

DATE: April 6, 2010

Audrey Hollins
Office of Professional Competence, Planning and Development
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Re – public comment on new rules

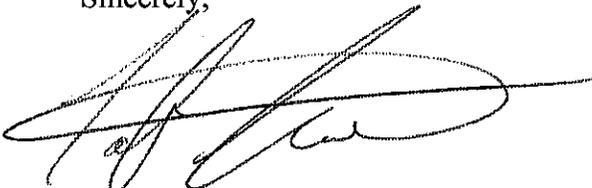
Dear Mr. Hollins:

The enclosed comment is in response to the new proposed amendments to the ethical standards for California Lawyers. I hope that you will find my work helpful in the matter and extremely comprehensive regarding Confidentiality, both on the state and the ABA level. (Bus. & Prof. Code § 6068(e) re rule 1.6.)

The comment advocates for the adoption of an exception in the case of wrongful incarceration - currently Massachusetts is the only state which has a rule like it. The ABA is currently considering a counterpart. The research in the comment might be useful for the public debate.

Please do not hesitate to contact me if you have an questions concerns or comments.

Sincerely,



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WHY THE ABA SHOULD PERMIT LAWYERS TO USE THEIR GET- OUT-OF-JAIL FREE CARD: A THEORETICAL AND EMPIRICAL ANALYSIS

*Patrick Santos**

INTRODUCTION

A recent study in Southern California questioned law students about the following attorney-client communication:

A, a stranger to you, has been convicted by a jury of his peers and sentenced to life imprisonment. B, also a stranger, comes into your law office and you agree to represent him on an unrelated matter. During the course of your representation, B tells you that he committed the crime for which A is currently serving his life sentence. After some probing questions on the matter you reasonably believe that B is telling the truth and he is the one who did the crime. B refuses to voluntarily disclose this information.¹

The current American Bar Association (ABA) standard under the Model Rules of Professional Conduct (Model Rules), Model Rule 1.6

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1. See *infra* app., question three.

specifically, requires that the hypothetical lawyer remain silent.² Although lawyers within the individual states are not bound by Rule 1.6, just one state permits a different response.³ Only 26% of the law students in this survey agreed with the position of the ABA.⁴ This Comment presents the results of the “lawyers-to-be” study, and uses them to advocate for the amendment of Model Rule 1.6, to include a narrow exception that could lead to the exoneration of “A.”

The benefits of the rules on attorney-client confidentiality oftentimes depend upon assumptions about human behavior—i.e. how will a client react if she knew of a new exception that allowed attorneys to divulge her secrets? Might the adoption of such an exception reduce candor? Will it turn lawyers into compliance officers? Will it change the fundamental relationship that secrecy has nurtured between lawyers and clients for centuries? These questions necessarily require more than theory to answer, they require data. Conclusory examinations are no longer sufficient. “Too often, the fundamental precepts of professionalism remain unexamined; arguments over candor, confidentiality and client loyalty proceed without rigorous empirical or philosophical foundation.”⁵ Too much professional responsibility scholarship is data-free doctrinal analysis: the functional equivalent of “geology without rocks.”⁶

2. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2002) (providing in pertinent part: “A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: (1) to prevent reasonably certain death or substantial bodily harm; (2) to prevent the client from committing a crime of fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used the lawyer’s services; (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client had used the lawyer’s services.”).

3. MASS. RULES OF PROF'L CONDUCT R. 1.6 (1998) (b)(1) (providing in pertinent part: “A lawyer may reveal . . . such information . . . to prevent the wrongful execution or incarceration of another.”).

4. See *infra* tbl. V.

5. Deborah L. Rhode, *Ethical Perspective on the Legal Practice*, 37 STAN. L. REV. 589, 589 (1985).

6. Deborah L. Rhode, *Law, Lawyers, and the Pursuit of Justice*, 70 FORDHAM L. REV. 1543, 1560 (2002) (citing PAUL WICE, JUDGES AND LAWYERS: THE HUMAN SIDE OF JUSTICE 16 (1991), citing Lawrence M. Friedman, quoted in JAMES WILLIAM HURST, THE GROWTH OF AMERICAN LAW 265–66 (1950)); see WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYER’S ETHICS 56 (1998) (recognizing confidentiality’s justifications depends upon assumptions about behavioral trends, of which are supported by only causal empiricism); see also Albert W. Alschuler, *The Preservation of a Client’s Confidences: One Among Many or a Categorical Imperative?*, 52 U. COLO. L. REV. 349 (1981) (recognizing the question of whether protecting client confidences has any affect on truth seeking is an unresolved empirical question); Roger C. Crampton & Lori P. Knowles, *Professional*

Although conjuring up hypotheticals in which confidentiality's exceptions fall short has become something of a law school parlor game, this admittedly exceptional scenario is based on many real life situations.⁷ The organized bar has recognized as much, as the ABA's Criminal Justice Section's Ethics, Gideon & Professionalism Committee is presently considering a draft proposal to amend Model Rule 1.6 that might allow disclosure of confidential information to prevent wrongful incarceration.⁸ The question the committee will face is deceptively simple: whether the benefits of confidentiality to B are outweighed by its costs to A. To answer this question, confidentiality's

Secrecy and Its Exceptions: Spaulding v. Zimmerman Revisited, 83 MINN. L. REV. 63, 115 (1998) (stating "[i]t must be conceded that there is little solid empirical evidence to support firm conclusions in either direction."); Mary C. Daly, *To Betray Once? To Betray Twice?: Reflections on Confidentiality, a Guilty Client, an Innocent Condemned Man, and an Ethics-Seeking Defense Counsel*, 29 LOY. L.A. L. REV. 1611, 1625 ("Another and even more significant difficulty . . . is the paucity of empirical data demonstrating that a guarantee of confidentiality is an essential precondition to the 'full and frank communication between attorneys and their clients [that is necessary to] promote broader public interest in the observance of law and administration of justice.' However, only intuition supports the fundamental assertion upon which the attorney-client privilege and ethical obligation of confidentiality rest. Empirical data are virtually nonexistent."); Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 352-53 (1989) [hereinafter *Rethinking Confidentiality I*] (stating "[e]minent commentators thus have called for empirical research testing the benefits of strict confidentiality. The academic community has, however, uniformly ignored the call.").

7. See *Frank v. Magnum*, 237 U.S. 309 (1915) (explaining that while Frank was serving his life sentence, and ultimately was lynched by fellow inmates, a client of attorney Arthur Powell revealed to Powell that he, not Frank, was responsible for the murder); see also *State v. Macumber*, 544 P.2d 1084 (Ariz. 1976) (describing how the Arizona Supreme Court affirmed the trial court, which asserted the attorney-client privilege after the death of the client); *Commonwealth v. Sullivan*, 239 N.E.2d 5 (Mass. 1968), *cert. denied*, 393 U.S. 1056 (U.S. Jan. 20, 1969); *State v. Hunt*, 659 S.E.2d 6 (N.C. 2008) (detailing how two men, Hunt and Cashwell, were convicted of a murder only to have Cashwell subsequently confess to his public defender of being the sole perpetrator, which the attorney did not reveal until after Cashwell's death); Editorial, *Imprisoned in the '66 Killing, He Goes Free in Boston*, N.Y. TIMES, Aug. 31, 1982, at A10, available at 1982 WLNR 290599 (detailing how Mr. Reissfelder spent years incarcerated at Walpole State Prison for a crime he did not commit); 60 Minutes: 26-Year Secret Kept Innocent Man in Prison (CBS television broadcast Mar. 9, 2008), available at <http://www.cbsnews.com/stories/2008/03/06/60minutes/main3914719.shtml> (showing that Andrew Wilson confessed to his public defenders that he committed a shotgun murder which Alton Logan served 26 years of a life sentence for before the public defenders released an affidavit, which they kept in a lock box for a quarter century).

8. See Peter A. Joy & Kevin C. McMunigal, *Confidentiality and Wrongful Incarceration*, 23 CRIM. JUST. 46 (2008) (describing that co-chairs Bruce Green and Ellen Yaroshevsky have drafted the following exception: "(c) A lawyer may reveal information relating to the representation of a deceased client to the extent the lawyer reasonably believes necessary to prevent or rectify the wrongful conviction of another.").

foundations must be examined, both theoretically and empirically.⁹ This Comment will provide assistance on both fronts.

Part I briefly but thoroughly explores attorney-client confidentiality's theoretical justifications and its critiques. Part II discusses the ABA's relevant third-party harm exceptions to confidentiality and their justifications. Part II provides insight into how and why exceptions to confidentiality are adopted and which costs have outweighed confidentiality's benefits in the past. Part III presents the results of primary research based on the hypothetical in the introduction above, distributed in the form of a survey to 260 law students in an effort to add to the ongoing debate. Part IV then presents the proposed amendment to Model Rule 1.6 and a supporting argument that explores the fundamental policy implications behind the adoption of such an exception. Part IV asserts that the justifications supporting strict confidentiality do not apply to this hypothetical, and even if they did, a new narrow exception, which might exonerate A, would do much less harm to attorney-client confidentiality than the current exceptions have already done—especially considering the scenario's high level of improbability. In the interests of justice, secrecy can do more harm than good. The conclusion points out that only one step remains to bring the rules of attorney-client confidentiality up to date with the modern realities of an imperfect justice system—a new exception that could exonerate an innocent convict.

I. CONFIDENTIALITY'S JUSTIFICATIONS AND FOUNDATIONS

The attorney's duty of confidentiality was incorporated into lawyer codes as an obligation beginning 100 years ago.¹⁰ The duty to maintain the confidence and to preserve the secrets of the fruits of representation is, arguably, the most important feature of the attorney-client relationship.¹¹ The ABA contends that confidentiality contributes to the trust that is the hallmark of the attorney-client relationship and induces and promotes assistance of legal counsel in a full and frank

9. *Rethinking Confidentiality I*, *supra* note 6, at 355.

10. ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 287 (1953) (providing that a lawyer has an "obligation to represent the client with undivided fidelity and not divulge his secrets or confidences . . ."); *but see* L. Ray PATTERSON, *LEGAL ETHICS: THE LAW OF PROFESSIONAL RESPONSIBILITY* (Mathew Bender 1984) (noting that confidentiality, as an ethical duty, made its first appearance as such in the 1887 Alabama Code of Ethics).

11. David Rosenthal, *The Criminal Defense Attorney, Ethics and Maintaining Client Confidentiality: A Proposal to Amend Rule 1.6 of the Model Rules of Professional Conduct*, 6 ST. THOMAS L. REV. 153, 159 (1993).

environment.¹² Confidentiality's justifications have been shaped and molded *ad nauseam* over the past several decades.¹³

The following sub-sections will discuss and review these justifications, which are at the heart of attorney-client confidentiality rules, because the first step in assessing whether strict rules err in rejecting exceptions that allow disclosure is to analyze the strength of the rules' justifications.¹⁴ Most of confidentiality's justifications are abstract,¹⁵ and oftentimes lines of demarcation can blur. This section

12. See MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 2 (2002).

13. Crampton & Knowles, *supra* note 6, at 123–24 (suggesting a complete substitute for Model Rule 1.6, including an exception for wrongful incarceration); Daly, *supra* note 6; Amanda Vance & Randi Wallach, *Updating Confidentiality: An Overview of the Recent Changes to Model Rule 1.6*, 17 GEO. J. LEGAL ETHICS 1003 (2004) (describing a step-by-step overview of the Model Rule changes in August 2003 and examination of the benefits and drawbacks of confidentiality); Krysten Hicks, *Thresholds for Confidentiality: The Need for Articulate Guidance in Determining When to Breach Confidentiality to Prevent Third-Party Harm*, 17 TRANSNAT'L LAW 295 (2004) (arguing that a rule which explicitly denotes factors that a lawyer might consider before breaching confidentiality will serve to remove ambiguity); Leslie C. Levin, *Testing the Radical Experiment: A Study of Lawyers Response to Clients Who Intend to Harm Others*, 47 RUTGERS L. REV. 81 (1994) (showing another empirical study, which inspired this study, in which Professor Levin surveyed 776 lawyers in New Jersey); Samuel J. Levine, *Taking Ethical Discretion Seriously: Ethical Deliberations as Ethical Obligation*, 37 IND. L. REV. 21, 36 (2003) (positing a Deliberative Model of ethical decision making, imposing on lawyers an obligation to exercise their discretion through ethical decisions that are the product of articulable and justifiable ethical deliberation); Samuel J. Levine, *Taking Ethical Obligations Seriously: A Look at American Codes of Professional Responsibility Through a Perspective of Jewish Law and Ethics*, 57 CATH. U. L. REV. 165 (2007) (arguing, in part, that formulating and interpreting various ethics provisions to impose a greater degree of mandatory ethical conduct, comparable to Jewish law, might demonstrate a resolve among lawyers to take their ethical obligations more serious); David McGowan, *Why Not Try the Carrot? A Modest Proposal to Grant Immunity to Lawyers Who Disclose Client Financial Misconduct*, 92 CAL. L. REV. 1825 (2004) (using a cost-benefit analysis to argue that the recent amendments to Rule 1.6 will do little to change the actual practice of lawyers in disclosing client misconduct); *Rethinking Confidentiality I*, *supra* note 6 (describing an empirical study, which inspired this study, concerning Professor Zacharias surveying 108 Laypersons and 125 Lawyers in an effort to question and rethink attorney-client confidentiality and its justifications); Rhode, *supra* note 6, at 613; SIMON, *supra* note 6 (pointing out that such justifications are easy to produce and depend on social contingencies regarding behavior which are pointless to try and refute because "as soon as I had shown one to be false, a horde of new ones would show up like ants at a picnic."); Gilda M. Tuoni, *Society Versus the Lawyers: The Strange Hierarchy of Protections of the "New" Client Confidentiality*, 8 ST. JOHN'S J. LEGAL COMMENT. 439, 470–92 (1993) (using hypotheticals to argue for a more ethical outcome under the Model Rules which would require lawyers to disclose in life or death situations and would also require use immunity); Fred C. Zacharias, *Rethinking Confidentiality II: Is Confidentiality Constitutional?*, 75 IOWA L. REV. 601, 635 (1990) [hereinafter *Rethinking Confidentiality II*] (analyzing whether attorneys have a constitutional right to disclose confidential information).

14. *Rethinking Confidentiality I*, *supra* note 6, at 363.

15. *Rethinking Confidentiality II*, *supra* note 13, at 637.

seeks to remedy this flaw by clearly denoting the justifications and separating them as a means to avoid the jumbling of justifications.

A. Client Candor

Confidentiality's primary systemic justification is simple: strict confidentiality promotes client candor.¹⁶ Stated differently, if the duty has been eroded, clients will have an incentive to hide information from their attorneys.¹⁷ Anything short of strict attorney-client confidentiality would have a chilling effect on client communications.¹⁸ This would result in lawyers giving less effective advice, thereby affecting the adversarial system and overall truth-seeking.¹⁹ Thus, the protection of confidentiality serves the public interest by encouraging client disclosure, which enables lawyers to better advise and assist their clients.²⁰ Lacking full disclosure, the lawyer might apply the wrong law or give incorrect legal advice or both, which in turn will reduce public confidence in the legal system and in lawyers.²¹

As early as 1888, the United States Supreme Court explained:

The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.²²

Prior to 2004 when the California Supreme Court approved a new confidentiality rule, Rule 3-100,²³ California's duty of confidentiality

16. See MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 129 (LexisNexis/Matthew Bender 3d ed. 2004) (1990).

17. See MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 87-108 (Matthew Bender 1990).

18. Cal. Rules of Prof'l Conduct R. 3-100 cmt. 10 (2009).

19. SIMON, *supra* note 6, at 54.

20. *In re Jordan*, 500 P.2d 873, 879-80 (Cal. 1972) (describing the duty to preserve confidentiality as being of "paramount" importance).

21. See DEBORAH L. RHODE & GEOFFREY C. HAZARD, JR., PROFESSIONAL RESPONSIBILITY AND REGULATION 64 (Foundation Press 2002).

22. *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888).

23. Cal. Rules of Prof'l Conduct R. 3-100 (2009) (providing in the pertinent part: "A member may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the member reasonably believes that disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in

perhaps best exemplified this systemic justification, as the state had the strictest duty of confidentiality in the country, with no express exceptions.

Opponents have attacked this justification on several fronts. Professor Fred C. Zacharias has pointed out that this systematic syllogism requires two premises to be met, without which, the justification falls apart.²⁴ The argument presupposes that (1) the client is aware of the rule, and (2) the client understands the rule.²⁵ Given the many aspects of confidentiality, the argument goes, clients are unlikely to ever meet these requirements.²⁶ Indeed, the instant study supports as much: only 60% of the sample understood the ABA's current rule.²⁷ Therefore, critics argue that creating limited additional disclosure exceptions are unlikely to affect a client's decision to confide.²⁸

More recently, others have pointed out that although this justification has been repeatedly asserted, it is an "empty" argument used as a front for the real reason strict confidentiality is promoted: to raise the demand for lawyers.²⁹ It is argued that the historical origins of the privilege are related to nothing more than the need to create incentives for clients to hire lawyers.³⁰

B. Client Autonomy and Privacy

The arguments for autonomy and privacy are fairly straightforward, but mainly philosophical in substance. There is a distinguished tradition in Western philosophy enshrining autonomy as a fundamental right of all human beings.³¹ Promoting autonomy and protecting privacies enhances the attorney-client relationship itself: it often makes the client *feel* as if the lawyer is a true fiduciary, with

death of, or substantial bodily harm to, an individual."); see Kevin E. Mohr, *California's Duty of Confidentiality: Is It Time for a Life-Threatening Criminal Act Exception?*, 39 SAN DIEGO L. REV. 307, 309 (2002) (pointing out that the California duty requires every lawyer "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.").

24. See Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1, 1 (1998); see also *Rethinking Confidentiality I*, *supra* note 6, at 365–66.

25. See *Rethinking Confidentiality I*, *supra* note 6, at 365–66.

26. *Id.* at 365 ("As a practical matter clients thus probably end up with only a general understanding that attorney-client conversations usually remain confidential but occasionally may be revealed.").

27. See *infra* tbl. I.

28. See *Rethinking Confidentiality I*, *supra* note 6, at 366.

29. Fischel, *supra* note 24, at 1.

30. *Id.* at 2.

31. Daly, *supra* note 6, at 1623.

loyalty to no one other than the client.³² This enhances the client's comfort level and serves to buttress the client's feeling that the lawyer will never take the stand against him. Without the assurance of confidentiality, a client will not jeopardize the privacy of intimate details, which will ultimately corrupt the client's autonomy because the lawyer's advice will be hobbled.³³

Under this view, autonomy (client-centered decision making) is enhanced along with the client's dignity.³⁴ Protecting the client's confidential information respects the autonomy and personal integrity of the client, recognizing that the client retains the right to make ultimate decisions regarding the outcome of the engagement.³⁵ This deontological view holds that confidentiality promotes respect for client autonomy by guaranteeing trust and privacy in the attorney-client relationship.³⁶ By promoting a sphere of privacy, confidentiality advances the individual's right to personal space required to plan and define his own meaning of life, free from government intervention in the form of the legal system that may seek to invade it.³⁷ Thus, confidentiality serves to foster the lawyer's central obligation to "enhance . . . the client's autonomy as a free citizen in a free society."³⁸

This justification is not without its critics.³⁹ Those against strict confidentiality argue that client distrust may actually increase if the lawyer insists that she will always act in accordance with the client's wishes.⁴⁰ Further, clients are not always "free citizens," but are also many times profit-driven corporations whose costs of confidentiality are borne by individuals whose health, safety and autonomy are not adequately represented.⁴¹

32. *Rethinking Confidentiality I*, *supra* note 6, at 367.

33. Daly, *supra* note 6, at 1624.

34. *Rethinking Confidentiality II*, *supra* note 13, at 635.

35. *Blanton v. Womancare, Inc.*, 696 P.2d 645, 648-51 (Cal. 1985); see MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (1983) (amended 2002) (stating "[a] lawyer shall abide by a client's decisions concerning the objectives of representation . . ."); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 21 cmt. e (2000) (discussing the allocation of authority).

36. SUSAN R. MARTYN & LAWRENCE J. FOX, *TRAVERSING THE ETHICAL MINEFIELD: PROBLEMS, LAW AND PROFESSIONAL RESPONSIBILITY* 122 (Aspen Publishers 1st ed. 2004).

37. *Id.* at 123.

38. Monroe H. Freedman, *How Lawyers Act in the Interests of Justice*, 70 *FORDHAM L. REV.* 1717, 1727 (2002).

39. MARTYN & FOX, *supra* note 36, at 123.

40. *Id.* (citing JONATHAN D. CASPER, *AMERICAN CRIMINAL JUSTICE: THE DEFENDANT'S PERSPECTIVE* (Prentice Hall 1972) (explaining that since criminal defendants perceive public defenders to be on the side of the state, counterintuitive claims by attorneys that they will never act against the client can only serve to put them on guard even further)).

41. Rhode, *supra* note 5, at 1546.

C. Preventing Client Misconduct

Perhaps the most persuasive justification provided for confidentiality⁴² is that confidentiality allows lawyers to obtain information that enables them to advise clients against committing improper acts or filing frivolous claims.⁴³ By refusing to disclose to outsiders, the lawyer may give up some deterrent leverage in the short run, but she remains free to dissuade the client from illegal conduct in the long run.⁴⁴ This justification is built into the new exception to confidentiality in California, as well as the ABA's rule.⁴⁵ Thus, confidentiality remains an essential incentive for clients to disclose their plans to lawyers, who then are in the best position to dissuade clients from engaging in the illegal activity.⁴⁶

Although dealing with the attorney-client privilege, the rationale in the landmark case of *Upjohn v. United States* lends a relevant understanding.⁴⁷ The Court in *Upjohn* found that the attorney-client privilege "promote[s] broader public interests in the observance of law and administration of justice."⁴⁸ The Court asserted that, "[i]n light of the vast and complicated array of regulatory legislation confronted by modern corporations, corporations, unlike most individuals, constantly go to lawyers to find out how to obey the law."⁴⁹

Furthermore, proper legal advice, given under the assurances that confidentiality guarantees, can prevent massive personal and social

42. See Levin, *supra* note 13, at 111–12, 115–16 (noting that the author bases his belief on a significant empirical study done by Professor Leslie Levin in New Jersey in which 67 out of 776 lawyers surveyed stated that they had encountered at least one occasion where they reasonably believed a client was going to commit harm to a third party. The lawyers would often respond strongly to the client's statements in order to deter the client from making serious plans to commit these acts); see also *Rethinking Confidentiality I*, *supra* note 6, at 381 (describing a study which found that over three-quarters of lawyers in the sample claimed to have at some point in their careers used the fruits of confidentiality to dissuade their clients from engaging in improper conduct).

43. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 2 (2002).

44. SIMON, *supra* note 6, at 55.

45. Cal. Rules of Prof'l Conduct R. 3-100(c) (2009) (requiring that "before revealing confidential information to prevent a criminal act as provided in paragraph (B), a member shall, if reasonable under the circumstances: (1) make a good faith effort to persuade the client: (i) not to commit or to continue the criminal act or (ii) to pursue a course of conduct that will prevent the threatened death or substantial bodily harm; or do both (i) and (ii)"); see MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 12 (2002) (explaining that "[w]here practical, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure").

46. See RHODE & HAZARD, JR., *supra* note 21, at 177.

47. *Upjohn v. United States*, 449 U.S. 383 (1981).

48. *Id.* at 389.

49. *Id.* at 392.

costs of criminal and fraudulent activity.⁵⁰ Information solicited from a client based on her faith in secrecy may prevent injury to the economic system itself: fraudulent practices can undercut competition, raise the price of goods, and cause a loss of confidence in the market system, thereby creating barriers to entry.⁵¹ Thus, confidentiality may actually serve to protect consumers in the free market economy itself.

Not everyone accepts this rationale. Critics argue that allowing clients to discuss planned misconduct with no fear of consequence might actually help the client commit wrongdoing.⁵² If the client discovers that the penalty for the illegal conduct is less than what she thought it would be, and in some cases much less, the lawyer's attempted dissuasion might have the opposite tendency of promoting client misconduct.⁵³ This might be especially apt in the cases of complex regulatory requirements. When a client is unclear as to whether a certain activity might be sanctionable, a client who had decided to avoid the activity (under a better-safe-than-sorry rationale) might reverse this decision after having been given confidential advice pertaining to either the likelihood of detection or the probability of being sanctioned.⁵⁴ This client, after receiving more accurate information, may conclude the expected gains from engaging in the activity outweigh its costs.⁵⁵

Critics also argue correlation is not causation.⁵⁶ How can we be sure it is strict confidentiality that provokes client candor about such intentions?⁵⁷ The available studies suggest that strict confidentiality rules serve this rational only marginally.⁵⁸ Furthermore, some have pointed out, to the extent an exception to confidentiality might force a lawyer to think about moral issues or enhance a client's respect for his attorneys (i.e. fear of possible disclosure), it is the exception rather than

50. RHODE & HAZARD, JR., *supra* note 21, at 196.

51. *Id.*

52. *Rethinking Confidentiality I*, *supra* note 6, at 370.

53. SIMON, *supra* note 6, at 60.

54. Fischel, *supra* note 24, at 30; see *Rethinking Confidentiality I*, *supra* note 6, at 375 (noting that "[t]he attorney will be happy to describe options, in secret, for getting around government regulations or contractual obligations – to the point of evaluating which of the options are illegal, which are not, and which are shady but unlikely to be punished.").

55. Fischel, *supra* note 24, at 30.

56. *Rethinking Confidentiality I*, *supra* note 6, at 369.

57. *Id.*

58. *Rethinking Confidentiality II*, *supra* note 13, at 640.

the basic rule that may produce the lawyer's ability to dissuade the client from misconduct.⁵⁹

D. Facilitating Effective Representation

Another argument for strict confidentiality concerns past conduct. Here, the argument is that a client who is not legally sophisticated may fail to disclose information that is highly relevant to a present cause of action because the client misunderstands her interests or rights.⁶⁰ If the lawyer cannot gather all the necessary information, free from the threat that these confidential communications will be shared with those whose interests may be adverse to the client, the lawyer's ability to serve her client will be hindered.⁶¹ Although at first glance this may seem duplicative of confidentiality's systemic justification (confidentiality promotes candor), this justification addresses the genuinely confused client who needs advice and representation but misunderstands the nature of the attorney-client relationship. By providing confidential guarantees, a lawyer may best serve both the client's instant legal needs and the public interests of conformity to law and sound administration of justice.⁶² Thus, confidentiality may facilitate effective legal representation.

Critics respond that any injustice that may result from a client withholding relevant information is an appropriate price for her dishonesty.⁶³ The law should not be written for liars and perjurers.⁶⁴ Furthermore, the argument assumes an unlikely scenario: a client who does not know enough to discern what information might help her cause, yet knows enough to understand the confidentiality rules that define what she can tell her lawyer.⁶⁵

59. Robert Burt, *Conflict and Trust Between Attorney and Client*, 69 GEO. L.J. 1015, 1032-34 (1981).

60. SIMON, *supra* note 6.

61. RHODE & HAZARD, JR., *supra* note 21, at 147 (citing ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-368 (1992)).

62. Crampton & Knowles, *supra* note 6, at 102.

63. *Id.*

64. *Rethinking Confidentiality I*, *supra* note 6, at 366 (citing Edmund M. Morgan, Foreword to MODEL CODE OF EVIDENCE 27 (1942)).

65. Morgan, *supra* note 64, at 61.

E. Preventing Negative Externalities and Promoting Positive Externalities

Externalities are forms of market failure, and thus are an oft-stated justification for government intervention in the market system.⁶⁶ Since much of economic analysis begins with the assumption that decision makers bear all the costs and receive all the benefits of their actions, the picture becomes askew when some of the costs of production spill over and injure third parties that are not part of the process—negative externalities.⁶⁷ Similarly, in many instances, some of the benefits of creating or consuming a product may spill over and benefit third parties—positive externalities.⁶⁸ These secondary and unforeseen third party effects are called externalities.⁶⁹

Conduct regulation of lawyers, which includes the rules on confidentiality, has also been justified as a means to prevent externalities that might spill over onto third parties as a result of substandard practitioners.⁷⁰ Negative externalities might be grouped into three general categories: harm to adversaries, harm to the court system, and harm to the public at large.⁷¹ As noted above, confidentiality guarantees can conceivably prevent severe market mishaps by encouraging a client not to engage in fraudulent activities that might severely affect the market and damage social ties, many of which depend upon trust.⁷² Thus, confidentiality can prevent this public harm.

Conduct regulating devices, such as Model Rule 1.6, can also promote positive externalities. The total cost to society in terms of resources consumed is the sum of the private costs paid by the producer and the external costs that must be borne by third parties.⁷³ This cost can be minimized by regulatory devices such as Model Rule 1.6. For example, confidentiality can prevent unnecessary bargaining costs between the parties themselves, and can save precious time on matters not directly connected with the provision of justice.⁷⁴ Society's faith in

66. HENRY N. BUTLER & CHRISTOPHER R. DRAHOZAL, *ECONOMIC ANALYSIS FOR LAWYERS* 175 (Carolina Academic Press 2006).

67. *Id.*

68. *Id.*

69. *Id.*

70. Benjamin Hoorn Barton, *Why Do We Regulate Lawyers?: An Economic Analysis of the Justifications for Entry and Conduct Regulation*, 33 ARIZ. ST. L.J. 429 (2001).

71. *Id.* at 470.

72. RHODE & HAZARD, JR., *supra* note 21, at 196.

73. BUTLER & DRAHOZAL, *supra* note 66.

74. *Id.* at 450.

the justice system might also ascend if lawyers were perceived as upstanding citizens who have the best interests of the public in mind, instead of the interests of the guild and other smaller groups.⁷⁵ Arguably, consumers in society are better protected in the legal system as a result of such regulatory devices, insofar as across the board confidentiality rules protect those unsophisticated clients who might not otherwise think to bargain for such consideration.⁷⁶ Clearly stated and fairly applied rules, including rules on confidentiality, promote an evenly distributive outcome when members of society enter the legal system, which in turn allows individuals to adjust their behavior to the law and better predict the outcome of their actions.⁷⁷ This translates into a positive externality, which supports the bases of modern liberal democracy: fostering maximum personal freedom and protecting individual rights. Therefore, by protecting consumers and effecting greater faith in the legal system and lawyers in general, confidentiality rules can have positive secondary effects.

II. RELEVANT THIRD PARTY HARM EXCEPTIONS

Rules regarding strict confidentiality have undergone several changes in recent years.⁷⁸ Those changes relevant to this analysis (third party harm prevention) will be explored in this section. The ABA's vision of the role the lawyer should play in this new millennium has been revolutionized with respect to secrecy and keeping client confidences.⁷⁹ The dawn of evolving corporate scandal and national security concerns has ushered in new guidelines for lawyers to follow, and the ABA is leading the way.

75. *Id.* at 469–470 (citing HARPER LEE, *TO KILL A MOCKINGBIRD* (HarperCollins Publishers 1988) (1961)).

76. *See Rethinking Confidentiality I*, *supra* note 6, at 361 n. 45 (arguing that in the absence of rules, sophisticated clients might negotiate for confidentiality while less educated clients would then be protected by across the board confidentiality rules).

77. Barton, *supra* note 70, at 479 (citing JOHN RAWLS, *A THEORY OF JUSTICE*, 239–40 (Belknap Press of Harvard Univ. Press 1971), stating that “[t]he principle of legality has a firm foundation, then, in the agreement of rational persons to establish for themselves the greatest equal liberty”).

78. *Id.* at 430.

79. *THE ATTORNEY–CLIENT PRIVILEGE IN CIVIL LITIGATION: PROTECTING AND DEFENDING CONFIDENTIALITY* 114 (Vincent S. Walkowiak ed., American Bar Association 4th ed. 2008).

A. Model Rule 1.6(b)(1): Preventing Physical Injury

The physical harm exception has broadened significantly since it was first recognized by the ABA in 1983.⁸⁰ Model Rule 1.6 provides that a lawyer may reveal information relating to the representation of the client if she reasonably believes it necessary to prevent reasonably certain death or substantial bodily harm.⁸¹ This exception does not require an element of client criminality as the original Model Rule 1.6(b)(1) required.⁸² The effect of this change is that a lawyer may breach confidentiality in order to prevent bodily harm, even for rectifying past harms, even if the harm is general to the public, and even if the harm is not statutorily criminal. Also, the exception no longer requires that the harm be imminent, as was previously required, only reasonably certain.⁸³

B. Justifications and Critiques

*“As soon as any part of a person’s conduct affects prejudicially the interests of others, society has jurisdiction over it.”*⁸⁴

The rationale behind the new rule is simple: the value of human life and bodily integrity trumps keeping client confidences. The interests that confidentiality preserves, as discussed above, seem less important when juxtaposed with another human good—such as when life itself is at stake. Even Professor Monroe Freedman, the nation’s most prominent and ardent defender of strict confidentiality, declines to defend it to the detriment of human life.⁸⁵ According to the ABA, the overriding value of life and physical integrity outweigh client trust.⁸⁶

80. ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 95 (American Bar Association Center for Professional Responsibility, 5th ed. 2003).

81. MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. 6 (2002) (explaining “paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm”; using toxic waste in the water example for illustrational purposes).

82. MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(1) (2000) (stating “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”).

83. *Id.*

84. JOHN STUART MILL, ON LIBERTY 99 (Alan Ryan ed., W.W. Norton & Co. 1996) (1859).

85. Freedman, *supra* note 17, at 103.

86. *See* MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. 6 (2002).

The ABA's view is in line with most attorneys' views, insofar as saving lives is worth relaxing the duty of confidentiality.⁸⁷

Although most lawyers would agree with the ABA's Model Rule 1.6, opponents remain. Critics' arguments usually rest on the premise that the new exception has turned the attorney-client relationship on its head,⁸⁸ turning lawyers into "compliance officers forced to monitor, prosecute, and judge their clients."⁸⁹ Others have maintained that it is unfair to both clients and themselves to require lawyers to "serve two masters."⁹⁰ All fifty states currently agree, in some form, that a lawyer either may or must disclose confidences to prevent serious bodily injury.⁹¹ California was the last state to concede as much, doing so in 2004.⁹²

C. Model Rule 1.6(b)(2) & (b)(3): Preventing Financial Injury

In August 2003, the ABA welcomed the two newest members of the Model Rules' exceptions to confidentiality in the midst of corporate misdeeds and the SEC's proposed rules implementing section 307 of the Sarbanes-Oxley Act.⁹³ In March 2002, in response to the changes in the ethical climate, the ABA appointed a Task Force on Corporate Responsibility to once again reexamine the ethics rules in light of the "tumultuous effects of major corporate failures."⁹⁴ Two brand new exceptions emerged. The first, Model Rule 1.6(b)(2), provides that a lawyer may reveal information relating to the representation of the client if the lawyer reasonably believes it necessary to prevent the client from committing a crime or fraud that is reasonably certain to result in

87. See Sarah Boxer, *Lawyers Are Asking, How Secret Is a Secret?*, N.Y. TIMES, Aug. 11, 2001, at B7.

88. Vance, *supra* note 13, at 1014 (citing Mohr, *supra* note 23, at 356–57).

89. *Id.* (citing Emiley Zalesky, *When Can I Tell a Client's Secret? Potential Changes in the Confidentiality Rule*, 15 GEO. J. LEGAL ETHICS 957, 966 (2002)).

90. Alschuler, *supra* note 6, at 354.

91. JOHN S. DZIENKOWSKI, PROFESSIONAL RESPONSIBILITY STANDARDS, RULES & STATUTES 109–115 (Thomson/West 2007–2008 ed.) (indicating that Arizona, Connecticut, Florida, Illinois, Nevada, New Jersey, North Dakota, Tennessee, Texas, Vermont, Virginia, and Wisconsin currently require a lawyer to disclose in this situation, New Mexico states a lawyer "should" disclose, and all other states permit the lawyer to use their discretion).

92. Nancy McCarthy, *New Ethics Rule Clarifies Confidentiality Exception*, CAL. B.J., Aug. 2004, available at http://www.calbar.ca.gov/state/calbar/calbar_home.jsp (in "Search Calbar Site" type "McCarthy 'New Ethics Rule'").

93. McGowan, *supra* note 13, at 1827 (enacting of § 307 required the SEC to establish minimum standards of conduct for attorneys practicing before the commission, including rules requiring counsel who learn of unlawful corporate conduct to report it).

94. John K. Villa, *Final Report of the ABA's Task Force on Corporate Responsibility: A Look at the Proposed Amendments to the Model Rules*, 21 No. 7 ACCA DOCKET 116, 116 (2003).

substantial loss to the financial interests or property of another, but only if the client has used or is using the lawyer's services to commit the crime or fraud.⁹⁵ The client can, of course, prevent such disclosure by refraining from the wrongful conduct, unlike the next exception, wherein the client no longer has the option of preventing disclosure.⁹⁶

The second new rule, Model Rule 1.6(b)(3), addresses the situation in which the lawyer does not learn of the client's crime of fraud until after it has been consummated.⁹⁷ It allows the lawyer to disclose in order to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud, but again, only if the client has used the lawyer's services in furtherance of the crime or fraud.⁹⁸

D. Justifications and Critiques

The new exceptions, the latter being a rectification provision, are forfeiture provisions. The rule recognizes that the client forfeits her protections of secrecy when the relationship is abused in such a manner that causes financial harm to third parties.⁹⁹ The exceptions are similar to the Restatement (Third) of the Law Governing Lawyers, sent to press a few years before the ABA adopted its new position.¹⁰⁰ The exceptions are a basic recognition that a human's willingness to lie can cause serious harm; confidentiality exceptions have long been recognized when clients seek to use lawyers to promote fraudulent activity.¹⁰¹ The efficient market economy and democratic government require honesty and the ability of a client to use lawyers to practice his own illegal deception undercuts these fundamental premises.¹⁰² The Ethics 2000 Commission explained that the interests of the affected persons in

95. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2) (2002).

96. See MODEL RULES OF PROF'L CONDUCT R. 1.6 cmts. 7-8 (2002).

97. See MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 8 (2002).

98. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(3) (2002).

99. See MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 7 (2002).

100. See generally RESTATEMENT (THIRD) OF LAW GOVERNING LAW § 67 (2000); see, e.g., David W. Raack, *The Ethics 2000 Commission's Proposed Revision of the Model Rules: Substantive Change or Just a Makeover?*, 27 OHIO N.U. L. REV. 233, 240 (2001) ("The new or redrafted confidentiality exceptions in 1.6(b)(1)-(3) are very similar to the Restatement provisions. This is one clear example of the influence that the Restatement had on the work of the Ethics 2000 Commission.").

101. RHODE & HAZARD, JR., *supra* note 21, at 177.

102. *Id.*

mitigating or recouping their substantial losses outweighs the interests of the client who has so abused the attorney-client relationship.¹⁰³

Rebuilding a broken connection to the public trust can also be seen as justification for the new exception. Since in the public eye, lawyers are often seen as individuals who are willing to cover up damaging information, some see the need to break down the strong confines of confidentiality as a means to regaining the public trust.¹⁰⁴ It has been argued that perhaps this drastic step towards breaking down confidentiality is, at least in part, due to the ABA's effort to "beat the government to the punch" given the public demand for such disclosure in light of Enron and its progeny, and concerns for security after September 11.¹⁰⁵

Opponents copiously object on the ground that the new rule leaves them in a precarious position, facing a troubling duality: zealous representation versus policing client's conduct. Critics have argued that the new exception completely redefines what it means to be a lawyer and has created a situation in which corporate clients will be discouraged from seeking legal advice at all—lest they turn their trusted legal advisor into a "cop on the beat."¹⁰⁶ The new exceptions have also been labeled as "snitch provision[s]."¹⁰⁷ Many see the new exceptions as overbroad, and feel that clients may hide quite a bit of information from their lawyers, whether that information be illegal or not.¹⁰⁸ Others have argued that the exception operates from a false premise that fraud is something which is apparent on its face, when in reality it does not appear that way except in the rarest of cases.¹⁰⁹ "That is why it's called

103. MODEL RULES OF PROF'L CONDUCT R. 1.6 (Reporter's Explanation Memo 2000), <http://www.abanet.org/cpr/e2k/e2k-rule16rem.html>.

104. Vance & Wallach, *supra* note 13, at 1015 (citing *Whose Side Are They on?*, THE ECONOMIST, Jan. 25, 2003, at 58).

105. *Id.* at 1016; *see also* MODEL RULES OF PROF'L CONDUCT pmb1. (2002) ("In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority."); American Bar Association Task Force on Corporate Responsibility, *Preliminary Report of the American Bar Association Task Force on Corporate Responsibility*, 58 BUS. LAW 189, 207 (2002); Tuoni, *supra* note 13, at 498–99 (pointing out that public dissatisfaction has led to greater involvement of public regulatory authorities in matters of lawyer conduct, which was previously wholly regulated by the bar, and adopting changes in client confidentiality may preserve the autonomy of the legal profession).

106. Lawrence J. Fox, *It Takes More Than Cheek to Lose Our Way*, 77 ST. JOHN'S L. REV. 277, 286 (2003).

107. *Id.* at 278.

108. Vance & Wallach, *supra* note 13, at 1017.

109. Fox, *supra* note 106, at 284.

fraud.”¹¹⁰ Whatever objections and concerns may arise, it is undeniable that the ABA’s new exceptions have fundamentally changed the attorney-client relationship. The extent to which it has been altered remains to be seen.¹¹¹

III. PRESENTATION OF EMPIRICAL RESEARCH

A. Methodology

The Ethics, Gideon & Professionalism Committee of the ABA’s Criminal Justice Section is presently considering a draft proposal to amend Model Rule 1.6 to allow disclosure of confidential information to prevent wrongful incarceration.¹¹² This Comment seeks to lend a hand to the scholarly debate, which is ongoing and in a state of flux, by presenting the findings of the lawyers-to-be study. This study presents some much-needed data on the issue in the form of survey responses voluntarily and anonymously given by law students at the University of La Verne College of Law in Southern California. The survey was distributed to a pool of nearly 300 law students in one of the country’s most diverse law schools.¹¹³ This survey should expand the limited research data available in this field.¹¹⁴ Law students stand in a unique position between the layperson and the lawyer, and thus provide edification in a way never done before.

The survey, listed in the appendix, sought to discover what lawyers-to-be would do if presented with the vexing hypothetical posed at the outset of this Comment. By distinguishing between those who understand the rules in their current form and those who do not, the results serve to undercut those that might argue that because law students are not lawyers, they do not understand the issues and what is really at stake. Arguably, a law student who has recently taken a professional responsibility course, and who is thereby required to know

110. *Id.*

111. The author has found no situations in which a lawyer has disclosed such information.

112. See Joy & McMunigal, *supra* note 8, at 46 (proposing “(c) A lawyer may reveal information relating to the representation of a deceased client to the extent the lawyer reasonably believes necessary to prevent or rectify the wrongful conviction of another”).

113. See *Law School Diversity*, U.S. NEWS & WORLD REPORT, May 1, 2009, at 76, available at 2009 WLNR 8463941. See *infra* app.

114. Levin, *supra* note 13, at 110 n.118 (explaining that Professor Levin surveyed 776 lawyers in New Jersey); *Rethinking Confidentiality I*, *supra* note 6, at 377 (stating that the Yale study surveyed 108 laypersons and 125 lawyers); Comment, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1226 (1962).

the rules in their current form, is more familiar with such issues than a long-standing practicing attorney. Furthermore, a law student who has only learned the rules of confidentiality in their newly revised form is more attuned, and perhaps better suited, to analyze the hypothetical. As discussed above, confidentiality rules are not what they used to be, and law students are not tainted by the rules in their previous form. In any event, the results will serve to provide fresh results of what up-and-coming attorneys will do when codified ethics and personal morals clash.

B. Findings

A total of 260 law students were surveyed regarding the wrongful incarceration hypothetical. Of this number, 115 were first-year students, ninety-one were second-year students, and fifty-four were third or fourth-year students. At this law school, law students are not confronted with confidentiality and its exceptions until the second year when they take a professional responsibility course. Thus the 115 first-year students might better be understood as laypersons. Of the total second-year students, 70% had either taken or were currently taking the professional responsibility class when the survey was administered. Thus, they stood somewhere between the first-year lay students and the third-year students, who had all taken professional responsibility and therefore more closely resembled practicing attorneys.

1. Question One – Separating the Laypersons from the Pack

The first question was designed to gauge the respondent's understanding of the rules. It asked whether, under the current ABA standards, the hypothetical lawyer might disclose B's confession. The correct answer is that the lawyer must not disclose because none of Model Rule 1.6's exceptions apply.¹¹⁵ Among the entire pool, only 56% understood that B's confession must not be disclosed ("got-it-right" hereinafter). At first blush this might seem like a grave problem, but when adjusted to reflect the year of study the respondents were in, the results are rational. Among the first-year students, 59% got-it-right as did 50% of the second-year students and 81% of the third and fourth-year students. This is reflective of a direct correlation between the

115. *But see* Colin Miller, *Ordeal by Innocence: Why There Should Be a Wrongful Incarceration/Exception to Attorney-Client Confidentiality*, 102 NW. U. L. REV. COLLOQUY 391, 397 (arguing that inmates are exposed to a substantially higher risk of substantial bodily harm inherent in incarceration, and therefore, a wrongful incarceration exception can be implied from the current rules).

completion of a professional responsibility course and a firm understanding of the rule of confidentiality and its exceptions. Therefore, third-year students best resembled practicing attorneys.

TABLE I- QUESTION ONE: UNDER CURRENT ABA STANDARDS, MAY YOU DISCLOSE THIS INFORMATION?

<u>Year of Study</u>	<u>Must Disclose</u>	<u>May Disclose</u>	<u>Must Not Disclose</u>
1 st (115)	26%	15%	59%
.....			
2 nd (91)	7%	43%	50%
.....			
3 rd (54)	4%	15%	81%
.....			
Overall	15%	25%	56%

2. Question Two – Reflections on Ambiguity

The second question in the survey changed the facts of the hypothetical slightly in an effort to show that determining whether an exception applies to a given set of facts can be tricky business. The question added the fact that the innocent convict, A, was being assaulted in jail, causing him substantial bodily harm. This question was also designed to test the limits of student's understanding of the rules. Under current Model Rule 1.6(b)(1), this situation is one in which the hypothetical lawyer should be able to disclose B's confession because the lawyer knows (is reasonably certain) that the disclosure is necessary to prevent reasonably certain substantial bodily injury. However, since the lawyer has heard of the assault (knows of it) after it happens, the implication could be that it has *already taken place*. Thus, one could argue that the hypothetical lawyer's disclosure is no longer permitted because she will not be *preventing* anything. On the other hand, the question asks if disclosure is allowed where the hypothetical lawyer knew that "A was *being assaulted* in prison," which implies a sense of perpetuity in the assault, and thereby falling back into the exception.

Certainly this added fact rings loud to show just some of the issues that might arise on the part of the lawyer trying to decide whether or not his situation falls within the exception. It is somewhat of a trick question in the sense that the answer may change based on interpretations of the ambiguity. In any event, of those that got-it-right (those which most closely resemble practicing lawyers), 38% thought that B's confession may be disclosed on these facts. Among the lay

first-year student pool, 77% felt that B's confession either must not or must be disclosed (39/115 must; 50/115 must not). Of the third-year students, 61% felt that B's confession must not be disclosed, and exactly one-third felt that it may be disclosed. Given the ambiguity of the question, any results are questionable, and this Comment does not conclude anything based on these responses. The question was designed to reflect upon the exception's inherent ambiguities, which some would argue need to be resolved.¹¹⁶

TABLE II - QUESTION TWO: UNDER THE CURRENT ABA STANDARDS, MAY YOU DISCLOSE THIS INFORMATION IF YOU KNEW THAT "A" WAS BEING ASSAULTED IN PRISON CAUSING HIM SUBSTANTIAL BODILY HARM?

<u>Year of Study</u>	<u>Must Disclose</u>	<u>May Disclose</u>	<u>Must Not Disclose</u>
1 st (115)	34%	23%	43%
.....			
2 nd (91)	19%	60%	21%
.....			
3 rd (54)	6%	33%	61%
.....			
Overall	23%	38%	39%

3. Question Three – Rule Breakers

“The legal system itself needs people who are willing to break the law for political reasons The legitimacy of the system itself requires confrontation with disobedience defended by individuals who view compliance as immoral or by individuals seeking to persuade lawful officials to change.”¹¹⁷

This question was designed to determine to what extent the lawyers-to-be would engage in civil disobedience.¹¹⁸ The pool of

116. Hicks, *supra* note 13, at 319.

117. Martha L. Minow, *Breaking the Law: Lawyers and Clients in Struggles for Social Change*, 52 U. PITT. L. REV. 723, 741 (1991).

118. Daly, *supra* note 6, at 1628 (“Civil disobedience is traditionally associated with acts that are ‘public, nonviolent, conscientious yet political . . . done with the aim of bringing about a change in the law or policies of government.’ Although . . . I have located no instances of civil disobedience directed at the judicial branch in its capacity as the regulator of the legal profession . . . I see no reason why the absence of precedent should be should be fateful to my claim.”).

students was asked whether they would disclose *regardless* of what the rules said. Among the entire sample, 41% said they would disclose B's confession regardless (first-year students: 34%; second-year students: 43%; third-year students: 46%). If adjusted to include those who said they might disclose (maybe), the number changes to 68%. This shows that as students become more familiar with the rules, they are more willing to disregard them and engage in civil disobedience.¹¹⁹ However, among the total number of students that got-it-right, 80% said they *would not* disclose, regardless of what the rules say. This serves to undercut the conclusion that as students become more familiar with the rules, they are more willing to break them. Conversely, it suggests an opposite conclusion: those who know the rules and their exceptions are intent on following them.

TABLE III - QUESTION THREE: WOULD YOU DISCLOSE REGARDLESS OF WHAT THE RULES MIGHT SAY?

Year of Study	Would Disclose	Would Not Disclose	Maybe
1 st (115)	34%	41%	25%
.....			
2 nd (91)	43%	32%	25%
.....			
3 rd (54)	46%	22%	30%
.....			
Overall	41%	34%	27% ¹²⁰

4. Question Four – Putting the Client First

Question four was created to measure where the lawyers'-to-be considerations lie when deciding whether to disclose. The question asked whether they might disclose if they knew that releasing the information *might* lead to A's release from prison and if they *knew* that their client B would not be implicated and suffer criminal consequences. The question provided a win-win for the hypothetical lawyer: she could possibly exonerate A and simultaneously protect B from criminal prosecution.

119. The survey tried to gauge why the students were willing to break the rule. Many responses included words or phrases such as "the right thing," or "morally right," or "A should not suffer because of B," and "justice."

120. The numbers throughout the section were rounded up. Thus, the percentages may not always equal exactly 100%.

This question brought the second highest level of agreement among the pool. Sixty-two percent (161/260) said they would disclose if they knew that their client B would not be implicated and suffer criminal consequences. If adjusted to include those who thought they might disclose (maybe), the percentage becomes 76% (197/260). Of those who got-it-right and said they might disclose (maybe), nearly half (49%) changed their minds and decided they would disclose if their client B would not suffer any criminal implications.

These results clearly reflect that the lawyers-to-be put the client's interests first. Thus, the notion that the duty of confidentiality is meant to protect the interests of the client first and foremost is supported by the instant study. The high level of across-the-board agreement shows that lawyers-to-be recognize and relate to the best interests of the client when considering whether to breach confidentiality. However, given the fact that the question provided a win-win for the hypothetical lawyer, these results are not surprising. They are, however, informative.

TABLE IV - QUESTION FOUR: WOULD YOU DISCLOSE INFORMATION THAT MIGHT RESULT IN "A's" RELEASE FROM PRISON IF YOU KNEW THAT YOUR CLIENT "B" WOULD NOT BE IMPLICATED AND SUFFER CRIMINAL CONSEQUENCES?

<u>Year of Study</u>	<u>Yes</u>	<u>No</u>	<u>Maybe</u>
1 st (115)	61%	28%	10%
.....			
2 nd (91)	64%	20%	14%
.....			
3 rd (54)	61%	19%	20%
.....			
Overall	62%	23%	14%

5. Question Five – Hypothetical Consequences and Their Implications

Question five added more facts to the hypothetical in the form of consequences that the hypothetical lawyer would face.¹²¹ It asked whether they would disclose if they knew what consequences they would suffer. The consequences were, ranging from highest to lowest: disbarment, suspension for an unspecified period, monetary sanction of unspecified amount, and a public reprimand. The question was

121. See *infra* app., question five.

designed to assess if, and to what extent, the students' own self-interest might determine whether they chose to breach confidentiality. Without such a question, it might be argued that the entire survey is without merit because it would not take into account the hypothetical lawyer's own costs and benefits.

As the consequences became less severe, the lawyers-to-be became more willing to breach confidentiality. Among the entire pool, 79% said they would not disclose if the consequences were disbarment. If suspension would result, with an unspecified time period, 58% would not disclose. If the consequences were an unspecified monetary sanction, 43% said they would not disclose. If the consequences were public reprimand, 48% would not disclose. Thus, at least some see public reprimand as a more taxing consequence than a monetary sanction. This is likely because of the role that a reputation can play in an attorney's career, and concerns over what other attorneys may think or how potential clients would react.

Of those who knew that the confession could not be disclosed under the Model Rules (got-it-right) and said they would disclose (knowing-rule-breakers), 87% changed their minds if they knew that the consequence was disbarment. However, only 26% changed their minds if they knew that an unspecified monetary sanction would result. Of those who got-it-right and of those who said they might disclose (potential knowing-rule-breakers), 63% changed their minds and said they *would* disclose if the consequence was merely an unspecified monetary sanction.

The implication from these hypothetical consequences, although not conclusive, is that the lawyers-to-be are in some sense self-interested (not surprisingly). Thus, although protecting the client's interests reflected a very high level of agreement among the pool (197/260), disbarment as a consequence reflected the highest level of agreement (200/260), but only by 1%. Therefore, although client concerns in a large part dictate the lawyer's course of action, most lawyers-to-be will not sacrifice their careers to save A.

6. *Question Six – Consensus Versus Divergence*

This question was designed specifically with the proposal of this Comment in mind. It sought to discover whether an exception, which would allow the hypothetical lawyer to disclose B's confession and thereby possibly exonerate A, would be supported by popular opinion.

The question, partially in line with the Tomkins study,¹²² asked if the lawyers-to-be thought the hypothetical lawyer should be able to disclose B's confession, and why.

Of those who got-it-right and said they would not disclose (the knowing-rule-followers—arguably the most skeptical of such an exception) nearly half (44%) thought that lawyers should be able to disclose B's confession. Not surprisingly, of those who got-it-right and of those who said they would disclose (the knowing-rule-breakers—arguably the most welcoming of such an exception), there was a consensus (100% thought that lawyers should be able to disclose this information). Among the entire pool, 61% thought that lawyers should be able to disclose B's confession. If adjusted to include those who were unsure (maybe lawyers should be able to disclose), the percentage becomes 74%. Thus, of the entire pool, only 26% of the lawyers-to-be believed that lawyers should not be able to disclose B's confession. Although not a consensus, this data suggests that the lawyers-to-be believe that the interests of confidentiality are outweighed by A's interests in physical liberty and being exonerated.

TABLE V - QUESTION SIX: DO YOU THINK YOU SHOULD BE ABLE TO DISCLOSE THIS INFORMATION? WHY OR WHY NOT?

<u>Year of Study</u>	<u>Yes</u>	<u>No</u>	<u>Maybe</u>
1 st (115)	57%	23%	15%
.....			
2 nd (91)	66%	21%	14%
.....			
3 rd (54)	61%	20%	11%
.....			
Overall	61%	26%	13%

7. Question Seven – Affecting Client Candor?

The last question of the survey covertly attempted to gauge to what extent the pool accepted confidentiality's primary systemic justification, which, as discussed in Part I, is promoting client candor. The question, also partially in line with the Tomkins study,¹²³ asked the lawyers-to-be whether people's willingness to use attorneys might be affected by an exception allowing the hypothetical lawyer to disclose B's confession.

122. *Rethinking Confidentiality I*, *supra* note 6, at 392.

123. *Id.* at 395.

If potential clients are not willing to use an attorney's services, then it might easily be conceded that client candor is being discouraged.

Of those who thought lawyers should be able to disclose B's confession, 39% were willing to make the sacrifice, insofar that they believed that people's willingness to use attorneys would be affected, thereby discouraging candor. Of the entire pool, almost half (47%) thought that such an exception would decrease demand for lawyers, thereby chilling client candor. If adjusted to include those who were unsure (maybe it would affect willingness to use attorneys), 74% felt that it would or it might. Only 23% felt that such an exception would not affect client candor. Therefore, a significant majority of the lawyers-to-be accept confidentiality's primary systemic justification—that protecting secrets promotes client candor and the data supports the warning that such an exception to confidentiality would impact the way clients use attorneys. On the other hand, it simultaneously casts doubt on whether the effect is as substantial as proponents of confidentiality presume—only 47% were completely sure.

TABLE VI - QUESTION SEVEN: IF ATTORNEYS WERE ALLOWED TO DISCLOSE IN CASES SUCH AS THESE, DO YOU THINK THAT WOULD MAKE PEOPLE LESS WILLING TO USE ATTORNEYS SERVICES?

<u>Year of Study</u>	<u>Yes</u>	<u>No</u>	<u>Maybe</u>
1 st (115)	51%	17%	32%
.....			
2 nd (91)	50%	29%	19%
.....			
3 rd (54)	31%	30%	30%
.....			
Overall	47%	23%	27%

C. Significance

Several of these results are telling. First, the study revealed widespread misunderstanding among first and second-year law students, who more closely resemble laypeople, as to confidentiality and its scope. Half of the second-year students, and 40% of the first-year students, answered incorrectly by concluding that the hypothetical

lawyer either may or must reveal B's confession. These findings are consistent with the other limited empirical data on confidentiality.¹²⁴

Second, of the entire pool, 63% stated that they either would or might disclose regardless of what the rules say. This result is also remarkably consistent with comparable empirical data.¹²⁵ For those who believe in professional codes of conduct, the picture that results from these responses is disturbing because, despite the fact that the code forbids disclosure, many lawyers-to-be might nonetheless disclose if their personal morals conflicted with the ABA's codified ethics. However, among those who understood the rules (those answering question one correctly—"got-it-right")—those most closely resembling practicing attorneys, 80% said they would not disclose.

Third, an amendment to the confidentiality rules allowing lawyers to disclose B's confession would clearly be popular. Only 26% of the entire pool thought that lawyers should not be able to disclose this information. Thus, 74% of the survey takers thought either that a lawyer should be able to disclose (158/260) or maybe should be able to disclose (34/260). This figure is also markedly consistent with similar studies.¹²⁶

Fourth, the results suggest that the lawyers-to-be place their client's interests in high regard when considering a breach of confidentiality. Reflecting the second highest level of agreement among the lawyers-to-be, 161/260, or 62%, replied that they would disclose the information if they knew that their client B would not be implicated or suffer criminal consequences. If one includes those who thought they might disclose in this situation, the number increases to 76% (197/260).

Fifth, the lawyers-to-be showed a noteworthy level of selflessness, as 42% of the pool actually said that they would take a suspension of unspecified time in order to disclose and potentially exonerate A. However, the highest level of agreement, perhaps not surprisingly, was reflected by an unwillingness to be disbarred—200/260 lawyers-to-be,

124. *Rethinking Confidentiality I*, *supra* note 6, at 381 (explaining how half of the clients relied on confidentiality and wrongly assumed the governing standard was absolute); *see also* Comment, *supra* note 114, at 1236 (revealing widespread misinformation concerning privileges in various professions and particularly the attorney-client privilege).

125. *Rethinking Confidentiality I*, *supra* note 6, at 392 (finding in the Tompkins study that 65% of the lawyers asked stated that they thought a good attorney would disclose in the innocent convict hypothetical and noting that the study did not provide for a "maybe" answer; the only options were "would disclose" or "would not disclose").

126. *Id.* at 395 (finding in the Tompkins study that 80% of clients thought lawyers should have to disclose in order to save the innocent defendant).

or 77%, said they would not disclose if they knew they would be disbarred.

Inconsistent with the Tomkins study were the results regarding what effect disclosure would have on potential clients' willingness to use attorneys (thereby affecting client candor). In the Tomkins study, 19% of the clients surveyed felt that disclosure of the innocent defendant information would affect their willingness to use an attorney.¹²⁷ In the lawyers-to-be survey, almost half (47%) felt that if disclosure were allowed to exonerate A, people would be less willing to use an attorney's services. Twenty-two percent thought that it might. Thus, the lawyers-to-be, unlike the actual clients in the Tomkins study, implicitly accepted confidentiality's primary systemic justification—i.e., confidentiality promotes client candor. Therefore, to the extent that a new exception would negatively affect demand for lawyers, the justification that confidentiality promotes client candor is supported by this data.

Ultimately, this study is not conclusive on these issues. It merely attempts to draw upon its data in an objective manner in order to provide code drafters with a way to avoid unsupported assumptions about client behavior.

IV. PROPOSAL & ARGUMENT

*"It is better that 100 guilty men go free than 1 innocent man go to jail."*¹²⁸

The Model Rules' Preamble states that a lawyer's responsibilities to serve the interests of the client, the demands of the legal system, and the public are *usually* harmonious.¹²⁹ The innocent convict hypothetical, which was designed to force a clash of the hypothetical lawyer's personal morals and codified ethics, highlights a troubling duality: the categorical mandates that Model Rule 1.6 provides versus the morally conscious lawyer seeking justice. The extreme, although not uncommon, example is one that pits three duties against themselves: duty to client, duty to self, and duty to society. The resolution of this

127. *Id.*

128. 4 WILLIAM BLACKSTONE, COMMENTARIES *352.

129. MODEL RULES OF PROF'L CONDUCT pmb1. (2002).

conflict is one that the ABA has yet to provide, although it is currently considering at least one possibility.¹³⁰

This section seeks to help resolve the problem, arguing that the ABA should adopt a narrow, permissive, wrongful incarceration exception for two reasons: (1) because none of the interests attorney-client confidentiality is meant to serve apply in this hypothetical; and (2) because, after balancing the utilities, B's secrets are far outweighed by A's fundamental right to freedom from physical restraint.

This Comment proposes that the ABA should adopt the following additional exception to attorney-client confidentiality under Model Rule 1.6(b): *a lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent the wrongful incarceration of another person.*

In order to decide if the rules err by not adopting such a wrongful incarceration exception to cover the hypothetical scenario, three central policy issues in drafting exceptions to confidentiality must be addressed. First, the justifications providing for strict confidentiality, as outlined in Part I, should be applied to the current hypothetical to determine if they are properly served in this context. Next, the interests that justify a possible sacrifice of attorney-client confidentiality must be clearly defined.¹³¹ Last, whether the proposed exception should be permissive or mandatory must be addressed.¹³²

A. Justifications Applicable?

1. Client Candor

The major argument against broadening exceptions to confidentiality, as fully discussed above, is that clients will be deterred

130. See Joy & McMunigal, *supra* note 8, at 46–47 which considers the ABA's proposed amendment to comment [15] of MODEL RULE 1.6. This amendment states that the drafters:

[R]ecognize[] the important societal interest in preventing and rectifying wrongful convictions The interests underlying the confidentiality obligation are usually paramount in the case of living clients. . . . However, the societal interests in disclosure may be paramount when the client is deceased, particularly when the client's reputation and estate will not be prejudiced by disclosure.

Id. at 47–48. Therefore, the rationale behind the exception is that deceased client's secrets are outweighed by society's interest in disclosure. This Comment asserts that this rationale is flawed because it misstates what the real interest should be: "A's" physical liberty.

131. See Crampton & Knowles, *supra* note 6, at 112.

132. *Id.*

from confiding information to their lawyers, thereby chilling attorney-client communications. Here, the client, B, has already provided the lawyer with full and frank information. He has entered a law office and told a lawyer that he broke the law by committing the crime for which A is currently serving his life sentence. It might easily be conceded that this client is as full and frank as a client can possibly be.

Necessarily, the justification applies not only to the present client, but also to other potential clients. Given the rarity of this exceptional scenario, it is highly unlikely that overall attorney-client communications would be chilled.¹³³ Moreover, currently recognized exceptions, such as those pertaining to third-party injury as outlined in Part II, seem much more likely to be triggered than the proposed wrongful incarceration exception, and thus more likely to impede the full and frank communication that confidentiality is designed to facilitate.¹³⁴ Therefore, the proposed exception would do little more than the current exceptions have already done to chill communications.

Opponents to such an exception face another hurdle because in order to argue that such a narrow exception would affect client candor, or at the very least lead to some lay hesitation, they must concede that clients understand the rules. This necessary premise, which is the very bedrock of attorney-client confidentiality's justifications, is called into question with the data presented herein. The survey revealed a widespread misunderstanding of the rules—nearly 40% of the 260 polled thought that B's confession either may or must be disclosed.¹³⁵ These findings are also consistent with other limited empirical data.¹³⁶ At least one third-year respondent in the lawyers-to-be survey exclaimed, “[t]hey won't know!” (referring to potential clients). Thus, potential clients that are unaware of the exception would not be affected by an exception they do not know exists. Perhaps more importantly, however, those clients who are aware of such an exception already have good reason not to confess to a crime for which another person has been charged or convicted.¹³⁷

133. See generally *Rethinking Confidentiality I*, *supra* note 6, at 365–66 (“[a]s a practical matter, clients thus probably end up with only a general understanding that attorney-client conversations usually remain confidential but occasionally may be revealed. If that is the case, creating limited additional disclosure exceptions is unlikely to affect a client's decision to confide.”).

134. Joy & McMunigal, *supra* note 8, at 46.

135. See *supra* tbl. I (showing poll of student opinion regarding client confidentiality).

136. See *Rethinking Confidentiality I*, *supra* note 6, at 381 (citing authority evidencing confidentiality issues).

137. Miller, *supra* note 115, at 401.

Widespread misunderstanding of the rules aside, the lawyers-to-be lend at least some credence to those who feel that such an exception would affect client candor and chill communications. Seventy-four percent of the lawyers-to-be felt that if lawyers were allowed to disclose B's confession that people either would, or might be, less likely to use an attorney's services.¹³⁸ However, only 47% were sure (26% answered "maybe"). Thus, this data might also support those who argue that an exception would negatively affect client candor, but it simultaneously casts doubt on whether the effect is as substantial as proponents of confidentiality presume. Furthermore, the level of understanding of the rules on confidentiality is objective—i.e., measurable—whereas whether demand for lawyers might be affected by a new exception is a subjective and conjectural question. Thus, the former is less speculative than the latter and seriously undercuts those who argue that a narrow exception for wrongful incarceration might chill client communications.

2. Client Autonomy and Privacy

Next, regarding client autonomy, privacy, and dignity, the argument, as explained above, is that the client's autonomy demands a certain level of dignity that allows the client to exercise her private decisions under a veil of secrecy as a free citizen in a free society. The application of this *purely* philosophical justification to the hypothetical is tenable at best. This justification is, by its very nature, an abstract one that cannot be proven. The position of this Comment is that when a person's physical liberty is at stake, the reality of that more certain harm should clearly trump dubious assumptions about effects on a client's personal feelings or autonomous dignity. Furthermore, studies indicate that mistrust and suspicion are already frequently encountered in the attorney-client relationship as it stands.¹³⁹ Therefore, even though adding an exception to cover the hypothetical scenario might philosophically affect a client's intangible subjective feelings and autonomy, such considerations should be overlooked in light of the objective and tangible harm faced by A.

138. See *supra* tbl. VI.

139. See, e.g., Robert A. Burt, *Conflict & Trust Between Att'y & Client*, 69 GEO. L.J. 1015 (1981) (arguing that expanding exceptions to confidentiality would enhance trust between attorney and client).

3. Preventing Misconduct

The strongest justification for confidentiality,¹⁴⁰ preventing client misconduct, does not apply here. It cannot meritoriously be argued that the hypothetical lawyer might use B's confession to prevent B's misconduct because the harm *has already occurred* and is therefore impossible to prevent. Ironically, there is a stronger guarantee of preventing harm in general under the proposed exception than there is under the current exceptions.¹⁴¹ This is because a client that discloses an intention to commit a *future* crime might actually change her mind, whereas under the proposed exception, the lawyer cannot disclose until *after* the harm has already been committed and is ongoing—i.e., the wrong person has been sentenced and is incarcerated. Therefore, since there is nothing the hypothetical lawyer can conceivably do to prevent the client's misconduct, this justification does not apply on these facts.

Incidentally, it is professional misconduct for a lawyer to engage in conduct which is prejudicial to the administration of justice.¹⁴² Arguably, by disclosing B's confession to a prosecutor, for example, a lawyer would be serving the interests of justice overall and would greatly promote the administration of justice. In August 2008, the ABA amended Model Rule 3.8 ("Special Responsibilities of a Prosecutor") to address a prosecutor's obligations, in particular with respect to wrongful incarcerations/convictions.¹⁴³ It codified prosecutors' post conviction obligations of disclosure and investigation when they know of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit the offense for which the defendant was convicted.¹⁴⁴ This new amendment is proof positive of the ABA's willingness and commitment to preventing wrongful convictions in general. Specifically, however, the amendment proposed herein would give non-prosecutors—i.e., defense attorneys—the tools they need to assist the prosecutor in his new duty of investigation, and thereby promote the overall administration of justice.

4. Facilitating Effective Representation

The fourth justification, which is partially duplicative, posits that lawyers need all relevant information in order to be effective and to

140. Again, the author uses this language because, as pointed out above, there is at least some empirical data on the matter.

141. Miller, *supra* note 115, at 399.

142. MODEL RULES OF PROF'L CONDUCT R. 8.4(d) (2003).

143. MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2008).

144. MODEL RULES OF PROF'L CONDUCT R. 3.8(g) (2008).

facilitate effective representation for the client. Here, however, the information at issue has not been disclosed for the purpose of seeking legal advice and will not result in such advice because the hypothetical lawyer is representing "B" on an *unrelated matter*. The crime has already been committed. Since the matter is wholly unrelated, it necessarily has no bearing on the facilitation of effective legal advice. Furthermore, there is at least some evidence that professional and legal rules have little effect on the willingness or unwillingness of clients to talk to their lawyers, as legal advice is usually sought out as a matter of necessity, especially in the criminal defense realm.¹⁴⁵ However, there is no evidence that the current broad exceptions, which are much more likely to be triggered than the proposed exception, have had any undesirable effect on facilitating effective representation. Therefore, since this justification does not apply on these facts, ABA code drafters should have no problem disregarding it.

5. Preventing Negative Externalities and Promoting Positive Externalities

An externality, as discussed above, is an unforeseen cost placed on a third party as a result of a producer or consumer creating or consuming goods.¹⁴⁶ Here, disclosure by the hypothetical lawyer might actually promote positive externalities in several ways. The disclosure of this information will actually deflect costs associated with housing inmates and appellate review.¹⁴⁷ Society's view of lawyers might increase if they knew lawyers were allowed to disclose this type of information and were driven to do so in order to uphold justice, as opposed to protecting those narrower groups with special interests.¹⁴⁸ The more that professional standards prescribe conduct inconsistent

145. See Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 683 (1978). Murray claims that, in general, lay persons visit accountants, psychiatrists, social workers, and other specially trained professionals expecting secrecy of most information. *Id.* However, there are circumstances which allow the shield of confidentiality to be pierced. *Id.* Nevertheless, clients continue to use these services because the risk of disclosure is simply insignificant in the face of the benefits the client obtains. *Id.*

146. See generally BUTLER & DRAHOZAL, *supra* note 66.

147. *McCoy v. Court of Appeals of Wis.*, 486 U.S. 429, 436 (1988) (holding that the State is required to provide counsel for first appeal by right).

148. *But see* MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYER'S ETHICS 147 (Lexisnexis/Matthew Bender 2d ed. 2002) (worrying that under a permissive exception to confidentiality "lawyers will be more likely to use or disclose a client's confidential information . . . when the client is an indigent . . . than any other client," resulting in "an even greater divide between the kind of legal services- and loyalty- provided to some clients than that provided to others").

with society's general ethical perceptions, the more likely society is to view the profession with cynicism.¹⁴⁹ Indeed, such a result is not unlikely given the fact that wrongful convictions have attained such prominence in today's legal and popular culture.¹⁵⁰ It may also prevent negative externalities because the failure to recognize an exception for the innocent convict is likely to attract public attention and undermine public confidence both in lawyers and our criminal justice system in general.¹⁵¹ Therefore, the hypothetical lawyer's disclosure of B's confession might actually help serve the very interests which confidentiality currently is supposed to serve. Thus, the argument actually cuts the other way.

B. Balancing the Interests: Physical Liberty Versus Confidentiality

*"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are . . . Liberty."*¹⁵²

Confidentiality rules have always recognized exceptions.¹⁵³ The comments to Model Rule 1.6 reveal that the ABA code drafters engage in a balancing act to determine whether an exception should exist. This utilitarian balancing runs parallel to the process courts may employ in the area of attorney-client privilege, which is beyond the scope of this Comment.¹⁵⁴ Thus, in order for the ABA to adopt a new exception, they must find a countervailing interest that outweighs the interests confidentiality preserves.

The search for utility need not extend past the current comments to Model Rule 1.6, which recognize *physical integrity* as such an interest. Physical integrity is part and parcel of physical liberty, which is a value upon which this country was founded. The right to be free from physical restraint is so basic a human right and fundamental to our precepts as just beings that it must not be overlooked or taken for granted. Currently, America is engaged in two wars that are, at least nominally, to fight for liberty and freedom. Any conceivable

149. *Rethinking Confidentiality I*, *supra* note 6, at 376 (citing Note, *Attorney Client Confidentiality: A New Approach*, 4 HOFSTRA L. REV. 685, 688 (1976)).

150. Joy & McMunigal, *supra* note 8, at 48-49.

151. *Id.*

152. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

153. *Id.*

154. See generally Note, *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement*, 91 HARV. L. REV. 464, 486-87 (1977).

justification for confidentiality pales in comparison to spending every waking hour behind bars. Clearly, Model Rule 1.6, as applied here, results in the maintenance of confidentiality, even in light of wrongful incarceration and the great physical, mental, emotional, and spiritual harm that such incarceration would cause to an innocent human being.¹⁵⁵ The data provided by the lawyers-to-be supports such notions—68% said that they either would or might disclose *regardless* of what the rules might say, and only 26% thought that lawyers should *not* be able to disclose this information.¹⁵⁶ This result is also supported by similar empirical research.¹⁵⁷ If the notion that an innocent man's physical liberty outweighs attorney-client confidentiality is a notion so commonly shared by lay persons, why as lawyers is it so hard to accept? Are the profession's interests really all that different from society's?

Currently, the two utilities on the ABA's balancing hierarchy that sufficiently outweigh attorney-client confidentiality are lawyer-centered.¹⁵⁸ These two interests are collecting fees and self-defense.¹⁵⁹ When juxtaposed against the right to be free from physical restraint, collecting fees and defending against professional negligence actions seem quite small in stature. Moreover, the high likelihood that such exceptions will be triggered, versus the low likelihood that a lawyer might have a client admit to committing a crime for which another is incarcerated, must not go unnoticed. Nonetheless, the same lawyer that is prohibited from disclosing on these facts is perfectly free to disclose confidential information when he or she is the one accused, whether falsely or not. There is no requirement that the lawyer's liberty be at stake; a simple fee dispute will suffice. At least one scholar has noted, "[n]o exception to the attorney-client privilege has done as much to draw [confidentiality] into question as the exception allowing lawyer self-protection."¹⁶⁰ Others have pointed out that allowing lawyers to disclose confidences for the purpose of collecting fees "is sanction for

155. Tuoni, *supra* note 13, at 473; *see also* Miller, *supra* note 115, at 397 (citing Jeff Potts, *American Penal Institutions and Two Alternative Proposals for Punishment*, 34 S. TEX. L. REV. 443, 462–65 (1993) and pointing out that inmates face an increased risk of physical violence based upon factors such as concentration of violent individuals, overcrowding, prison culture, the inability of prisoners to physically separate themselves, the prevalence of drug use, and prison guard brutality).

156. *See supra* tbls. III & V.

157. *See e.g. Rethinking Confidentiality I*, *supra* note 6, at 394 (stating that 80% of clients surveyed believed that lawyers should be able to disclose information regarding an innocent defendant).

158. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(4), (5) (2003).

159. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(5) (2003).

160. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 308 (West Publishing Co. 7th ed. 2005).

blackmail.”¹⁶¹ Professor Daniel R. Fischel has argued that confidentiality rules benefit lawyers but are of dubious value to clients and society as a whole, and do nothing more than increase the demand for lawyers.¹⁶² Other scholars have shared their views on the ABA’s current enigmatic position.¹⁶³ If nothing else, this Comment can assist code drafters in basing confidentiality’s exceptions on empirically supported contentions and thereby forestalling the public perception, both by lawyers and laypersons alike,¹⁶⁴ that ethical regulations merely protect the guild.

161. FREEDMAN & SMITH, *supra* note 16, at 155.

162. *See* Fischel, *supra* note 24, at 33.

163. Tuoni, *supra* note 13, at 446, 469 (“It is difficult to understand how a lawyer’s self-reputational interests are regarded as more worthy of protection than societal and individual interests in not being victimized The Model Rules set forth a very strange hierarchy of protections in the area of client confidentiality Perhaps the *coup de grace* of the model Rules’ ‘slap in the face’ to the needs of those outside of the legal system is the enhancement of lawyer’s ability to protect themselves through the use of confidential client information.”); *see also* FREEDMAN & SMITH, *supra* note 16, at 144 (“[S]ome of the ABA’s exceptions to lawyer-client confidentiality are a mockery of an ideal”); Cramton & Knowles, *supra* note 6, at 111 (“[A] profession that justifiably asks for and receives permission to disclose confidential information when its own economic self-interests are at stake (e.g. to collect a fee from a client) cannot plausibly take the position that the threatened death or serious injury of another does not justify an occasional sacrifice of confidentiality.”); Daly, *supra* note 6, at 1625 (“Less noble and even more firmly established is the exception that permits disclosure to the extent necessary to collect a lawyer’s fee or to defend against an accusation of wrongdoing.”); Thomas D. Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702, 738 (1977) (explaining that the code effectively ends attorney’s obligations of confidentiality when it becomes uncomfortable for an attorney); William H. Simon, *The Belated Decline of Literalism in Professional Responsibility Doctrine: Soft Deception and the Rule of Law*, 70 FORDHAM L. REV. 1881, 1901 (2002) [hereinafter Simon, *Belated Decline*] (“Literalism has at least a modest correlation with the economic self-interest of the bar. It is consistent with the bar’s perceived material interest in minimizing the lawyer’s responsibilities to people who do not pay for legal services. Moreover, it seems to have a tendency to enlarge demand for legal services.”); William H. Simon, *Who Needs the Bar?: Professionalism Without Monopoly*, 30 FLA. ST. U. L. REV. 639, 652 (2003) [hereinafter Simon, *Professional*] (“[T]hese [confidentiality] rules are less often seen as an expression of economic self-interest than the rules specifically focused on admission and marketing. Critics are as likely to explain the bar’s ethical orientation in terms of ideological commitments as in terms of economic self-interest.”). *See generally* *Rethinking Confidentiality I*, *supra* note 6, at 353–71 (“[T]he tradition of strict confidentiality has helped teach lawyers and clients to rationalize amoral representation The resulting patchwork of standards governing attorney-client secrets casts doubt on the ideals to which confidentiality rules aspire.”).

164. *See* Daniel R. Fischel, *Lawyers & Confidentiality*, 65 U. CHI. L. REV. 1 (1998) (providing that lawyers are the beneficiaries of the rule of confidentiality); *see also* Colin Miller, *Ordeal by Innocence: Why There Should be a Wrongful Incarceration/Execution Exception to Attorney-Client Confidentiality*, 102 NW. U. L. REV. COLLOQUY 391 (discussing the importance of the wrongful incarceration exception).

After all is said and done and both sides have made their arguments, what remains is a hierarchy of interests that places lawyer self interest higher than the exoneration of A. When viewed in this light, the primary beneficiary of the rules of confidentiality is not the client, as the ABA contends, but rather it is the lawyer. This argument is not an attack on the ABA, because as recent amendments have proved, their concerns are headed in the right direction; it simply is made to show that one last step needs to be taken. The recognition of a wrongful incarceration exception is consistent with the recent trend to ease confidentiality restrictions when doing so allows lawyers to serve an important public purpose. This trend expands a lawyer's duty to act cooperatively in preventing and remedying wrongdoing, emphasizing the lawyer's role as an officer of the court rather than the lawyer's role as a zealous advocate for the client.¹⁶⁵

C. Permissive Versus Mandatory: Practical Considerations

This Comment suggests that the discretion to disclose should remain with the lawyer herself despite the fact that a mandatory rule might lead to a more uniform and predictable outcome. The Model Rules are just that; they are guidelines for the professional lawyer and they are rules of reason.¹⁶⁶ The rules do not exhaust the moral and ethical considerations that should inform a lawyer, "for no worthwhile human activity can be completely defined by legal rules."¹⁶⁷ The rules are primarily an ethical framework that stitch appropriate considerations into a lawyer's moral fiber. As such, the lawyer should be able to exercise her discretion in each individual context whilst considering and weighing what the lawyer "may" do if need be, as opposed to what she shall do no matter what. This also allows proper time and peace of mind to consider all the relevant factors before disclosing. Much of the law of lawyering makes room for morals by giving lawyers discretion in determining what they ought to do; confidentiality exceptions should provide the same level of flexible regulation.¹⁶⁸ Furthermore, few

165. Joy & McMunigal, *supra* note 8, at 49.

166. MODEL RULES OF PROF'L CONDUCT, scope 14 (2002).

167. *Id.* at 16.

168. Serena Stier, *Legal Ethics: The Integrity Thesis*, 52 OHIO ST. L.J. 551, 596 (1991). *see also* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 69 (West Publishing Co. 1986) ("Most lawyer decisions are open-ended and discretionary in the sense that a lawyer can choose between a variety of tactics or outcomes with no fear of violating any legal rule. In making those decisions, lawyers rely on some innate sense of proper behavior. One lawyer's sense might be the result of a very thought out and consciously followed system of moral values. Another lawyer's sense might be nothing more complicated than an instinct

States, nor either the current Model Rule 1.6 or the Restatement (Third) Governing Lawyers, mandate disclosure, they merely allow it.¹⁶⁹

A mandatory rule would not reflect the complexity this hypothetical presents. Disclosing B's confession can be costly to lawyers. Such costs can present themselves in a variety of ways. A more realistic ramification for the lawyer who decides to disclose might be professional martyrdom.¹⁷⁰ From an economic standpoint, harm facing the attorney can be staggering in a freely competitive market, and disclosure can jeopardize a young criminal defense attorney's career, possibly resulting in occupational suicide.¹⁷¹ Such a notion is supported by the lawyers-to-be study, insofar that more were willing to disclose in the event a monetary sanction would result than when the consequence was a public reprimand.¹⁷²

Some have used the rational actor model to argue that allowing the attorney to maintain discretion in deciding whether to disclose confidences will not result in actual disclosure in practice.¹⁷³ If the costs outweigh the benefits, then the simple economic model dictates that the lawyer will not disclose. This much is supported by the instant study: the highest level of agreement among the lawyers-to-be was reflected in the consensus that if disbarment would result, then they would not disclose (200/260). The significance of the self-interest assumption is that it allows economists to predict changes in individual behavior in response to changes in economic variables.¹⁷⁴ However, the self-interested rational actor model does not take into consideration the subjective costs and benefits of the decision not to disclose—another type of cost. The model fails to account for the guilt associated with allowing an innocent man spending his life in prison. The potential psychological ramifications that may result from non-disclosure elude

that a lawyer may engage in any conduct that leads to a higher fee. Both lawyers are making decisions about the rightness or wrongness of conduct.”).

169. See DZIENKOWSKI, *supra* note 91, at 109–15 (providing that Arizona, Connecticut, Florida, Illinois, Nevada, New Jersey, North Dakota, Tennessee, Texas, Vermont, Virginia, and Wisconsin are the only states which require a lawyer to disclose confidential information); Mohr, *supra* note 23, at 351.

170. Rosenthal, *supra* note 11, at 168.

171. *Id.* at 167 (pointing out that the reputation of a criminal defense attorney travels swiftly through the ranks of criminal defendants and once the attorney is labeled as untrustworthy, that attorney may be hard pressed to retain any future clients).

172. See app., question five (providing that 48% of lawyers would not disclose if public reprimand would result, whereas 43% would not if unspecified monetary sanction would result).

173. See McGowan, *supra* note 13, at 1828 (“A simple rational actor assumption suggests that lawyers are reluctant to create costs for themselves.”).

174. BUTLER & DRAHOZAL, *supra* note 66, at 5.

measurement and the hypothetical lawyer cannot be made whole unless disclosure is made. Certainly, not all lawyers would feel a sense of perpetual guilt, but indeed some may.¹⁷⁵ Whatever the personal costs and benefits may be, the discretion should remain with the lawyer to weigh them accordingly in a contextual setting.

A mandatory rule might cause more harm than good. A lawyer's professional responsibility necessarily carries with it a duty to exercise discretion by considering the relevant legal issues.¹⁷⁶ Since a rigid rule dictates what the lawyer shall do when given a particular happening of a small number of factors, it thereby leaves the lawyer with no discretion to consider factors that are not specified under the rules. This presents a problem because given the nature of the legal practice, few fact patterns are the same. Ultimately, by requiring a given response, a mandatory disclosure rule disregards this fundamental premise. Consider the client's confession in the hypothetical. After some probing questions, the lawyer reasonably believes that B is telling the truth and he is the one who committed the crime. Now consider a second situation in which the client's confession is questionable and the alleged facts are not adding up. Out of a fear of disciplinary action against her if she did not disclose, the second lawyer reveals the information that turns out to be false. She might have caused more harm than would have resulted under a discretionary rule, which would have allowed a proper consideration of all the relevant factors. A person's credibility is unquestionably relevant and may be hard to make. A discretionary rule might have allowed the second lawyer to meet with the prosecuting attorneys to get a stronger understanding of the facts of the case, thereby leading to the conclusion that the client is not credible. Now, subject to potential civil damages and being stigmatized amongst potential clients, lawyer two has done more harm than good; both to herself and to the administration of justice. This admittedly exceptional situation demonstrates at least one way in which a rigid rule might be counterproductive and not allow for contextual judgment.

Credibility aside, a permissive exception recognizes the importance in allowing the lawyer to assess the substantive merit (i.e., admissible evidence) and to decide whether or not she should disclose. This allows the lawyer to determine if the confession is or might be admissible as evidence, and even if the confession is admissible, if it is

175. The lawyer in Logan's case said he thought about it every day; there wasn't a day that went by where he didn't consider it. 60 Minutes, *supra* note 7.

176. Levine, *supra* note 13, at 188 (citing Bruce A. Green & Fred C. Zacharias, *Permissive Rules of Professional Conduct*, 91 MINN. L. REV. 265 (2006)).

enough to vindicate A and induce a court to overturn his conviction. Several actual cases are illustrative of the issues a lawyer may face when confidentiality rules clash with evidentiary rules relating to the attorney-client privilege.¹⁷⁷ The rules of hearsay also present troubling and arguably unresolved legal issues to the hypothetical lawyer, which are beyond the scope of this Comment.¹⁷⁸

Furthermore, the hypothetical attorney, after having decided that she has admissible evidence, must then decide if said evidence is sufficient to meet the burden of production and burden of persuasion. In most jurisdictions, the burden of proof at trial differs from the burden in post-conviction proceedings.¹⁷⁹ To obtain an acquittal, a defendant bears no burden of proof and the state must prove each element of the charged offense beyond a reasonable doubt.¹⁸⁰ A defendant on a post conviction writ, however, typically bears a heavy burden.¹⁸¹ Thus, what burden will apply to a given proceeding indefinitely raises yet another question a rigid rule cannot conceivably address: *when* should the disclosure occur? The proposed permissive exception states that the lawyer may reveal the information to *prevent* the wrongful incarceration of another person. Considering the fact that juries are unpredictable,

177. See *Morales v. Portuondo*, 154 F. Supp. 2d 706, 730–31 (S.D.N.Y. 2001) (relying on *Chambers v. Mississippi*, 410 U.S. 284, 302–03 (1973) (permitting a lawyer to disclose that his deceased client had confessed to a murder for which another man was convicted on the grounds that habeas action due process required admission of the evidence to guarantee fundamental fairness to the defendant)); see also *State v. Macumber*, 544 P.2d 1084, 1086 (Ariz. 1976) (refusing to admit the testimony of the attorneys which might have revealed the wrongful conviction on the grounds that it violated attorney-client privilege); *State v. Valdez*, 618 P.2d 1234, 1237 (N.M. 1980) (holding attorney-client privilege prevented lawyer from testifying that a former client confessed to a robbery); *State v. Doster*, 284 S.E.2d 218, 220 (S.C. 1981) (applying attorney-client privilege to prevent lawyer from testifying about deceased client's statements that may have exonerated defendant).

178. See generally FED. R. EVID. 801–804. Since “B” in the hypothetical scenario would likely plead the 5th in a proceeding, it is likely he would be “unavailable” under FRE 804(a)(1). In consequence, the key question is whether the declarant, in this case “B”, made a statement against interest under FRE 804(b)(3) becomes at least one potential issue. Also, if introduced during trial by defense counsel of the accused, the statement then becomes double hearsay: statements relating to someone else's statements. See, e.g., *Portuondo*, 154 F. Supp. 2d at 730–31.

179. See generally Margaret Raymond, *The Problem with Innocence*, 49 CLEV. ST. L. REV. 449 (2001).

180. *In re Winship*, 397 U.S. 358, 361 (1970).

181. See, e.g., *Ex parte Thompson*, 153 S.W.3d 416, 417 (Tex. Crim. App. 2005). A defendant seeking to overturn a conviction based on newly discovered evidence indicating actual innocence must show “that the newly discovered evidence unquestionably establishes his or her innocence.” *Id.* (quoting *Ex parte Elizando*, 947 S.W.2d 202, 209 (Tex. Crim. App. 1996)). To grant relief, “the reviewing court must believe that no rational juror would have convicted the applicant in light of the newly discovered evidence.” *Id.* (quoting *Ex parte Elizando*, 947 S.W.2d 202, 207 (Tex. Crim. App. 1996)).

one lawyer may choose to await the verdict before disclosing while another may decide to disclose before the jury comes back. While different states may place different burdens on defendants seeking post-conviction relief on actual innocence grounds, the burden of proof is yet another factor the hypothetical lawyer must consider, as it might be insurmountable in certain contexts. Such questions are contextually driven and should be left up to the lawyer under a permissive exception.

Still other considerations remain. Although the lawyer in the hypothetical might be barred from disclosing such information in a court of law because of evidentiary barriers, the lawyer may reveal the information to the accused's defense counsel, the prosecutor, the governor, or the press. Such disclosures might lead to revelations about the case that otherwise might not have been available, which could prevent wrongful incarceration.¹⁸² For example, the revelation might help a wrongfully convicted person attract public support and attention, prompt the prosecution to re-examine the case, or lead a state governor to consider his unchecked executive power of pardon. It might also lead to a re-investigation that might reveal, for example, DNA evidence, transforming the underlying dispute into a matter of science as opposed to a matter of law.

The hypothetical lawyer also has one last consideration, which is arguably the most important: the effect that disclosure would have on his client, B. Fundamental to the rules on confidentiality are two notions: (1) it is a duty, which is a basic obligation; and (2) it is owed to the client, and not to society in general. Thus, in considering a breach of this duty, the hypothetical lawyer must be cognizant of the client's interests, and what a breach would mean to the client. Reflecting the second highest level of agreement among the pool, the lawyers-to-be recognized the importance of the client's interests and how the client would be affected. One hundred and ninety-seven of the 260 surveyed, or 77%, responded that they might or would disclose client B's confession if they knew he would not be implicated and suffer criminal consequences (62% would; 15% might).¹⁸³ The question is concededly imperfect because it lacks a pecuniary element of consequence; but it is informative. Interestingly, of those who understood the rules (got-it-right) and also said they might disclose regardless of what the rules said, nearly half (49%) changed their minds and said they would disclose if their client, B, would not suffer criminal consequences. Overall, the client's interests add another piece of the puzzle for the lawyer to

182. See e.g., Joy & McMunigal, *supra* note 8, at 47.

183. See *supra* tbl. IV.

consider, and a permissive rule, as opposed to a mandatory one, would allow the lawyer to mull over these considerations.

The multitude of both legal and practical considerations facing the hypothetical lawyer are astounding and cannot be taken into account by the rules of professional responsibility. Discretionary disclosure allows for an analytical and efficient case-by-case determination, resulting in proper service to the court, the client and society.¹⁸⁴ Therefore, by allowing the discretion to remain with the lawyer, the rules better serve the interests of all parties involved and better promote the overall administration of justice—something a one-size-fits-all rule could never accomplish.

CONCLUSION

The study presented herein is by no means meant to be conclusive; it seeks only to uniquely add to the scholarly debate on confidentiality and wrongful incarceration. Thus, overreliance on the study is cautioned against because its methodology is somewhat unscientific.¹⁸⁵ Although this Comment advocates the adoption of a new exception to confidentiality, the relevant data it provides should prove important to both proponents and opponents of confidentiality exceptions alike because, as with most empirical evidence, differing interpretations are possible. The study's methodologies are imperfect and the results are not definitive, but they serve an important function for ABA code drafters: avoiding unsupported theoretical assumptions about attorney-client behavior and its relation to confidentiality's exceptions.

This Comment is not the first to advocate for the inclusion of a wrongful incarceration exception to the ABA's Model Rule 1.6,¹⁸⁶ and it should not be the last. As of June 1997, only Massachusetts' Rules of

184. Hicks, *supra* note 13, at 317 (citing Limor Zer-Gutman, *Revising the Ethical Rules of Attorney-Client Confidentiality Towards a New Discretionary Rule*, 45 LOY. L. REV. 669, 689 (1999)).

185. NOREEN CHANNELS, *SOCIAL SCIENCE METHODS IN THE LEGAL PROCESS* 53–81, 148–81 (Rowan & Allanheld 1985).

186. See Cramton & Knowles, *supra* note 6, at 124; see also Miller, *supra* note 115, at 393 (pointing out that in 1979, the ABA's Kutak Commission prepared a draft proposal which allowed a lawyer to disclose to the extent necessary to prevent wrongful detention (citing Daniel Walfish, *Making Lawyers Responsible for the Truth: The Influence of Marvin Frankel's Proposal for Reforming the Adversary System*, 35 SETON HALL L. REV. 613, 631 n.99 (2005))); see generally Alschuler, *supra* note 6, at 355 (“[W]hen a client has confessed that he is guilty of a crime and has given his lawyer information that he would not have known unless he were guilty in fact, the lawyer ought at least attempt to prevent the imprisonment . . . of another person for this crime.” (citing THE AMERICAN LAWYER'S CODE OF CONDUCT: PUBLIC DISCUSSION DRAFT, JUNE 1980 §1.2 Alternative A) (1980))).

Professional Conduct has adopted an exception for wrongful incarceration.¹⁸⁷ The Innocence Project has reported that there have been 223 post-conviction DNA exonerations in United States history.¹⁸⁸ Another recent study indicates that there were 340 exonerations in our criminal justice system between 1989 and 2003, including 196 that did not involve DNA evidence.¹⁸⁹ The common themes that run through these cases and that plague our criminal justice system are eyewitness misidentifications, corrupt scientists, overzealous police and prosecutors, and inept defense counsel.¹⁹⁰ Whatever the cause, the effect cannot continue to be ignored. The ABA's motto is "Defending Liberty, Pursuing Justice."¹⁹¹ It is the assertion of this Comment that the ABA can best defend liberty by announcing the adoption of a new exception to confidentiality, which is grounded in the fundamental notion that physical liberty outweighs client candor. The recent trend to relax the duty of confidentiality in the face of a greater good is a testament to our partial progress. Only one step remains.

Only one-quarter of lawyers find that legal practice has lived up to their expectations in contributing to the social good, and this lack of contribution is the greatest source of career dissatisfaction.¹⁹² Ethical mandates can frequently conflict with moral initiative, oftentimes making a good person and a good lawyer mutually exclusive creatures. Lawyers who feel compelled to do the right thing deserve more support from the organized bar. A great number of law students enter the profession partly out of a commitment to social justice, only to find out that the connection has been partially lost. Too often, lawyers have "file[ed] a demurrer, rather than an answer, to the charge of immorality."¹⁹³ Lawyers must not be deterred by what has been, but rather, use the profession as a means to rebuild the bond with society and push the system closer to justice as most Americans conceive it. The special obligations to pursue justice and uphold the rule of law necessarily carry with it a greater accountability for the performance of

187. MASS. RULES OF PROF'L CONDUCT R. 1.6(b)(1) ("A lawyer may reveal . . . such information . . . to prevent the wrongful execution or incarceration of another.").

188. Innocence Project Case Profiles, *available at* <http://www.innocenceproject.org/know/> (last visited Nov. 14, 2008).

189. ACHIEVING JUSTICE: FREEING THE INNOCENT, CONVICTING THE GUILTY, REPORT OF THE ABA CRIMINAL JUSTICE SECTION'S AD HOC INNOCENCE COMMITTEE TO ENSURE THE INTEGRITY OF THE CRIMINAL PROCESS (2006).

190. *Id.*

191. *See* ABA Home Page, <http://www.abanet.org>.

192. ABA *Young Lawyers Division Survey: Career Satisfaction* 19 (2000).

193. Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 674 (1978).

the system as a whole. The system, although efficient, is not perfect. The rules which lawyers model their behavior after should reflect this imperfection by allowing lawyers to correct grave misfortunes had by the likes of Alton Logan, who spent more than a quarter century in prison, while an affidavit attesting to his innocence remain locked away in a lawyer's closet.¹⁹⁴

194. See generally Miller, *supra* note 115.

APPENDIX¹⁹⁵

Instructions to read before distributing survey: I have been asked to administer a survey to you to gather law student's perspective and opinion on a matter. I would ask that you take it seriously and think about your answers as the issues it presents may one day effect you as future attorneys. It should not take more than a few minutes. I cannot say anything more about the survey. Your responses will remain completely anonymous unless you choose otherwise.

Instructions for law students: all answers will remain anonymous.

Please answer the questions in the order they appear. Do not read the next question until you have answered the first. Answer to the best of YOUR knowledge.

1) What year of law school are you currently in?

2) Have you taken Professional Responsibility yet?

3) Under current ABA standards regarding lawyer-client confidentiality, please read the following hypothetical and answer the questions that follows.

"A", a stranger to you, has been convicted by a jury of his peers and sentenced to life imprisonment. "B", also a stranger, comes into your law office and you agree to represent him on an unrelated matter. During the course of your representation, B tells you that he committed the crime for which A is currently serving his life sentence. After some probing questions on the matter you reasonably believe that B is telling the truth and he is the one who did the crime. "B" refuses to voluntarily disclose the information.

1) UNDER CURRENT ABA STANDARDS, MAY YOU DISCLOSE THIS INFORMATION?

(Please Check One)

Must Disclose _____ May Disclose _____ Must Not Disclose _____

2) UNDER CURRENT ABA STANDARDS, MAY YOU DISCLOSE THIS INFORMATION IF YOU KNEW THAT "A" WAS BEING ASSAULTED IN PRISON CAUSING HIM SUBSTANTIAL BODILY HARM? (Please Check One)

195. The survey has been recreated exactly as it appeared when utilized by the author.

Must Disclose _____ May Disclose _____ Must Not Disclose _____

3) WOULD YOU DISCLOSE REGARDLESS OF WHAT THE RULES MIGHT SAY?

(Please Check One)

Would Disclose _____ Would not disclose _____ Maybe _____

If you answered maybe, please explain why.

4) WOULD YOU DISCLOSE INFORMATION THAT MIGHT RESULT IN "A's" RELEASE FROM PRISON IF YOU KNEW THAT YOUR CLIENT "B" WOULD NOT BE IMPLICATED AND SUFFER CRIMINAL CONSEQUENCES?

Yes _____ No _____ Maybe _____

If you answered maybe, please explain why.

5) WOULD YOU DISCLOSE THIS INFORMATION IF THE CONSEQUENCES WOULD BE . . .

Disbarment: Yes ___ No ___

Suspension: Yes ___ No ___

Monetary Sanction: Yes ___ No ___

Public Reprimand: Yes ___ No ___

6) DO YOU THINK YOU SHOULD BE ABLE TO DISCLOSE THIS INFORMATION? WHY OR WHY NOT?

Yes _____ No _____ Maybe _____

7) IF ATTORNEYS WERE ALLOWED TO DISCLOSE IN CASES SUCH AS THIS, DO YOU THINK THAT WOULD MAKE PEOPLE LESS WILLING TO USE AN ATTORNEY'S SERVICES?

Yes _____ No _____ Maybe _____

OVERALL RESULTS

Question One: Under current ABA standards, may you disclose this information?

Year of Study	Must Disclose	May Disclose	Must Not Disclose
1 st (115)	30	17	68
.....			
2 nd (91)	6	39	46
.....			
3 rd (54)	2	8	44
.....			
Overall	38	64	145

Question Two: Under the current ABA standards, may you disclose this information if you knew that "A" was being assaulted in prison causing him substantial bodily harm?

Year of Study	Must Disclose	May Disclose	Must Not Disclose
1 st (115)	39	26	50
.....			
2 nd (91)	17	55	19
.....			
3 rd (54)	3	18	33
.....			
Overall	59	99	102

Question Three: Would you disclose regardless of what the rules might say?

Year of Study	Would Disclose	Would Not Disclose	Maybe
1 st (115)	39	47	31
.....			
2 nd (91)	39	29	24
.....			
3 rd (54)	25	12	16
.....			
Overall	103	88	71

Question Four: Would you disclose information that might result in "A"'s release from prison if you knew that your client "B" would not be implicated and suffer criminal consequences?

Year of Study	Yes	No	Maybe
1 st (115)	70	32	12
.....			
2 nd (91)	58	18	13
.....			
3 rd (54)	33	10	11
.....			
Overall	161	60	36

Question Five:

Would you disclose this information if the consequences would be disbarment?

Year of Study	Yes	No
1 st (115)	19	86
.....		
2 nd (91)	20	68
.....		
3 rd (54)	13	36
.....		
Overall	52	200

Would you disclose this information if the consequences would be suspension?

Year of Study	Yes	No
1 st (115)	46	59
.....		
2 nd (91)	37	49
.....		
3 rd (54)	18	30
.....		
Overall	101	138

Would you disclose if the consequences would be monetary sanction?

Year of Study	Yes	No
1st (115)	65	39
.....		
2nd (91)	47	38
.....		
3rd (54)	28	20
.....		
Overall	130	97

Would you disclose if the consequences would be public reprimand?

Year of Study	Yes	No
1st (115)	49	57
.....		
2nd (91)	48	37
.....		
3rd (54)	29	20
.....		
Overall	126	114

Question Six: Do you think you should be able to disclose this information? Why or why not?

Year of Study	Yes	No	Maybe
1 st (115)	65	26	17
.....			
2 nd (91)	60	19	13
.....			
3 rd (54)	33	11	6
.....			
Overall	158	56	36

Question Seven: If attorneys were allowed to disclose in cases such as these, do you think that would make people less willing to use attorneys services?

Year of Study	Yes	No	Maybe
1 st (115)	59	19	37
.....			
2 nd (91)	45	26	17
.....			
3 rd (54)	17	16	16
.....			
Overall	121	61	70



**THE STATE BAR
OF CALIFORNIA**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

**COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT**

TELEPHONE: (415) 538-2161

May 6, 2010

Harry B. Sondheim, Chair
Commission for the Revision of the
Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Proposed Rule 1.6

Dear Mr. Sondheim:

The State Bar of California's Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California, pursuant to the request of the Board Committee on Regulation, Admissions & Discipline Oversight (RAD) for public comment.

COPRAC has reviewed the provisions of proposed Rule 1.6 - Confidentiality of Information. COPRAC supports the adoption of proposed Rule 1.6 and the Comments to the Rule.

Thank you for your consideration of our comments.

Very truly yours,

A handwritten signature in cursive script that reads "Carole J. Buckner".

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

May 6, 2010

Ms. Audrey Hollins
Office of Professional Competence, Planning and Development
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Re:

RULE	TITLE
Rule 1.0	Purpose and Scope of the Rules of Professional Conduct
Rule 1.0.1	Terminology *BATCH 6*
Rule 1.1	Competence
Rule 1.2	Scope of Representation and Allocation of Authority Between Client and Lawyer
Rule 1.4	Communication
Rule 1.4.1	Disclosure of Professional Liability Insurance *BATCH 6*
Rule 1.5	Fee for Legal Services
Rule 1.5.1	Financial Arrangements Among Lawyers
Rule 1.6	Confidential Information of a Client
Rule 1.7	Conflict of Interests: Current Clients
Rule 1.8.1	Business Transactions with a Client and Acquiring Interests Adverse to the Client
Rule 1.8.2	Use of a Current Client's Confidential Information
Rule 1.8.3	Gifts from Client
Rule 1.8.5	Payment of Personal or Business Expenses Incurred by or for a Client
Rule 1.8.6	Payments Not From Client
Rule 1.8.7	Aggregate Settlements
Rule 1.8.8	Limiting Liability to Client
Rule 1.8.9	Purchasing Property at a Foreclosure Sale or a Sale Subject to Judicial Review
Rule 1.8.10	Sexual Relations with Client
Rule 1.8.11	Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9)
Rule 1.9	Duties to Former Clients
Rule 1.11	Special Conflicts for Former and Current Government Officers and Employees *BATCH 6*
Rule 1.12	Former Judge, Arbitrator, Mediator or Other Third-Party Neutral
Rule 1.13	Organization as Client
Rule 1.14	Client with Diminished Capacity
Rule 1.15	Handling Funds and Property of Clients and Other Persons
Rule 1.16	Declining or Terminating Representation
Rule 1.17	Purchase and Sale of a Law Practice *BATCH 6*
Rule 1.18	Duties to Prospective Clients *BATCH 6*
Rule 2.1	Advisor
Rule 2.4	Lawyer as a Third-Party Neutral
Rule 2.4.1	Lawyer as a Temporary Judge
Rule 3.1	Meritorious Claims
Rule 3.3	Candor Toward the Tribunal
Rule 3.4	Fairness to Opposing Party and Counsel
Rule 3.5	Impartiality and Decorum of the Tribunal
Rule 3.6	Trial Publicity
Rule 3.7	Lawyer As A Witness

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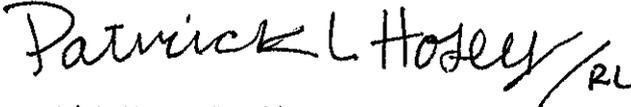
Rule 3.8	Special Responsibilities of a Prosecutor
Rule 3.9	Advocate in Non-adjudicative Proceedings *BATCH 6*
Rule 3.10	Threatening Criminal, Administrative, or Disciplinary Charges
Rule 4.1	Truthfulness in Statements to Others *BATCH 6*
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Rule 4.3	Dealing with Unrepresented Person
Rule 4.4	Respect for Rights of Third Persons *BATCH 6*
Rule 5.1	Responsibilities of Partners, Managers, and Supervisory Lawyers
Rule 5.2	Responsibilities of a Subordinate Lawyer
Rule 5.3	Responsibilities Regarding Nonlawyer Assistants
Rule 5.3.1	Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member
Rule 5.4	Duty to Avoid Interference with a Lawyer's Professional Independence
Rule 5.5	Unauthorized Practice of Law; Multijurisdictional Practice
Rule 5.6	Restrictions on Right to Practice
Rule 6.1	Voluntary Pro Bono Publico Service *BATCH 6*
Rule 6.2	Accepting Appointments *BATCH 6*
Rule 6.3	Legal Services Organizations
Rule 6.4	Law Reform Activities
Rule 6.5	Limited Legal Services Programs *BATCH 6*
Rule 7.1	Communications Concerning the Availability of Legal Services
Rule 7.2	Advertising
Rule 7.3	Direct Contact with Prospective Clients
Rule 7.4	Communication of Fields of Practice and Specialization
Rule 7.5	Firm Names and Letterheads
Rule 8.1	False Statement Regarding Application for Admission to Practice
Rule 8.1.1	Compliance with Conditions of Discipline and Agreements in Lieu of Discipline
Rule 8.2	Judicial and Legal Officials; Lawyer as a Candidate or Applicant for Judicial Office *BATCH 6*
Rule 8.3	Reporting Professional Misconduct
Rule 8.4	Misconduct
Rule 8.4.1	Prohibited Discrimination in Law Practice Management and Operation
Rule 8.5	Disciplinary Authority; Choice of Law

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,



Patrick L. Hosey, President
San Diego County Bar Association



**SAN DIEGO COUNTY
BAR ASSOCIATION**

November 11, 2009

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Audrey Hollins
Office of Professional Competence,
Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

Re: Comments to Proposed Amendments to the Rules of Professional Conduct of
The State Bar of California (Batch 5)

Dear Ms. Hollins:

On behalf of the San Diego County Bar Association (SDCBA), I respectfully submit
the attached comments to Batch 5 of the Proposed Amendments to the Rules of
Professional Conduct. The comments were proposed by the SDCBA's Legal Ethics
Committee, and have been approved by our Board of Directors.

Sincerely,

Jerrilyn T. Malana, President
San Diego County Bar Association

Enclosures

cc: David F. McGowan, Co-Chair, SDCBA Legal Ethics Committee
Edward J. McIntyre, Co-Chair, SDCBA Legal Ethics Committee

SDCBA Legal Ethics Committee
Subcommittee for Responses to Requests for Public Comment
Coversheet to Recommendations on State Bar of California Rules Revision Commission
Batch 5

- Rule 1.2 Scope of Representation [N/A]
APPROVE
- Rule 1.6 Confidentiality of Information [3-100, B&P 6068(e)]
APPROVE WITH MODIFICATIONS – see comments**
- Rule 1.8.2 Use of Confidential Information [3-100, 3-310]
APPROVE
- Rule 1.8.13 Imputation of Personal Conflicts [N/A]
APPROVE
- Rule 1.9 Duties to Former Clients [3-310]
APPROVE
- Rule 1.10 Imputation of Conflicts: General Rule [N/A]
APPROVE WITH MODIFICATIONS (to mimic ABA Model Rule 1.10)
- Rule 1.12 Former Judge, Arbitrator, Mediator [N/A]
APPROVE WITH MODIFICATIONS – see comments
- Rule 1.14 Client with Diminished Capacity [N/A]
APPROVE
- Rule 2.1 Advisor [N/A]
APPROVE
- Rule 3.8 Responsibilities of a Prosecutor [5-110]
NO POSITION TAKEN – see comments
- Rule 8.5 Choice of Law [1-100(D)] SIMMONS
APPROVE

SDCBA Legal Ethics Committee
Comments to Revisions to Rules of Professional Conduct (RPC) Batch 5
SDCBA Legal Ethics Committee Deadline October 8, 2009
Subcommittee Deadline October 26, 2009
State Bar Comment Deadline November 13, 2009

LEC Rule Volunteer Name(s): [sic]

Old Rule No./Title: 3-100, B&P § 6068(e)

Proposed New Rule No./ Title: 1.6

QUESTIONS (please use separate sheets of paper as necessary):

(1) Is the **policy** behind the new rule correct? If “yes,” please proceed to the next question. If “no,” please elaborate, and proceed to Question #4.

Yes [– in part] No [– in part]

Given Cal. Bus. & Prof. Code § 6068(e), the Rules Revision Commission very smartly departed from Model Rule 1.6 and adhered more closely to California Rule 3-100 and § 6068(e)’s high level of respect for the protection of client confidences.

The only questionable policy concerns are raised by proposed Rule 1.6(a) and 1.6(b)(3). If the Committee decides against adoption of Rule 1.14(b), then Rule 1.6(b)(5) also should be addressed. Rule 1.6(b)(5) refers lawyers to Rule 1.14(b), and allows disclosures to protect the interests of a client under the limited circumstances identified in Rule 1.14(b). Although Rule 1.6(b)(5) adds a significant exception to the duty to keep client confidences, the policy behind its addition is correct in light of proposed Rule 1.14(b), which allows a lawyer to act on behalf of a client with significantly diminished capacity.

Rule 1.6(a)

The Introduction to Proposed Rule 1.6 notes that the Commission is substantially divided regarding the addition to Rule 1.6(a) appearing in **bold** below:

A lawyer shall not reveal information protected from disclosure by Business and Professions Code section 6068(e)(1) unless the client gives informed consent or the disclosure is permitted by paragraph (b). **The information protected from disclosure by section 6068(e)(1) is referred to as “confidential information relating to the representation” in this Rule.**

By adding the sentence in bold, the majority of the Commission attempted to harmonize § 6068(e)(2) with § 6068(e)(1). However, this harmonization is unnecessary given the clear statutory language of § 6068(e), and the result of the Commission’s attempt at harmonization is to weaken § 6068(e)’s protection for client confidences overall.

Section 6068(e)(1) protects all client confidences, and not just those “related to the representation.” Section 6068(e)(2) permits the disclosure of confidences “related to the representation” in a very narrow instance, i.e., to prevent a crime that will result in death or substantial bodily harm. In other words, under § 6068(e)(1), an attorney has a duty to preserve all client confidences, regardless of whether they are related to the representation. Under § 6068(e)(2), an attorney may reveal only those confidences “related to the representation” in a very narrow instance.

The Commission’s proposal to define information protected from disclosure by § 6068(e)(1) as “confidential information relating to the representation” could be read to weaken California’s traditional protection of client confidences. Given its express wording, the second sentence of proposed Rule 1.6(a) is confusing at best, because it could arguably allow attorneys to reveal confidences not related to the representation. It interprets only confidences “related to the representation” as protected by § 6068(e)(1). The proposed sentence also is confusing as to whether Rule 1.6(b)(2) (exception for attorney to secure legal advice) and 1.6(b)(5) (exception in Rule 1.14(b) circumstances) would apply only when the confidential information of a client was “related to the representation.” The wording proposed by the **minority** is preferable and clearer.

Minority Proposal for Rule 1.6(a), (b)(1).

- (a) A lawyer shall not reveal information protected from disclosure by Business and Professions Code section 6068(e)(1) unless the client gives informed consent or the disclosure is permitted by paragraph (b). **The information protected from disclosure by section 6068(e)(1) is referred to as “confidential information” in this Rule.**

- (b) A lawyer may, but is not required to, reveal confidential information of a client to the extent that the lawyer reasonably believes the disclosure is necessary:
 - (1) **when the information relates to the representation of a client,** to prevent a criminal act that the lawyer reasonably believes is likely to result in death of, or substantial bodily harm to, an individual, as provided in paragraph (c);

Rule 1.6(b)(3)

Rule 1.6(b)(3) provides an exception to the duty to keep client confidences when a duty relating to the attorney-client relationship has been breached:

to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client relating to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship;

This paragraph, although intended by the Commission to track Cal. Evid. Code § 958, in fact goes far beyond the statutory exception to the attorney-client privilege in California. The exception set forth in § 958 applies only when a court determines that the exception applies. By contrast, proposed Rule 1.6(b)(3) would allow each individual attorney to make that determination. As a practical matter, it seems impossible for any attorney involved in such a client conflict to make a truly impartial determination of whether the Rule 1.6(b)(3) exception applies. This determination is better left to an impartial court. *See* Evid. Code § 958. California's respect for client confidences should not be lessened by the inclusion of Rule 1.6(b)(3).

Nonetheless, in the interest of uniformity, the recommendation is to replace the proposed paragraph with the provision of the ABA Model Rules, set forth in 1.6(b)(5).

(2) Is the new rule **practical** for attorneys to follow? If "yes," please proceed to the next question. If "no," please elaborate, and then proceed to the Conclusions section.
Yes [] No []

(3) Is the new rule **worded correctly and clearly**? If "yes, please proceed to the Conclusions section. If "no," please elaborate, and then proceed to the Conclusions section.
Yes [– in part] No [– in part]

Yes, with the exception of sub-part 1.6(a) and (b)(3), as stated above.

(4) Is the policy behind the existing rule correct? If "yes," please proceed to the Conclusions section. If "no," please elaborate, and then proceed to the Conclusions section.
Yes [] No []

(5) Do you have any other comments about the proposed rule? If so, please elaborate here:

CONCLUSIONS (pick one):

[] We approve the new rule in its entirety.

[] We approve the new rule with modifications.* Modify 1.6(a) and 1.6(b)(3) as indicated above.

[] We disapprove the new rule and support keeping the old rule.

We disapprove the new rule and recommend a rule entirely different from either the old or new rule.*

We abstain from voting on the new rule but submit comments for your consideration.*

* If you select one of the * options, please make sure your concerns are included in your comments above in response to Questions 1-5, or set the forth on a separate sheet of paper.

May 16, 2010

2715 Alcatraz Ave.
Berkeley, CA 94705

Ms. Audrey Hollins
Office of Professional Competence, Planning and Development
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Comments on proposed new or amended rules of Professional Conduct:
adjustments needed for non-litigators and government attorneys

Dear Ms. Hollins:

I appreciate this opportunity to comment on the draft new or amended rules of Professional Conduct under consideration by the Special Commission for the Revision of the Rules of Professional Conduct. I have been a member of the California bar for 28 years, much of that time as a non-litigating, in-house attorney for a non-regulatory governmental agency, and I comment from that perspective.

The proposed rules, understandably, are meant to apply to attorneys in California in all types of public and private employment. In a number of places, the proposed rules do recognize unique considerations applicable to attorneys engaged in differing types of work. But I believe that several proposed rules could be strengthened by specifying the particular manner in which they are meant to affect public, in-house attorneys, or by the addition of clarifying, official comments. I have described some potential problems below, and have made some suggestions.

- ~~1. Proposed Rule 1.7 (Conflict of Interest: Current Clients). The proposed Rule should be modified slightly to more fully recognize additional types of potential conflicts faced by some public sector attorneys.~~

~~Governmental attorneys employed by one public agency, are sometimes asked or expected by their employer to provide advice, often transactional or other non-litigation advice, on a long-term, continuing basis to one or more other, especially small, agencies that lack or cannot afford their own counsel— a city and a port district or a redevelopment agency, a county and a resource conservation district, two or more different boards that may have overlapping subject or geographical jurisdiction. In these situations, potential or actual conflicts of interest may arise at any time, at the very least risking a material limitation on the scope of the representation to one entity or the other. The~~

Ms. Audrey Hollins
Comments on Draft Rules of Professional Conduct

~~conflict issues are not always foreseeable before they arise or before one entity or the other has confided in the attorney. Under the Rule, an attorney may sometimes proceed, but only upon obtaining the informed consent of both entities. Yet an “informed” consent by the two entities in advance, pertaining to a contemplated, general course of conduct for the indefinite future, is almost a contradiction, and difficult to invent.~~

~~The first question in these situations is, who is the attorney’s client? The employer public agency only, or also the other public entity to which the employer asks the attorney to provide services? Who may rely or can reasonably expect to rely on the advice? Who may confide and rely on the confidentiality of the communication?~~

~~These issues arise in at least two ways in non-litigation contexts: first, in direct relations between the two entities—for example a contract between the two entities that requires legal review. Second, and more usually, with respect to legal advice related to intended agency positions on substantive governmental issues, competition for budgets, or competing desires of the two potential “masters,” each of which may expect undivided loyalty. Further complicating the matter is the fact that most public agencies must act “on the record”; a complete discussion and informed consent might well require revealing confidential information at a public meeting, thus posing an awkward problem, as well as a paradox, possibly to the detriment of the two entities.~~

~~While the draft official comments do mention conflicting instructions and inconsistent interests (see draft official comment [29], for example), they do not adequately address potential conflicts that can arise at any time during the long-term assignment of a public attorney to also provide advice to a second, non-employing entity. As a practical matter, to allow the provision of adequate legal services to small public agencies, I suggest a limited exception to the client-consent requirement, allowing the public attorney to inform the two agencies in writing generally about the types of conflicts that could arise. The Rule could also specify that it is not meant to apply to non-litigation representation of public agencies.~~

2. Proposed Rule 1.6 (Confidential Information of a Client). The proposed Rules should be augmented to allow a limited public attorney right to breach confidentiality in the public interest.

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Not all governmental agencies in California are subject to “whistleblower” statutes, and even where these statutes do apply to public agency employees generally, the State Bar has declined, so far, to sanction a whistleblower exception to attorney confidentiality requirements. In the public interest, the Rule should be augmented to allow public attorneys to reveal confidential information as a matter of conscience where the attorney concludes that there are no other reasonable, effective means of protecting the public interest.

- ~~3. Proposed Rule 1.16 (Declining Or Terminating Representation). The proposed Rule should be clarified as to the meaning of the term “a representation.”~~

~~In-house governmental attorneys are sometimes pushed, by their own entities or by “control agencies” into rendering or withholding advice in substance contrary to their professional judgment, or aiding an activity of questionable propriety in a particular matter, or otherwise acting in an inappropriate manner. These circumstances can arise with respect to transactional as well as with litigation attorney positions. (See Rule 1.16(b)(1), in relevant part: “making a demand in a non-litigation matter, that is not warranted under existing law and cannot be supported by good faith argument.”) The Rule should make clear that the in-house governmental attorney may or must (depending on the circumstances) withdraw from “a representation” in the particular matter, but would not be expected (except under the most extreme circumstances) to terminate the attorney’s full-time career employment with his or her agency. In other words, the term “a representation” should be clarified to refer, in most cases, to a particular matter, and not to the overall relationship between an in-house public counsel and his or her employer.~~

- ~~4. Proposed Rule 3.1 (Meritorious Claims and Contentions). The proposed Rule should be clarified as to the meaning of the term “proceeding.”~~

~~Under subdivision (a), “[a] lawyer shall not bring, continue or defend a proceeding. . . unless there is a basis in law and fact for doing so that is not frivolous. . . .” Official comment [4] states that “[t]his Rule applies to proceedings of all kinds, including appellate and writ proceedings.” But neither this Rule nor (draft) Rule 1.0.1 (Terminology) defines “proceeding.” (Compare Rule 3.3 (Candor Toward the Tribunal), pertaining to an “adjudicative proceeding”; and Rule 3.9 (Advocate in Nonadjudicative Proceedings) [BATCH 6]: “A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding. . . .”~~

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~~(Emphasis added.) Rule 3.1 should be clarified to indicate the extent to which it does or does not apply to arbitrations, mediations, and non-adjudicatory hearings and other matters (awards of grants by public bodies, for example; and processes by which public agencies select contractors and enter into agreement with them). Perhaps this can be accomplished through better integration of cross-references with proposed Rule 3.9 (Advocate in Nonadjudicative Proceedings) [BATCH 6], and rule 4.1 (Truthfulness in Statements to Others).~~

- ~~5. Proposed Rule 4.2 (Communication With a Person Represented By Counsel). The proposed Rule should clarify which public employees may be contacted by an outside attorney without permission of agency counsel.~~

~~Existing Rule 2-100 (Communication With a Represented Party) provides in subdivision (A) that a member may not “communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter. . . .” Subdivision (C)(1) provides an exception for “Communications with a public officer, board, committee, or body[.]” Perhaps because of the ambiguities inherent in the existing rule, it is often honored in the breach; outside lawyers frequently contact general public agency staff members regarding matters on which the agency is represented, without permission of agency counsel.~~

~~Proposed Rule 4.2 (Communication With a Person Represented By Counsel) provides in subdivision (a) that “a lawyer shall not communicate directly or indirectly about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter. . . .” Subdivision (c) states that the rule “shall not prohibit: (1) Communications with a public official, board, committee or body[.]” Unlike the existing rule, which does not define “public officer,” the proposed rule then defines “public official” in subdivision (g) as a “public officer of the United States government, or of a state, or of a county, township, city, political subdivision, or other governmental organization, with the equivalent authority and responsibilities as the non-public organizational constituents described in paragraph (b)(1).” Subdivision (b), in turn, identifies a “person” as: “(1) A current officer, director, partner, or managing agent of a corporation, partnership, association, or other represented organization[.]”~~

~~The proposed rule is more clear than the existing rule that it applies to non-litigation situations as well as to litigation situations, and that not all non-~~

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~~attorney governmental employees may be contacted by an outside lawyer without permission. However, the rule is still not adequately clear as to which governmental employees an outside lawyer may contact directly without violating the rule. "Officer" and "director" are reasonably clear. But "partner" and "managing agent" are not clear in the context of a governmental agency. "Partner" would not seem to apply at all. As for "managing agent," official comment [12] states that the term means "an employee, member, agent or other constituent of a represented organization with general powers to exercise discretion and judgment with respect to the matter on behalf of the organization. A constituent's official title or rank within an organization is not necessarily determinative of his or her authority."~~

~~Public agencies generally have supervisors, and sometimes a separate class of "managers" or "management employees." Lower level "line" staff often exercise at least some "discretion and judgment" with respect to their work, for example, the initial proposed content of a contract under negotiation. So, does the exception allowing contact by an outside attorney apply to all management employees? To supervisors? To all staff who exercise some judgment with respect to a particular matter? Public agencies and attorneys representing parties who deal with them need more clarity about whom they may contact without permission of agency counsel. A better approach would be to define "public official" in subdivision (g) with more detail, and independent of the cross-reference to business entities in subdivision (b). Outside lawyers should need to obtain permission of agency counsel before discussing most legal matters with non-attorney public agency staff.~~

- ~~6. Rule 6.1 (Voluntary Pro Bono Publico Service) [BATCH 6]. While attorneys should be encouraged to provide pro bono services, Rule 6.1 should not be included in the Rules of Professional Conduct, for several reasons.~~

~~Our society has many unmet needs, legal and otherwise. Whether and how these needs are met is a question of economics, the study of production and distribution of goods and services; and, primarily, politics. The Rule takes a particular political position, perhaps inadvertently, and is subject to political controversy and attack from both left and right. Should social production of wealth be distributed in a different manner, through revisions to the tax system and otherwise? Is an attempt to encourage or force attorneys to provide free services a form of indentured servitude? The Bar should avoid entangling itself in these disputes.~~

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~~Second, the Rule would appear to apply equally to very differently situated attorneys, including those who work for large private firms. After several decades of work, attorneys who have chosen to devote their careers to public service or nonprofit organizations often earn less than first-year associates at these private interest firms. There is something untoward about purporting to equally require affluent attorneys in large, private firms and less affluent attorneys engaged full time in public service to donate time to pro bono work, or, alternatively, donate money as part of "professional responsibility."~~

~~Third, as a practical matter, many public sector attorneys have donated many hours to their work, working during mandatory furlough days, weekends, and otherwise. They also, typically, do not receive time off to perform pro bono work, unlike many in private practice. Further, the State of California does not pay its attorneys for continuing legal education unrelated to an attorney's work, so that a state attorney seeking to perform pro bono work in another field would need to find additional time for training and funds to pay for it. The time and money required for this and the pro bono work itself are a far greater burden to less-affluent, governmental attorneys.~~

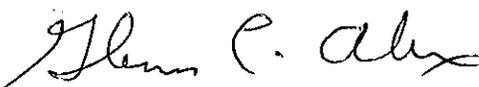
~~Finally, the Rule is largely written for litigation attorneys; non-litigation attorneys are not as well placed to provide direct representation to the indigent, at least not without substantial additional training to ensure competence.~~

~~The Bar should conclude, as it has in other contexts within the Rules that this subject is beyond the scope of the Rules. Instead of including Rule 6.1, the Bar should periodically send emails to all attorneys recommending pro bono work and listing numerous possibilities with contact information.~~

- ~~7. Proposed Rule 6.5 (Limited Legal Services Programs) [BATCH 6].
Subdivisions (a)(2) and (b), and official comments [1], [3], [4], and [5] refer to Rule 1.10, which does not seem to be included in the draft Rules.~~

Thank you again for the opportunity to comment on the draft Rules.

Yours truly,



Glenn C. Alex



**THE STATE BAR OF
CALIFORNIA**

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June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning &
Development
State Bar of California
180 Howard Street
San Francisco, California 94105

re: Comments of the Office of the Chief Trial Counsel to Proposed
Amendments to the Rules of Professional Conduct

Dear Ms. Hollins:

Preliminarily, the Office of the Chief Trial Counsel (OCTC) would like to thank Harry B. Sondheim, Chair, Mark L. Tuft and Paul W. Vapnek, Co-Vice-Chairs, and the members of the Commission for the Revision of the Rules of Professional Conduct, for the opportunity to submit comments to the proposed amendments to the Rules of Professional Conduct, as released for public comment by the Board of Governors. We appreciate the Commission's considerable efforts in crafting rules of conduct for California attorneys relevant to our contemporary legal environment. While we concur with many of the Commission's recommendations, we raise some points of disagreement. Our disagreement is offered in the spirit of aiding in the adoption of rules which can be practically and fairly understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,¹ we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.² We hope you find our thoughts helpful.

SUMMARY

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

¹ OCTC refers the Commission to its previous comments and recommendations.

² We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
- One of the Comments invades OCTC's prosecutory discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- Some of the rules attempt to define and limit provisions adopted by the Legislature in the State Bar Act (i.e. Rule 1.6's defining the scope of confidentiality in Business & Professions Code section 6068(e)); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9, 4.4 and 8.4).³

GENERAL COMMENTS

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

The Rules and Comments are not meant to be annotated rules, a treatise on the rules, a series of ethics opinions, a law review article, or musings and discussions about the rules and best practices. There are other more appropriate vehicles for such discussions and expositions.

Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.⁴

In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.⁵ The 1974 rules were 13 pages; contained 25 rules; and 6 comments.⁶ The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

³ Unless stated otherwise, all future references to section are to a section of the Business & Professions Code; all references to rule are to the current Rules of Professional Conduct; all references to proposed rule is to the Commission's proposed Rule of Professional Conduct; and all references to the Model Rules are to the ABA's current Model Rules of Professional Conduct.

⁴ See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

⁵ The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

⁶ The 1974 rules had 6 footnotes (*), four simply reference another rule and two contain a short substantive discussion.

Letter from OCTC
To Randall Difuntorum
June 15, 2010

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.⁷

⁷ There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

Rule 1.6. Confidentiality of Information.

1. OCTC remains concerned that this proposed rule might create confusion and enforcement problems as Business & Professions Code section 6068(e) already addresses the issues raised in proposed rule 1.6. (We have already expressed in this letter our concern with the definition in rule 1.0 (e)(2).) If California is to have a rule to cover this issue, OCTC suggests that paragraph (a) use the same terms as Business & Professions Code section 6068(e)(1) to ensure that the rule is not interpreted to change the duty of an attorney to preserve the confidences and secrets of a client as provided in Business & Professions Code section 6068(e). For the same reason, OCTC believes that paragraph (a) should refer to all of Business & Professions Code section 6068(e) including (e)(2)'s statement when an attorney may reveal the information ordinarily protected under section (e)(1).
2. OCTC is further concerned that subparagraph (b)(1) does not address what happens if any further changes are adopted to Business & Professions Code section 6068(e).
3. OCTC still agrees with the concerns of the Minority of the Commission that paragraph (b)(3) permits disclosure to establish a claim or defense on behalf of the lawyer without a court determination. We believe a court, not an attorney, should make this determination. This will also aid in the enforcement of violations of this paragraph.
4. OCTC continues to disagree with the removal from subparagraph (b)(4) of the term "other law" and agrees with the Model Rules that this term should be included in this paragraph. OCTC does not believe that the term "other law" is too vague or imprecise. It simply provides that if there is other law preventing or permitting disclosure, it will be complied with. It should be followed in California's rule. In fact, other proposed rules use similar terms. (See e.g. proposed rule 1.11 (a) [Except as law may otherwise expressly permit].) There are statutes that require certain disclosures and the rules should not encourage disobedience of those statutes.

OCTC agrees that the term "court order" should be in this paragraph. An attorney should not be disobeying a court order. Such disobedience violates Business & Professions Code section 6103, brings disrespect to the court, and demeans the profession. It mocks the court's authority and sends a message that juries (and others) may also disobey the judge's directives and ignore the law. (See *People v. Chong* (1999) 76 Cal.App.4th 232, 244.) The Supreme Court has stated that an attorney's disobedience of a court order is one of the most serious violations of professional duties. (See *Barnum v. State Bar* (1990) 52 Cal.3d 104, 112.) No rule should permit or encourage disobedience of a court order. There should not be an exception to obeying court orders for an attorney's claim of attorney-client confidences. The court, not the lawyer, should be the final arbiter of what must be disclosed. (The lawyer has his or her appellate options.) Further, this type of behavior is subject to serious abuse by attorneys who simply use this as an excuse to violate court orders and frustrate the proper administration of justice, no matter how frivolous their assertions. A court, not an attorney, should decide when an attorney can refuse to disclose matters. OCTC has recently experienced cases in State Bar Court where attorneys attempted to disrupt, delay, and frustrate the proceedings by refusing to obey court orders to answer questions by making frivolous claims of attorney-client confidences. Unless an attorney obtains an immediate stay or a writ is granted he or she should not be allowed to disobey a court order. The minority view would result in chaos in and disrespect for the court and the law.

5. As to paragraph (b)(5), OCTC refers to its discussion of proposed rule 1.14(b).
6. OCTC has concerns about subparagraph (e). It appears subparagraph (e) is an attempt to carry forward the concept in Business & Professions Code section 6068(e)(2) that an attorney may but is not required to reveal some information. The problem is that proposed subparagraph (e) is too broad. It covers all of proposed subparagraph (b), but that would include that an attorney could not be disciplined for disobeying a law or court order to reveal the information. (See our discussion of paragraph (b)(4).) Although the Commission states this paragraph is just what current rule 3-100(E) states, proposed subparagraph (b)'s language is broader than current rule 3-100(B). Proposed subparagraph (e), unlike current rule 3-100, includes allowing an attorney to refuse to reveal confidences required by a court order, apparently even after all the appeals and writs have been completed. This paragraph needs clarification and it should be a violation to disobey a court order or law.
7. The Comments are more appropriate for treatises, law review articles, and ethics opinions. We are particularly concerned that the first sentence of Comment 1 implies that OCTC can only discipline under this rule and not under Business & Professions Code section 6068(e). If that is what is meant, OCTC strongly disagrees. It should also be noted that by creating a rule that covers the subject of section 6068(e) the Commission may be eliminating the good faith defense that might exist to a violation of section 6068(e). As already discussed, the good faith defense generally applies to the Business & Professions Code and not to the Rules of Professional Conduct.
8. OCTC finds the first sentence of Comment 3 too narrow and may exclude information protected by section 6068(e). OCTC would strike that first sentence and only keep the second sentence.
9. OCTC finds Comment 9 confusing. It states that the overriding value of life permits disclosure otherwise protected by Business & Professions Code section 6068(e)(1), but Business & Professions Code section 6068 (e)(2) already provides for this. More importantly, OCTC does not think the rules should or can be adding Comments that are explaining a statute passed by the Legislature. OCTC recommends that this Comment be stricken.
10. Comment 15 is overly narrow and seems to imply that the rule of limited disclosure applies only to prevent criminal conduct. If that is what is meant, OCTC strongly disagrees and believes that such an interpretation is contrary to established law. OCTC would strike the Comment or significantly modify it. Comment 19 could result in a claim that, in an investigation commenced under the State Bar's own authority and not the result of a client's complaint, the respondent does not have to provide certain information. It does not explain what it means by cooperation. What if OCTC subpoenas the client or the client consents?
11. OCTC is concerned that Comments 21 and 23 appear to allow a lawyer to disobey a court order to disclose information. As previously discussed, OCTC disagrees with that this position.



UNIVERSITY OF CALIFORNIA
HASTINGS COLLEGE OF THE LAW

FACULTY

June 15, 2010

Lauren McCurdy
State Bar of California
Office of Professional Competence
180 Howard Street
San Francisco, CA 94105
BY EMAIL ONLY

Dear Lauren:

Enclosed please find a letter co-signed by 29 California ethics professors – three drafters, me, Prof. Geoffrey Hazard of Hastings, and Prof. Deborah Rhode of Stanford, and 26 others named and identified in the letter.

This letter addresses over 20 specific issues raised by the rules of professional conduct as proposed by the Commission. Given the number of issues raised, we think the letter is as succinct as possible. While some issues are more important than others, each issue raised had the support of each and every signatory, with the exception of one co-signer as to one issue, as noted.

The co-signers are identified only by name, title, and law school affiliation. Each teaches in the area of Legal Ethics and/or Professional Responsibility, though the names of programs differ by law school. (For example, Loyola's program is called "Ethical Lawyering.")

A bit more about the demographics of the co-signers:

- One is a current law school dean, and two are professors at institutions for which they were formerly deans (Profs. Chemerinsky, Keane, and Perschbacher)
- Six (including Profs. Hazard and Rhode) hold endowed chairs at their law schools.
- Three have founded ethics centers (Prof. Robert Cochran as well as Profs. Rhode and Zitrin).
- Many have written multiple books on the legal profession, including, as it specifically relates to California, two of the authors of California Legal Ethics, (West/Thomson) (Profs. Wydick and Perschbacher), and two (Prof. Langford and I) whose annual rules book (Lexis/Nexis) has since 1995 contained a substantive comparison of the California and ABA Rules.
- One, Peter Keane, is a former member of the Board of Governors and president of the Bar Association of San Francisco.
- At least half of the co-signers have been actively involved in the practice of law as well as holding their current academic appointments.

Please include this cover letter along with the enclosed letter in the package going to the Board of Governors. Also, I would like to testify at the hearing on these rules – either before the relevant committee or the full board or both – to be available to explain any of the issues raised in the letter. I would appreciate if you would pass this request on to the Board.

Thank you, and best regards,

Sincerely,

A handwritten signature in cursive script that reads "Richard Zitrin / by son".

Richard Zitrin

rz/mcm
enc.

cc: Drafters and co-signers
Randall Difuntorum



UNIVERSITY OF CALIFORNIA
HASTINGS COLLEGE OF THE LAW

FACULTY

June 15, 2010

To the Members of the Board of Governors
State Bar of California
c/o Lauren McCurdy
Office of Professional Competence
180 Howard Street
San Francisco, CA 94105

Re: Public comment on proposed rules of professional conduct

Dear President Miller and Members of the Board:

Please consider this comment on behalf of each of the undersigned, each a teacher of Legal Ethics or Professional Responsibility at a law school in California. We are providing you with identification for each professor, including law school affiliation and other significant identifying information. The information is for identification purposes only.

Preliminarily, we note the following: First, we believe that the ethical rules that govern the conduct of lawyers in California are extraordinarily important to the daily practice of law. Second, we also believe that, taken as a whole, the proposed rules fall short in their charge, first and foremost, to protect clients and the public.¹ Any variation from this path that puts the profession's self-interest or self-protection ahead of the needs of clients or the public must fail. Not only would such a course be a disservice to the consumers of legal services, but it would likely result in damaging the integrity of, respect for, and confidence in the profession that the rules are expressly designed to foster.

Third, the black-letter rules must serve not only as rules of discipline for those lawyers accused of offenses, but as guidance for the overwhelming majority of responsible and ethical lawyers who look to the rules for benchmarks that govern their behavior. Most of California's lawyers do not have the level of sophistication that members of the Rules Commission or this Board of Governors have developed. Thus, the State Bar must make it clear that these rules shall serve as guideposts to the average practitioner.

Fourth, we note the charge from our state's Supreme Court to bring California rules into closer alignment with the ABA Model Rules. There are some instances in which the California rules are superior, but more instances – particularly in the Commission's omission of certain rules – in which California would be wise to adopt an ABA-style rule.

A few additional preliminary notes:

¹ The laudable language in current proposed rule 1.0(a) says the following: "The purposes of the following Rules are: (1) To protect the public; (2) To protect the interests of clients; (3) To protect the integrity of the legal system and to promote the administration of justice; and (4) To promote respect for, and confidence in, the legal profession."

1. We note that this letter is not all-inclusive. Rather, it is an attempt to articulate some of the most important and more global concerns that we share about the rules draft submitted to the Board. There are a number of issues left unaddressed. In particular, we have generally not commented on specific paragraphs of the Comment sections of the rules, though these sections can be extremely important.

2. Issues not addressed include some that have received a great deal of attention, such as flat fees under Rule 1.5 and lawyers, including prosecutors, contacting represented parties. These issues either have been amply deconstructed elsewhere or are matters on which we did not reach consensus. Still other issues would unduly lengthen and diffuse the points made here.

3. While the signatories have all concurred in the below recommendations, some would have expressed their agreement in somewhat different language than the drafters of this letter have used. Moreover, we refer to but – due to the desire to avoid adding to this letter’s already considerable length – have not always cited to the Commission’s written reasoning or certain minority reports with which we agree.

4. Lastly, this letter is in no respect intended as criticism of the Rules Commission. Commission members have done laudable work, including, for example, ultimately approving a conflicts of interest rule that more closely approximates the ABA Model Rules, provides more client protection, and gives more guidance for the average attorney.

We note the following specific issues within five general areas of comment:

I. Rules relating to conflicts of interest

1. Rule 1.7 – Basic conflict of interest rule

~~We commend the Commission for adopting the ABA version of Model Rule 1.7 after much back and forth debate. This revises an earlier decision of the Commission to continue with California Rule of Professional Conduct (“CRPC”) 3-310. On June 6, 2008, thirteen California ethics professors signed a letter critical of CRPC 3-310 (“June 2008 Ethics Profs. Letter”). The position in this letter is consistent with the June 2008 letter, except that the Commission has heeded the concerns expressed in that letter and elsewhere and to its credit adopted MR 1.7 in ABA format and style.~~

A. Comment 22 on advanced waivers – no position taken in this letter

~~This letter does not address the issue of whether Comment 22 of Rule 1.7, on advanced waivers, is or is not appropriate. The June 2008 Ethics Profs. Letter did address this issue, and opposed the adoption of this Comment paragraph, then enumerated ¶ 33.² To the extent that the same dozen signatories objecting to this paragraph are signatories here, their previous positions have been noted. Other signatories take no position on this paragraph here.~~

B. Other comments to Rule 1.7 – in need of careful consideration

~~This letter does not – and could not succinctly – address each and every paragraph of the Comment section to Rule 1.7, other than as follows: We note that the comments are extensive and complex. While the Commission’s history shows that earlier comments came about as the product of much discussion and deliberation, the ultimate comments as revised~~

² One professor of the 13, Fred Zacharias, did not oppose this paragraph. Unfortunately, Prof. Zacharias passed away in the last year and is not available at all as a signatory to this letter.

might have "a chilling effect on legitimate advocacy."

However, no such chilling effect has been shown to exist in the vast number of states that have approved Rule 4.4(a). Perhaps this is because the rule does not simply prevent actions that embarrass, delay and burden. Rather it limits a lawyer where s/he uses "means that have no substantial purpose other than" these impermissible goals. Emphasis added. Legitimate advocacy is, of course, a legitimate goal.

We strongly recommend implementation of this rule.

6. Rule 5.7 – Rule application to "law-related services"

Similarly, the Commission has determined not to adopt Model Rule 5.7. This rule simply makes it clear that when lawyers, increasingly doing multi-disciplinary work, are not acting as lawyers in "law-related" matters, they still must comply with the rules of attorney conduct.

The Commission argues that California case law provides "broader and more nuanced guidance," such as to make the rule unnecessary. However, adding this rule will in no way have a chilling effect on the ability of California courts to provide more specific and nuanced guidance. Perhaps some matters would not require "nuanced" court adjudication if this rule is adopted.

7. Rule 2.1 – Lawyer as advisor

A. Strengthening the comments

The Commission has chosen to adopt a weakened version of this rule. In particular, in order for this rule to be effective, the truncated comments must be expanded to include ¶ 3 and the first two sentences of ¶ 5 of the ABA rule. Also, the Commission eliminated the sentence in ¶ 2 of the Comment that states, "Purely technical legal advice, therefore, can sometimes be inadequate." Apparently, this occurred because some Commission members were concerned about creating a "gotcha" civil liability against lawyers. This could be easily remedied by replacing the word "inadequate" with "insufficient," and striking the word "therefore."

B. Independent professional judgment

We understand as this letter is being distributed for signature, some effort may be made by Commission members to add a definition of "independent professional judgment" to this rule. While we have no draft of that proposal, we strongly caution the Board about adopting a sudden definition of this complex and exceptionally important term without it being fully and completely vetted. This is particularly true of any effort to equate "independent professional judgment" with "loyalty" two vital and important concepts that are nevertheless not the same.

IV. Rules related to confidentiality

1. Rule 1.6 – Basic confidentiality

We remind the Board that this rule is based on the statutory modification to Bus. & Profs. Code § 6068(e) of 2004.⁴ The Board should be very careful to ensure that in any modifications to the comments to the rule, the Commission has not overstepped the narrow bounds created by the legislature in drafting the original exceptions to confidentiality.

⁴ The California Supreme Court declined to modify issues relating to confidentiality on at least three occasions prior to 2004, demonstrating its clear view that this issue was the province of the legislature.