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Lawyers and Confidentiality

Daniel R. Fischel†

Confidentiality is the bedrock principle of legal ethics.¹ According to representatives of the legal profession, the duty is nearly absolute. Lawyers who learn information while representing a client are required to maintain secrecy (absent client consent to disclosure), except in the most unusual and extraordinary circumstances.² If an attorney obtains information from a client that, if disclosed, would prevent another person from being falsely convicted of murder and sentenced to death, he or she must remain silent, even if the disclosure would not implicate the client in the crime.³ The same duty of silence remains if the at-

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¹ For a general discussion of the "centrality and power of the norm of confidentiality" to the organized bar, see Susan P. Koniak, *The Law Between the Bar and the State*, 70 NC L Rev 1389, 1427-47 (1992).

² See ABA Model Rules of Professional Conduct Rule 1.6 (1994) ("Model Rules") (providing for only very limited exceptions to the duty of confidentiality). See also text accompanying note 22.

³ See, for example, *State v Macumber*, 112 Ariz 569, 544 P2d 1084, 1086-87 (1976) (en banc) (invoking the attorney-client privilege to prevent two attorneys from testifying in a capital murder trial that their deceased client had confessed to them that he, and not the defendant, had committed the murder). See also *In re John Doe Grand Jury Investigation*, 408 Mass 480, 562 NE2d 69, 70-71 (1990) (refusing to override the attorney-client privilege to compel an attorney to testify in a grand jury proceeding concerning conversations with his client, the prime suspect in the murder of the client's wife and child, which occurred just prior to the client's suicide); *State v Valdez*, 95 NM 70, 618 P2d 1234, 1236-37 (1980) (barring a lawyer from testifying that his client had confessed to the robbery for

torney learns of kidnapping plans in a contested child custody case.⁴ Attorneys who violate the confidentiality norm are subject to sanctions, including, potentially, disbarment and malpractice suits.

Lawyers are not the only people in society who learn secrets. Friends, partners, relatives, and business associates, among countless others, learn private information, frequently with the express or implied understanding that the information will be kept confidential. No doubt these other groups also face the occasional dilemma of whether to maintain confidentiality or to disclose the information in order to prevent harm to a third party. And no doubt nonlawyers would have a different moral or ethical sense about the need to disclose confidential information to help the falsely accused defendant or to prevent the aforementioned kidnapping.⁵ And regardless of what nonlawyers would do voluntarily, they are subject to compelled disclosure by subpoena and face civil or criminal penalties if they refuse. Not so with attorneys, who are protected from compelled disclosure by the attorney-client privilege.⁶

Why is confidentiality so important? The legal profession has a ready answer—confidentiality is necessary “to encourage full and frank communication between attorneys and their clients.”⁷ But this standard justification, although repeated endlessly, is empty. Why should “full and frank” communication between attorneys and their clients be encouraged?

which the defendant had been convicted).

⁴ See, for example, Cal Comm on Professional Ethics Formal Op 1976-37, reprinted in *California Compendium on Professional Responsibility* (State Bar of Cal 1995) (asserting that a lawyer representing a client in a child custody case may not properly inform the court of conflicting interests between the child and his client when such interests were relayed by the client in confidence).

⁵ The Restatement (Second) of Agency § 395 comment f (1958), for example, provides that an agent is “privileged to reveal information confidentially acquired by him in the course of his agency in the protection of a superior interest of himself or of a third person.”

⁶ The attorney-client privilege is a rule of evidence, not an ethical principle of the organized bar. The privilege allows an attorney to resist compelled disclosure even if relevant to a judicial proceeding. According to John Henry Wigmore’s classic formulation, the privilege applies: “(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relevant 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 adviser, (8) except the client waives the protection.” John Henry Wigmore, 4 *A Treatise on the System of Evidence in Trials at Common Law* § 2292 at 3204 (Little, Brown 1905) (“*Evidence*”) (emphasis omitted). The privilege is narrower than the ethical duty of confidentiality, which prevents disclosure of all information learned about a client during representation, whether or not the information was communicated to or from the client. See Model Rule 1.6(a).

⁷ *Upjohn Co v United States*, 449 US 383, 389 (1981).

Why isn't there a greater need to "encourage" disclosure to the falsely accused defendant or the family of the kidnapped child? And why should communications with attorneys be "encouraged" more than communications with close friends, partners, or relatives? I suspect that outside the legal profession, many believe these other communications need to be encouraged more than interactions with lawyers.

Another way to ask why encouraging communications with the legal profession is so important is to inquire who benefits from these communications. Stated this way, the question answers itself: confidentiality benefits lawyers because it increases the demand for legal services. The legal profession, not clients or society as a whole, is the primary beneficiary of confidentiality rules.⁸

I. HOW CONFIDENTIALITY RULES BENEFIT LAWYERS

While legal codes of ethics are relatively recent (the first American Bar Association ("ABA") code was developed in 1908⁹), the attorney-client privilege has existed for hundreds of years. Initially, the privilege was based on "the oath and the honor of the attorney," who needed to be spared from the unseemly task of having to testify in court.¹⁰ Under this rationale, the privilege belonged to the attorney, not the client. Over time, this status-based justification for special treatment gave way to a candid recognition that the privilege made clients more willing to hire attorneys.

The privilege was particularly valuable in early common law England, when parties to a proceeding were not allowed to testify on their own behalf.¹¹ Parties could either argue their own cases or hire attorneys to do so for them. As law became more complex—perhaps due to attorneys' efforts—hiring attorneys who specialized in the law became the more attractive option. However, parties who had something to hide would naturally be reluctant to hire attorneys if no confidentiality privilege existed. Because the party could not testify, the negative information would remain secret unless disclosed by someone else, such as the cli-

⁸ I use the term "confidentiality rules" to refer to the ethical duty of confidentiality, the attorney-client privilege, and the work product doctrine in both civil and criminal contexts. Where appropriate, I discuss the doctrines and contexts separately.

⁹ ABA Canons of Professional Ethics ("ABA Canons") (1908).

¹⁰ Wigmore, 4 *Evidence* § 2290 at 3194 (cited in note 6). For a discussion of the history of the privilege, see Geoffrey C. Hazard, *An Historical Perspective on the Attorney-Client Privilege*, 66 Cal L Rev 1061, 1069-91 (1978).

¹¹ Hazard, 66 Cal L Rev at 1083.

ent's attorney. The privilege solved this problem and gave clients with something to hide the incentive to hire attorneys and not risk disclosure. One well-known nineteenth century opinion recognized this relationship between the origins of the privilege and the need to create incentives for clients to hire lawyers:

Its origin seems to have been this: In ancient times parties litigant were in the habit of coming into court and prosecuting or defending their suits in person. Subsequently, however, as law suits multiplied, and the modes of judicial proceeding became more complex and formal, it became necessary to have these suits conducted by persons skilled in the laws and in the practice of the courts. This necessity gave rise, at an early day, to the class of attorneys. To facilitate the business of the courts, it was important that these men should be employed. But as parties were not then obliged to testify in their own cases, and could not be compelled to disclose facts known only to themselves, they would hesitate to employ professional men and make the necessary disclosures to them, if the facts thus communicated were thus within the reach of their opponent. *To encourage the employment of attorneys, therefore, it became indispensable to extend to them the immunity enjoyed by the party.*¹²

What is the effect of the privilege now that clients are not only permitted, but required to testify, at least in civil cases? The importance of the privilege in creating incentives to hire attorneys is surely diminished. Because clients can now be compelled to testify under oath, information known exclusively to them is likely to be revealed, whether or not a privilege exists. At the same time, substantive and procedural rules have become even more complex, making self-representation an unrealistic option in most cases. While attorneys are going to be hired in any event, the legal profession still benefits from confidentiality rules. Sometimes confidentiality rules enable a client to violate a law or regulation and escape detection (and thereby avoid the need to testify). Other times confidentiality rules give lawyers a competitive advantage over other professional groups that operate under different rules. Still other times confidentiality rules enable lawyers to increase their investments in investigation and litigation preparation (with client approval). I expand on these points below.

¹² *Whiting v Barney*, 30 NY 330, 332-33 (1864) (emphasis added) (tracing the development of the privilege).

A. Increased Value of Legal Advice

Confidentiality rules enable clients to obtain the benefit of legal advice without having to bear the cost of disclosing information they would prefer to remain secret.¹³ This is particularly true outside the litigation context, where disclosure cannot be compelled. For example, a client who takes an aggressive position on a tax return after receiving legal advice from an attorney on how to minimize the probability of an audit does not want the consultation revealed. The advice is only valuable if it remains secret, because public disclosure by the attorney would increase, not decrease, the probability of an audit. And if an audit does occur, confidentiality is still valuable because it decreases the probability of a more severe sanction, which might be levied if the client's deliberate attempt to evade compliance were revealed. Confidentiality rules, therefore, increase the value of legal advice and hence the demand for lawyers.

B. Substitution Effects

Lawyers offer services that, in certain areas, duplicate those offered by other professionals. Lawyers or accountants can offer tax advice; lawyers or investment bankers can structure defensive tactics in response to a tender offer; lawyers or financial planners can provide estate planning services; lawyers or other investigators can marshal facts from corporate employees in response to a regulatory investigation. Only lawyers, however, can offer the unique advantage that communications with them are privileged.¹⁴ This increases the value of legal advice relative to

¹³ For a discussion of when confidentiality encourages clients to seek legal advice in deciding what actions to take, see Steven Shavell, *Legal Advice About Contemplated Acts: The Decision to Obtain Advice, Its Social Desirability, and Protection of Confidentiality*, 17 J Legal Stud 123 (1988). For a similar discussion of the relationship between confidentiality and the determination of what evidence to present at trial, see also Louis Kaplow and Steven Shavell, *Legal Advice About Information to Present in Litigation: Its Effects and Social Desirability*, 102 Harv L Rev 567, 570-76, 608-13 (1989). For a more optimistic account of the social value of legal advice (but not confidentiality), see Stephen McG. Bundy and Einer Elhauge, *Do Lawyers Improve the Adversary System? A General Theory of Litigation Advice and Its Regulation*, 79 Cal L Rev 315, 358-61, 407-09 (1991) (criticizing Kaplow and Shavell).

¹⁴ There are limits to lawyers' ability to extend the privilege while performing tasks of other professions. Edward W. Cleary, ed, *McCormick's Handbook of the Law of Evidence* § 88 at 179-81 (West 2d ed 1972) ("*McCormick's Handbook*"). Purely business communications between attorneys and clients are not privileged, but the problem, of course, is distinguishing between "business" and "legal" communications. This problem is particularly difficult if the privilege is used to block access to the underlying communication in order to determine whether the privilege properly applies. For a discussion of business versus legal communications, see Elizabeth G. Thornburg, *Sanctifying Secrecy: The Mythology of the*

advice from other professionals, and thus again increases the demand for legal services.

C. Increased Incentives to Investigate

Consider a hypothetical lawsuit between two major corporations. The lawyers for the defendant interview all employees who might have relevant information about the controversy and summarize their findings in written form. The attorney-client privilege protects these notes from disclosure and forces the plaintiff's lawyers to interview these employees a second time. Moreover, the plaintiff's lawyers are prevented from contacting the defendant's employees directly because they are represented by counsel.¹⁵ Contacts are structured and formal, probably through depositions.¹⁶ The defendant's lawyers both prepare employees in advance of any such depositions and are present while questioning occurs. Because they have been interviewed in advance and prepared for anticipated questions, the defendant's employees typically shade their testimony in ways suggested, perhaps subtly, by counsel. And if the employees do not follow "the script" when they are interrogated, the defendant's lawyers can frustrate the examination by making objections or taking breaks to inform a witness how to "improve" his answers to the questions posed. The privilege prevents the plaintiff's lawyers from asking about what was said at the preparation sessions and during conferences in the middle of any actual testimony.¹⁷ As a result, the plaintiff's lawyers will have a difficult time extracting candid responses from the witnesses.

Corporate Attorney-Client Privilege, 69 Notre Dame L Rev 157, 167-68 (1993). This exception to the attorney-client privilege benefits outside lawyers relative to in-house counsel, who are more likely to have their advice challenged as a business communication. See *Kramer v Raymond Corp*, 1992 US Dist LEXIS 7418, *3 (E D Pa) ("Because in-house counsel may play a dual role of legal advisor and business advisor, the privilege will apply only if the communication's primary purpose is to gain or provide legal assistance."). But see *Barr Marine Products Co v Borg-Warner Corp*, 84 FRD 631, 636 (E D Pa 1979) ("[The] fact, by itself, that in-house counsel are involved in the communications at issue should not affect the protection afforded by the attorney-client privilege.").

¹⁵ See Model Rule 4.2 (prohibiting attorneys from directly contacting another party known to be represented by counsel).

¹⁶ For purposes of this article, I take the existing rules of discovery as given. However, I believe that these rules are themselves the product of legal rent seeking. See Ralph K. Winter, *In Defense of Discovery Reform*, 58 Brooklyn L Rev 263, 277 (1992).

¹⁷ Some of these costs could be avoided by other reforms (which undoubtedly also would be opposed by the organized bar). For example, other legal systems discourage attorney contact with or preparation of witnesses. See, for example, John H. Langbein, *The German Advantage in Civil Procedure*, 52 U Chi L Rev 823, 834-35 (1985).

Of course the reverse is also true. The plaintiff's lawyers are able to engage in the identical tactics with the plaintiff's employees to frustrate the factfinding efforts of the defendant. Likewise, the defendant's lawyers will be forced to duplicate prior efforts and face obstructions at every turn.

The work-multiplying effects of the attorney-client privilege for lawyers are exacerbated by the related work product doctrine.¹⁸ This privilege shields from discovery legal research and attorney notes of interviews with nonparty witnesses. As a result, both sets of lawyers must interview the same witnesses and conduct the same research without knowledge of the work being performed by the other side. This duplication merely serves to funnel money from the clients to their attorneys.

Now consider what the situation would be like without privileges (but with discovery). Both sides would have access to whatever the other generated. The need for duplicative work by two sets of lawyers would be correspondingly reduced. Moreover, the recognition that no right to confidentiality existed would affect the client's incentives to have each set of lawyers investigate in the first instance. Parties would be less likely to incur costs for legal services if they knew their adversaries would then be entitled to the same services at no cost. The effect would again be to reduce the demand for legal services.

Subjecting lawyers to investigation would partially offset this effect by creating a new area of discovery, but this in turn would force lawyers to adapt strategically in order to reduce the value of their output to their adversaries. To begin with, fewer lawyers would work on a case. In addition, other more subtle changes would occur: lawyers would cease writing legal memoranda, they would interview witnesses but not take notes, and they would engage in other tactics to raise adversaries' costs of discovering information. This same adaptive behavior, however, would simultaneously reduce the value of legal output to the party bearing the cost of legal services. Interviews are less valuable, for example, if nobody takes notes. Since legal services would be less valuable, fewer services will be demanded and produced. Lawyers would be clear losers if the attorney-client and work product privileges were eliminated.

¹⁸ FRCP 26(b)(3). For a thoughtful analysis of the effect of the attorney-client and work product privileges in increasing parties' incentives to invest in litigation, see Frank H. Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 S Ct Rev 309, 353-64.

D. Use of Attorneys to Avoid Discovery

Confidentiality rules, as the above hypothetical about a lawsuit between two corporations illustrates, raise the cost to both sides of discovering relevant information. Although less information presumably would be discovered because of the increased cost, both sides still would retain the right to interview and/or depose all witnesses. In other contexts, however, attorneys can be used to shield information from discovery altogether.

Assume, for example, a situation in which a company expects to introduce a new product. The company plans to test the product internally before introducing it formally. However, the company is advised by its attorney that any tests performed internally will be discoverable in any future litigation. The company is further advised that the risk of discovery will be minimized if the attorney is retained to hire outside experts to conduct the testing in anticipation of litigation. Any negative results can be hidden; in fact the client never even needs to know the identity of the expert. Positive results, by contrast, can be placed in the client's files. The legal advice itself is confidential under the attorney-client privilege. Because confidentiality facilitates such "creating a record" schemes in anticipation of litigation, it increases the demand for legal services.

E. Avoidance of Personal Sanctions and Negative Publicity

Attorneys face constraints on their behavior deriving from multiple sources, such as ethical rules, agency law, and various bodies of substantive law.¹⁹ Attorneys, for example, cannot knowingly sponsor perjured testimony.²⁰ The difficulty, of course, is monitoring when an attorney "knows" testimony is perjured. The most direct evidence of perjury is communications between attorneys and their clients, but this is precisely what is difficult to discover because of the privilege.

Similarly, lawyers as agents face personal liability if they knowingly participate in a client's illegal scheme.²¹ But again the

¹⁹ For a general discussion of this point, see Geoffrey C. Hazard, Jr., *Lawyers and Client Fraud: They Still Don't Get It*, 6 Georgetown J Legal Ethics 701, 702-21 (1993).

²⁰ Lawyers are required to disclose client perjury to the court if discovered while the case is still pending. See Model Rule 3.3(b) and comment (recognizing that debate exists over whether attorney must disclose perjury by a criminal defendant). See also *Nix v Whiteside*, 475 US 157, 171 (1986) (holding that constitutional right to assistance of counsel is not violated by refusal of attorney to cooperate with a criminal defendant's plan to present perjured testimony).

²¹ See, for example, *United States v Benjamin*, 328 F2d 854, 862-64 (2d Cir 1964) (opinion by Friendly) (holding lawyers and other professionals criminally liable when they

key determinant of liability is what the attorney “knew” about the scheme. Confidentiality rules create powerful obstacles to the discovery of attorney participation in an unlawful scheme.

More generally, confidentiality rules shield attorneys from public scrutiny. Attorneys typically justify their role in the legal system in exalted moral terms—defending the innocent, preventing government and police misconduct, exposing liars, safeguarding the liberties of all citizens, and so forth. These declarations would ring hollow if discovery in particular cases revealed that the attorneys involved believed the exact opposite of what they were saying. Skillful cross-examination of a key witness that casts doubt on the witness’s credibility would look like shameless manipulation of the system if it turned out the attorney learned from his client that the witness was telling the truth. Secrecy better enables the legal profession to define its role on its own terms and thus to avoid more public scrutiny of its activities.

II. WHEN CONFIDENTIALITY IMPOSES COSTS ON LAWYERS

A. The Self-Defense Exception

The proposition that the near-absolute duty of confidentiality benefits lawyers is subject to one major qualification. Sometimes attorneys become embroiled in disputes concerning their performance as agents. Obvious examples include fee disputes and malpractice suits. Other examples involve claims asserted by the government or third parties alleging that attorneys knowingly participated in, or failed to disclose, client wrongdoing. In these situations, lawyers frequently benefit by disclosing confidential information. But this would be impossible if confidentiality obligations were owed to, and could only be waived by, clients. The legal profession has solved this problem by creating a broad “self-defense” exception to the general confidentiality obligations. Rule 1.6 of the Model Rules of Professional Conduct contains two exceptions to the duty of confidentiality:

A lawyer may reveal . . . information [relating to the representation of a client] to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.²²

The juxtaposition of these two exceptions is striking. Lawyers are permitted (but not required) to disclose information to prevent clients from committing crimes that are "likely to result in imminent death or substantial bodily harm." Disclosure of past crimes or intent to commit other types of crimes in the future, such as financial fraud, is forbidden. But the second exception permits disclosure to establish any "claim or defense on behalf of the lawyer" in any controversy, civil or criminal, between the lawyer and the client or between the lawyer and a third party relating to his representation of the client.

The same lawyer who is prohibited from disclosing information learned while representing a client to exonerate someone falsely accused of a capital crime, in other words, is perfectly free to disclose confidential information when he or she is the one accused, falsely or not. Nor is there any requirement that the lawyer's liberty be at stake, or even that the lawyer be accused of anything criminal. A simple fee dispute with a client is sufficient grounds to disclose confidential information. The lawyer's interest in collecting a fee is apparently a higher priority than exonerating an innocent defendant about to be convicted of a capital crime or helping a distraught family locate an abducted child. Confidentiality means everything in legal ethics unless lawyers lose money, in which case it means nothing.²³

Courts interpreting the attorney-client privilege have also given attorneys broad discretion to disclose confidential information without client consent under the self-defense exception. In one well-known early case, for example, a court held that an attorney seeking to collect a fee could introduce letters written to him by the defendant, his former client, revealing that the defendant "was engaged in leasing buildings for immoral purposes."²⁴ The court reasoned that the letters proved that the attorney had provided "advice and consultation" services and that the embar-

²² Model Rule 1.6.

²³ See Henry D. Levine, *Self-Interest or Self-Defense: Lawyer Disregard of the Attorney-Client Privilege for Profit and Protection*, 5 Hofstra L Rev 783, 811-15 (1977) (recognizing that the self-defense exception to the confidentiality rules benefits attorneys).

²⁴ *Stern v Daniel*, 47 Wash 96, 91 P 552, 553 (1907).

rassment to the client resulting from public disclosure was irrelevant.²⁵ It is not difficult to envision other situations where this so-called “self-defense” exception can be used opportunistically by attorneys who, having obtained sensitive information with a promise of confidentiality, threaten to reveal the information if a client refuses to pay a disputed bill or threatens to expose malpractice.

Of course, the converse situation might also exist if lawyers could never reveal confidential information: clients might attempt to gain an unfair advantage. The client who instructed his lawyer to pursue a particular strategy that turned out poorly could, for example, credibly threaten to blame the lawyer if confidentiality were absolute—but the self-defense exception solves this problem. When lawyers are potential victims of confidentiality rules, disclosure is never a problem.

Professional self-interest is even clearer when lawyers invoke the self-defense exception in response to suits brought by third parties. Here, opportunistic behavior by clients is not an issue, but disclosure is permitted anyway. The leading case on this subject is *Meyerhofer v Empire Fire & Marine Insurance Co.*,²⁶ where the court held that the disclosure by an attorney defendant, Goldberg, of confidential client information to plaintiffs’ counsel was proper in a class action securities fraud suit. Upon receiving the information from the attorney, plaintiffs amended their complaint to include more specific facts and removed the attorney as a defendant. The remaining defendants, including the attorney’s client, objected, arguing that the disclosure violated the attorney-client privilege and the ethical duties of confidentiality. The Second Circuit rejected this argument and upheld Goldberg’s right to disclose under the self-defense exception:

The charge, of knowing participation in the filing of a false and misleading registration statement, was a serious one. . . . The cost in money of simply defending such an action might be very substantial. The damage to [Goldberg’s] professional reputation which might be occasioned by the mere pendency of such a charge was an even greater cause for concern.

Under these circumstances Goldberg had the right to make an appropriate disclosure with respect to his role in the public offering.²⁷

²⁵ *Id.*

²⁶ 497 F2d 1190, 1194-95 (2d Cir 1974).

²⁷ *Id.* at 1195.

Subsequent cases have extended *Meyerhofer*, holding that attorneys can disclose even before being actually named as defendants to avoid the “stigma” of being formally charged.²⁸

These concerns about “damage to personal reputation” and “stigma” would be touching, if not so obviously hypocritical. When others complain that confidentiality rules damage their reputations or worse, the legal profession is unresponsive. Encouraging “candid communications” between lawyers and clients always trumps adverse effects on third parties. But the need to encourage candor somehow becomes less important when lawyers’ interests are at stake.

B. Whistle-Blowing and the Fear of Civil and Criminal Liability

Attorneys’ obligations to keep information confidential (other than the self-defense exception) have been steadily expanding in scope in recent decades.²⁹ More specifically, attorneys’ discretion to reveal client wrongdoing—to “blow the whistle” on client misconduct—has been radically curtailed. While the organized bar has justified expanded confidentiality obligations by emphasizing the cardinal importance of client loyalty, there is an alternative, more self-interested explanation. Lawyers have expanded confidentiality obligations to avoid being sued.

Lawyers’ discretion to disclose confidential information to protect third parties was initially quite broad. Canon 37 of the Canons of Professional Conduct, adopted in 1928, the predecessor to the current American Bar Association Model Rules of Professional Conduct, provided that: “The announced intention of a client to commit a crime is not included within the confidences which he is bound to respect. He may properly make such disclosures as to prevent the act or protect those against whom it is threatened.”³⁰

Canon 41 went further and imposed a broad whistle-blowing obligation:

²⁸ See, for example, *In re Friend*, 411 F Supp 776, 777 n * (S D NY 1975) (allowing an attorney to turn over documents to a grand jury investigating him and his client). As one commentator has noted, summarizing judicial developments since *Meyerhofer*, “there seem to be few, if any, cases in which a court has denied an attorney’s request to invoke the expanded self-defense exception.” Jennifer Cunningham, Note, *Eliminating “Backdoor” Access to Client Confidences: Restricting the Self-Defense Exception to the Attorney-Client Privilege*, 65 NYU L Rev 992, 1017 (1990) (citation omitted).

²⁹ See, for example, Harris Weinstein, *Client Confidences and the Rules of Professional Responsibility: Too Little Consensus and Too Much Confusion*, 35 S Tex L Rev 727, 732 (1994) (noting that the ABA’s current rules and commentary do not even acknowledge the “different position that the Bar had taken for two-thirds of a century”).

³⁰ ABA Canon 37 (adopted 1928).

When a lawyer discovers that some fraud or deception has been practiced, which has unjustly imposed upon the court or a party, he should endeavor to rectify it; at first by advising his client, and if his client refuses to forego the advantage thus unjustly gained, he should promptly inform the injured person or his counsel, so that they may take appropriate steps.³¹

These principles were recodified in the revised Code of Professional Responsibility adopted by the ABA in 1969.³² Disciplinary Rule ("DR") 7-102(B)(1), like the earlier Canon 41, required a lawyer to rectify fraud by, if necessary, revealing the fraud to third parties.³³

In 1972, however, whistle-blowing obligations became more than an ethical issue. That year the Securities and Exchange Commission ("SEC") relied on DR 7-102(B)(1) in its complaint in the widely publicized *National Student Marketing* case,³⁴ asserting that an attorney who knows his client is committing securities fraud must stop the client or, if unable to do so, must disclose the fraud to the SEC.³⁵ The organized bar predictably denounced the suit.³⁶ The drafters of the Code of Professional Responsibility certainly did not intend for the legal profession's own ethical rules to be used by third parties to expand theories of liability against lawyers.

Reaction was swift. In 1974, the ABA gutted DR 7-102(B)(1) by amending it to preclude disclosure of client fraud "when the information is protected as a privileged communication."³⁷ The following year, the ABA defined "privileged communication" to include all "confidences and secrets" learned during a "professional relationship."³⁸ The duty to disclose was limited to the virtual null

³¹ ABA Canon 41 (adopted 1928).

³² ABA Code of Professional Responsibility ("ABA Code") (1969).

³³ ABA Code DR 7-102(B)(1). The Rule, as adopted in 1969, provided in relevant part: "A lawyer who receives information clearly establishing that . . . [a] client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal." Id.

³⁴ *SEC v National Student Marketing Corp*, 457 F Supp 682 (D DC 1978).

³⁵ See Complaint, *SEC v National Student Marketing Corp*, Fed Secur L Rptr (CCH) ¶ 93,360 (1971-72 Transfer Binder) (D DC Feb 3, 1972) (summarizing the SEC's complaint against two major law firms that allegedly failed to notify shareholders and the SEC of a fraudulent scheme in connection with a merger). See also John P. Freeman, *Current Trends in Legal Opinion Liability*, 1989 Colum Bus L Rev 235, 246-49 (describing the SEC's position and the organized bar's response to it).

³⁶ For a discussion, see Koniak, 70 NC L Rev at 1462 n 319 (cited in note 1).

³⁷ ABA Code DR 7-102(B)(1) (1974).

³⁸ ABA Comm on Ethics and Professional Responsibility, Formal Op 341 (1975).

set—information learned by an attorney from a third party “but not in connection with his professional relationship with the client.”³⁹

By 1977, the ABA had decided to produce a new ethics code, partly to clarify lawyers’ whistle-blowing obligations.⁴⁰ Like the earlier Canons 37 and 41 and DR 7-102(B)(1), the original draft produced by the Kutak Commission gave attorneys broad discretion to disclose client wrongdoing.⁴¹ Fearful that courts and regulatory agencies would rely on the broad discretion to disclose provided by ethical rules to justify expanding theories of liability against lawyers, however, the ABA rejected the proposed rule.⁴² Current Rule 1.6 of the Model Rules, which limits lawyers’ discretion to disclose crimes that are “likely to result in imminent death or substantial bodily harm,” is the narrowest standard ever promulgated by the ABA.⁴³

³⁹ *Id.*

⁴⁰ For a discussion of the decision to draft a new ethical code, and particularly the importance of clarifying lawyers’ whistle-blowing obligations, see Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 1989 L & Soc Inquiry 677, 688-93.

⁴¹ In the May 1981 draft of Rule 1.6, the Kutak Commission proposed that

[a] lawyer may reveal . . . information [relating to representation of a client] to the extent the lawyer believes necessary: (1) to serve the client’s interests . . . ; (2) to prevent the client from committing a criminal or fraudulent act that the lawyer believes is likely to result in death or substantial bodily harm, or substantial injury to the financial interest or property of another; (3) to rectify the consequences of a client’s criminal or fraudulent act in the commission of which the lawyer’s services had been used

Model Rule 1.6 (proposed final draft 1981).

⁴² See Schneyer, 1989 L & Soc Inquiry at 719-20, 723-24, for an account of how opponents of the Kutak Commission used the fear of personal liability to defeat the May 1981 draft of Rule 1.6. Subsequent courts have relied upon the absence of a general ethical duty to disclose in refusing to extend liability against professionals, including lawyers, under the securities laws. In *Barker v Henderson, Franklin, Starnes & Holt*, 797 F2d 490, 497 (7th Cir 1986) (granting summary judgment for a defendant law firm in a securities fraud action), for example, Judge Easterbrook stated:

The extent to which lawyers and accountants should reveal their clients’ wrongdoing—and to whom they should reveal—is a question of great moment. . . . The professions and the regulatory agencies will debate questions raised by cases such as this one for years to come. . . . We are satisfied, however, that an award of damages under the securities laws is not the way to blaze the trail toward improved ethical standards in the legal and accounting professions. Liability depends on an *existing* duty to disclose. The securities law therefore must lag behind changes in ethical and fiduciary standards. The plaintiffs have not pointed to any rule imposing . . . a duty to blow the whistle.

See also *Schatz v Rosenberg*, 943 F2d 485, 490-92 (4th Cir 1991) (following *Barker*). In other contexts, the organized bar has been less successful in defining the duty to disclose under substantive law by its own interpretation of ethical duties. See Koniak, 70 NC L Rev at 1397-1402, 1416-27 (cited in note 1).

⁴³ Model Rule 1.6(1).

The aim of limiting lawyers' exposure is also evident in the official comments to Rule 1.6. If lawyers discover that their services have been used to further a fraudulent scheme, lawyers are instructed by the Rule to withdraw.⁴⁴ After withdrawal, lawyers are permitted to provide "notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation or the like."⁴⁵ Lawyers, in other words, are not required to stay with a sinking ship. While disclosure to protect third parties is prohibited, lawyers are free to protect themselves by quitting and "disaffirming" their previous work. No provision is made for the return of fees.

Finally, the Model Rules stress that lawyers' failure to disclose, in the few situations where disclosure is permitted, should not create liability. The "exercise of discretion not to disclose information under Rule 1.6 should not be subject to reexamination."⁴⁶ And, if there is any remaining doubt that the purpose of ethical duties is to limit, not create, liability, the ABA made clear that the Model Rules "are not designed to be a basis for civil liability. . . . [N]othing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such duty."⁴⁷ Nor should liability result when ethical rules compel silence but substantive law requires disclosure. "Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supersession."⁴⁸ According to the ABA, therefore, attorneys should be protected from liability, whether or not they disclose, whether or not they follow ethical rules, and regardless of what substantive law requires. When these rules against whistle-blowing are juxtaposed with the expanded self-defense exception, it is hard to escape the conclusion that confidentiality rules exist to benefit lawyers. Any other effect is coincidental.

III. DO CLIENTS BENEFIT FROM CONFIDENTIALITY?

That clients benefit from confidentiality seems obvious. Indeed, the benefit to clients from higher quality legal advice facilitated by confidential communications is the stated justification for confidentiality rules. And the benefit is arguably greatest

⁴⁴ Model Rule 1.6 comment (citing Model Rule 1.16(a)(1)).

⁴⁵ *Id.*

⁴⁶ Model Rules, Preamble ¶ 20.

⁴⁷ Model Rules, Preamble ¶ 18.

⁴⁸ Model Rule 1.6 comment.

when confidentiality enables a client to prevent relevant but negative information from reaching a decisionmaker. Society may lose if its laws and regulations are violated, but the private benefit appears to be indisputable. Moreover, the contractual nature of the attorney-client relationship must be considered. If the higher quality legal advice facilitated by confidentiality was not worth the cost, clients would simply refuse to pay. So how can it be, as I claimed at the outset, that clients are not the primary beneficiaries of confidentiality rules?

A. The Zero-Sum Nature of Litigation

Consider again the effects of confidentiality. The attorney-client privilege and related doctrines increase the incentive to use legal services because, among other reasons, the probability that negative information will be revealed is reduced. The problem, however, is that, at least in civil litigation, both sides are entitled to the same confidentiality protections.⁴⁹ Whatever benefit one party receives may well be offset by the benefits to the other. Neither party may increase its chances of winning.

Litigation is a zero-sum game (with an important caveat discussed in Part IV). If both parties invest more in legal services because of confidentiality rules but do not improve their expected outcome in the litigation, both are worse off. Attorneys benefit, however, even if their clients lose.

This general point may not apply, of course, in every individual case. The value of confidentiality will vary depending on the circumstances in each case. One party may have more to hide, or one party may have greater resources to invest in litigation and therefore be less hindered in factfinding by confidentiality rules. But this reality does not alter the fundamental point that attorneys, not clients, benefit from confidentiality.

In fact, the differential value of confidentiality *ex post* disappears when considered from the *ex ante* perspective—before parties know the relative value of confidentiality to them as compared to their adversaries. *Ex ante*, confidentiality in litigation

⁴⁹ In criminal cases, the constitutional privilege against self-incrimination as currently interpreted by the Supreme Court limits the government's ability to either compel the defendant to disclose information or to ask the factfinder to draw an adverse inference from the defendant's refusal to provide such information. See *Griffin v California*, 380 US 609, 613-15 (1965) (reversing the death sentence conviction of a defendant where the court instructed the jury that they could draw inferences from the defendant's refusal to testify). This privilege also enhances the importance of attorneys by denying the factfinder access to information from the person who is typically in the best position to know what happened.

has value only if the increased utilization of legal services results in a corresponding benefit to clients as a class. But clients as a class derive no benefit, by definition, from wealth transfers to attorneys that have no effect other than to alter the results in a zero-sum game. So long as the ex post gain to one party from confidentiality is exactly offset by the ex post loss to the other, as will be the case in a zero-sum game, parties as a class obtain no benefit. Indeed, due to these offsets and the fee-increasing nature of the privilege, parties pay for the privilege. Attorneys are the only beneficiaries.

More controversially, confidentiality rules victimize clients as a class (or stated alternatively, society as a whole) even outside the context of civil litigation. Presumably, society would benefit if legal rules facilitated, rather than prohibited, disclosure to exonerate the falsely accused defendant or to locate the abducted child.⁵⁰ The same is true when one client benefits by taking a questionable tax deduction and hiring an attorney to lower the probability of an audit. The gain to one client is offset by losses to others (who must pay higher taxes or themselves hire attorneys), and resources are wasted in the process. Society would be better off if fewer resources were used to avoid compliance with existing laws and regulations (assuming that the laws and regulations and penalties for violations internalize the social costs and benefits of the activities in question). And if this assumption does not hold, the proper course is to change the socially undesirable rules and regulations rather than create incentives to hire attorneys to evade them.

B. Confidentiality and the Adversary Ideal

Confidentiality frequently is viewed as a necessary corollary of the adversary ideal. No client would want a lawyer who is anything less than a vigorous advocate on his behalf. Being a vigor-

⁵⁰ For disclosure to occur, the attorney must learn the information in the first place. This makes the effect of weakening confidentiality rules on the amount of disclosure somewhat ambiguous. If confidentiality is less than absolute, clients may be unwilling to communicate information to attorneys, so there might be nothing for attorneys to disclose. See Albert W. Alschuler, *The Preservation of a Client's Confidences: One Value Among Many or a Categorical Imperative?*, 52 *Colo L Rev* 349, 350 (1981). This is a general problem with disclosure rules, however, that extends beyond the attorney context. That close friends or business associates are permitted, and indeed can be compelled to disclose information, also may deter initial communications, but the law presumes that the gains from disclosure by such confidants outweigh this effect. Why are lawyers different? See text accompanying note 80 for a discussion of whether clients' greater willingness to confer with their attorneys due to confidentiality rules increases the amount and quality of information reaching the tribunal.

ous advocate means doing everything possible to advance the client's cause (subject to the prohibition against fraud), regardless of the attorney's personal knowledge or beliefs. Any obligation to reveal information inimical to the client's interests is obviously inconsistent with the zealous advocate's objective to cast his client's position in the best possible light and therefore evidences disloyalty to the client. As a leading authority on the rules of evidence has stated:

Our adversary system of litigation casts the lawyer in the role of fighter for the party whom he represents. A strong sentiment of loyalty attaches to the relationship, and this sentiment would be outraged by an attempt to change our customs so as to make the lawyer amenable to routine examination upon the client's confidential disclosures regarding professional business.⁵¹

Equating confidentiality with zealous advocacy, however, confuses means with ends. Clients value winning, not zealous advocacy for its own sake. If confidentiality does not increase the probability of winning, it has no independent value.⁵² And, at least in the context of civil litigation as discussed above, there is no reason to believe that confidentiality rules increase the probability of winning because the benefit of confidentiality in any particular case is offset by the cost in another. Clients as a class gain nothing.

But there is a more fundamental point. Proponents of confidentiality as a necessary attribute of vigorous advocacy ignore its effect on the decisionmaker. Simply stated, an argument made by someone known to be an advocate is less credible than the same argument made by someone who is expressing his own beliefs after independent investigation. Anyone who is being paid by a party in a legal dispute likely will have his views discounted somewhat. And if the person is known to be acting as an advocate, the discount is greater still. No matter how compelling the claim being made, the rational response of the listener will be skepticism (what does the speaker, whom I know to be a paid advocate, know that he is not telling me?).

For this reason, confidentiality penalizes clients with nothing to hide. Such clients would like their attorneys to communicate credibly that nothing is being hidden from the decisionmaker—but confidentiality makes this impossible. Civil litigants with com-

⁵¹ *McCormick's Handbook* § 87 at 176 (cited in note 14).

⁵² For a similar analysis of the right of privacy, see Richard A. Posner, *The Right of Privacy*, 12 Ga L Rev 393 (1978).

peting claims have to convince the uninformed decisionmaker to believe them over their adversaries. The result resembles a lemons market, where clients with nothing to hide attempt to signal the merit of their case by using attorneys as reputational intermediaries to overcome informational asymmetries between themselves and the decisionmaker.⁵³ Confidentiality, however, weakens the ability of these high-quality clients to distinguish themselves through their attorneys from low quality clients with something to hide (the lemons). Attorneys of low quality clients rely on confidentiality to mimic the claims made by attorneys of high-quality clients, making it more difficult for the decisionmaker to distinguish between the two.

The reputational issues surrounding the attorney-client privilege also influence those fields in which attorneys compete with other professionals. It is interesting to compare the Supreme Court's recognition of broad confidentiality privileges for attorneys with its rejection of any analogous privilege for accountants. In *United States v Arthur Young & Co*,⁵⁴ the Court refused to extend to accountants the work product protection earlier recognized for attorneys in *Hickman v Taylor*.⁵⁵ The Court based its holding on the difference between the role of attorneys as zealous advocates and the role of accountants who serve as "public watchdog(s)".⁵⁶

The *Hickman* work-product doctrine was founded upon the private attorney's role as the client's confidential adviser and advocate, a loyal representative whose duty it is to present the client's case in the most favorable possible light. An independent certified public accountant performs a different role. By certifying the public reports that collectively depict a corporation's financial status, the independent auditor assumes a *public* responsibility transcending any employment relationship with the client. The independent public accountant performing this special function owes ultimate allegiance to the corporation's creditors and stockholders, as well as to the investing public. This "public watchdog" function demands that the accountant maintain total independence from the client at all times and requires complete fidelity to the public trust. To insulate from disclosure a certified

⁵³ For a discussion of this phenomenon in the context of a market for goods, see George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q J Econ 488, 495-96 (1970).

⁵⁴ 465 US 805, 817-18 (1984).

⁵⁵ 329 US 495, 508-14 (1947).

⁵⁶ 465 US at 817-18. HeinOnline -- 65 U. Chi. L. Rev. 19 1998

public accountant's interpretations of the client's financial statements would be to ignore the significance of the accountant's role as a disinterested analyst charged with public obligations.⁵⁷

The Court's analysis is fundamentally flawed. The Court simply assumes, without explanation, that it is preferable for attorneys retained by clients to be "advocates" while accountants retained by the same clients should be "public watchdogs." Based on this assumed premise, the Court then concludes that confidentiality is necessary for attorneys to present clients' cases "in the most favorable light," but not for "independent" accountants who "certify" the accuracy of clients' communications to the investing public.

In reality, the economic function of attorneys and accountants is far closer than the Court's analysis suggests. Accountants are reputational intermediaries who help to overcome information asymmetries between firms and outside investors. By certifying firms' financial statements, accountants make the financial disclosures in those statements more credible. For this reason, firms have strong private incentives to hire independent accountants, even in the absence of any regulatory requirement to do so.⁵⁸ Firms hire independent accountants, particularly large accounting firms with strong incentives to preserve a reputation for independence, in order to reduce information asymmetries between themselves and investors that, in turn, lowers their cost of capital relative to firms that prepare their financial disclosures internally.

The public/private distinction drawn by the Court in *Arthur Young* is illusory. Attorneys are also reputational intermediaries. And just as clients (at least those with nothing to hide) benefit from hiring "independent" accountants because their communications become more credible when "certified," they could benefit from hiring "independent" attorneys to act as informational intermediaries. Such clients are harmed, therefore, by legal rules that make this more difficult.

The analogy between lawyers and accountants is not perfect. Accountants have strong incentives to develop reputations for honesty and independence because many market participants,

⁵⁷ Id.

⁵⁸ See Ross L. Watts and Jerold L. Zimmerman, *Agency Problems, Auditing, and the Theory of the Firm: Some Evidence*, 26 J L & Econ 613, 615 (1983) (analyzing empirical evidence and concluding that the existence of independent auditors was not the result of regulatory requirements).

such as institutional investors, analysts, ratings services, and investment bankers that take firms public, are repeat players. An accountant who aids a fraudulent scheme will suffer a heavy reputational penalty with these groups. The legal system is different.⁶⁰ Jurors are not repeat players, which makes it more difficult for clients to signal quality by hiring brand name attorneys. On the other hand, lawyers must interact with judges (who are repeat players) even in cases that are ultimately decided by juries. Moreover, judges communicate with each other either formally through published opinions or informally through conversation. Lawyers who mislead the court or the factfinder will suffer damage to their reputation. But confidentiality makes it harder to discern when lawyers are being candid.

C. The Impediments to Waiving Confidentiality Rules

Clients who have nothing to hide are harmed by confidentiality rules because they are less able to distinguish themselves from clients who do. The force of this claim would be substantially weakened if clients, the supposed beneficiaries of confidentiality rules, could waive confidentiality rules to communicate credibly that they have nothing to hide. Because the legal profession benefits from confidentiality, however, we can predict that the applicable rules would make waiver difficult. This is exactly what has occurred.

The witness-advocate rule generally prohibits attorneys from testifying in the same case in which they serve as advocates.⁶⁰ The antivouching rule goes further and prohibits attorneys from expressing their personal beliefs about their client's cause.⁶¹ These rules effectively prevent attorneys from performing the same certification function as other informational intermediaries such as independent accountants.

The witness-advocate and antivouching rules focus on the different roles played by partisan advocates and objective reporters of facts. Combining the two roles—as occurs when an attorney acting as advocate communicates his own knowledge and beliefs

⁶⁰ On the difficulty of drawing correct inferences from selective presentation of information in an adversary system along with some proposed reforms, see Frank H. Easterbrook, *Adversary Inferences*, 20 Harv J L & Pub Pol 503 (1997).

⁶⁰ Model Rule 3.7 (stating the general rule that “[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness”).

⁶¹ Model Rule 3.4 (“A lawyer shall not . . . in trial . . . assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.”).

in argument or as a witness—is thought to be unacceptable. But why?

Maintaining this separation has been defended from the clients' perspective. Attorneys who undermine their clients' positions, even if indirectly by not certifying their belief in those positions, cannot be effective advocates. Once separation is compromised, therefore, certain clients (those with something to hide) will be unable to secure effective representation. But, to paraphrase Jeremy Bentham, this is a benefit, not a cost.⁶² Why clients should be entitled automatically to "effective representation," if what that means is the ability to assert frivolous claims, is far from obvious. This justification for separation, to put the point differently, confuses the interests of those clients with something to hide with the interests of clients as a whole.

Not surprisingly, the rationales given for maintaining separation focus primarily on its importance to the legal profession.⁶³ Concerns expressed range from the need to protect attorneys from the awkward and "unseemly" situation of arguing their own credibility⁶⁴ to maintaining the attorneys' ability to get business.⁶⁵ If separation is preserved, attorneys could represent all clients, regardless of their personal beliefs. If separation is blurred, however, attorneys who did not believe in their clients' causes would have a hard time getting hired because their lack of belief would be revealed to the factfinder.⁶⁶

D. Jeremy Bentham and the Privilege

More than 150 years ago, Jeremy Bentham attacked the attorney-client privilege as benefiting the guilty.⁶⁷ Bentham mocked the traditional justification of the privilege as necessary to foster candid communications between clients and their attorneys:

'A counsel, solicitor, or attorney, cannot conduct the cause of his client' (it has been observed) 'if he is not fully instructed

⁶² See Jeremy Bentham, 5 *Rationale of Judicial Evidence* bk IX, pt IV, ch V at 304 (Garland 1978) (originally published in 1827) ("The argument employed as a reason against the compelling disclosure, is the very argument that pleads in favor of it.").

⁶³ See generally Thomas L. Shaffer, *The Legal Profession's Rule Against Vouching for Clients: Advocacy and "The Manner That is the Man Himself"*, 7 *Notre Dame J L, Ethics, & Pub Pol* 145, 153-54, 162 (1993); Jeffrey A. Stonerock, *The Advocate-Witness Rule: Anachronism or Necessary Restraint?*, 94 *Dickinson L Rev* 821, 849-75 (1990) (discussing rationales for the witness-advocate rule).

⁶⁴ Stonerock, 94 *Dickinson L Rev* at 861.

⁶⁵ *Id* at 851.

⁶⁶ For a discussion of whether allowing attorneys to testify would increase or decrease accuracy in decisionmaking, see Part IV.

⁶⁷ See Bentham, 5 *Judicial Evidence* bk IX, pt IV, ch V at 304.

in the circumstances attending it: but the client' (it is added) 'could not give the instructions with safety, if the facts confided to his advocate were to be disclosed.' Not with safety? So much the better. To what object is the whole system of penal law directed, if it be not that no man shall have it in his power to flatter himself with the hope of safety, in the event of his engaging in the commission of an act which the law, on account of its supposed mischievousness, has thought fit to prohibit? The argument employed as a reason against the compelling such disclosure, is the very argument that pleads in favour of it.⁶⁸

Bentham thought it was a benefit, in other words, for the guilty to withhold information from their attorneys. They would then receive lower quality legal advice and be more likely to be convicted.

My argument is similar to Bentham's but goes further. Whereas Bentham argued the privilege benefited the guilty but was of no value to the innocent, I argue that the privilege in fact harms the innocent. The harm exists because the privilege makes it more difficult for the innocent credibly to communicate that they have nothing to hide. Modern commentators, however, for the most part simply take the privilege as given⁶⁹ and therefore do not consider the possibility that Bentham did not go far enough. Because the argument developed here is an extension of Bentham's, it is useful to examine the claims made by those few commentators who have addressed his argument.⁷⁰

First, Bentham's view of the world as consisting of the guilty who benefit from the privilege and the innocent who do not has

⁶⁸ Id at 309-10, quoting Thomas Peake, *A Compendium of the Law of Evidence* ch III § IV at 250-51 (Abraham Small 5th ed 1824) (emphasis omitted). Edmund Morgan has voiced a similar critique of the privilege—that it facilitates perjury. Morgan described the effect of the privilege on clients who testify at trial as follows: "If he told his lawyer the truth, he must now tell the same thing from the witness box. If he told his lawyer a lie and sticks to it, he will tell the same story at the trial or hearing. If he told his lawyer the truth and now tells a lie, why should he be protected from exposure? Is the privilege retained in order to protect perjurers? How can that either directly or indirectly further the administration of justice?" Edmund M. Morgan, Foreword, *Model Code of Evidence* 26-27 (1942).

⁶⁹ Summarizing modern developments, one commentator has stated: "There is no responsible opinion suggesting that the privilege be completely abolished." Hazard, 66 *Cal L Rev* at 1062 (cited in note 10). See also *Developments in the Law—Privileged Communications*, 98 *Harv L Rev* 1450, 1473 (1985) ("Society would surely suffer greatly if the lack of a privilege discouraged clients from conferring with their lawyers.").

⁷⁰ For a sympathetic discussion of Bentham's analysis of the privilege relative to arguments advanced by Bentham's critics, see Kaplow and Shavell, 102 *Harv L Rev* at 605-08 (cited in note 13).

been criticized as oversimplified, particularly in civil cases.⁷¹ In the typical contested civil case, both parties will attempt to use the privilege to prevent certain information from reaching the tribunal. But this point, even if conceded, does not weaken Bentham's argument. That both parties may have something to hide in particular cases is not a justification for their being able to do so. Moreover, one party typically will benefit more from being able to withhold information than the other. Bentham's basic point—that the privilege benefits those with the most to hide—still holds in the civil context.

Second, recent commentators have criticized Bentham for failing to consider the situation where a party thinks he has something to hide but in fact does not.⁷² The example given is a party who behaves negligently, but is unaware that he has a defense of contributory negligence.⁷³ If confidentiality is not absolute, such an individual would be less likely to disclose the truth to his attorney because of the mistaken belief that truthful disclosure would result in liability. Under a rule of absolute confidentiality, by contrast, the party will disclose everything and learn about the contributory negligence defense. According to this argument, what Bentham ignored is that confidentiality benefits the innocent who think they are guilty as well as the guilty themselves.

This critique of Bentham is very much overstated. Why isn't the problem solved by the attorney explaining to the client that he can prevail if either he was not negligent or the other party was contributorily negligent? So informed, the client would behave the same as under a confidentiality rule. Moreover, as a practical matter, parties are most likely to be ignorant of the law in the context of highly technical regulatory offenses where there is no necessary relationship between moral intuition and legal requirements. But even here, parties can obtain effective advice without confidentiality simply by learning from their advisor what the governing legal rules are, just as parties learn from their accountants what tax deductions they can take or how transactions should be treated in financial statements. And if a

⁷¹ See Wigmore, 4 *Evidence* § 2291 at 3202 (cited in note 6) ("There is in civil cases often no hard-and-fast line between guilt and innocence, which will justify us as stigmatizing one or the other party and banning him from our sympathy. . . . We are therefore not necessarily abetting crime or other moral delinquency when we permit the concealment of the party's admissions to his attorney.") (emphasis omitted).

⁷² See Ronald J. Allen, et al, *A Positive Theory of the Attorney-Client Privilege and the Work Product Doctrine*, 19 *J Legal Stud* 359, 371 (1990).

⁷³ See id at 365-66.

lack of complete confidentiality results in less effective legal advice relating to complex regulatory requirements, so what? It is precisely in this context where the presumption that improved legal advice will result in socially desirable behavior (as opposed to, say, increased rent-seeking activity) is the weakest.

Third, Bentham's attack on confidentiality has been criticized as insensitive to the effect of compelled disclosure on the morale of the legal profession.⁷⁴ Wigmore makes the following claim in response to Bentham:

If the counsellor were compellable to disclose . . . the position of the legal adviser would be a delicate and disagreeable one; for it must be repugnant to any honorable man to feel that the confidences which his relation naturally invites are liable at the opponent's behest to be laid open through his own testimony. He cannot but feel the disagreeable inconsistency of being at the same time the solicitor and the revealer of the secrets of the cause. This double-minded attitude would create an unhealthy moral state in the practitioner. Its concrete impropriety could not be overbalanced by the recollection of its abstract desirability. If only for the sake of the peace of mind of the counsellor, it is better that the privilege should exist.⁷⁵

The Supreme Court has relied on similar reasoning in justifying confidentiality rules. In *Hickman v Taylor*, the Court stressed how any weakening of confidentiality rules would be "demoralizing" to the legal profession.⁷⁶ Justice Jackson in his concurring opinion echoed the same theme, stating that the "primary effect" of disclosure "would be on the legal profession itself."⁷⁷ He continued: "I can conceive of no practice more demoralizing to the Bar than to require a lawyer to write out and deliver to his adversary an account of what witnesses have told him."⁷⁸

Why legal rules should depend on the "morale" of the legal profession, however, is nowhere explained. In any event, compromising confidentiality would almost certainly not be "demoralizing" for the legal profession (except to the extent that it would result in less business). The accounting profession, for example, seems to have survived legal rules that require disclosure of work papers, including notes of client interviews. And non-lawyer con-

⁷⁴ See Wigmore, 4 *Evidence* § 2291 at 3203-04 (cited in note 6).

⁷⁵ *Id.*

⁷⁶ 329 US at 511.

⁷⁷ *Id.* at 514 (Jackson concurring).

⁷⁸ *Id.* at 516.

fidants such as close friends and business partners are to disclose communications, whether or not made in confidence. Compelled disclosure is probably more "demoralizing" in these situations than in the legal context because the parties are more likely to have a continued course of dealing. Finally, the effect of disclosure on morale is a function of the existing legal rule. If everyone understands at the outset that confidentiality is not absolute, no feeling of betrayal will result from disclosure.

But convincing or not, the Supreme Court's justification for confidentiality rules in *Hickman*, like Wigmore's earlier defense, at least puts all the cards on the table—the legal profession is the primary beneficiary of confidentiality. What is important to recognize, however, is that the benefits identified are not shared by clients or society as a whole.

IV. THE SOCIAL VALUE OF CONFIDENTIALITY

A. Confidentiality and Legal Error

Litigation is not purely a zero-sum game because results in particular cases may affect future conduct. If confidentiality resulted in greater accuracy in the resolution of disputed factual questions, for example, it might be socially desirable, even assuming this social benefit is of no value to the parties themselves.⁷⁹ Legal rules are of no value if there is no relationship between the rule and the actual results in litigation when the rule is violated. If, for example, the fact of a party's negligence did not affect the probability that the party would in fact be found negligent, the legal rule would have no effect on the incentive to take care. The relationship between confidentiality and accuracy, however, is tenuous at best.

Without confidentiality rules, clients would be less willing to disclose negative information to their attorneys (unless the information was going to be revealed anyway from some other source, such as from the client directly in discovery or testimony). Attorneys also would be less willing to investigate and gather information if they knew negative information must be revealed. Some positive information that would have been discovered will then never be found, further decreasing the information reaching the tribunal.

⁷⁹ For a thorough analysis of when greater accuracy in adjudication is socially desirable, see Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J Legal Stud 307 (1994).

On the other hand, absent confidentiality rules, information that clients would have been willing to reveal until counseled not to do so by their attorneys has a higher probability of reaching the tribunal. Similarly, negative information learned by attorneys as a by-product of their (now-decreased) investigation would become discoverable. The net effect of confidentiality rules on the amount of information reaching the tribunal is, therefore, indeterminate.⁸⁰

Ultimately, the issue is whether the change, if any, in the amount of information reaching the tribunal increases legal error.⁸¹ In fact, so long as it does not result in an increase in legal errors, the legal system should encourage both sides to invest less in generating information. Rejecting confidentiality rules is likely to have precisely this effect.

If high-quality clients are better able to use their attorneys to distinguish themselves from their adversaries, for example, legal error should decrease. Of course, allowing lawyers to testify (subject to satisfying the test of relevance and other rules of evidence) will change the market for attorneys. Testimonial skills would become important when hiring an attorney. Some might claim that this result is undesirable because only dishonest attorneys will thrive in the marketplace (the same claim is frequently heard about expert witnesses today). But consider the current system, where attorneys are encouraged to obfuscate and mislead without having their actual knowledge and beliefs tested under oath. Any reform that discourages the excessive role playing and gamesmanship by attorneys that characterizes current trial practice should decrease legal error.

B. Confidentiality and Precedent

Litigation also may affect future conduct by creating precedents. Confidentiality, particularly the near-absolute protection provided by the work product doctrine for legal theories and research, may create incentives for legal innovation. Conversely, requiring attorneys to disclose their mental impressions and legal theories might discourage searches. Viewed in this way, the work product doctrine is best understood as a form of intellectual property protection analogous to patent or copyright laws.⁸²

⁸⁰ This is the conclusion of both Kaplow and Shavell, 102 *Harv L Rev* at 610-11 (cited in note 13), and Bundy and Elhauge, 79 *Cal L Rev* at 404-05 (cited in note 13).

⁸¹ More precisely, the issue is whether increased accuracy affects future conduct. For a comprehensive discussion of when increased accuracy does and does not affect future behavior, see Kaplow, 23 *J Legal Stud* 307 (cited in note 79).

⁸² This point is made in Easterbrook, 1981 *S Ct Rev* at 356 (cited in note 18).

But the case for confidentiality is still weak. Protecting information from disclosure to stimulate greater production is desirable only if the new information produced is socially valuable and would not be produced in the absence of protection. Is there a presumption that new legal theories that produce new precedents are socially valuable? This is far from obvious. Even if the efficiency of the common law is assumed, there is considerable evidence that recent developments in tort, contract, and property law (not to mention judicial interpretation of statutory law) demonstrate the reverse tendency.⁸³ Legal theories advanced by the organized plaintiffs' class action bar are particularly likely to be motivated by a desire to maximize the lawyers' return rather than that of their clients or, for that matter, to increase social welfare.⁸⁴

The incremental effect of work product protection on the incentive to develop new legal theories is also debatable. Intellectual property protection prevents others who have not expended resources on exploration from appropriating valuable ideas. In litigation, however, there is little risk of this occurring. Since disclosure is to an adversary, the new idea will not be copied. At most disclosure would give the adversary advance notice of new legal theories. However, this is unlikely to be of significant practical importance because the adversary would receive time to respond once the idea is revealed in any event. Moreover, once the new theory is revealed, it will then be equally available for copying by everyone (unlike, say, a new invention protected by patent). The work product doctrine, in sum, is unlikely to have a material effect on the incentive to develop new legal theories.

C. Confidentiality and Legal Compliance

Do confidentiality rules increase the level of legal compliance? According to the Supreme Court in *Upjohn Co v United States*,⁸⁵ the attorney-client privilege in the corporate context

⁸³ The literature on this point is too vast to cite, even illustratively. For a tiny sampling, see Paul H. Rubin and Martin J. Bailey, *The Role of Lawyers in Changing the Law*, 23 J Legal Stud 807, 822-25 (1994) (arguing that changes in substantive law have been driven by attorneys' rent seeking); George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J Legal Stud 461, 520 (1985) (positing that changes in tort law reflect an ideological shift in the conception of who should bear the costs of product-related injuries); Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J L & Econ 293, 315 (1975) (asserting that the expanded application of the doctrine of unconscionability has had socially undesirable effects).

⁸⁴ See Rubin and Bailey, 23 J Legal Stud at 814-17.

⁸⁵ 449 US 383 (1981).

“promote[s] broader public interests in the observance of law and administration of justice.”⁸⁶ The Court asserted that, “[i]n light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, ‘constantly go to lawyers to find out how to obey the law.’”⁸⁷ By protecting the confidentiality of these communications, the privilege furthers “the valuable efforts of corporate counsel to ensure their client’s compliance with the law.”⁸⁸

The Court got it exactly backwards. Confidentiality rules either have no effect or decrease the level of legal compliance. They never increase the level of compliance. Consider the situation that the Court described in *Upjohn*—a corporate client confronted with a blizzard of regulatory requirements needs to know what the law is in order to comply with it. Confidentiality rules for such clients have no effect. Clients who seek legal advice to conform their conduct to law before they act have no need for confidentiality rules because they face no sanctions.⁸⁹

Confidentiality rules in other situations, by contrast, will decrease the level of legal compliance.⁹⁰ Sometimes—particularly with complex regulatory requirements—whether certain conduct is sanctionable is unclear. A client faced with this uncertainty may decide to avoid the activity rather than face possible sanctions.⁹¹ Legal advice, if confidential, may cause such a client to reverse this decision and engage in the potentially sanctionable activity.⁹² This can occur in one of two ways. Most obviously, the lawyer can provide more accurate information about the prob-

⁸⁶ Id at 389.

⁸⁷ Id at 392, quoting Bryson P. Burnham, *The Attorney-Client Privilege in the Corporate Arena*, 24 Bus Law 901, 913 (1969).

⁸⁸ Id.

⁸⁹ The need to seek legal advice for the purpose of compliance is directly related to the degree of legal complexity of the law or regulation. The more regulatory and complex the applicable legal provisions, the less likely nonspecialists will be able to intuit correctly what is sanctionable. Complexity, therefore, increases the demand for legal services and creates incentives for lawyers to favor complex regulatory schemes. Such schemes are more likely to be the product of interest group deals and less likely to mirror social costs and benefits than, say, the prohibition against fraud, suggesting that the importance of legal advice in ensuring legal compliance is far less important than the Court in *Upjohn* assumed.

⁹⁰ See Shavell, 17 J Legal Stud at 134 (cited in note 13) (“[T]he expected value to a person of protection of confidentiality inheres entirely in the possibility that he will decide, on the basis of advice, to commit an act that turns out to be sanctionable.”).

⁹¹ For a discussion of how uncertainty may lead to overcompliance, see John E. Calfee and Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 Va L Rev 965 (1984).

⁹² For a more complete discussion of the relationship between confidentiality and the incentive to engage in sanctionable activity, see Shavell, 17 J Legal Stud 123 (cited in note 13).

ability that the conduct will be sanctionable and the expected penalty. This more accurate information may lead the client to conclude that the expected gains from engaging in the activity outweigh the expected costs. Alternatively, legal advice can itself decrease the probability that the proposed conduct will be sanctionable by providing clients with advice on how to minimize the probability of detection (for example, advice on how to avoid an audit).

Confidentiality rules also may reduce the level of compliance by decreasing expected sanctions from a violation that already has occurred, as illustrated by the facts of *Upjohn* itself.⁹³ *Upjohn's* independent accountants discovered that one of the company's foreign subsidiaries made illegal payments to foreign governments to procure additional business. *Upjohn* knew that the existence of these "questionable payments" would have to be disclosed in its public financial statements, and this would in turn reveal the existence of the payments to the SEC, the Internal Revenue Service ("IRS"), and other government regulators. Faced with this knowledge, *Upjohn's* General Counsel sent out a detailed questionnaire to employees "for the purpose of determining the nature and magnitude" of payments to foreign governments. *Upjohn's* inside and outside counsel then interviewed recipients of the questionnaire and thirty-three other *Upjohn* officers and employees.

When the investigation was complete, *Upjohn* prepared a report disclosing the existence of the illegal payments to its shareholders that it submitted, as it was required to do, to the SEC for approval. Simultaneously, the report was submitted to the IRS, which also received a list of names of those interviewed and those who responded to the questionnaires. The IRS then subpoenaed, among other things, the completed questionnaires and the notes taken at the interviews. *Upjohn*, invoking the attorney-client privilege and work product doctrine, refused to produce these materials.

The Supreme Court, relying heavily on the need to encourage investigations intended to ensure compliance with the law, upheld this refusal. The Court summarily rejected the claim that the threat of civil and criminal penalties would cause corporations to seek legal advice with or without a privilege: "This response ignores the fact that the depth and quality of any investi-

⁹³ The following facts are discussed in 449 US at 386-88.

gations to ensure compliance with the law would suffer, even were they undertaken.⁹⁴

The Court's fundamental error was to equate the incentive to investigate with the incentive to comply with the law. Confidentiality does create an incentive to investigate by giving the client the ability to hide any negative information discovered. The Court was correct, therefore, in concluding that absent confidentiality, investigations would be less thorough. But this does not mean that more violations of law would result. The opposite is true.

The Court overlooked the real purpose of the investigation in *Upjohn*, which was to decrease the expected penalty from a known violation. If no privilege existed, the company still would have been faced with the discovery by its accountants that "wrongdoing" had occurred, which would have to be publicly disclosed in any event.⁹⁵ If, hypothetically, *Upjohn* then decided not to investigate further, it would have taken its chances with the penalty levied after any governmental investigation. This course may have been sufficiently risky that the company would have investigated even without confidentiality. But investigating with confidentiality was better still. *Upjohn* apparently concluded that disclosing the investigation without disclosing its results would result in lower penalties than either not investigating or investigating and disclosing everything. How could this be? Surely the government understood the possibility, indeed certainty, that *Upjohn* was hiding something. Suspicion is not the same as proof, however, and *Upjohn* apparently reasoned that the government, perhaps due to inadequate resources or motivation, would not be willing to reinterview all of the company's now-prepared witnesses, fighting invocations of privilege at every turn. In any event, *Upjohn*'s strategic choice was vindicated when the Court upheld the company's refusal to disclose.

In light of its expressed concern of creating incentives for legal compliance, the Court's result is more than a little ironic. By upholding *Upjohn*'s assertion of confidentiality, the Court allowed the company to reduce the expected penalty for its violation. Reducing expected sanctions, however, will increase the number of violations by lowering the cost of noncompliance. Investigations will increase (as will the demand for legal services), but legal compliance will decrease.

⁹⁴ *Id.* at 393 n 2.

⁹⁵ Of course, *Upjohn* could have decided against disclosing the existence of the foreign payments, but then it would have faced additional liability for securities fraud.

Whether decreased compliance is socially desirable, of course, depends on the relationship between the costs of compliance, the penalty, and the social costs of violation. In cases where the costs of compliance and the penalties are positive, but the social costs of violation are zero (as may well be the case with the anti-foreign payment laws at issue in *Upjohn*⁹⁶), decreased compliance is socially desirable. But this obviously is a completely different rationale for the result in *Upjohn* than that offered by the Court, which simply assumed that compliance with the law is always desirable.

D. The Attorney-Client Privilege Compared With Other Privileges

The attorney-client privilege is not the only evidentiary privilege. Communications with physicians, clergymen, and therapists also generally are privileged.⁹⁷ Like attorneys, these other professionals benefit from confidentiality. The demand for their services, all else being equal, is increased if all client communications are confidential.

Confidentiality in these other contexts also primarily benefits those with something to hide. And if any privilege precludes disclosure of relevant information in litigation, the gain to one party is offset by the loss to another. Clients as a whole, therefore, also derive no benefit from these other privileges, at least in litigation.

But there are reasons to believe that the attorney-client privilege is the most harmful of all the privileges.⁹⁸ First, other privileges are easy to waive, and so do not punish those with nothing to hide by making it difficult for them to distinguish themselves from those who do. Second, the privilege typically will affect communications with only one person on one side of a case (rather than, say, communications between two sets of attorneys and potentially all members of organizations on opposite sides of a case). Other privileges, therefore, pose much less of a risk of causing both parties to overinvest in litigation to affect the outcome of a zero-sum game.

⁹⁶ For a critique of anti-foreign payment and similar laws, see Daniel R. Fischel, *The Corporate Governance Movement*, 35 Vand L Rev 1259, 1270-71 (1982).

⁹⁷ For a discussion of these privileges see *Developments*, 98 Harv L Rev at 1530-63 (cited in note 69).

⁹⁸ See Kaplow and Shavell, 102 Harv L Rev at 600 & n 84 (cited in note 13) ("[T]he common view that the attorney-client relationship in litigation presents the strongest case for protection of confidentiality, although consistent with professional self-interest, seems wrong—it presents the weakest.")

Finally, the social value of professional advice facilitated by confidentiality is likely to be greater in contexts other than the attorney-client relationship. Professional advice that leads to enhanced physical, mental, or spiritual health is more valuable than legal advice, which frequently results in increased rent seeking or other socially useless activity. This is most obviously true in litigation, where the parties are fighting over the division of fixed stakes. But it is also true outside the litigation context. Legal advice that enables clients to use the regulatory state to hinder their competitors, for example, or benefit themselves directly has little, if any, social value. Professional advice protected by other privileges is not likely to result in any corresponding increase in socially useless activity.

CONCLUSION

Confidentiality rules—the ethical duty of confidentiality, the attorney-client privilege, and the work product doctrine—benefit lawyers but are of dubious value to clients and society as a whole. Absent some more compelling justification for their existence than has been advanced to date, these doctrines should be abolished.

