<sup>129</sup> While this argument may have merit where the client is malevolent and the attorney is blameless,<sup>130</sup> it does not give sufficient weight to the notion that, in many cases, the client has good reason to sue or to refuse to pay a legal fee.<sup>131</sup> In such cases, perhaps the client should not be required to pay for the right to bring such claims with disclosure of his confidences. Moreover, a totally innocent client may have confidences disclosed because a third party has made a claim against the lawyer.<sup>132</sup>

In fact, these protective rules are inherently suspect: No one has articulated why an attorney's rights should override those of the clients while those of other innocent parties do not.<sup>133</sup> The rules arguably demonstrate the drafters' preferential treatment of their colleagues.

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129. M. BAYLES, *supra* note 9, at 85; C. WOLFRAM, *supra* note 10, at 308-09. See MODEL RULES, *supra* note 11, at Rule 1.6 comment (client may not exploit fiduciary relationship).

130. In such a case it could be argued that the prima facie duty of reparation supports an exception for fees and the duty of justice supports the self defense exception. See W.D. ROSS, *supra* note 13, at 19-20 (description of prima facie duties). Assuming those duties are implicated, they still must be carefully balanced against the right to autonomy to reach the proper result in a given case. See *supra* note 29. See Levine & Committere, *supra* note 112, at 826-29 (complexity of factors to be considered in determining whether the fee and self defense exceptions should be made precludes rigid rule; judge should make finding that disclosure necessary and in interest of justice).

131. See Moore, *supra* note 12, at 224-25 n.225 (clients who question lawyer fees are not necessarily wrongdoers). Compare *Kriegsman v. Kriegsman*, 150 N.J. Super. 474, 375 A.2d 1253 (1977) (lawyer may not withdraw from representation where client's failure to pay fee is not culpable), with *Holmes v. Y.J.A. Realty Corp.*, 128 A.D.2d 482, 513 N.Y.S.2d 415 (1987) (withdrawal permitted where client able to pay but does not).

132. See MODEL RULES, *supra* note 11, at Rule 1.6(b)(2); MODEL CODE, *supra* note 3, at DR 4-101(C)(4); C. WOLFRAM, *supra* note 10, at 309-10. See Levine & Committere, *supra* note 112, at 816 ("only when the attorney and client are in direct opposition can the client be accused of taking advantage of the privilege . . ."). The right to disclose may be stronger where the client exploited the lawyer. See *supra* note 129.

133. Landesman, *supra* note 12, at 193 (protecting confidentiality means sacrificing other aims; special significance of self defense exceptions needs further justification because lawyers' interests protected and other innocent third party interests are not); Levine & Committere, *supra* note 112, at 812 (difficult to justify rule that would prevent attorney from reporting communications useful to falsely accused non-client or to tradesman seeking payment for services to client, while attorney may disclose when she is accused of wrongdoing or expects payment); Moore, *supra* note 12, at 224-25 n.225 (obvious discrepancy between virtually absolute duty of confidentiality where third parties are concerned and lack of such duty when lawyers' interests implicated); Subin, *supra* note 10, at 1112 (difficult to understand why lawyers but not others are protected). Levine suggests that judges rather than lawyers should determine whether disclosures for self protection or fees should be made, balancing the harm to the client against the necessity of disclosure for the attorney. Levine & Committere, *supra* note 112, at 825.

Thus, although a lawyer may sometimes be justified in disclosing for her own benefit,<sup>134</sup> code drafters should carefully consider the rights of clients and evaluate the consequences of disclosure in various circumstances. Where the lawyer's interests do not outweigh the client's interest in maintaining confidences, the exception allowing disclosures should not apply. Regardless of how confidentiality rules ultimately are promulgated, however, it is reasonably clear that a court will not discipline an attorney or hold her civilly liable for disclosures as long as they fall within a category listed as an exception to the requirement of keeping confidences.

#### IV. INFORMED CONSENT AND DISCLOSURE OF LIMITS TO CONFIDENCE

The crux of a client's complaint against a lawyer for divulging his secrets is that the client never would have entrusted the lawyer with private information had the client known the lawyer would share it with others. The client would claim that his decision to share information was not an informed one, because he was not told of the material fact that the lawyer might not hold all confidences inviolate.<sup>135</sup>

The legal profession only slowly recognized that a general requirement of informed consent should exist with respect to decisions made by clients.<sup>136</sup>

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134. The most compelling set of circumstances for disclosure would occur when the client deceives the lawyer and implicates her in a fraud, because the client has violated the lawyer's autonomy. See *supra* notes 126-28 and accompanying text; see also Moore, *supra* note 12, at 240.

135. This claim differs from more typical informed consent claims which focus on a professional performing services, seemingly for the good of the client or patient, without informing him of risks and alternatives. See, e.g., *Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir.), cert. denied, 409 U.S. 1064 (1972) (laminectomy performed and patient unaware of risks), *Kushner v. McLarty*, 165 Ga. App. 400, 300 S.E.2d 531 (1983) (contract drafted without advising client of consequences of terminology used), *aff'd*, 173 Ga. App. 432, 326 S.E.2d 777 (1985). However, because the point of informed consent is to maintain autonomous decisionmaking, the rationale behind the theory is equally applicable in the context of limitations on confidentiality. See *infra* notes 156-68 and accompanying text. In fact, informed consent may be more important in this context because a clear conflict of interest arises between lawyer and client. See *infra* notes 153-55 and accompanying text. Failure to allow an informed consent is analogous to deception, as evidenced by a client's feeling of betrayal. See *infra* notes 169-71 and accompanying text.

136. The Model Code has long required that informed consent be obtained before a lawyer may represent conflicting interests. See MODEL CODE, *supra* note 3, at DR 5-101, 5-105. See *infra* notes 153-55 and accompanying text. Further, courts have also made clear that clients must consent to settlements or plea bargains. See *infra* note 139. However, generalized recognition of the necessity of informed consent in legal practice has occurred only in the last ten years. See Andersen, *Informed Decisionmaking in an Office Practice*, 28 B.C.L. REV. 225 (1987); Martyn, *Informed Consent in the Practice of Law*, 48 GEO. WASH. L. REV. 307 (1980); Maute, *Allocation of Decisionmaking Authority Under the Model Rules of Professional Conduct*, 17 U.C. DAVIS L. REV. 1049 (1984); Peck, *A New Tort Liability for Lack of Informed Consent in Legal Matters*, 44 LA. L. REV. 1289 (1984); Spiegel, *The New Model Rules of*



Few cases articulate the basis for finding a duty to provide an opportunity for informed consent in a legal context.<sup>137</sup> Today, however, the legal profession clearly recognizes such a duty. Model Rule 1.4 provides that “[a] lawyer shall explain a matter to the extent *reasonably necessary* to permit the client to make informed decisions regarding the representation.”<sup>138</sup>

Of course, not all information must be communicated to the client. Only information reasonably necessary for informed decisionmaking must be pro-

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*Professional Conduct: Lawyer-Client Decision Making and the Role of Rules in Structuring the Lawyer-Client Dialogue*, 1980 AM. B. FOUND. RES. J. 1003 [hereinafter Spiegel, *Lawyer-Client Dialogue*]; Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41 (1979) [hereinafter Spiegel, *Informed Consent*]; Strauss, *Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy*, 65 N.C.L. REV. 315 (1987).

Conversely, medical literature has grappled with informed consent since the 1960's. *Id.* at 316. The first judicial opinion to use the term “informed consent” was *Salgo v. Leland Stanford Jr. College Bd. of Trustees*, 154 Cal. App. 2d 560, 317 P.2d 170 (1957). Strauss, *supra*, at 316. An enormous amount of scholarship has been generated regarding informed consent in the medical arena. See, e.g., R. FADEN & T. BEAUCHAMP, *supra* note 13; C. LIDZ, A. MEISEL, E. ZERUBANEL, M. CARTER, R. SESTAK, & L. ROTH, *INFORMED CONSENT, A STUDY IN DECISIONMAKING IN PSYCHIATRY* (1984) [hereinafter C. LIDZ]; J. LUDLAM, *INFORMED CONSENT* (1978); R. WRIGHT, *supra* note 13, at 84-105; T. MAPPES & J. ZEMBATY, *supra* note 13, at 44-64; A. ROSOFF, *INFORMED CONSENT: A GUIDE FOR HEALTH CARE PROVIDERS* (1981); Carpenter, *A New Setting for Informed Consent*, THE LANCET, Mar. 23, 1974, at 500; Epstein & Lasagna, *Obtaining Informed Consent: Form or Substance*, 123 ARCHIVES OF INTERNAL MED. 682 (1969); Faden, *Disclosure & Informed Consent: Does It Matter How We Tell It?*, 5 HEALTH EDUC. MONOGRAPHS 198 (1977); Hassar & Weintraub, “Uninformed” *Consent and the Wealthy Volunteer: An Analysis of Patient Volunteers in a Clinical Trial of a New Anti-Inflammatory Drug*, 20 CLINICAL PHARMACOLOGY THERAPEUTICS 379 (1976); Laforet, *The Fiction of Informed Consent*, 235 J. A.M.A. 1579 (1976); Leeb, Bowers & Lynch, *Observations on the Myth of “Informed Consent,”* 58 PLASTIC RECONSTRUCTIVE SURGERY 280 (1976); Olin & Olin, *Informed Consent in Voluntary Mental Hospital Admissions*, 132 AM. J. PSYCHIATRY 938 (1975); Smith, *Myocardial Infarction — Case Studies of Ethics in the Consent Situation*, 8 SOC. SCI. & MED. 399 (1974); Waltz & Scheuneman, *Informed Consent to Therapy*, 64 NW. U.L. REV. 628, 637 (1970); Comment, *Informed Consent in Medical Malpractice*, 55 CALIF. L. REV. 1396 (1967).

137. Early cases of legal malpractice stressed the special duties arising from the fiduciary nature of the relationship, and the potential for usurpation of authority absent a high standard of trust and devotion. See, e.g., *Nocton v. Lord Ashburton*, 1914 A.C. 932; Martyn, *supra* note 136, at 323. Later cases, using the developing concept of negligence, stressed customary skill. *Id.* at 324. Today, lack of informed consent in the legal context arises almost exclusively where there is either a failure to disclose conflicts of interest or to communicate settlement offers. See *infra* notes 139, 153-55. But see *infra* note 165; *Spector v. Marmelstein*, 485 F.2d 474 (2d Cir. 1973) (failure to advise regarding risks of loan); *Kushner v. McLarty*, 165 Ga. App. 400, 300 S.E.2d 531 (1983) (failure to inform of consequences of using terminology), *aff'd*, 173 Ga. App. 432, 326 S.E.2d 777 (1985).

138. MODEL RULES, *supra* note 11, at Rule 1.4 (emphasis added). Ethical Consideration 7-8 provides that a lawyer “should exert his best efforts to insure that the decisions of his client are made only after the client has been informed of relevant considerations.” MODEL CODE, *supra* note 3, at EC 7-8.

vided. Thus, the principal question is whether information regarding the possibility of disclosure is of the type that an attorney must share. In the context of this Article, the question is who should make the decision of whether a client will give an attorney information that the attorney may later disclose.

#### A. Allocation of the Decisionmaking Functions

The classic formulation regarding allocation of decisionmaking functions calls for the lawyer to make "procedural" or "tactical" decisions while the client retains authority over "substantive" issues, such as accepting or rejecting settlements or plea bargains.<sup>139</sup> Commentators sometimes characterize this formulation as a "means/ends" dichotomy.<sup>140</sup>

One could argue that the decision whether to disclose client confidences demands an examination of personal and professional ethics that transcends the attorney-client relationship. The fact that client consent is only one of several available exceptions to the rule requiring maintenance of confidences supports this conclusion. Thus, one could view the decision whether to inform the client about the possibility of disclosure as akin to a tactical, professional decision, rather than a substantive client decision. If so, the attorney can decide to disclose without consulting the client.

Such an analysis begs the question. No one disputes that, at times, disclosure is morally and legally appropriate (or even mandated), and that client input cannot be dispositive.<sup>141</sup> Instead, a determination by the lawyer whether she should disclose a matter must occur only after a careful analysis of the competing rights at stake.<sup>142</sup> However, while the question whether to warn the client about the possibility of such disclosure is related to the question of propriety of the disclosure itself, it is not identical. Rather than conflating the two questions, the lawyer must separately consider the rights of

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139. See, e.g., *Staatz v. Dupnek*, 789 F.2d 806 (9th Cir. 1986) (defendant bound by tactical decisions by counsel); *Gans v. Mundy*, 762 F.2d 338 (3d Cir.), cert. denied, 474 U.S. 1010 (1985) (duty to convey settlement offer recognized, but court concluded attorney met duty); *Whitaker v. State of Iowa*, 382 N.W.2d 112 (Iowa 1986) (attorney must advise of settlement offer); *Joos v. Auto-Owners Ins. Co.*, 94 Mich. App. 419, 288 N.W.2d 443 (1980) (attorney has duty as a matter of law to communicate good faith settlement offers); *Rizzo v. Haines*, 520 Pa. 484, 555 A.2d 58 (1989) (attorney must communicate and investigate settlement offers); *Senyshyn v. Karlak*, 450 Pa. 535, 299 A.2d 294 (1973) (attorney could not enter consent decree without permission); see generally Maute, *supra* note 136, at 1063-66; Spiegel, *Informed Consent*, *supra* note 136, at 50-64; Strauss, *supra* note 136, at 318-21.

140. Spiegel, *Informed Consent*, *supra* note 136, at 101-03; Strauss, *supra* note 136, at 318-21.

141. See MODEL CODE, *supra* note 3, at DR 4-101(C); MODEL RULES, *supra* note 11, at Rule 1.6(b); see also *supra* notes 119-34 and accompanying text.

142. See *supra* notes 116-34 and accompanying text.

the client to information regarding limits on confidentiality versus the potential damage to her own rights or those of third parties if she provides that information and, as a result, the client does not speak openly to her.<sup>143</sup>

Most commentators recognize that the tactics/substance dichotomy cannot be dispositive in determining whether the client should have the right to decide.<sup>144</sup> First, courts have deviated from this formula when necessary to protect third party expectations or judicial administration.<sup>145</sup> Second, and more important, the dichotomy does not provide for the instance when a seemingly pure tactical decision implicates substantive rights.<sup>146</sup> Thus, the artificial distinction between tactics and substance should be abandoned and replaced with a presumption that a client must be given the opportunity to provide his informed consent whenever the client would find the information material to his decisionmaking.<sup>147</sup>

Although the Model Rules continue to base distinctions regarding decisionmaking upon the substance/procedure dichotomy, a limited recognition does exist that the client has an interest in determining even procedural issues. For example, although the lawyer has ultimate authority regarding the means of representation, Model Rule 1.2(a) requires that she consult with the client regarding those issues.<sup>148</sup> Moreover, Rule 1.2(e) requires that the

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143. See W.D. Ross, *supra* note 13, at 19 (actor confronted with conflicting prima facie duties must study the particular situation in which the conflict arises so that he may form a considered opinion regarding which right takes precedence).

144. See, e.g., Maute, *supra* note 136, at 1080-1105; Spiegel, *Informed Consent*, *supra* note 136, at 72-133; Strauss, *supra* note 136, at 324-26; 336-49.

145. Spiegel, *Informed Consent*, *supra* note 136, at 63.

146. Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454, 458-59; Maute, *supra* note 136, at 1061-62; Strauss, *supra* note 136, at 324-26. As an example of a situation in which a "tactical" decision matters to the client as much as the result does, Strauss cites a hypothetical suggested by Professor David Luban: an innocent client being prosecuted for murder forbids his lawyer from calling his best friend's wife, with whom he had been having an affair, as an alibi witness because he does not want anyone to know he had been with her. *Id.* at 325. Strauss offers other examples: the client might be embarrassed to use an insanity defense; he might not want the stress of continuances advised by the lawyer; or he may want arguments raised although the chances of success are low. *Id.* For other examples, see Luban, *supra*, at 454-59. One could find numerous examples of situations in which clients care about the tactics or means employed. *Id.* One immediately coming to mind is that persons engaged in a long-term relationship may wish to resolve controversies as amicably as possible, while a lawyer may wish to play hardball to get the best deal for his client. *Id.* at 455. See also Maute, *supra* note 136, at 1061 (clear distinction between ends and means impossible).

147. See Andersen, *supra* note 136, at 233 (subjective standard which takes into account wishes of individual client best protects autonomy); Martyn, *supra* note 136, at 348-49 (advocating that standard for informed consent should be subjective expectations of client); Spiegel, *Lawyer-Client Dialogue*, *supra* note 136, at 1006 (attorney must consider when it is reasonable to assume client would want to participate in decisionmaking); Strauss, *supra* note 136, at 341 (even traditional disclosure of risks and benefits gives attorney great discretion).

148. MODEL RULES, *supra* note 11, at Rule 1.2(a).

lawyer consult with the client regarding legal restraints against pursuing client goals.<sup>149</sup>

Thus, some understand that the relationship resembles a cooperative, "joint venture" between lawyer and client.<sup>150</sup> Commentators who have considered this issue argue that the appropriate focus centers upon the expectations of the client, rather than upon whether a lawyer customarily makes decisions of the type contemplated.<sup>151</sup> Therefore, rather than determining that an issue is "technical" or "procedural," the inquiry should focus on whether the client would consider the information material to his decision-making. Using this analysis helps to assure that the lawyer treats her client

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149. *Id.* at Rule 1.2(e). Furthermore, Rule 1.2(c) allows the lawyer to limit client objectives with client consent. *Id.* at Rule 1.2(c).

150. See Maute, *supra* note 136, at 1080. Professor Maute uses this nomenclature to describe the allocation of the decisionmaking authority under the Model Rules. *Id.* She finds that decisionmaking is shared, but that client and lawyer each have presumptive spheres of authority. *Id.* at 1066. The client has ultimate authority over objectives, which include "the client's overall purpose or desired result, other matters affecting the client's legal rights, obligations or financial interests, and subjective concerns, including business, political, moral, or personal values." *Id.* at 1063. The lawyer has presumptive authority over legal, tactical, and technical issues, and may override client choice where prohibited by law from aiding it. *Id.* at 1064-66. Thus, the means/ends distinctions remain relevant to Professor Maute, with two important clarifications. First, "ends" are interpreted more broadly to comport with client expectations. Second, communication must occur even with respect to "technical" issues, and borderline questions should be resolved through consensus or compromise to avoid the lawyer or client encroaching upon the authority of the other. *Id.* at 1061. Professor Shaffer recognizes that, although lawyer and client are autonomous moral agents, their relationship is a mutually dependent one. Shaffer, *The Practice of Law as Moral Discourse*, 55 NOTRE DAME LAWYER 231, 246 (1979). He rejects the notion that a lawyer must either patronize the client and make decisions for him, defer to the client at all costs, or isolate himself from the client by withdrawing his aid. *Id.* at 234-37. Instead, he advocates the collaborative model of a continuing moral dialogue between lawyer and client. *Id.* at 248-50, 252-53.

151. Such a shift in emphasis would track developments in informed consent in the medical profession. See Martyn, *supra* note 136, at 333-40. Prior to the decision in *Canterbury v. Spence*, 464 F.2d 772, 787 (D.C. Cir.), *cert. denied*, 409 U.S. 1060 (1972), reasonableness of disclosures was examined in light of medical custom; that is, from the perspective of doctors rather than patients. See Martyn, *supra* note 136, at 336. In *Canterbury*, recognizing the fiduciary nature of the doctor-patient relationship and the primacy of patient expectations, the court held that "the patient's right of self-decision [is] the factor that determines the scope of the duty to reveal." *Id.* at 337. See also *Canterbury*, 464 F.2d at 786. Under the *Canterbury* approach, the scope of the requirement of informed consent in medical practice is now determined not by the custom of medical professionals but by the patient's right to information necessary for making an intelligent choice. Martyn, *supra* note 136, at 338. *Canterbury* did not go far enough because it used an objective standard of materiality rather than a subjective inquiry into the client's needs. Compare *id.* at 338 n.196 with *Cobbs v. Grant*, 8 Cal. 2d 229, 245, 502 P.2d 1, 11, 104 Cal. Rptr. 505, 515 (1972) (materiality to be determined by reference to subjective patient needs).

as another human being engaged in a cooperative endeavor with her rather than simply as a means by which to exercise her professional skill.<sup>152</sup>

In fact, one need not go far beyond the traditional rules regarding informed consent in the practice of law to conclude that the lawyer must warn the client regarding how the lawyer may use the client's confidences. Courts have long required a client's informed consent when a conflict of interest exists.<sup>153</sup> An informed consent requirement regarding conflicts serves the critical purpose of reducing the ability of a lawyer to overstep her authority and take unfair advantage of the client.<sup>154</sup> The lawyer resolves a conflict in favor of third parties or the legal system and against her client when she reports crimes or frauds, and she resolves the conflict in favor of herself when she discloses to defend herself or to collect a fee. Given that substantive client rights may be affected, the possibility of disclosure is material. Therefore, a presumption should arise that attorneys must make the client aware of potential conflicts and how both parties may resolve them.<sup>155</sup>

#### *B. Justifying the Imposition of a Duty to Inform About Limits to Confidentiality*

To provide a philosophical framework for the imposition of a duty to inform, one must consider the rights affected by failure to apprise of limits to confidentiality and those rights affected if the lawyer describes those limits. Commentators unanimously recognize that the principle of autonomy and its concomitant right of self-determination provide a moral justification for

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152. Professor Shaffer, using nomenclature articulated by Martin Buber, explains that the morally right and emotionally satisfying relationship between two persons is an "I-Thou" relationship, a mutually dependent and cooperative one. Shaffer, *Legal Ethics and the Good Client*, 36 CATH. U.L. REV. 319, 319-20 (1987). However, he claims relationships between professionals and laypersons often degenerate into an "I-It" relationship, where the professional does all the counselling and refuses to be counselled. *Id.* This approach fails to recognize that clients can be a source of sound morality to lawyers, and it promotes hubris on the part of lawyers. *Id.*

153. Spiegel, *Informed Consent*, *supra* note 136, at 68, 72. See, e.g., *Unified Sewerage Agency of Wash. County v. Jelco, Inc.*, 646 F.2d 1339 (9th Cir. 1981); *Johnson v. Jones*, 103 Idaho 702, 652 P.2d 650 (1982); *Phillips v. Carson*, 240 Kan. 462, 731 P.2d 820 (1987); *Hartford Accident & Indem. Co. v. Foster*, 528 So. 2d 255 (Miss. 1988); *Bankers Trust of S.C. v. Bruce*, 283 S.C. 408, 323 S.E.2d 523 (1984).

154. Martyn, *supra* note 136, at 313; Strauss, *supra* note 136, at 329-30, 343 (even assuming attorneys adequately recognize client interests, professional, moral or economic self interest may influence the choices that lawyers make; imposing informed consent requirements lessens incentive for coercion).

155. See Spiegel, *Informed Consent*, *supra* note 136, at 123 (when a client's values are likely to be implicated or an attorney's professional loyalty is suspect, the client should make the decision).

informed consent in the legal profession.<sup>156</sup> As Gerald Dworkin explains, the ability to make our own decisions reaffirms our sense that we are individuals able to control our own destiny.<sup>157</sup> Thus, autonomy is a good in itself, which should not be overcome absent the strongest of countervailing rights.<sup>158</sup>

Closely tied to the concept of autonomy is the requirement of veracity.<sup>159</sup> To fulfill that duty, fiduciaries clearly owe their principals not only an absence of active deception, but the affirmative obligation of candor.<sup>160</sup> Whether a lawyer purposely makes misstatements or intentionally withholds information,<sup>161</sup> failure to disclose is morally problematic because it involves professionals trying to build and encourage trust and then using it to deceive.<sup>162</sup> Thus, deception in the attorney-client setting includes both active misstatements and failure to disclose material information.<sup>163</sup>

156. See, e.g., Martyn, *supra* note 136, at 311-12 (autonomy recognized as moral right and as basis for exercise of legal rights); Strauss, *supra* note 136, at 336-39 (explaining deontological and utilitarian justifications for autonomy); see also *supra* notes 14-16 and accompanying text.

157. Dworkin, *Autonomy and Informed Consent*, in PRESIDENT'S COMM. FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE & BIOMEDICAL & BEHAVIOR RESEARCH, 3 MAKING HEALTH CARE DECISIONS: THE ETHICAL AND LEGAL IMPLICATIONS OF INFORMED CONSENT IN THE PATIENT-PRACTITIONER RELATIONSHIP 74 (1982), quoted in Strauss, *supra* note 136, at 337. Thus, autonomy is justifiable as a good in itself. Dworkin, *supra*, at 73-74. Moreover, principles of utility justify informed consent: they assure that individual choice is maximized, resulting in client satisfaction; attorney and client are protected from the dangers of poor communication; the public may be less skeptical of the legal profession; and they encourage self-scrutiny. Strauss, *supra* note 136, at 338. See Martyn, *supra* note 136, at 318-21 (informed consent increases self-scrutiny and public involvement in affairs of profession).

158. Strauss, *supra* note 136, at 340. Professor Strauss's argument is consistent with the notion articulated by W.D. Ross that a presumption exists, absent stronger opposing rights, that prima facie rights must be vindicated. See *supra* notes 25-29 and accompanying text.

159. Some philosophers question whether the rights to veracity and autonomy are of equal force, or whether veracity is simply a means by which autonomy may be achieved. See T. BEAUCHAMP & J. CHILDRESS, *supra* note 25, at 307-08 (comparing G. J. Warnock's view that veracity is an independent moral principle with Henry Sidgwick's conclusion that veracity is merely a special application of other principles). Ross concludes that the prima facie duty of fidelity is based upon a promise not to lie, which can be implied from the act of entering civilized conversation. W.D. ROSS, *supra* note 13, at 21. See T. BEAUCHAMP & J. CHILDRESS, *supra*, note 25, at 308 (we implicitly promise we will speak truthfully when we communicate with others).

160. M. BAYLES, *supra* note 9, at 72.

161. The crux of deception is intention. S. BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 6-8 (1978).

162. R. WRIGHT, *supra* note 13, at 94.

163. *Id.* "When we undertake to deceive others intentionally, we communicate messages meant to mislead them . . . . We can do so through gesture, through disguise, by means of action or inaction, even through silence." S. BOK, *supra* note 161, at 13.

A client's right to veracity is compromised even when an attorney negligently fails to disclose material facts<sup>164</sup> because she reduces a client's autonomy despite the fact that her motives are not venal. For this reason, some courts have stated that an attorney must investigate matters to determine what a client may find material.<sup>165</sup>

Veracity is critical to the maintenance of autonomy because, although deception does not implicate a person's ability to remain autonomous, it certainly implicates the ability to make autonomous choices.<sup>166</sup> The lack of information creates two restrictions on autonomous decisionmaking: limiting information limits choices, and, almost inevitably, the client will be manipulated when an attorney withholds or gives incorrect information.<sup>167</sup> Commentators have recognized the anomaly of defending confidentiality on the basis of autonomy while simultaneously failing to explain to a client the limits of such confidentiality.<sup>168</sup>

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164. Some may generally view a failure to speak as intentional, because attorneys are aware of limitations on confidentiality. See *supra* notes 6-8 and accompanying text. Nondisclosure is not intentional, however, when an attorney mistakenly believes the information withheld is not relevant to a client. While such a failure is perhaps not as morally culpable as deliberate nondisclosure, it still violates client autonomy, which is the value underlying an attorney's duty to inquire in order to determine what the client thinks is material. See *infra* text accompanying note 165, notes 209-13 and accompanying text; Martyn, *supra* note 136, at 323 (citing J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 208 (fiduciary has affirmative duty to disclose facts and circumstances principal would find important)).

165. See, e.g., *Kushner v. McLarty*, 165 Ga. App. 400, 300 S.E.2d 531 (1983) (duty to discuss terminology), *aff'd*, 173 Ga. App. 432, 326 S.E.2d 77 (1985); *Rizzo v. Haines*, 520 Pa. 181, 555 A.2d 58 (1989) (lawyer must investigate so that a client's decision to accept or reject settlement offer will be informed). Moreover, actions for breach of fiduciary duty do not require intent. Martyn, *supra* note 136, at 321-22.

166. R. WRIGHT, *supra* note 13, at 95. Accord T. BEAUCHAMP & J. CHILDRESS, *supra* note 25, at 313. T. MAPPE & J. ZEMBATY, *BIOMEDICAL ETHICS* 57 (1981).

167. R. WRIGHT, *supra* note 13, at 95. The client has been manipulated because he expects he has been told the truth. *Id.* at 95, 99. See Spiegel, *Lawyer-Client Dialogue*, *supra* note 136, at 1005 (granting decisionmaking right to layperson without corresponding duty of communication undermines right). Bok equates deceit with violence and refers to them as "the two forms of deliberate assault on human beings. Both can coerce people into acting against their will." S. BOK, *supra* note 161, at 18 (footnote omitted). It thus gives unjust power to the deceiver. *Id.* at 22. As Warnock explains, "the simplest and most seductive way [ ] of manipulating and maneuvering other persons for the sake of one's own ends is that of thus operating self-interestedly upon their beliefs." G.J. WARNOCK, *THE OBJECT OF MORALITY* 84 (1971). See Shaffer, *supra* note 150, at 246-47 (lawyer should not use methods of influence which interfere with ability of clients to reflect rationally; methods which rely on deception or client ignorance should be avoided).

168. See Subin, *supra* note 10, at 1165-66 (autonomy requires disclosure of limits; promise of confidentiality without intention to keep confidences defrauds the client). See Zacharias, *supra* note 6, at 381 (to extent lawyers manipulate clients by assurance of absolute confidentiality, autonomy rationale for confidentiality is undercut). It has also been suggested that psychiatrists should warn patients of limits to confidentiality. See, e.g., Fleming & Maximov, *supra* note 53, at 1056-60 (basing conclusion on power of psychiatrist, limited patient understanding

An attorney's misstatements or failure to share material facts may have an immediate and substantial impact upon the client's right to autonomy. Moreover, discovering the deception may cause the client to alter his view of the lawyer and perhaps of people generally. The client who discovers that his lawyer has deceived him might become "resentful, disappointed and suspicious,"<sup>169</sup> not only of his lawyer but also of others.<sup>170</sup> The fact that the client put trust in his lawyer exacerbates the feelings of betrayal that inevitably result and may exist regardless of whether the lawyer intended to mislead her client.<sup>171</sup>

Additional issues arise if lawyers willfully misrepresent or withhold information.<sup>172</sup> The misrepresentation or withholding may have an immediate impact upon the attorney-client relationship, even if the client is still unaware of the deception. First, the lawyer may feel compelled to make additional false statements to avoid discovery of the original deception.<sup>173</sup> Moreover, the attorney may become desensitized to the consequences of her deception: "lies seem more necessary, less reprehensible; the ability to make moral distinctions can coarsen; the liar's perception of his chances of being

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of risks, and dependence and trust of patient); *Accord*, Note, *Duty to Warn*, *supra* note 95, at 155-56.

169. S. BOK, *supra* note 161, at 63 (discussing dangers of deception by using placebos in drug experimentation).

170. Warnock explains:

It is, one might say, not the implanting of false beliefs that is damaging, but rather the generation of the suspicion that they may be being implanted. For this undermines trust; and, to the extent that trust is undermined, all co-operative undertakings . . . must tend to break down. I cannot reasonably be expected to go over the edge of a cliff on a rope, for however vital an object, if I cannot trust you to keep hold of the other end of it; there is no sense in my asking you for your opinion on some point, if I do not suppose that your answer will actually express your opinion. (Verbal communication is doubtless the most important of all our co-operative undertakings.)

G.J. WARNOCK, *supra* note 167, at 84. Warnock's view is consistent with Aquinis' notion that the evil in lying is the impact it has upon communication, the undertaking most indicative of our status as human beings. T. AQUINIS, *SUMMA THEOLOGICA* Art. I (I would like to thank my colleague, Father Robert Kirtland, for translating Aquinis from Latin.) Warnock adds that lying is especially dangerous because it is *easy* to do. As it is difficult to discriminate between truthful persons and liars, uncertainty as to the credibility of any will infect relations with all. G.J. WARNOCK, *supra* note 167, at 84.

171. Bok uses a literary example to illustrate her point: "[I]n *Othello*, . . . part of the horror comes from the knowledge of the great trust Othello had for Iago and from the fact Iago played upon this trust: 'he holds me well, The better shall my purpose work on him.'" S. BOK, *supra* note 161, at 88.

172. There are probably few situations where failure to speak should not be regarded as intentional. *See supra* notes 6-8, 164 and accompanying text.

173. S. BOK, *supra* note 161, at 25. Bok observes that strains on the liar become greater as time goes on, because it becomes more difficult to keep track of stories told. *Id.*



caught may warp."<sup>174</sup> Finally, the lawyer who successfully deceives may view her client as being easily duped. Consequently, the attorney's respect for the client as an autonomous moral agent may be reduced.<sup>175</sup> Perhaps she may develop a general unwillingness to respect the client's rights, or those of other clients.<sup>176</sup> A lack of informed consent about the limits of confidentiality also presents an interesting irony: the lawyer makes a misrepresentation regarding secrecy to clients to create an atmosphere encouraging candor.<sup>177</sup> Such lawyers "would prefer, in other words, a 'free-rider' status, giving them the benefits of lying without the risks of being lied to."<sup>178</sup>

It may be argued without reference to client autonomy that the very core of the lawyer-client relationship is adversely affected by deception. Lawyer and client are not isolated persons with separate lives; they are interdependent and engaged in a cooperative enterprise.<sup>179</sup> If the client views his lawyer as a good person possessing wisdom, she is in a position to exert moral influence.<sup>180</sup> Instead, deception changes the nature of the relationship, and their allegiance to one another in the pursuit of a common goal is put into question.<sup>181</sup> The client no longer views the lawyer as having integrity, and he no longer views her as a dependable source of moral authority.<sup>182</sup>

In sum, deception has the immediate effect of reducing client autonomy and damaging the attorney-client relationship. The next question is whether deception is ever justified. Although Kant would argue that one can never

174. *Id.*

175. The lawyer may reach this conclusion to reduce her own feelings of guilt. The attorney may conclude it is the client's "fault" that deception was necessary, or the client's "fault" that he is too dense to recognize the deception.

176. Disdain for the client's right or ability to make intelligent decisions may result even when the lawyer lies for the client's "own good." The lawyer may come to view the client as unable or unworthy to decide for himself. S. BOK, *supra* note 161, at 76.

177. See *supra* notes 1, 8 and accompanying text.

178. S. BOK, *supra* note 161, at 23.

179. See Shaffer, *supra* note 152, at 325.

180. *Id.*

181. A. MACINTYRE, *AFTER VIRTUE* 191-92 (1984).

182. Shaffer, *supra* note 152, at 330. According to Professor MacIntyre, this breakdown has ramifications far beyond an individual relationship. He finds that individuals are influenced by and derive their moral view from a shared tradition of the good in a community. A. MACINTYRE, *supra* note 181, at 222-23. That tradition is a living, changing environment that has been developed over generations from "practices," which are defined as complex, socially established cooperative human activity intended to advance human experience. *Id.* at 187. The cooperative relation between lawyer and client could be viewed as one such practice. See generally Shaffer, *supra* note 152. As MacIntyre explains, if practices and institutions are corrupted by untruthfulness, traditions will be corrupted as well. Individuals thus lose a reference point for interpreting morality. A. MACINTYRE, *supra* note 181, at 233.

accept deception,<sup>183</sup> most theorists recognize that it is excused in certain circumstances.<sup>184</sup> Seldom, however, can one justify deception regarding the limits to confidentiality.

*C. Justifying Exceptions to the Duty to Inform About Limits to Confidentiality*

Before considering the strength of the justifications for various deceptions, a few general observations may be made. First, because veracity is a *prima facie* right, the presumption of a right to nondeceptive information is strong, and the burden of proof that deception is justified rests with the person who intends to deceive.<sup>185</sup> Next, in part because liars "tend to place a much more benevolent interpretation on their own excuses than when they are on the receiving end,"<sup>186</sup> the proffered justification must withstand the test of "publicity:" that is, it must appeal to a common, universal view of propriety.<sup>187</sup>

Deception is most justified when it avoids imminent bodily harm to a third party.<sup>188</sup> The justification for deception here is threefold: limited time is available to evaluate alternatives; the avoidance of harm creates a strong countervailing duty; and the deception typically occurs in such isolated in-

183. Kant finds the duty of truthfulness "a sacred and absolutely commanding degree of reason, limited by no expediency." Truth is required regardless of the harm to the liar or innocent third parties. KANT, ON A SUPPOSED RIGHT TO LIE FROM ALTRUISTIC MOTIVES, reprinted in S. BOK, *supra* note 161, at 267, 269. Although Aquinas finds all lies to be wrong as they interfere with communication, joking or officious lies (those told for the well-being or advantage of the listener) are less culpable than pernicious lies. T. AQUINAS, *supra* note 170, at Art. II & III.

184. See, e.g., S. BOK, *supra* note 161, at 39-42; R. WRIGHT, *supra* note 13, at 95.

185. S. BOK, *supra* note 161, at 32-41. Veracity is a *prima facie* right either because of its inherent goodness, or because it enhances autonomy. See *supra* note 159 and accompanying text. Bok notes that deception by professionals is particularly disfavored because given the opportunities to deceive, the extreme loss of trust, and possibility of imitation and deceptive countermeasures, it is highly likely deceptive practices of that nature will spread and harm the community. S. BOK, *supra* note 161, at 119.

186. S. BOK, *supra* note 161, at 86-87. Liars tend to minimize the impact of lies both because of their inherent bias and their reduced sensitivity to moral issues. See *supra* note 174 and accompanying text; S. BOK, *supra* note 161, at 83, 120.

187. Bok agrees with Hume that moral justifications must be considered with reference to the common view of all. S. BOK, *supra* note 161, at 91 (citing D. HUME, AN ENQUIRY CONCERNING THE PRINCIPLES OF MORALS, in HUME'S MORAL AND POLITICAL PHILOSOPHY 252 (H. Aiken ed. 1948)). Bok's use of the term "publicity" refers to Rawls' view that every moral principle "must be capable of public statement and defense." *Id.* at 92 (citing J. RAWLS, A THEORY OF JUSTICE 133 (1972)). Bok finds the requirement of publicity is perhaps particularly critical to justifications of deception, because lies are inherently secretive. They are, therefore, less likely to otherwise be brought to the attention of the public for debate than are more openly performed controversial acts. *Id.*

188. *Id.* at 108-09. See also *supra* notes 119-20 and accompanying text.

stances that it probably will not encourage others to lie.<sup>189</sup> Thus, it may be appropriate to deceive the client regarding confidentiality so that he will disclose his immediate plans to harm another; thereupon, the lawyer must try to stop him. If harm is imminent, as where a client has a history of violent behavior, such deception may be justified.<sup>190</sup>

This hypothesis, however, cannot serve as a blanket justification for deception. Deception about possible disclosure occurs from the commencement of the relationship, when it is unclear whether anyone's interests are implicated, let alone an innocent third party's interest in bodily integrity. Thus, no one evaluates the alternatives, and, furthermore, no one can determine the likelihood or severity of an infringement of a third party's rights at the time of the deception. Thus, the lawyer cannot evaluate the strength of the justification for the deception at the time it occurs.<sup>191</sup> Moreover, a policy of not disclosing limits on confidences, if intentional, goes beyond the isolated

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189. S. BOK, *supra* note 161, at 108-09. Cf. T. BEAUCHAMP & J. CHILDRESS, *supra* note 25, at 312-13 (prima facie obligation of veracity and respect for autonomy, as well as implications of a long term threat to relationship of trust mandate a search for alternatives); *id.* at 335-41 (using utilitarian balance, authors show that the right to confide may be outweighed by harm to third parties where that harm is both probable and severe; professionals should seek alternatives where possible).

190. Although the rights of third parties are most clearly at issue in such a case, the information is also more material to the client, and of a more private nature than some confidences. Perhaps as a result, some commentators believe that patients who are tested for AIDS should be informed of the doctor's responsibility to report results, and of the economic and social consequences that may follow disclosure. See, e.g., McDonald, *Ethical Problems for Physicians Raised by AIDS and HIV Infection: Conflicting Legal Obligations of Confidentiality and Disclosure*, 22 U.C. DAVIS L. REV. 557, 588 (1989) (duty to advise clients in high risk categories); Swartz, *AIDS Testing and Informed Consent*, 13 J. HEALTH POL., POL'Y & LAW 607, 613-15 (1988) (doctors should explain implications to health and lifestyle); Weldon-Linne, Weldon-Linne, & Murphy, *AIDS-Virus Antibody Testing: Issues of Informed Consent and Patient Confidentiality*, 75 ILL. B.J. 206, 210 (1986) (duty to warn of ramifications of testing, including possibility of disclosure). See *People v. Younghanz*, 156 Cal. App. 3d 811, 202 Cal. Rptr. 907 (1984) (psychologist must inform patient of duty to report child abuse in order to protect patient privacy). An argument could be made, however, that where harm is clear, such as where patients bring a child who is a victim of child abuse to an emergency room, the doctor could refrain from informing parents of his duty to disclose in order to assure the child's treatment and perhaps to avoid future abuse.

191. Bok states that any attempt to establish priorities or rights in the abstract is bound to fail. For example:

[W]hile it is obscure to claim that weight and length conflict in the abstract, there are concrete cases where both cannot be satisfied, where you cannot get a thing the length you want and the weight you want, as where you need fifteen yards of heavy chain but only have the strength to carry home five pounds of it. In the same way, you cannot always make a choice, or expect others to make it, which achieves both the fairness and the beneficence you desire. Moral principles, just like length and weight, represent different dimensions by which we structure experience and can therefore present conflicts in concrete cases but never in the abstract. It is for this reason that the search for priority rules among moral principles in the abstract is

incident that will not encourage others to lie. Rather, it reflects an ongoing practice of deception.<sup>192</sup>

Finally, the deception may have no countervailing justification. First, some clients have no intention of harming others, so deception is unnecessary. Second, the argument that deception is necessary assumes that, absent a belief that secrets will be held inviolate, the client will never tell the lawyer, who will then be unable to prevent harm.<sup>193</sup> In fact, some clients may tell their lawyers anyway, either because they feel the need to confess or because they recognize the necessity of candor to assure competent legal representation.<sup>194</sup> Moreover, a lawyer who has not engaged in deception is in a better position to exercise moral suasion.<sup>195</sup>

If deception cannot be justified by the argument that a lawyer may thereby be in a position to avoid harm to a third party, it follows that it may not be justified by the possibility that a lawyer may avoid harm to herself if her competence is challenged or if she must collect her fee.<sup>196</sup> In fact, if such

doomed to fail; one might as well search for such priority rules among pounds, yards, and hours in the abstract.

S. BOK, *supra* note 161, at 77-78.

192. In the context of "self-defensive lies," Bok observes that a practice of lying can permeate all one does, perhaps reaching the point where one is "living a lie." *Id.* at 79. She adds that "[p]rofessionals involved in collective practices of deceit" thereby renounce ordinary assumptions about their own honesty and the honesty of others. *Id.*

193. Three-quarters of the lawyers surveyed in Professor Zacharias's study believe that confidentiality helped them dissuade a client from wrongdoing. Zacharias, *supra* note 6, at 381. Professor Zacharias notes that these responses leave two questions unanswered: whether the lawyers could have gotten the information at all, absent promises of confidentiality, and whether disclosure exemptions would cause clients to hide information they otherwise would disclose. *Id.* Most of those surveyed believed they would get the same information from clients if they did not advise clients about confidentiality. *Id.* at 385.

194. Subin, *supra* note 10, at 1163-64; Zacharias, *supra* note 6, at 369.

195. See *supra* notes 179-84 and accompanying text.

196. Those who accept the notion that a client who sues the lawyer or will not pay a fee is an "unjust aggressor" might argue that it is appropriate to lie to enemies or in one's own defense to counteract the evil of the client. As suggested above, not all such clients are unjust aggressors. See *supra* note 131. Moreover, such claims are particularly susceptible to bias:

Because claims to fairness involve deeply personal views about what one deserves or what is one's right, they are extraordinarily prone to misinterpretation and bias. Injustice, exploitation, the disparity of power — these are held to excuse innumerable lies. Those who believe they are exploited hold that this fact by itself justifies dishonesty in *rectifying* the equilibrium; those who have the upper hand often feel justified in using deceit so as to *maintain* that equilibrium.

S. BOK, *supra* note 161, at 83 (emphasis added). Where "enemies" are concerned, paranoia may exacerbate bias. *Id.* at 139. Finally, a claim that an act is right due to the status of another as an enemy is less likely than most to satisfy the requirement of publicity:

The language of enmity and rivalry, as Hume indicated . . . is private language not suited to moral inquiry. If we want to produce excuses for lying to someone, these excuses should be capable of persuading reasonable persons, not merely some partic-

scenarios arise more often than the possibility of harm to third parties, the potential that a lawyer might use confidences in those cases is even more material, and hence especially deceptive, to the client. The attorney should therefore inform the client of that possibility.

Lawyers may fear the chilling effect of disclosing the limits on confidentiality. Other than avoidance of harm to the lawyer or third parties, the only danger of such a "chill" is that clients may not confide information the attorney feels is critical to competent representation. One can analogize such an argument to the roundly criticized, paternalistic notion held by some physicians that a patient should not be told of risks because he might not submit to a medical procedure that is "good" for him.<sup>197</sup> Thus, so long as the client understands that the lawyer may be hampered by a lack of information, the choice of whether to disclose belongs to the client.<sup>198</sup>

ular public locked in hostility to a particular group. Entering into hostilities is, in a sense, to give up the ability to shift perspectives. But even those who give up the language of morality during a period of hostility and adopt that of strategy instead, may do well to remember Mark Twain's words: 'When in doubt, tell the truth. It will confound your enemies and astound your friends.'

*Id.* at 145.

197. The desire to do what is best for the client is a laudable one, based on the principle of beneficence, or providing benefits (which includes both prevention of harm and promotion of welfare). T. BEAUCHAMP & J. CHILDRESS, *supra* note 25, at 194-95. However, failure to provide informed consent for the client's "own good" creates a conflict between the principles of beneficence and autonomy. *Id.* at 210. In medical ethics, it is generally recognized that beneficence must give way to promotion of autonomy, at least where the patient is competent.

The primary goal of health care in general is to maximize each patient's well-being. However, merely acting in a patient's best interests without recognizing the individual as the pivotal decisionmaker would fail to respect each person's interest in self-determination. . . . When the conflicts that arise between a competent patient's self-determination and his or her apparent well-being remain unresolved after adequate deliberation, a competent patient's self-determination is and usually should be given greater weight than other people's views on that individual's well-being. . . .

Respect for the self-determination of competent patients is of special importance. . . . The patient [should have] the final authority to decide.

*Id.* at 210, (quoting *President's Comm. for the Study of Ethical Problems in Medicine & Biomedical & Behavioral Research* 26-27, 44 (1983)). Perhaps in those situations where the client appears especially nervous and mistrustful (assuming the attorney believes no potentially damaging disclosures are imminent), the attorney may be justified in waiting until she develops a rapport with the client and can speak calmly with him. *Cf.* T. MAPPE & J. ZEMBATY, *supra* note 13, at 55 (short term paternalism appropriate where it is necessary to assure autonomy in the long run). *But see infra* note 200; T. BEAUCHAMP & J. CHILDRESS, *supra* note 25, at 312-13 (caution must be exercised and deception practiced only in limited circumstances without alternatives); Luban, *supra* note 146, at 465 (three conditions necessary to justify paternalism are that individual's decisionmaking capacity must be impaired, the constraint must be as limited and temporary as possible, and the threatened damage must be severe and irreversible).

198. Subin, *supra* note 10, at 1167 (no "mischief" if clients keep such matters to themselves); Zacharias, *supra* note 6, at 366 (a client who lies has himself to blame for consequences).

D. *The Content of Warnings About Limits to Confidentiality*

One obvious question that arises is how much information the lawyer should share. Providing the client with an equivalent of a law school education by explaining all of the nuances of confidentiality rules seems unnecessary and, in fact, would be counterproductive.<sup>199</sup> However, the attorney should give a general explanation of the duty of confidentiality and its major exceptions. In that way, the client will have enough information to enable him to ask intelligent questions as specific confidentiality issues arise.<sup>200</sup> If it becomes clear to the attorney as the representation progresses that the client needs more specific information because an exception may apply, she should raise the issue again.

Some may argue that the question of what is material to a client varies depending on the kind of representation the lawyer offers and the nature of confidences shared. Thus, they might add, no general requirement of disclosure should arise. Three variables might be considered in determining when exceptions to confidentiality are material.

First, the lawyer could evaluate the relative sophistication of her client. Some clients, such as corporations, may be aware of limits to confidentiality. Arguably, knowledgeable clients would not require warnings to make an informed decision.<sup>201</sup>

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199. Confidentiality rules are varied and confusing. See Zacharias, *supra* note 6, at 365. Studies disclose that patients given too much information at one time do not absorb the information received. Thus, to be effective, the process of obtaining informed consent must be an ongoing one. See C. LIDZ, *supra* note 136, at 318, 330-34; see *infra* note 213. As Beauchamp and Childress explain, however, the fact that a party cannot know or communicate the "whole truth" is no excuse for deception. The "whole truth" is useful only in the way the concept of infinity is useful: it may never be reached but can be the ideal that professionals seek to reach and against which they can measure their performance. T. BEAUCHAMP & J. CHILDRESS, *supra* note 25, at 313.

200. Such a continuing dialogue will assure that consent is truly informed. See *supra* note 199. Moreover, it is likely that honesty about the limits of confidentiality will increase trust: "The client may more readily accept [the attorney] as an ally *within the defined boundaries*, both because the lawyer has exhibited integrity and because the limitations on the alliance make the total package more believable." Zacharias, *supra* note 6, at 368. See also Burt, *supra* note 23, at 1015-16 (attorney and client will transcend initial mistrust by discussing limitations on attorney loyalty). As Professor Shaffer observes, an ethic of mutual care and moral discourse between lawyer and client is the preferred alternative to unexamined deference to client goals, or to paternalism. Shaffer, *supra* note 150, at 253. See *infra* note 213 and accompanying text. Methods involving deception or keeping the client in ignorance cannot promote such a relationship. Shaffer, *supra* note 150, at 247.

201. Professor Zacharias did not question corporate officers regarding their views of the attorney-client privilege. See Zacharias, *supra* note 6, at 380. It is safe to say that corporations acting through in-house corporate counsel may have a more sophisticated understanding of the privilege. And, on the whole, it may be assumed that corporate officers are better educated and more sophisticated than some other clients. However, corporate officers do not inevitably

Next, the lawyer could evaluate the likelihood that information within an exception may be confided.<sup>202</sup> For example, lawyers representing multiple parties in a transaction currently are required to inform the parties that no attorney-client privilege exists regarding communications between any of them and the lawyer.<sup>203</sup> This rule could be premised on a belief that a breakdown in the relationship is foreseeable, so clients should be aware of the potential consequences.<sup>204</sup> Similarly, the likelihood of conflict renders it mandatory that lawyers should advise an officer of a corporation that counsel for the entity does not represent officers' interests;<sup>205</sup> it has been suggested that a warning should include a statement that the attorney may disclose harmful information to the company if an officer shares it with her.<sup>206</sup> The same rationale might be used to support a contention that law-

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understand the consequences of sharing confidences. *Cf.* *E. F. Hutton v. Brown*, 305 F. Supp. 371, 400 (S.D. Tex. 1969) (officer of corporation did not waive right to disqualify corporate counsel who also acted on his behalf by allowing counsel to represent both him and corporation at hearings, because he, as a layman, did not necessarily understand the consequences of dual representation). *See infra* note 205.

202. Beauchamp and Childress evaluate both the probability of harm and its magnitude in their discussion of when to accept risks. T. BEAUCHAMP & J. CHILDRESS, *supra* note 25, at 234-38. For a discussion of the gravity of the risk of not disclosing limits to clients, see *infra* text accompanying notes 219-21. Such a test is not unlike the "Learned Hand balancing test," developed in *United States v. Carroll Towing*, 159 F.2d 169, 173 (2d Cir. 1969). *See also* Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 645 (1985) (determination of appropriate ethics rule should include a consideration of magnitude and likelihood of harm).

203. *See* MODEL RULES, *supra* note 11, at Rule 2.2 comment (no attorney-client privilege among joint clients; clients should be informed).

204. *See id.* (discussing potential for failure of joint representation).

205. *See* MODEL CODE, *supra* note 3, at EC 5-19; MODEL RULES, *supra* note 11, at Rule 1.13 comment (lawyer should advise officer he does not represent officer).

206. As a general rule, the corporation, not the officers, holds the attorney-client privilege, and a lawyer may disclose information regarding conversations between counsel and a corporate official if the corporation consents, regardless of whether the officer does. *See, e.g., In re Grand Jury Investigation*, 599 F.2d 1224 (3d Cir. 1979); *In re Grand Jury Investigation*, 575 F. Supp. 777, (N.D. Ga. 1983); *In re Grand Jury Subpoena Duces Tecum*, 391 F. Supp. 1029, 1033-34 (S.D.N.Y. 1975).

In fact, some courts have concluded that the corporation may waive the privilege for the officer even where the lawyer has been deemed to have performed dual representation of the officer and corporation, unless the *client* makes it clear that he is seeking advice in an individual capacity. *See, e.g., In the Matter of Bevill, Bresler & Shulman Asset Management Corp.*, 805 F.2d 120 (3d Cir. 1986); *In re Grand Jury Investigation*, 575 F. Supp. 777 (N.D. Ga. 1983); *In re Grand Jury Proceedings*, 434 F. Supp. 648 (E.D. Mich. 1978). Shifting the burden to the client is inconsistent with the notion that lawyers must fully disclose the ramifications of dual representation and obtain an informed consent where a conflict of interest arises. *See supra* notes 153-55 and accompanying text; *E. F. Hutton v. Brown*, 305 F. Supp. 371, 400 (S.D. Tex. 1969) (client did not waive right to disqualify lawyers who concurrently represented him and corporation by allowing joint representation, because attorney may not shift to client the obligation to disclose nature and consequences of such representation). Professor Drew

yers should warn criminal clients about exceptions to confidentiality for future crimes or fraud.

Finally, the character of potential confidences to be shared could be considered. The client might want to know that highly private or harmful information may be the subject of disclosure, but may not care about less sensitive information.<sup>207</sup> Thus, it could be argued, clients do not need to know that fee information may be shared as it is usually quite general and not harmful to the client if disclosed. Of course, use of this factor would lead to the conclusion that the client would want to know that information about crimes or frauds might be disclosed, or that the lawyer may disclose information inculpatory to the client to exculpate herself.

Perhaps a consideration of these variables would lead to a more precise answer to the question whether the lawyer should discuss exclusions to confidentiality rules. There are, however, two serious problems with using such an analysis.

First, the factors would seem to suggest that selective disclosure is appropriate. In fact, partial information may be much more misleading than no information at all<sup>208</sup> and would give the client misplaced security regarding those matters not raised in his attorney's carefully worded speech.

Second, use of the factors tends to treat clients as groups rather than as individuals, which is contrary to the central notion of the informed consent requirement.<sup>209</sup> Rather than enhancing autonomy of the individual client in an individual case, the lawyer relying on the factors above runs the risk of creating "a standardized person to whom he attributes standardized ends"<sup>210</sup> and "acting for the hypothetical client rather than the one before him."<sup>211</sup> This approach depersonalizes the client and treats him as an ob-

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Kershen advocates that corporations be estopped from asserting the privilege unless the lawyer informs the officer not only that she represents the entity rather than the officer, but also that information the client shares with counsel is not privileged. Kershen, *Ethical Issues for Corporate Counsel in Internal Investigations: A Problem Analyzed*, 13 OKLA. CITY U.L. REV. 1, 12, 22-23 (1988); MODEL RULES, *supra* note 11, at Rule 1.13 comment (lawyer should inform officer that discussions may not be privileged).

207. See Moore, *supra* note 12, at 195 (suggesting that information closer to the "core" person should receive additional protection). See *supra* notes 17-18 and accompanying text.

208. "Half-truths" may support an action for fraud. See P. KEETON, PROSSER & KEETON ON TORTS 737-39 (5th Ed. 1984).

209. See Andersen, *supra* note 136, at 233 (objective standard for materiality threatens autonomy by depersonalizing clients). See also *supra* note 147.

210. Lehman, *The Pursuit of a Client's Interest*, 77 MICH. L. REV. 1078, 1087 (1977). See Andersen, *supra* note 136, at 233 (using the "reasonable client" approach to materiality assumes that clients fit into categories and that it is permissible to treat them alike).

211. Lehman, *supra* note 210, at 1087.



ject.<sup>212</sup> To assure true autonomy, the lawyer must not decide what she thinks the client wants or needs, but must explore the client's actual goals with him.<sup>213</sup>

As a result, while the above factors might be useful, they cannot be dispositive. The lawyer must engage the client in an ongoing, personal discussion to enable her to determine what matters to the client. Perhaps that discussion could begin with a statement such as the following one, which is drafted to apply to a criminal client:

You should know that I work for you and that I consider it very important to keep your confidences. The attorney-client privilege essentially means that I cannot be forced to disclose information about discussions we have. For example, judges sometimes can order lawyers to disclose information, but they can't make me tell them about whether you committed the crime.<sup>214</sup> You should know about some limits to the privilege, however. If I learn that you will lie or have lied on the witness stand, I must report that.<sup>215</sup> I am also allowed to report if you tell me you are going to commit a crime. I may also report limited information to defend against claims made against me or to collect my fee, but I am allowed to report only that information necessary to meet those goals. For example, if we fight about my fee, I might be able to show my billing records, but I couldn't just reveal all the things I know about you. Although there are times I may feel it is necessary to

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212. See *supra* notes 209-10. Professor Shaffer counsels against the creation of a professional relationship where the client is merely an object, and he advocates a more cooperative model. See *supra* note 152.

213. Professor Andersen asserts that professionals should not second guess clients and make assumptions about how they might react but instead should engage clients in a dialogue to determine which questions need further explanation and what gaps in the client's understanding exist. Andersen, *supra* note 136, at 233 n.32. Professor Lehman concurs, observing that many clients do not have a clear set of preferences when first seeking legal counsel, and that lawyers who do not engage in a dialogue tend to assume that legal or financial considerations are of paramount importance, when the client may have another view. Lehman, *supra* note 210, at 1080; 1088-89. Lehman concludes that "the lawyer needs to be careful to discover what it is the client is really about, [and] to give the fullest possible opportunity for her interests to be explored. . . ." *Id.* at 1089. See Luban, *supra* note 146, at 479 (we should not assume eccentric opinion is an incompetent one and should respect it so long as any facts exist upon which opinion may be based). Of course, using an objective client standard is better than focusing totally on the professional's view; many informed consent cases in the medical context use an objective standard. See *supra* note 151.

214. In another setting, the lawyer might say the court cannot force her to disclose her client's negligence, breach of contract, or other past act which is the subject of the representation.

215. This statement assumes the lawyer lives in a jurisdiction where such disclosures are mandated. See *supra* note 67.

report information, I want to remind you that I take the privilege very seriously and would never lightly decide to share information.

Those reading this suggested statement might believe all of this sounds terrible and the client would view the lawyer as greedy and self-protective.<sup>216</sup> This response is like shooting the messenger rather than wishing the message were different. The ethics rules provide for these exceptions, and if they sound as if ethical priorities are misplaced, the rules should be changed.<sup>217</sup> So long as they exist, however, the client should be aware of them. Of course, absent modification of the rules, one alternative to revealing the more self-serving of those exceptions is that an individual attorney may decide as a matter of personal ethics not to warn regarding those exceptions because she intends never to invoke them. In this way, no deception occurs.<sup>218</sup>

The final question is what consequences a failure to inform of exceptions should have. If a client does not have information reasonably necessary to make informed decisions, the lawyer has violated Model Rule 1.4(b) and should be subject to discipline. Moreover, the client could bring a cause of action for lack of informed consent if he would find the information withheld material to his decisionmaking.<sup>219</sup> If there are no actual damages flowing from the lack of informed consent, at least nominal damages and possibly attorney fees should be assessed.<sup>220</sup> Moreover, punitive damages may be appropriate where reckless disregard is shown.<sup>221</sup> Thus, for both moral and legal reasons, the lawyer should presume the appropriateness of warning clients concerning the limits to confidentiality.

## V. CONCLUSION

It is unlikely that failure to inform about limits on confidentiality will result in constitutional violations or civil liability if disclosures are made. However, an attorney practices deception upon a trusting client when she

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216. It may also be argued that the client may be deterred from making disclosures. To the extent this is an exercise in client autonomy, this response is appropriate. *See supra* note 198 and accompanying text. To the extent it may frighten an individual so much he is unable to make a decision, it may be morally justifiable to delay disclosures about limits, but only if several requirements are met. *See supra* note 197.

217. *See supra* notes 116-34 and accompanying text.

218. This appears to be the approach Professor Amsterdam advocates. *See supra* note 8. An attorney may also decide as a matter of personal ethics to refrain from disclosing perjury, but she thereby runs the risk of violating an ethics rule and subjecting herself to discipline. *See supra* note 67.

219. *See supra* notes 135-55 and accompanying text.

220. Andersen, *supra* note 136, at 230.

221. *Id.* at 249-50.

misstates or refuses to disclose those circumstances that constitute exceptions to the attorney-client privilege. Deception has the immediate impact of reducing client autonomy and impairing the trust relationship, while the rights that deception might vindicate are varied and speculative. Thus, an attorney is morally required, and should be legally required, to be forthright with a client and allow the client to choose whether the risks of disclosure outweigh its benefits.