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THE HYPOTHETICAL AS A TOOL FOR TEACHING THE LAWYER'S DUTY OF CONFIDENTIALITY

*Kathryn W. Tate**

As one who instructs law students in the whys and wherefores of the legal profession's ethical standards and lawyering skills,¹ I found myself considering this hypothetical as a teaching tool. The hypothetical presents a particularly outrageous scenario—pitting one person's life and liberty against another's. As such, it presents a classic contrast between the profession's ethical rules on confidentiality and one's own values or morality. The hypothetical would thus be useful for teaching because it puts into clear focus the choice the profession has made in crafting a confidentiality rule covering a confidence of this type.² But exploring the lawyer's duty of confidentiality in the hypothetical is just the beginning of examining the duty generally. The hypothetical could be a vehicle to introduce the law student to the policy considerations that undergird all facets of the model confidentiality rule proposed by the American Bar Association (ABA).³ And it would allow discussion about the effect on the

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1. Besides business law subjects, I teach one section of Loyola's required Ethics, Counseling, and Negotiation course which teaches the legal profession's ethical rules in the context of the students also learning lawyering skills of interviewing, counseling, and negotiation.

2. Other useful hypotheticals are based on the facts underlying *People v. Belge*, 372 N.Y.S.2d 798 (Onondaga County Ct. 1975) (stating that although the murder defendant admitted to three other murders in discussions with his attorneys Frank Armani and Francis Belge, and although the attorneys visited the murder scene and confirmed the presence of bodies, their nondisclosure of their knowledge of the prior murders and location of the bodies was proper), *aff'd*, 359 N.E.2d 377 (N.Y. 1976), and cases like *Estate of D'Alessio v. Gilberg*, 617 N.Y.S.2d 484 (App. Div. 1994) (denying application of executor for hit-and-run victim to compel attorney to reveal name of client who may have been hit-and-run driver because client's identity was privileged communication).

3. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1994) [hereinafter MODEL RULES]. For the pertinent text of Model Rule 1.6, see *infra* note 10 and text

lawyer's role toward the client and within the judicial system given the variety of ethical rules on confidentiality in the various jurisdictions that allow—and sometimes require—the lawyer to reveal the confidences of a client.

As I approached writing this Essay and answering the question the hypothetical presents, I felt as a teacher that I must start by fully examining what the ethical rules do require. This would be the same approach I would take as a lawyer to meet the requirement that I be competent, meaning that I have the “legal knowledge, skill, thoroughness and preparation reasonably necessary for the [situation].”⁴ I knew generally the many variations of a lawyer's duty of confidentiality that had developed across the country, but I had never felt the need to study them in detail. Now, to meet my competency mandate, I felt the need to do so, and then after doing that research, I felt its perspective would be useful to the Symposium. Here then, is what I learned and my reactions to it that informed my response to the hypothetical's question.

“A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation.”⁵ A client's confidences receive protection in two ways: the evidentiary attorney-client privilege and the lawyer's ethical duty.⁶ While the two protections overlap, the focus of this essay is on the latter obligation, which the ABA's *Model Rules of Professional Conduct (Model Rules)* define as follows: “A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly

accompanying note 7.

4. See MODEL RULES, *supra* note 3, Rule 1.1 (“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”).

5. *Id.* Rule 1.6 cmt., para. 4.

6. The drafters of the *Model Rules* described the difference between the attorney-client privilege and the ethical duty:

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.

Id. Rule 1.6 cmt., para. 5; see *X Corp. v. Doe*, 805 F. Supp. 1298, 1304-08 (E.D. Va. 1992) (providing a detailed description of the two confidentiality standards), *aff'd sub nom. Under Seal v. Under Seal*, 17 F.3d 1435 (4th Cir. 1994).

authorized in order to carry out the representation, and except as stated in paragraph (b).⁷ The purpose of the duty of confidentiality is to encourage clients to confide fully in their lawyers so that the lawyers will be in the best position both to represent their clients and to give them the best advice.⁸ The concept of confidentiality is also viewed as central to an attorney-client relationship which enhances client autonomy and gives the client assurance that the legal system is fair.⁹

The statement of a lawyer's ethical duty of confidentiality seems simple; its purpose laudatory. Yet, the hypothetical for this Symposium sets out certain facts—a client who has confessed to murder where another person has been convicted of that crime and faces execution—and then asks: What should the public defender do?, implying that the answer is not obvious. In the hypothetical's situation, however, the current legal professional rules in all jurisdictions instruct the lawyer to remain silent.¹⁰ In particular, the lawyer

7. MODEL RULES, *supra* note 3, Rule 1.6(a). The earlier *Model Code* provided in DR 4-101(B)(1) that "a lawyer shall not knowingly . . . [r]eveal a confidence or secret of his client" except as was permitted by DR 4-101(C), part of which is quoted *infra* text accompanying note 19 and none of which is pertinent to the hypothetical's facts. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(B)(1) (1969) (amended 1981) [hereinafter MODEL CODE]. The even earlier *Canons of Professional Ethics* stated succinctly: "It is the duty of a lawyer to preserve his client's confidences." CANONS OF PROFESSIONAL ETHICS Canon 37 (1908) (amended 1937) [hereinafter CANONS].

8. See *Upjohn Co. v. United States*, 449 U.S. 383, 389-90 (1981); *Trammel v. United States*, 445 U.S. 40, 51 (1980); *Fisher v. United States*, 425 U.S. 391, 403 (1976); MODEL RULES, *supra* note 3, Rule 1.6 cmt., paras. 2, 4; ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 89 (1992) [hereinafter ANNOTATED MODEL RULES].

9. See Albert W. Alschuler, *The Preservation of a Client's Confidences: One Value Among Many or a Categorical Imperative?*, 52 U. COLO. L. REV. 349, 351-52 (1980).

10. Virtually all jurisdictions operate either under Model Rule 1.6 or Model Code DR 4-101. See ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 01:3-4 (Feb. 23, 1994) (indicating 42 states have adopted the *Model Rules* in some form). A number of jurisdictions have varied the language of Model Rule 1.6(b)(1), which allows permissive disclosure "to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm." MODEL RULES, *supra* note 3, Rule 1.6(b)(1); see *infra* notes 28-29 and accompanying text. Some states have promulgated rectification provisions which provide for disclosure of past crimes or frauds involving the lawyer's services. See *infra* notes 40-44 and accompanying text. However, no jurisdiction has altered the language of Model Rule 1.6(a) and Model Code DR 4-101(B)(1) in any significant way from the basic mandate to keep a client's confidences concerning a completed crime of the type described in the hypothetical. See *infra* notes 28-46 and accompanying text.

The attorney-client privilege also attaches in such circumstances. See, e.g., *Alexander v. United States*, 138 U.S. 353, 359-60 (1891) (finding error in the admission of testimony by defendant's attorney because "the consultation was had after the crime was committed,

is not permitted to reveal information about a past crime where the representation involves a client's criminal defense¹¹ —which is the nature of the hypothetical's confidence. To disclose this information

and [the testimony] was offered in evidence as an admission tending to show that defendant was concerned in the crime"); *United Servs. Auto. Ass'n v. Werley*, 526 P.2d 28, 32 (Alaska 1974) ("[C]ommunications between advisor and client must pertain to ongoing or future, rather than prior, wrongdoing before the [attorney-client] privilege ceases to operate."); *Attorney Grievance Comm'n of Md. v. Rohrback*, 591 A.2d 488, 494 (Md. 1991) (stating that where client reveals to attorney commission of a completed offense, attorney has "a duty not to reveal it; 'it would be hard to imagine a more serious violation of the law of lawyering if he did' " (quoting 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* § 1.2:508 (2d ed. Supp. 1994))); *State v. Phelps*, 545 P.2d 901, 903 (Or. Ct. App. 1976) ("If a client consults an attorney about prior wrongdoing, there is no doubt that the privilege protects their confidential communications.").

Also relevant to a lawyer's nondisclosure are those Model Rules which discuss criminal or fraudulent acts by the attorney. Model Rule 8.4 states in part: "It is professional misconduct for a lawyer to . . . (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects; (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . ." MODEL RULES, *supra* note 3, Rule 8.4(b)-(c). Because the *Model Rules'* Terminology section defines the term "fraud" as "conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information," *id.* Terminology, para. 4, one bar association has concluded that an attorney's failure to disclose client information does not violate Rule 8.4(c) where nondisclosure involved the client's being incarcerated and getting worker's compensation and where incarceration would disqualify the client for such payment. See Philadelphia Bar Ass'n Prof. Guidance Comm., Guidance Op. 94-21 (1994), available at 1994 WL 802657, at *2. After analyzing Pennsylvania's versions of Model Rules 1.6 and 4.1, the bar association also found no affirmative obligation on the part of the attorney to disclose the client's confidences, unless the lawyer determined that nondisclosure was a crime by the attorney under the worker's compensation statute and a violation of Rule 8.4(b). See *id.* at *3-*4.

11. Comments or guidelines to some jurisdictions' ethical rules make this clear, even where those jurisdictions permit or require disclosure in some situations. See, e.g., CONNECTICUT RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt., para. 12, reprinted in CONNECTICUT RULES OF COURT: STATE AND FEDERAL 337 (1995) ("Paragraph (c) [permitting certain disclosures] does not apply where a lawyer is employed after a crime or fraud has been committed to represent the client in matters ensuing therefrom."); MICHIGAN RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt., para. 17, reprinted in MICHIGAN RULES OF COURT: STATE 573 (1995) ("Paragraph (c)(3) [permitting certain disclosures] does not apply where a lawyer is employed after a crime or fraud has been committed to represent the client in matters ensuing therefrom."); MINN. STAT. ANN., CT. R., MINNESOTA RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt., para. 4 (West 1993) ("A lawyer is not permitted, however, to disclose a client's criminal or fraudulent act committed prior to the client's retention of the lawyer's services."); see also 1 HAZARD & HODES, *supra* note 10, § 1.6:201-1, at 158.7 ("[T]he generalization [that a lawyer has an unqualified duty of confidentiality to a client] is essentially accurate only when the representation involves defense of a criminal accused.").

would prevent clients from seeking legal advice to protect their rights.¹²

And yet, under the circumstances stated in the hypothetical, the lawyer's mandate seems onerous to many in the profession and incomprehensible to nonlawyers. Perhaps surety on this issue has become more troublesome because the legal profession has in recent years seemed more willing to allow lawyers to reveal confidences in certain other situations, such as concerning a future crime—especially if it involves the possibility of death or serious bodily injury—or a past or ongoing fraud.¹³

But to *know* as lawyers that we may not reveal the client's confidences in the hypothetical situation, we must be clear what this situation is *not*. This is not a confession of a client's intent to commit a future crime.¹⁴ It is also not a confidence concerning a past or

12. See *In re Mendel*, 897 P.2d 68, 74 (Alaska 1995) (“[T]he privilege is designed to encourage those who may have committed a prior wrong to seek protection of their rights,” which is why this court distinguishes between past and ongoing or future wrongdoing.” (quoting *Munn v. Bristol Bay Hous. Auth.*, 777 P.2d 188, 195 (Alaska 1989))); cf. *State v. Macumber*, 544 P.2d 1084 (Ariz. 1976) (denying request of lawyers who had represented actual, now deceased murderer to testify at trial of one charged with murder because testimony would breach attorney-client privilege), *cert. denied*, 439 U.S. 1006 (1978); *People v. Cassas*, 646 N.E.2d 449 (N.Y. 1995) (holding lawyer's statement to police that client shot his own wife was inadmissible at trial absent client's consent as violative of the attorney-client privilege); *Estate of D'Alessio v. Gilberg*, 617 N.Y.S.2d 484, 486 (App. Div. 1994) (denying application of executor for hit-and-run victim to compel attorney to reveal name of client who may have been hit-and-run driver because client's identity was privileged communication).

13. See *infra* notes 30-44 and accompanying text (discussing the many variations of the confidentiality rule in the 51 jurisdictions).

14. The fact pattern makes clear that this murder had occurred seven years earlier. *Symposium Problem: The Wrong Man is About to Be Executed For a Crime He Did Not Commit*, 29 LOY. L.A. L. REV. 1543 (1996) [hereinafter *Hypothetical*]. The only aspect of the situation that is in the future or ongoing is the client's unwillingness to confess in order to save the other person from execution. *Id.* at 1544-45. While this unwillingness to confess could be viewed as the indirect cause of the other's death—should it occur—failure to confess is not a crime under our present laws. Absent the intent of the client to commit a crime that will lead to another's death or substantial bodily harm, the lawyer is given no permission to disclose under the ethical rules. See MODEL RULES, *supra* note 3, Rule 1.6(b)(1). There is an analogy in this situation to the fact that our laws also impose no duty on a stranger to aid another in danger, even when the danger is life-threatening. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 56, at 375 (5th ed. 1984) [hereinafter PROSSER & KEETON]. While there are a few states whose statutes seem to require an individual to give assistance to another who is in harm's way, each of those provisions impose the duty only if it can be done without endangering the one lending aid. See HAW. REV. STAT. § 663-1.6 (1993); MINN. STAT. ANN. § 604A.01 (West Supp. 1996); R.I. GEN. LAWS § 11-56-1 (1994); VT. STAT. ANN. tit. 12, § 519 (1973).

ongoing crime or fraud of the type that some jurisdictions now permit a lawyer to disclose.¹⁵ While the profession's framing of a lawyer's duty of confidentiality toward these two situations has varied over the years, there has been no variance toward the situation of our hypothetical.

For example, concerning a client's announcement of intent to commit a crime, the ABA explicitly stated in its first codification of legal professional ethics that "[t]he announced intention of a client to commit a crime is not included within the confidences which [the lawyer] is bound to respect."¹⁶ However, about thirty-five years later the ABA's Standing Committee on Ethics and Professional Responsibility issued an opinion which held that where an attorney refuses to represent a client because there was no basis for the client's claim, that attorney cannot reveal the client's planned false statements to a second attorney because any such disclosure would breach the lawyer's duty of confidentiality to the client.¹⁷ The Committee's opinion did not address the issue that its conclusion seemed to contradict the above-quoted language of Canon 37.¹⁸

When adopted in 1969, the *Model Code of Professional Responsibility* (*Model Code*) seemed to bridge the two positions by continuing the general approach of the earlier Canon but making explicit that a lawyer was permitted, but not mandated, to "reveal . . . [t]he intention of his client to commit a crime and the information necessary to prevent the crime."¹⁹

Concerning a past or ongoing fraud, the 1908 *Canons of Professional Ethics* instructed the lawyer to "inform the injured person or his counsel" of such a situation, assuming the client refused

15. See *infra* notes 40-44, 79 and accompanying text (concerning the so-called rectification provisions). These rectification statutes, with one exception, permit disclosure only when the services of the lawyer have been used by the client to accomplish the crime or fraud. See *infra* note 47 (describing the one statute that permits disclosure otherwise than under these circumstances).

16. CANONS, *supra* note 7, Canon 37.

17. ABA Comm. on Professional Ethics and Grievances, Formal Op. 268 (1945).

18. See *generally id.* (holding, without acknowledging that Canon 37 did not include within a lawyer's confidentiality duty a client's intention to commit a crime, that an attorney whose former client has lied to another attorney in order to create a cause of action not barred by the statute of limitations cannot disclose the truth to the second attorney).

19. MODEL CODE, *supra* note 7, DR 4-101(C)(3).

to rectify it.²⁰ Commentators have interpreted the meaning of this Canon as mandatory as to the lawyer's disclosure duty.²¹ Nevertheless, in 1953 the ABA Standing Committee ruled that a lawyer may not disclose a client's perjury if knowledge of it was discovered after the proceeding in which the perjury occurred had concluded.²² Again, this opinion contradicted the language of this Canon.²³

Despite this formal ABA opinion, the 1969 *Model Code* continued the approach of Canon 41 that a fraud victim be informed of the client's wrongdoing.²⁴ Within a few years, however, the ABA altered this longstanding disclosure rule by amending the Code provision to prohibit revealing a client's fraud "when the information is protected as a privileged communication."²⁵ An ABA formal

20. See CANONS, *supra* note 7, Canon 41. Canon 41 provides in part:

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.

Id.

21. See GEOFFREY C. HAZARD, JR. & SUSAN P. KONIAK, *THE LAW AND ETHICS OF LAWYERING* 282 (1990) ("Canon 41 imposed a mandatory duty to disclose both past and ongoing fraud, whether or not the lawyer's services had been used to perpetrate the fraud.").

22. See ABA Comm. on Professional Ethics, Formal Op. 287 (1953); *cf.* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 87-353 (1987) (holding in part that a lawyer who learns that the lawyer's client has committed perjury prior to the conclusion of the proceedings must disclose that information to the tribunal if the client refuses to rectify the situation).

23. The ABA panel noted:

We do not believe that *Canon 41* was directed at a case such as that here presented [where in order to get a divorce one spouse testified falsely on the date of desertion of the other] but rather at one in which, in a civil suit, the lawyer's client has secured an improper advantage over the other through fraud or deception.

ABA Comm. on Professional Ethics, Formal Op. 287 (1953).

24. As originally drafted Model Code DR 7-102(B)(1) provided:

A lawyer who receives information clearly establishing that . . . [h]is 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.

CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B)(1) (Final Draft 1969). As noted by one commentator, "The only significant departure from the language of Canon 41 [was] in the statement that the information the lawyer receives must 'clearly establish' the client fraud." Harris Weinstein, *Client Confidences and the Rules of Professional Responsibility: Too Little Consensus and Too Much Confusion*, 35 S. TEX. L. REV. 727, 731 (1994).

25. See MODEL CODE, *supra* note 7, DR 7-102(B)(1). Some jurisdictions never adopted the ABA's amendment. Indeed, in the few states still using the *Model Code* as

opinion then emphasized that this amendment was intended to reverse this disclosure duty as to all client confidences, not just evidentiary privileged communications.²⁶

This amendment reflected a deepening division between the trial bar and the counselling bar within the ABA.²⁷ In the 1983 *Model Rules*, the trial bar's position prevailed, as it had with the amendment to Model Code DR 7-101(B)(1). The *Model Rules* as drafted do not, therefore, require disclosure of future or ongoing crimes to the person injured by the client's act or planned act.²⁸ However, the *Model*

the basis for their ethical rules, some use the original version of Model Code DR 7-102(B)(1), which requires the lawyer to reveal the fraud of a client perpetrated during the course of the representation. See, e.g., GA. CODE ANN. tit. 9 app., R. & REGS. FOR ORG. & GOV'T OF THE STATE BAR OF GA. pt. III, ch. 1, CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B)(1) (Harrison 1989); OHIO REV. CODE ANN. tit. XIX, CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(B)(1) (Anderson 1994). Others seem to have modified the mandatory requirement of the original Model Code DR 7-102(B)(1) by adding a provision to their version of Model Code DR 4-101 permitting the lawyer to reveal a client's confidences in order to rectify the effects of a client's criminal or fraudulent act which was done using the lawyer's services. See, e.g., MICHIGAN RULES OF PROFESSIONAL CONDUCT Rule 1.6(c)(3), reprinted in MICHIGAN RULES OF COURT: STATE 572 (1995); MINN. STAT. ANN., CT. R., MINNESOTA RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(4) (West 1993).

26. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 341 (1975) ("The balancing of the lawyer's duty to preserve confidences and to reveal frauds is best made by interpreting the phrase 'privileged communication' in the 1974 amendment to DR 7-102(B) as referring to those confidences and secrets that are required to be preserved by DR 4-101."). Commentators have observed that "[o]n this interpretation, the amendment operatively repeals the duty to disclose fraud, while nominally preserving it, which is surely disingenuous." HAZARD & KONIAK, *supra* note 21, at 284.

27. See Weinstein, *supra* note 24, at 731-32.

28. See MODEL RULES, *supra* note 3, Rule 1.6(b)(1) (permitting, but not mandating, disclosure of client's intent to commit a crime likely to result in death or substantial injury); cf. *id.* Rule 4.1(b) (prohibiting a lawyer from knowingly failing to disclose a material fact to a third person when disclosure is necessary to avoid assisting a client's criminal or fraudulent act, unless disclosure is prohibited by Model Rule 1.6).

The *Model Rules* also mandate certain disclosures to a tribunal in specific circumstances. See *id.* Rule 3.3(a)(4), (b). In contrast to Model Rule 1.6, the lawyer is under higher disclosure standards when before a tribunal and is not permitted to knowingly offer false evidence. See *id.* Rule 3.3(a)(4); *supra* note 7 and accompanying text (discussing Model Rule 1.6). If such testimony is offered and the lawyer then learns of its falsity before the conclusion of the proceedings, the lawyer is to take remedial measures which could include disclosure to the tribunal. See MODEL RULES, *supra* note 3, Rule 3.3 cmt., para. 11. These duties apply "even if compliance requires disclosure of information otherwise protected by rule 1.6." See *id.* Rule 3.3(b). However, the hypothetical's facts do not suggest there has been any false evidence presented to a tribunal by the attorney or client. Therefore, these higher standards do not apply here.

Rules do give a lawyer permission to reveal a client's intent to commit a crime that is likely to result in death or substantial bodily injury.²⁹

Only ten states have actually adopted the *Model Rules'* approach and limited disclosure to the situation where the lawyer believes the client will kill or seriously injure another, making even that disclosure permissive.³⁰ The other forty-one jurisdictions³¹, in adopting legal ethics rules, came up with numerous variations to Model Rule 1.6(b) regarding the scope of a lawyer's duty of confidentiality.

In considering the *Model Rules'* proposal to allow disclosure only for the most serious crimes, twenty-four states decided to stick with the broader view of the *Model Code*, permitting their lawyers to reveal client confidences to prevent a crime whenever the lawyer

29. When the Kutak Commission presented its final draft of Model Rule 1.6 to the ABA House of Delegates, it included not only the permissive disclosure discussed in the text above, but also permission for the lawyer to reveal information necessary both to prevent the client "from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result . . . in substantial injury to the financial interests or property of another," and "to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services had been used." AMERICAN BAR ASS'N COMM'N ON EVALUATION OF PROF. STANDARDS, FINAL DRAFT—MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1), (2), reprinted in AMERICAN BAR ASS'N JOURNAL, at 9 (Supp. Nov. 1982). After debate at several meetings of the ABA House of Delegates, the *Model Rules* were adopted in August 1983, but with those sections of the proposed Model Rule 1.6 quoted above deleted. See 108 REPORTS OF AMERICAN BAR ASS'N 1219-21, 1239 (1983).

In 1991 the ABA Committee on Ethics again proposed the provision to permit lawyers to disclose client confidences to rectify a client's misdeeds when the lawyer's services were used. By a vote of 158-251, the House defeated the proposal. See AMERICAN BAR ASS'N, SUMMARY OF ACTION TAKEN BY THE HOUSE OF DELEGATES 11 (1991).

30. See ALA. CODE, ALABAMA RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (Michie 1990); DEL. R. ANN., DELAWARE LAWYERS' RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (Michie 1995); D.C. CT. R. ANN., D.C. BAR R. app. A, RULES OF PROFESSIONAL CONDUCT Rule 1.6(c)(1) (Michie 1995); KY. REV. STAT. ANN., KY. R. ANN., R. SUP. CT. 3.130, KENTUCKY RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (Michie 1996); LA. REV. STAT. ANN. tit. 37, ch. 4 app., art. XVI, RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (West 1988); MO. SUP. CT. R., RULES GOVERNING THE MISSOURI BAR AND THE JUDICIARY 4, RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1), reprinted in MISSOURI RULES OF COURT: STATE AND FEDERAL 20 (1996); MONT. CONST. art. VII, § 2, RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1); N.H. CT. R. ANN., NEW HAMPSHIRE RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (Butterworth 1995); R.I. CT. R. ANN., SUP. CT. R. art. V, RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (Michie 1995); S.D. CODIFIED LAWS ANN. tit. 16, ch. 16-18 app., SOUTH DAKOTA RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (Michie 1995).

31. The total number of jurisdictions is 51 because the District of Columbia is also included.

believes the client has an intent to commit the crime.³² Five jurisdictions took a middle approach and permitted their lawyers to reveal client confidences to prevent not only the client's intent to seriously harm or kill, but also to substantially injure the financial interest or property of another.³³ However, nine states have made the require-

32. See ARK. CODE ANN., CT. R., PROCEDURES OF THE COURT REGULATING PROFESSIONAL CONDUCT OF ATTORNEYS AT LAW, MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (Michie 1995); COLO. REV. STAT., CT. R. ch. 18-20 app., COLORADO RULES OF PROFESSIONAL CONDUCT Rule 1.6(b) (Supp. 1995); GA. CODE ANN. tit. 9 app., R. & REGS. FOR ORG. & GOV'T OF STATE BAR OF GA. pt. III, ch. 1, CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(3) (Harrison 1989); IDAHO RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (1993), *published by* Legal Information Institute, Cornell Law School, at <http://www.law.cornell.edu:80/lawyers/rule.html>; IND. CODE ANN., IND. R.P., RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (Burns 1995); IOWA CODE ANN. tit. XV, ch. 602 app., IOWA CODE OF PROFESSIONAL RESPONSIBILITY FOR LAWYERS DR 4-101(C)(3) (West 1996); R. SUP. CT. KAN. 226, MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1), *reprinted in* KANSAS COURT RULES AND PROCEDURE: STATE AND FEDERAL 459 (1996); ME. BAR R. 3, CODE OF PROFESSIONAL RESPONSIBILITY Rule 3.6(h)(4), *reprinted in* MAINE RULES OF COURT: STATE AND FEDERAL 349 (1995); MASS. SUP. JUD. CT. R. 3:07, CANONS OF ETHICS AND DISCIPLINARY RULES REGULATING THE PRACTICE OF LAW DR 4-101(C)(3), *reprinted in* MASSACHUSETTS RULES OF COURT: STATE 278 (1995); MICHIGAN RULES OF PROFESSIONAL CONDUCT Rule 1.6(c)(4), *reprinted in* MICHIGAN RULES OF COURT: STATE 572 (1995); MINN. STAT. ANN., CT. R., MINNESOTA RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(3) (West 1993); MISSISSIPPI RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1), *reprinted in* MISSISSIPPI RULES OF COURT: STATE AND FEDERAL 313 (1995); NEB. R. CT. ANN., CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(3) (Michie 1995); N.Y. COMP. CODES R. & REGS. tit. 22, pt. 1200, DISCIPLINARY RULES OF THE CODE OF PROFESSIONAL RESPONSIBILITY § 1200.19(c)(3) (1995); N.C. GEN. STAT. ANN. R., RULES OF PROFESSIONAL CONDUCT OF THE NORTH CAROLINA STATE BAR Rule 4(c)(4) (Michie 1995); OHIO REV. CODE ANN. tit. XIX, CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(3) (Anderson 1994); OKLA. STAT. ANN. tit. 5, ch. 1, app. 3-A, RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (West 1996); OREGON CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101, *reprinted in* OREGON RULES OF COURT 398 (1995); S.C. CODE ANN., S.C. APP. CT. R. 407, RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (Law. Co-op. 1995); TENN. CODE ANN., CT. R. ANN., R. SUP. CT. 8, CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(3) (Michie 1995); VT. STAT. ANN., SUP. CT. ADMIN. ORDERS & R., CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(3) (1986); WASH. CT. R. ANN. pt. 1, RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (Law. Co-op. 1995); W. VA. CODE ANN., CT. R., RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (Michie 1996); WYO. CT. R. ANN., RULES OF PROFESSIONAL CONDUCT FOR ATTORNEYS AT LAW Rule 1.6(b)(1) (Michie 1995).

33. See ALASKA RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1), *reprinted in* ALASKA COURT RULES: STATE AND FEDERAL 444 (1995); R. SUP. CT. HAW. exh. A, HAWAII RULES OF PROFESSIONAL CONDUCT Rule 1.6(c)(1), *reprinted in* HAWAII COURT RULES: STATE AND FEDERAL 229 (1995); MD. CODE ANN., MD. R. app., MARYLAND LAWYERS' RULES OF PROFESSIONAL CONDUCT Rule 1.6(c)(1) (Michie 1996); 42 PA. CONS. STAT. ANN., RULES OF PROFESSIONAL CONDUCT Rule 1.6(c)(1) (West Supp. 1995); UTAH CODE ANN., UTAH CT. R., UTAH CODE OF JUD. ADMIN. ch. 13, RULES OF

ment *mandatory* to reveal a client's plan to kill or seriously harm,³⁴ and the majority of those then made permissive any disclosure about any other future intent, whether the intent to substantially injure financial or property interests³⁵ or other general criminal intent.³⁶

PROFESSIONAL CONDUCT Rule 1.6(b)(1) (Michie 1995). This variation, of course, mirrored Model Rule 1.6, as it was first proposed to the ABA House of Delegates in 1982. See *supra* note 29.

34. See ARIZ. REV. STAT. ANN., SUP. CT. R. 42, ARIZONA RULES OF PROFESSIONAL CONDUCT ER 1.6(b) (West 1988); CONNECTICUT RULES OF PROFESSIONAL CONDUCT Rule 1.6(b), *reprinted in* CONNECTICUT RULES OF COURT: STATE AND FEDERAL 336 (1995); ILL. ANN. STAT., SUP. CT. R., ILLINOIS RULES OF PROFESSIONAL CONDUCT Rule 1.6(b) (Smith-Hurd 1993 & Supp. 1995); NEV. REV. STAT. ANN., CT. R. ANN., NEV. SUP. CT. R. 156(2) (Michie 1996); N.J. R. GEN. APPLICATION pt. I app., RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1), *reprinted in* NEW JERSEY RULES OF COURT: STATE AND FEDERAL 124 (1995); N.D. CT. R. ANN., NORTH DAKOTA RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (Michie 1996) (requiring disclosure when death or substantial bodily harm is "imminent"); TEX. GOV'T CODE ANN. tit. 2, subtit. G app., art. X, § 9, TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT Rule 1.05(e) (West Supp. 1996); WIS. SUP. CT. R. ch. 20, RULES OF PROFESSIONAL CONDUCT FOR ATTORNEYS Rule 20:1.6(b), *reprinted in* WISCONSIN COURT RULES AND PROCEDURE: STATE 1110 (1995); see also N.M. R. ANN., RULES OF PROFESSIONAL CONDUCT Rule 16-606(B) (Michie 1995) (providing that the lawyer "should" reveal such information).

35. This is true for four of the jurisdictions cited *supra* note 34. See CONNECTICUT RULES OF PROFESSIONAL CONDUCT Rule 1.6(c)(1), *reprinted in* CONNECTICUT RULES OF COURT: STATE AND FEDERAL 336 (1995); ILL. ANN. STAT., SUP. CT. R., ILLINOIS RULES OF PROFESSIONAL CONDUCT Rule 1.6(c)(2) (Smith-Hurd 1993 & Supp. 1995); N.M. R. ANN., RULES OF PROFESSIONAL CONDUCT Rule 16-606(C) (Michie 1995); N.D. CT. R. ANN., NORTH DAKOTA RULES OF PROFESSIONAL CONDUCT Rule 1.6(d) (Michie 1996) (permitting disclosure if necessary to prevent injury to financial interest, property injury, nonimminent substantial bodily harm or death).

Two states, Wisconsin and New Jersey, also made mandatory the disclosure of information necessary to prevent the client from committing a criminal or fraudulent act that would be likely to result in substantial injury to financial interest or property. See N.J. R. GEN. APPLICATION pt. I app., RULES OF PROFESSIONAL CONDUCT Rule 1.6(b), *reprinted in* NEW JERSEY RULES OF COURT: STATE AND FEDERAL 124 (1995); WIS. SUP. CT. R. ch. 20, RULES OF PROFESSIONAL CONDUCT FOR ATTORNEYS Rule 20:1.6(b), *reprinted in* WISCONSIN COURT RULES AND PROCEDURE: STATE 1110 (1995). Nevada imposes no duty other than that discussed in text accompanying note 34 *supra*. See generally NEV. REV. STAT. ANN., CT. R. ANN., NEV. SUP. CT. R. 156 (Michie 1996) (providing that a lawyer shall reveal information related to representation to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act likely to result in imminent death or substantial bodily harm).

36. See ARIZ. REV. STAT. ANN., SUP. CT. R. 42, ARIZONA RULES OF PROFESSIONAL CONDUCT ER 1.6(c) (West 1988) (providing that the lawyer may reveal the client's intention to commit a crime and information necessary to prevent it); TEX. GOV'T CODE ANN. tit. 2, subtit. G app., art. X, § 9, TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT Rule 1.05(c)(7) (West Supp. 1996) (providing that the lawyer may reveal confidences reasonably believed necessary to prevent the client from committing a criminal or fraudulent act).

One state made both types of client intent mandatory,³⁷ and another made mandatory the disclosure of a client's stated intent to commit any crime and information necessary to prevent it once the client was notified of the attorney's duty, unless the client abandoned the plan.³⁸ In stark contrast to all these variations on lawyer disclosure duties, one state's lawyer confidentiality provision allows no disclosure of any kind.³⁹

In addition to all these differences in the standards for disclosure as to future crimes, fifteen states have adopted rectification provisions. Thirteen of these states permit a lawyer to reveal information necessary to rectify the results of a client's criminal or fraudulent act

37. See FLA. STAT. ANN., R. REGULATING FLA. BAR 4-1, RULES OF PROFESSIONAL CONDUCT Rule 4-1.6(b)(1) (West 1994 & Supp. 1996) (discussing disclosure to prevent client's committing a crime); *id.* Rule 4-1.6(b)(2) (discussing disclosure to prevent a death or substantial bodily harm to another).

38. See VA. CODE ANN., R. SUP. CT. VA. § II, VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(D)(1) (Michie 1995).

39. See CAL. BUS. & PROF. CODE § 6068(e) (West 1993) ("It is the duty of an attorney . . . [t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."). California has no specific ethical rule concerning client confidences. See generally CAL. CODE CT. R., RULES OF PROFESSIONAL CONDUCT Rule 1-100 to 5-320 (West 1981 & Supp. 1995) (outlining the ethical obligations of California attorneys). Thus, one local California bar association has opined that California lawyers have no discretion to disclose a client's intent to murder a codefendant who has decided to cooperate with the prosecutor and incriminate the client. See San Diego County Bar Ass'n Legal Ethics and Unlawful Practices Comm., Op. 1990-1 (1990), reprinted in 1 STATE BAR OF CAL., CALIFORNIA COMPENDIUM ON PROFESSIONAL RESPONSIBILITY pt. IIC, at 382-85 (1993) [hereinafter CALIFORNIA COMPENDIUM]. By contrast, another local bar association has taken the view in dictum that the Model Rule approach is appropriate and "disclosure of future crimes is only permitted in situations where such crimes are likely to result in imminent death or serious bodily injury." Los Angeles County Bar Ass'n, Op. 436 (1985), reprinted in 2 CALIFORNIA COMPENDIUM, *supra*, at 138, 140.

Even if California's ethical duty seems absolute by its terms, its attorney-client privilege is limited by the crime-fraud exception which provides that communications between an attorney and client are not privileged "if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud." CAL. EVID. CODE § 956 (West 1995); see, e.g., *People v. Superior Court*, 37 Cal. App. 4th 1757, 1768, 44 Cal. Rptr. 2d 734, 740 (1995). The California legislature has also enacted another exception which states: "There is no privilege . . . if the lawyer reasonably believes that disclosure of any confidential communication relating to representation of a client is necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm." CAL. EVID. CODE § 956.5 (West 1995). For an analysis of the operation of this exception, see Fred C. Zacharias, *Privilege and Confidentiality in California*, 28 U.C. DAVIS L. REV. 367 (1995).

in which the lawyer's services were used.⁴⁰ One state requires its lawyers to reveal to the victim or a tribunal a client's fraud which has involved the lawyer's services,⁴¹ while another's rule has both a mandatory and permissive provision. The mandatory part only requires a lawyer to reveal information that "clearly establishes" the client's criminal or fraudulent act in order to rectify the situation when it has resulted in substantial injury to another's financial interests or property.⁴² The permissive provision allows, but does not require, a lawyer to reveal information in order to rectify what the lawyer "reasonably believes" is a client fraud or crime.⁴³ One additional state allows a lawyer to reveal such client information as is

40. CONNECTICUT RULES OF PROFESSIONAL CONDUCT Rule 1.6(c)(2), *reprinted in* CONNECTICUT RULES OF COURT: STATE AND FEDERAL 336 (1995); MD. CODE ANN., MD. R. app., MARYLAND LAWYERS' RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (Michie 1996); MICHIGAN RULES OF PROFESSIONAL CONDUCT Rule 1.6(c)(3), *reprinted in* MICHIGAN RULES OF COURT: STATE 572 (1995); NEV. REV. STAT. ANN., CT. R. ANN., NEV. SUP. CT. R. 156(3)(a) (Michie 1996) (permitting disclosure both to prevent or rectify but first requiring lawyer's efforts to persuade client to take corrective action); N.J. R. GEN. APPLICATION pt. I app., RULES OF PROFESSIONAL CONDUCT Rule 1.6(c)(1), *reprinted in* NEW JERSEY RULES OF COURT: STATE AND FEDERAL 124 (1995); N.D. CT. R. ANN., NORTH DAKOTA RULES OF PROFESSIONAL CONDUCT Rules 1.6(f), 3.3(c) (Michie 1996) (permitting disclosure both to prevent or rectify unless disclosure is to a court and the falsity discovered by the lawyer was contained in the client's testimony); OKLA. STAT. ANN. tit. 5, ch. 1, app. 3-A, RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (West 1996) (but first requiring lawyer's efforts to get client to rectify); 42 PA. CONS. STAT. ANN., RULES OF PROFESSIONAL CONDUCT Rule 1.6(c)(2) (West Supp. 1995) (permitting disclosure both to prevent or rectify); S.D. CODIFIED LAWS ANN. tit. 16, ch. 16-18 app., SOUTH DAKOTA RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(3) (Michie 1995); TEX. GOV'T CODE ANN. tit. 2, subtit. G app., art. X, § 9, TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT Rule 1.05(c)(8) (West Supp. 1996); UTAH CODE ANN., UTAH CT. R., UTAH CODE OF JUD. ADMIN. ch. 13, RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (Michie 1995); VA. CODE ANN., R. SUP. CT. VA. § II, VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(3) (Michie 1995) (permitting lawyer to reveal information which clearly establishes client has during representation perpetrated fraud on another related to the subject matter of representation, apparently even if the lawyer's services have not been used); WIS. SUP. CT. R. ch. 20, RULES OF PROFESSIONAL CONDUCT FOR ATTORNEYS Rule 20:1.6(c)(1), *reprinted in* WISCONSIN COURT RULES AND PROCEDURE: STATE 1110 (1995). The rectification provision adopted by all states but Virginia mirrored Model Rule 1.6(b)(2) as it was first proposed to the ABA House of Delegates in 1982 and repropounded in 1991. *See supra* note 29.

41. *See* GA. CODE ANN. tit. 9 app., R. & REGS. FOR ORG. & GOV'T OF STATE BAR OF GA. pt. III, ch. 1, CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B)(1) (Harrison 1989) (maintaining the *Model Code* rectification provision with no exception for privileged information).

42. *See* R. SUP. CT. HAW. exh. A, HAWAII RULES OF PROFESSIONAL CONDUCT Rule 1.6(b), *reprinted in* HAWAII COURT RULES: STATE AND FEDERAL 229 (1995).

43. *See id.* Rule 1.6(c)(2).

“implicit” in the lawyer’s withdrawal of a previously given statement on which a nonclient still relies where the lawyer has learned that the statement was based on material inaccurate information or where it is being used in a continuing fraud or crime.⁴⁴

As earlier noted, none of these amendments by the various state jurisdictions to the ABA’s formulation of Model Rule 1.6(b) affect the basic mandate of a lawyer’s ethical obligation to maintain a client’s confidences in the hypothetical’s situation under Model Rule 1.6(a) as presently interpreted.⁴⁵ Thus, under the profession’s ethical standards in all jurisdictions, the lawyer in the hypothetical must maintain her silence about her client’s past crime absent his consent to disclosure.⁴⁶ This client’s crime is not even subject to the rectification provisions that some jurisdictions have adopted because there is no inference in the facts that the lawyer’s services were used by the client in performing his criminal act⁴⁷—nor would a crime of murder be likely to involve the services of one’s attorney. The attorney’s only option pursuant to the letter of the profession’s ethical rules is to withdraw from representing the client.⁴⁸ However, withdrawal will

44. See N.Y. COMP. CODES R. & REGS. tit. 22, pt. 1200, DISCIPLINARY RULES OF THE CODE OF PROFESSIONAL RESPONSIBILITY § 1200.19(c)(5) (1995).

45. MODEL RULES, *supra* note 3, Rule 1.6(a); see *supra* text accompanying note 7 (quoting the text of Model Rule 1.6); *supra* note 11 (quoting parts of comments making that clear). The same would be true in jurisdictions still using the *Model Code*. See MODEL CODE, *supra* note 7, DR 4-101(B)(1) (stating that “a lawyer shall not knowingly . . . [r]eveal a confidence or secret of his client” except as was permitted by DR 4-101(C)); cf. Sloan v. State Bar of Nev., 726 P.2d 330, 333 (Nev. 1986) (“[W]e know of no statute . . . which would make it an offense to fail to disclose to the authorities that a crime has taken place.”).

46. Arguably the client has given consent to the lawyer’s talking to the prosecutors about a deal involving his confession, but he was adamant that any such discussion not reveal his identity. *Hypothetical*, *supra* note 14, at 1545.

47. In the one jurisdiction, Virginia, which seems to permit disclosure to rectify even situations not involving the lawyer’s services, the type of client activity allowed to be disclosed is fraud—and murder is not fraud. See VA. CODE ANN., R. SUP. CT. VA. § II, VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(3) (Michie 1995) (permitting lawyer to reveal information which clearly establishes client has during representation defrauded another related to the subject matter of representation, and making no absolute requirement that lawyer’s services have been used in the fraud).

48. See MODEL RULES, *supra* note 3, Rule 1.16. A basis for withdrawal may be found in Model Rule 1.16(b)(3) which allows permissive withdrawal where “a client insists upon pursuing an objective that the lawyer considers repugnant.” *Id.* Rule 1.16(b)(3). Rule 1.16(a)(1) might also be a basis if the lawyer’s competence and ability to represent the client would be affected by negative feelings concerning the client’s past act. See *id.* Rule 1.16(a)(1) (requiring lawyer’s withdrawal from representation of a client if representation will result in violation of ethical rules). However, since the hypothetical seems to suggest

not give the lawyer leave to reveal the client's confidences as the duty continues after the representation ends.⁴⁹ This is also not the kind of situation where notice of the lawyer's withdrawal might alert an affected third party,⁵⁰ since the person convicted of the client's crime is not an opposing party or one with whom the lawyer might have had contact in connection with representation of the client.

This review of the present state of lawyer-client confidentiality in the various jurisdictions in general and as it pertains to the hypothetical begins to illustrate what a tangled web the profession has woven. The hypothetical as a teaching tool could help introduce these issues to law students so that they do not enter the profession unprepared, for most law students come to law school thinking as nonlawyers—as laypersons. Many of them would therefore approach this hypothetical from a high moral ground, believing that the lawyer must reveal the client's wrong in order to save the other person. They have not had an opportunity to consider why a bright-line rule of confidentiality is important in order to give all clients assurance that their attorneys will keep their confidences about their past acts, no matter what. They have not yet thought about how allowing an attorney in the hypothetical's situation to reveal the client's confidences puts the profession

that the lawyer is appointed counsel, a public defender, she will need permission of the court to withdraw, whatever the basis. See *id.* Rule 1.16(c) & cmt., para. 3.

49. See Commercial Standard Title Co. v. Superior Court, 92 Cal. App. 3d 934, 945, 155 Cal. Rptr. 393, 400 (1979) (confidentiality duty is owed to both present and former clients); *In re Robak*, 654 N.E.2d 731, 735 (Ind. 1995) (confidentiality duty is owed both present and former clients); *Solow v. W.R. Grace & Co.*, 632 N.E.2d 437, 439-40 (N.Y. 1994) (confidentiality duty is owed both present and former clients); MODEL RULES, *supra* note 3, Rule 1.9(c) (stating that a lawyer shall not reveal information relating to the representation of a former client or use such information to that client's disadvantage except as permitted by Model Rules 1.6 and 3.3); ANNOTATED MODEL RULES, *supra* note 8, at 91.

50. See MODEL RULES, *supra* note 3, Rule 1.6 cmt., para. 15 (noting that the ethical rules do not "prevent[] the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like"); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 92-366 (1992) (concluding, in part, that withdrawal is required if the fact of representation of the client "is likely to be known to and relied upon by third persons to whom [the client's] continuing fraud is directed," and permitting the lawyer to disavow any work product to prevent its use in client's continuing or planned future fraud, even if that results in the disclosure of client confidences); *supra* note 44 and accompanying text (discussing N.Y. COMP. CODES R. & REGS. tit. 22, pt. 1200, DISCIPLINARY RULES OF THE CODE OF PROFESSIONAL RESPONSIBILITY § 1200.19(c)(5) (1995), which allows revealing of client information upon withdrawal).

even farther down the slippery slope of feeling freer to make confidential disclosures.

In addition to providing an occasion to discuss the role and duty of an individual attorney in this situation, the hypothetical would permit a professor to explore with the law students their option to urge the client on moral grounds to confess or to authorize disclosure in order to save the person convicted of the murder committed by the client. Certainly nothing in the profession's ethical rules would prevent such a discussion between attorney and client.⁵¹ In response to such urging, possibly the client will consent to disclosure or take action himself. This client already feels the other person does not deserve to die, and he is concerned enough about the situation that he has also confided in his clergy and his psychiatrist.⁵² However, it is also possible that the client will refuse to agree to any disclosure, especially since such disclosure may put his own life at risk. If the client refuses, this lawyer will be required to maintain silence even if her own values would dictate a different action. However, as earlier noted, she can consider withdrawal.

Because this situation arguably involves a life-and-death situation for both the client and the other person, the hypothetical is a useful example of how there are no fully satisfactory answers to ethical dilemmas. The class discussion could look at the situation from several different perspectives: the client's, the convicted defendant's, the prosecutor's, even the victim's family's. Given these different perspectives, and also given that because the other person might be seen by some as not totally sympathetic,⁵³ students are likely to have different views on whether they would be morally outraged enough by the client's requirement of silence to consider civil disobedience.⁵⁴

51. See MODEL RULES, *supra* note 3, Rule 1.6 cmt., para. 13 ("Where practical, the lawyer should seek to persuade the client to take suitable action."); *cf. id.* Rule 3.3 cmt., para. 11 ("If perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to remonstrate with the client confidentially.").

52. *Hypothetical*, *supra* note 14, at 1545-46.

53. The client describes him as "a nasty dude." *Id.* at 1544.

54. In this regard the level of outrage might differ from that presented in *Spaulding v. Zimmerman*, 116 N.W.2d 704 (Minn. 1962). In *Spaulding* a lawyer who was defending a client who was civilly sued after an automobile accident did not disclose to the plaintiff that he had a life-threatening aorta aneurysm discovered in an examination by the defendant's medical expert. See *id.* at 707-08. Thus, *Spaulding* presented a situation where the life of the other party was involved, but only the financial interest of the client was at stake, in terms of an increased settlement or judgment if the aneurysm was found to be caused by the accident. Nevertheless, the court in *Spaulding* ruled the lawyer was not

Thus, the class discussion would also cover the students' need to be prepared to accept whatever the consequences may be of acting on one's higher moral position. If the lawyer reveals the client's confidences, the client could certainly be expected to file a complaint, and since the disclosure would put the client at high risk, the lawyer could also anticipate the Bar authorities bringing disciplinary charges against her. The bottom line question the students might need to ask themselves is—"Am I willing to give up my Bar 'ticket'?"

As earlier noted, the hypothetical also gives the opportunity to consider the overarching issue of where the profession is headed given the current array of disclosure standards nationwide. This very array suggests the profession is on a slope that is likely to get more and more slippery. Clearly the profession does not have one mind concerning the extent to which a client's confidences should or will be protected. Moreover, there is no longer clear unanimity even on keeping a client's past crimes anonymous. Where a lawyer's services have been used, the rectification provisions permit—and in one state require—lawyers to reveal information about their clients, including client confidences, sufficient to rectify the consequences of a client's past criminal or fraudulent act.⁵⁵ Yet as one court has recognized, "[f]ew questions are graver or more serious in the practice of law than determining what evidence of crime or fraud justifies a lawyer's disclosure of his client's confidential information."⁵⁶

Where an attorney is given the discretion to disclose the client's confidences, whether it be to prevent some future crime or to rectify a past crime, the attorney must reach a decision whether disclosure is appropriate under the circumstances. This is not an easy task since it creates a conflict for the attorney with the traditional duty of the profession to maintain client confidences. One might expect that a provision suggesting the attorney may make such disclosures would use language that would give some guidance on when disclosure is

under a duty to disclose this critical information to the plaintiff. *See id.* at 709.

55. *See supra* notes 40-44.

56. *X Corp. v. Doe*, 805 F. Supp. 1298, 1304 (E.D. Va. 1992) (granting employer-client's motion for injunction to prevent employee-attorney's disclosure of confidential information), *aff'd sub nom. Under Seal v. Under Seal*, 17 F.3d 1435 (4th Cir. 1994).

proper.⁵⁷ However, this is only true to a limited degree; the provisions currently in existence leave a great deal to lawyers' discretion.

For example, those jurisdictions which follow the *Model Rules'* limited disclosure approach provide that "[a] lawyer may reveal such information to the extent the lawyer *reasonably believes* necessary . . . to prevent the client from committing a criminal act that the lawyer *believes is likely to result in imminent* death or *substantial* bodily harm."⁵⁸ The italicized words are presumed intended to create a somewhat heightened standard governing the lawyer's decision to disclose, even in the situation where another's life may be at risk. Thus, unless the lawyer *believes* the client is going to take action with the stated results, there is no discretion to make any disclosure at all. And while some may feel *imminent* death is pretty clear, others might differ on what *substantial* bodily injury is. The comments for this Model Rule add little more. They do acknowledge that disclosure may occur absent actual knowledge that the client will act,⁵⁹ and they suggest that "[t]he lawyer's exercise of discretion requires consideration of such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question."⁶⁰ While this discussion does not therefore provide very specific guidance for a lawyer's disclosure decision in this serious situation, it does at least alert the lawyer to consider even this decision thoughtfully.

As earlier discussed, a few states permit their lawyers to reveal client confidences not only for this most serious form of future crime, but also to prevent the client's commission of a crime or fraud "that the lawyer *believes is likely to result in . . . substantial injury* to the

57. How much to disclose is typically defined in terms similar to that in the *Model Rules*: "such information [as] the lawyer reasonably believes necessary . . . to prevent the client from committing the criminal act." MODEL RULES, *supra* note 3, Rule 1.6(b)(1); *see also id.* Rule 1.6 cmt., para. 13 ("In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose.").

58. MODEL RULES, *supra* note 3, Rule 1.6(b)(1) (emphasis added); *see supra* note 30 and accompanying text.

59. *See* MODEL RULES, *supra* note 3, Rule 1.6 cmt., para. 12 ("The lawyer may make a disclosure in order to prevent homicide or serious bodily injury which the lawyer reasonably believes is intended by a client. It is very difficult for a lawyer to 'know' when such a heinous purpose will actually be carried out, for the client may have a change of mind.").

60. *Id.* Rule 1.6 cmt., para. 13.

financial interest or property of another.”⁶¹ Again, the italicized words seem intended to qualify the scope of the discretion accorded. However, four of the five jurisdictions provide no clarification of those terms in their ethical rule.⁶² Even the one state that has some discussion of the additional bases for a lawyer’s discretionary disclosure gives no real definition.⁶³ Thus, the lawyer is given no further guidance concerning the serious harm situations and no guidance at all for judging when injury to another’s financial interest or property is “substantial.”

61. ALASKA RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1), *reprinted in* ALASKA COURT RULES: STATE AND FEDERAL 444 (1995) (emphasis added); MD. CODE ANN., MD. R. app., MARYLAND LAWYERS’ RULES OF PROFESSIONAL CONDUCT Rule 1.6(c)(1) (Michie 1996) (emphasis added); 42 PA. CONS. STAT. ANN., RULES OF PROFESSIONAL CONDUCT Rule 1.6(c)(1) (West Supp. 1995) (emphasis added); UTAH CODE ANN., UTAH CT. R., UTAH CODE OF JUD. ADMIN. ch. 13, RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (Michie 1995) (emphasis added). Hawaii calls for the lawyer to “reasonably believe.” R. SUP. CT. HAW. exh. A, HAWAII RULES OF PROFESSIONAL CONDUCT Rule 1.6(c)(1), *reprinted in* HAWAII COURT RULES: STATE AND FEDERAL 229 (1995).

62. *See* ALASKA RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1), *reprinted in* ALASKA COURT RULES: STATE AND FEDERAL 445 (1995); R. SUP. CT. HAW. exh. A, HAWAII RULES OF PROFESSIONAL CONDUCT Rule 1.6(c)(1), *reprinted in* HAWAII COURT RULES: STATE AND FEDERAL 230 (1995); MD. CODE ANN., MD. R. app., MARYLAND LAWYERS’ RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (Michie 1996); 42 PA. CONS. STAT. ANN., RULES OF PROFESSIONAL CONDUCT Rule 1.6(c)(1) (West Supp. 1995). Alaska simply adopts the *Model Rules’* comments with no change at all. Hawaii, Maryland, and Pennsylvania modify the *Model Rules’* comments discussed and quoted in text and *supra* note 59, by adding without further definition the phrase “substantial injury to the financial interests or property of another” to the comment discussion’s mention of “homicide or serious bodily injury.” R. SUP. CT. HAW. exh. A, HAWAII RULES OF PROFESSIONAL CONDUCT Rule 1.6(c)(1), *reprinted in* HAWAII COURT RULES: STATE AND FEDERAL 230 (1995); MD. CODE ANN., MD. R. app., MARYLAND LAWYERS’ RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (Michie 1996); 42 PA. CONS. STAT. ANN., RULES OF PROFESSIONAL CONDUCT Rule 1.6(c)(1) (West Supp. 1995); *see supra* note 59 (quoting MODEL RULES, *supra* note 3, Rule 1.6 cmt., para. 12).

63. *See* UTAH CODE ANN., UTAH CT. R., UTAH CODE OF JUD. ADMIN. ch. 13, RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (Michie 1995). The comment to the Utah provision provides in pertinent part:

[T]he lawyer may learn that a client intends prospective conduct that is criminal or fraudulent. . . . If the prospective crime or fraud is likely to result in substantial injury, the lawyer may feel a moral obligation to take preventive action. When the threatened injury is grave, such as homicide or serious bodily injury, the lawyer may have an obligation under tort or criminal law to take reasonable preventive measures. Whether the lawyer’s concern is based on moral or legal considerations, the interest in preventing the harm may be more compelling than the interest in preserving confidentiality of information relating to the client.

Id. Rule 1.6 cmt., para. 9.

In addition to those jurisdictions that have specifically limited disclosure to set situations, almost half the jurisdictions permit disclosure whenever the client has an intention to commit any crime. These provisions usually take one of two approaches. The first follows the language of Model Rule 1.6(b)(1) but eliminates that part of the provision which limits the "criminal act" to one the attorney "believes is likely to result in imminent death or substantial bodily harm."⁶⁴ Where these jurisdictions adopted the *Model Rules'* comments to their rule,⁶⁵ most simply dropped the description of the crime but otherwise kept virtually unchanged the text of the comment.⁶⁶ Thus, in those jurisdictions the comments still suggest that an attorney be thoughtful in making the disclosure decision, but no guidance is given as to what crimes are proper subjects for disclosure.

Three jurisdictions did a little more. One jurisdiction does note that its version of the rule is different from Model Rule 1.6(b)(1), and that the language concerning "imminent death or substantial bodily

64. See ARK. CODE ANN., CT. R., PROCEDURES OF THE COURT REGULATING PROFESSIONAL CONDUCT OF ATTORNEYS AT LAW, MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (Michie 1995); IDAHO RULES OF PROF. CONDUCT, Rule 1.6(b)(1) (1993) (published by Legal Information Institute, Cornell Law School, at <http://www.law.cornell.edu/80/lawyers/ruleable.html>); IND. CODE ANN., IND. R.P., RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (Burns 1995); R. SUP. CT. KAN. 226, MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1), reprinted in KANSAS COURT RULES AND PROCEDURE: STATE AND FEDERAL 459 (1996); MISSISSIPPI RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1), reprinted in MISSISSIPPI RULES OF COURT: STATE AND FEDERAL 313 (1995); S.C. CODE ANN., S.C. APP. CT. R. 407, RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (Law. Co-op. 1995); WASH. CT. R. ANN. pt. 1, RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (Law. Co-op. 1995); W. VA. CODE ANN., CT. R., RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (Michie 1996); WYO. CT. R. ANN., RULES OF PROFESSIONAL CONDUCT FOR ATTORNEYS AT LAW Rule 1.6(b)(1) (Michie 1995).

65. See ARK. CODE ANN., CT. R., PROCEDURES OF THE COURT REGULATING PROFESSIONAL CONDUCT OF ATTORNEYS AT LAW, MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (Michie 1995); R. SUP. CT. KAN. 226, MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1), reprinted in KANSAS COURT RULES AND PROCEDURE: STATE AND FEDERAL 459 (1996); MISSISSIPPI RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1), reprinted in MISSISSIPPI RULES OF COURT: STATE AND FEDERAL 313 (1995); WASH. CT. R. ANN. pt. 1, RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (Law. Co-op. 1995); WYO. CT. R. ANN., RULES OF PROFESSIONAL CONDUCT FOR ATTORNEYS AT LAW Rule 1.6(b)(1) (Michie 1995). Surprisingly, one state did not drop the comment language referring to "homicide or serious bodily injury," see *supra* note 59 (quoting MODEL RULES, *supra* note 3, Rule 1.6 cmt., para. 12), thus leaving the attorney unclear as to whether the nature of the criminal act is narrow or broad. See IND. CODE ANN., IND. R.P., RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (Burns 1995).

66. See *supra* note 59 and text accompanying note 60 (quoting the relevant portions of the comment to Model Rule 1.6).

harm" was deleted "to provide greater flexibility for the lawyer, similar to the flexibility present under DR 4-101 of the [Model] Code."⁶⁷ Another gives examples—that disclosure is permissible "to prevent homicide or serious bodily injury or damage to another's property or rights."⁶⁸ The final jurisdiction suggests the attorney may reveal information necessary to prevent a crime "based on a determination of whether preventing the harm involved is more compelling than preserving the confidentiality of information relating to the client in a particular case."⁶⁹ In sum, this group of jurisdictions with provisions giving lawyers broad discretion to reveal client confidences for generic future crimes provides very little useful guidance for when an attorney's disclosure will be appropriate.

The second approach of this type of provision more closely tracks the language of Model Code DR 4-101(C)(3) that an attorney may reveal "the intention of [the] client to commit a crime and the information necessary to prevent the crime."⁷⁰ The way these jurisdictions have handled defining the scope of this provision form is

67. See S.C. CODE ANN., S.C. APP. CT. R. 407, RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (Law. Co-op. 1995).

68. See W. VA. CODE ANN., CT. R., RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (Michie 1996).

69. See MISSISSIPPI RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1), *reprinted in* MISSISSIPPI RULES OF COURT: STATE AND FEDERAL 313 (1995).

70. See COLO. REV. STAT., CT. R. ch. 18-20 app., COLORADO RULES OF PROFESSIONAL CONDUCT Rule 1.6(b) (Supp. 1995); GA. CODE ANN. tit. 9 app., R. & REGS. FOR ORG. & GOV'T OF STATE BAR OF GA. pt. III, ch. 1, CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(3) (Harrison 1989); IOWA CODE ANN. tit. XV, ch. 602 app., IOWA CODE OF PROFESSIONAL RESPONSIBILITY FOR LAWYERS DR 4-101(C)(3) (West 1996); ME. BAR R. 3, CODE OF PROFESSIONAL RESPONSIBILITY Rule 3.6(h)(4), *reprinted in* MAINE RULES OF COURT: STATE AND FEDERAL 349 (1995); MASS. SUP. JUD. CT. R. 3:07, CANONS OF ETHICS AND DISCIPLINARY RULES REGULATING THE PRACTICE OF LAW DR 4-101(C)(3), *reprinted in* MASSACHUSETTS RULES OF COURT: STATE 278 (1995); MICHIGAN RULES OF PROFESSIONAL CONDUCT Rule 1.6(c)(4), *reprinted in* MICHIGAN RULES OF COURT: STATE 572 (1995); MINN. STAT. ANN., CT. R., MINNESOTA RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(3) (West 1993); NEB. R. CT. ANN., CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(3) (Michie 1995); N.Y. COMP. CODES R. & REGS. tit. 22, pt. 1200, DISCIPLINARY RULES OF THE CODE OF PROFESSIONAL RESPONSIBILITY § 1200.19(c)(3) (1995); N.C. GEN. STAT. ANN. R., RULES OF PROFESSIONAL CONDUCT OF THE NORTH CAROLINA STATE BAR Rule 4(c)(4) (Michie 1995); OHIO REV. CODE ANN. tit. XIX, CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(3) (Anderson 1994); OKLA. STAT. ANN. tit. 5, ch. 1, app. 3-A, RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (West 1996); OREGON CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101, *reprinted in* OREGON RULES OF COURT 398 (1995); TENN. CODE ANN., CT. R. ANN., R.SUP. CT. 8, CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(3) (Michie 1995); VT. STAT. ANN., SUP. CT. ADMIN. ORDERS & R., CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(3) (1986).

even less illuminating. Eight jurisdictions have no descriptive comments of any kind.⁷¹ Despite their provisions' similarity to the *Model Code*, two jurisdictions have adopted the comments to Model Rule 1.6 but without the death or serious harm limitation.⁷² Two others have done the same but have added certain statements. One provides that "[w]here the conduct is likely to result in imminent death or substantial harm to the person or financial interests of another, doubts should be resolved in favor of disclosure."⁷³ The other states:

If the prospective crime is likely to result in substantial injury, the lawyer may feel a moral obligation to take preventive action. When the threatened injury is grave, such as homicide or serious bodily injury, a lawyer may have an obligation under tort or criminal law to take reasonable preventive measures. Whether the lawyer's concern is based on moral or legal considerations, the interest in preventing the harm may be more compelling than the interest in preserving confidentiality of information relating to the client.⁷⁴

Two other jurisdictions have continued using the *Model Code's* Ethical Considerations (ECs) for further definition of their rules;

71. See GA. CODE ANN. tit. 9 app., R. & REGS. FOR ORG. & GOV'T OF STATE BAR OF GA. pt. III, ch. 1, CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(3) (Harrison 1989); ME. BAR R. 3, CODE OF PROFESSIONAL RESPONSIBILITY Rule 3.6(h)(4), *reprinted in* MAINE RULES OF COURT: STATE AND FEDERAL 349 (1995); MASS. SUP. JUD. CT. R. 3:07, CANONS OF ETHICS AND DISCIPLINARY RULES REGULATING THE PRACTICE OF LAW DR 4-101(C)(3), *reprinted in* MASSACHUSETTS RULES OF COURT: STATE 278 (1995); NEB. R. CT. ANN., CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(3) (Michie 1995); N.Y. COMP. CODES R. & REGS. tit. 22, pt. 1200, DISCIPLINARY RULES OF THE CODE OF PROFESSIONAL RESPONSIBILITY § 1200.19(c)(3) (1995); OREGON CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101, *reprinted in* OREGON RULES OF COURT 398 (1995); TENN. CODE ANN., CT. R. ANN., R. SUP. CT. 8, CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(3) (Michie 1995); VT. STAT. ANN., SUP. CT. ADMIN. ORDERS & R., CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(3) (1986).

72. See COLO. REV. STAT., CT. R. ch. 18-20 app., COLORADO RULES OF PROFESSIONAL CONDUCT Rule 1.6(b) (Supp. 1995); N.C. GEN. STAT. ANN. R., RULES OF PROFESSIONAL CONDUCT OF THE NORTH CAROLINA STATE BAR Rule 4(c)(4) (Michie 1995); *supra* note 59 and accompanying text.

73. See OKLA. STAT. ANN. tit. 5, ch. 1, app. 3-A, RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. (West 1996).

74. See MICHIGAN RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt., *reprinted in* MICHIGAN RULES OF COURT: STATE 573 (1995).

however, none of the ECs speak to the permissive disclosure provision.⁷⁵ The final jurisdiction has used a combination of the ECs and the comment to Model Rule 1.6 but with no specific guidance on this issue.⁷⁶

This discussion emphasizes the difficulty of the decision-making task of lawyers in just those states allowing some form of permissive disclosure. And, as earlier noted, a number of jurisdictions have further exacerbated that task by either mandating disclosure concerning the most severe future crime of murder or maiming,⁷⁷ or requiring disclosure of even the less serious future crimes.⁷⁸ All in all, lawyers in jurisdictions where there is permission to disclose client information concerning any future crime have been given very broad discretion with virtually no definition of the provisions' terms and scope.⁷⁹ And those in jurisdictions mandating disclosure face even

75. See IOWA CODE ANN. tit. XV, ch. 602 app., IOWA CODE OF PROFESSIONAL RESPONSIBILITY FOR LAWYERS DR 4-101(C)(3) (West 1996); OHIO REV. CODE ANN. tit. XIX, CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(3) (Anderson 1994).

76. See MINN. STAT. ANN., CT. R., MINNESOTA RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(3) (West 1993).

77. See *supra* notes 34, 37.

78. See *supra* notes 37-38.

79. This discussion has not even explored the variety of the rectification statutes which permit the lawyer to reveal information about certain past crimes and frauds. See *supra* notes 40-44. Suffice it to say, the level of guidance and definition in these rules is even less than those in the permissive-mandatory future crime disclosure provisions. A number of the provisions' comments merely provide a justification for the provision on the basis that the lawyer's services were used and therefore the lawyer has an interest in being able to rectify. See CONNECTICUT RULES OF PROFESSIONAL CONDUCT Rule 1.6(c)(2), reprinted in CONNECTICUT RULES OF COURT: STATE AND FEDERAL 336 (1995); MD. CODE ANN., MD. R. app., MARYLAND LAWYERS' RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (Michie 1996); MICHIGAN RULES OF PROFESSIONAL CONDUCT Rule 1.6(c)(3), reprinted in MICHIGAN RULES OF COURT: STATE 572 (1995); OKLA. STAT. ANN. tit. 5, ch. 1, app. 3-A, RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (West 1996) (but first requiring lawyer's efforts to get client to rectify); 42 PA. CONS. STAT. ANN., RULES OF PROFESSIONAL CONDUCT Rule 1.6(c)(2) (West Supp. 1995) (permitting disclosure both to prevent or rectify); UTAH CODE ANN., UTAH CT. R., UTAH CODE OF JUD. ADMIN. ch. 13, RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (Michie 1995). Only one statute warns that "the constitutional rights of defendants in criminal cases may limit the extent to which counsel for a defendant may correct a misrepresentation that is based on information provided by the client." See MICHIGAN RULES OF PROFESSIONAL CONDUCT Rule 1.6(c)(3), reprinted in MICHIGAN RULES OF COURT: STATE 572 (1995).

Overall, the provisions suffer not only from the same failure to define "crime" or "criminal act," see *supra* notes 64-69 and accompanying text, but sometimes from no definition of "fraud." The significance of the latter gap is emphasized in *Prosser & Keeton* where it is noted that the word "fraud" has been used so indiscriminately and is "so vague that it requires definition in nearly every case." PROSSER & KEETON, *supra* note 14, § 105, at 727. However, those jurisdictions that have adopted all of the *Model Rules*'

more serious difficulties in determining when they *must* breach client confidences.⁸⁰ Since a client has a right to enforce the attorney's confidentiality duty, a client may challenge an attorney's disclosure, especially one concerning a more minor crime or an insubstantial injury.⁸¹ Another level of risk, especially in jurisdictions that require certain disclosures, is a challenge by the Bar for failure to disclose.⁸² Only time will tell which voluntary disclosures or failures to disclose will be found ethically appropriate by the courts and Bar disciplinary authorities.⁸³

comments do have a brief, vague definition of "fraud." See MODEL RULES, *supra* note 3, Terminology, para. 4 (defining fraud as "conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information").

80. To highlight the difficulties facing lawyers in those jurisdictions, two states that have elected to make disclosure merely permissive have emphasized in their guidance comments the phrase quoted *supra* note 59 concerning knowledge, noting further that "[t]o require disclosure when the client intends such an act, at the risk of professional discipline if the assessment of the client's purpose turns out to be wrong, would be to impose a penal risk that might interfere with the lawyer's resolution of an inherently difficult moral dilemma." See MICHIGAN RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt., para. 14, reprinted in MICHIGAN RULES OF COURT: STATE 573 (1995); accord UTAH CODE ANN., UTAH CT. R., UTAH CODE OF JUD. ADMIN. ch. 13, RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt., para. 10 (Michie 1995).

Virginia has tried to give more specific guidance in its choice of language in its ethical rules. For its permissive provision the lawyer may only reveal "[i]nformation which *clearly establishes* that his client has, in the course of the representation, perpetrated upon a third party a fraud related to the subject matter of the representation." VA. CODE ANN., R. SUP. CT. VA. § II, VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(3) (Michie 1995) (emphasis added). One court has acknowledged that the phrase "clearly establishes" sets a high standard for disclosure of client information involving fraud. See *X Corp. v. Doe*, 805 F. Supp. 1298, 1309 (E.D. Va. 1992) ("The voluntary nature of the actual or potential disclosures and the absence of judicial scrutiny justify the higher 'clearly establishes' standard for disclosure of purported evidence of ongoing or future fraud."), *aff'd sub nom. Under Seal v. Under Seal*, 17 F.3d 1435 (4th Cir. 1994). In Virginia's mandatory provision requiring disclosure of a client's intention to commit a crime, the lawyer is only under the provision's aegis if the client has actually stated the intent, and is only required to disclose that stated intent after the lawyer has advised the client, where feasible, "of the possible legal consequences of his action, urge[d] the client not to commit the crime, and advise[d] the client that the attorney must reveal the client's criminal intention unless thereupon abandoned." VA. CODE ANN., R. SUP. CT. VA. § II, VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(D)(1) (Michie 1995).

81. See *X Corp.*, 805 F. Supp. 1298 (granting employer-client's motion for injunction to prevent employee-attorney's disclosure of confidential information).

82. See *Sloan v. State Bar of Nev.*, 726 P.2d 330 (Nev. 1986) (denying the state bar association's recommendation to suspend attorney from practice for, inter alia, failure to disclose existence of a fraudulent transaction learned from a client).

83. One problem, however, is that while court opinions are fairly accessible, the various jurisdictions' ethics opinions are far less so. For instance, only 14 states' ethics opinions are currently available through Westlaw. See WESTLAW, LEGAL ETHICS AND

Allowing or mandating attorneys to reveal a client's confidences puts the profession on a slippery slope of having to be the judge of which confidences are to be revealed and which are not. Now that the profession has begun to assume the role of deciding when to make disclosures in the first instance, without judicial scrutiny and without clear guidelines,⁸⁴ lawyers may become more and more comfortable with this role change and with disclosure. Then the client will only have the luck of the draw as to what moral standard or perspective of the professional code's scope the lawyer selected will follow. And given that the typical attorney begins the lawyer-client relationship by giving the client assurances of confidentiality—or uses that assurance if the client needs encouragement in discussing a sensitive problem⁸⁵—the client will still be led to believe that confidences will be

PROF. RESPONSIBILITY, STATES ETHICS OPS. (directory). Other opinions are excerpted in the biweekly issues of *ABA/BNA Lawyers' Manual on Professional Conduct*. However, it is unlikely that many lawyers have regular access to this publication. A jurisdiction may maintain a hotline service to respond to questions by members of its bar; however, service may not be quickly available. See, e.g., STATE BAR OF CAL., ETHICS WATCH: KEEPING AN EYE ON ETHICS, ETHICS HOTLINE SURVEY 2 (1992) (noting that "[t]he staff goal is to return calls within 24 hours"). Further guidance on the scope of attorneys' discretion under these disclosure provisions may not therefore be readily available to those in most need of that assistance.

84. It must be emphasized that this role is far different than the lawyer's traditional role of advocate. An attorney can be compelled pursuant to the crime-fraud exception to the attorney-client privilege to reveal communications between the attorney and client where those communications were sought to further a criminal scheme. See *X Corp.*, 805 F. Supp. at 1306-07; 1 HAZARD & HODES, *supra* note 10, § 1.6:104. While the purpose and effect of the crime-fraud exception and some of the disclosure provisions—especially the rectification provisions—are similar, the means employed are very different. For example, if a lawyer is called as a witness to testify concerning a client, the ethical confidentiality obligation of the lawyer, as well as the attorney-client privilege, require the lawyer to invoke the privilege—to remain silent. Thus, the lawyer will only reveal client confidences if a court rules that the privilege is inapplicable. See MODEL RULES, *supra* note 3, Rule 1.6 cmt., para. 19. By contrast, a lawyer's decision to reveal confidences permitted by the various disclosure provisions is purely voluntary, not compelled, and not subject to any oversight. See *X Corp.*, 805 F. Supp. at 1309.

85. One book still in use for instruction of law students in interviewing techniques suggests making the following statement concerning confidentiality as a motivation for clients who are reluctant: "Remember, whatever you tell me is strictly confidential. I cannot and will not divulge anything you say to anyone else without your express permission." DAVID A. BINDER & SUSAN C. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH 108 (1977). Even in a later version of the book, the statement has only been slightly modified: "Remember, unless you tell me you're planning to rob a bank or something like that, everything you tell me is confidential. I cannot and will not divulge anything you say without your express permission." DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH 241 (1991). A footnote at the end of that quote states: "Hopefully, the humorous reference

protected and will have no advance warning as to what standard of disclosure the attorney will follow in interpreting the jurisdiction's ethical rule.⁸⁶

Thus, while I conclude that the client in the hypothetical will enjoy his attorney's maintaining of his confidences, I fear the overall direction the profession is headed. The morass of confidentiality rules promulgated since the ABA adopted the *Model Rules* in 1983 has significantly altered the role of the lawyer in our judicial system. Moreover, these rules also lay serious traps for both lawyers⁸⁷ and clients. And in the case of the latter, the very professional who the client believes will keep the client's interests uppermost has now become the one who may *cause* the client's downfall. While some may counter that clients cause their own downfall, it is inarguable that these rules allow the client's own lawyer to give the push that starts the client's public fall. When I was a law student, this was not the understanding of a lawyer's role that I learned. I am not happy that I must now instruct my students in this new kind of "lawyering." But instruct I do, so that hopefully they will avoid the lawyer traps and also so that hopefully they will know how to treat their clients with candor and with the dignity and autonomy such candor accords, which I believe is mandated in ethical provisions other than Model Rule 1.6.

to bank robbery allows you to suggest that the attorney-client privilege is not unlimited while still providing motivation." *Id.* at 241 n.5 (citing Model Rule 1.6). Query whether "the humorous reference" provides the client with sufficient information for the client either to appreciate how limited the lawyer's confidentiality duty will be or to make an informed decision about whether this attorney will meet the client's confidentiality needs. See MODEL RULES, *supra* note 3, Rule 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.").

86. None of the ethics rules that permit or require disclosure suggest informing the client at the time representation begins that such disclosure might occur. See *supra* notes 30, 32-33, 37-38, 40-44. Although Virginia's mandatory disclosure provision requires advising the client of the lawyer's disclosure requirement, *supra* note 80 (discussing the Virginia rule), it only requires this warning at the point an attorney will make disclosure, not at the time of retention. For a thorough and thoughtful discussion of this issue, see Lee A. Pizzimenti, *The Lawyer's Duty to Warn Clients About Limits on Confidentiality*, 39 CATH. U. L. REV. 441 (1989).

87. This is particularly true given the increasing amount of interstate practice engaged in by attorneys who can then be held accountable under the ethical rules of both the jurisdiction where they are members of the Bar, and the jurisdiction where the practice has been performed. See MODEL RULES, *supra* note 3, Rule 8.5; Committee on Counsel Responsibility, *Risks of Violation of Rules of Professional Responsibility by Reason of the Increased Disparity Among the States*, 45 BUS. LAW. 1229, 1233-34 (1990) (discussing the differences in the ethical confidentiality rules between Florida and Delaware where an attorney might be subject to both).