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LAWYERS AS “TATTLALES”: A CHALLENGE TO THE BROAD APPLICATION OF THE ATTORNEY-CLIENT PRIVILEGE AND RULE 1.6, CONFIDENTIALITY OF INFORMATION

David A. Green

I don’t want a lawyer to tell me what I cannot do; I hire him to tell me how to do what I want to do.

J.P. Morgan

When there’s a rift in the lute, the business of the lawyer is to widen the rift and gather the loot.

Arthur Garfield Hays

INTRODUCTION

Carrie Client worked for ABC Corporation as a bookkeeper. Carrie had been stealing money from ABC Corporation for five years. Victor Victim, a vice president with ABC Corporation, became suspicious that Carrie was stealing from the company. Victor approached Carrie about his suspicion, and she vehemently denied the accusation. Carrie became concerned that Victor would continue to examine the books and discover that she had in fact been stealing from the company. Although Victor was a married man, Carrie began to flirt with him and persuaded him to engage in an extramarital affair with her. Once Victor and Carrie began their affair, he ceased to ask her questions about his suspicion. After two years of having an affair

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2. Id.
with Victor, Carrie wanted to end the relationship. She told Victor this, and he became very angry, threatening to examine the company books and prove that Carrie was stealing from the company. As Victor turned to walk away from Carrie, she hit him over the head with a brass statue that was in the room. The blow killed Victor instantly. Carrie called her cousin, Arnold Accomplice, and he helped her bury the body.

The following week, detectives interviewed Carrie, as well as other employees, because Victor’s wife had filed a missing person’s report. The police learned from one of the employees that Carrie and Victor had had an affair. The police also found a note in Victor’s file about his suspicion that Carrie was stealing from the company. The detectives questioned Carrie extensively about her relationship with Victor and about Victor’s suspicion. Carrie denied that she and Victor had had an affair, and she denied that she knew of Victor’s whereabouts. The police informed Carrie that they would question her later.

Carrie ran to the office of Lena Lawyer. Carrie informed Lena that she was stealing from the company and that she had had an affair with Victor. Carrie also told Lena that she had hit Victor in self-defense and that she had disposed of the body with the assistance of her cousin on her grandmother’s farm. Although the police never located Victor’s body, they possessed sufficient evidence that he was dead.

Carrie was tried for the murder of Victor. In the middle of the trial, Carrie killed herself. Brendan Barrister handled the trial because Carrie had fired Lena over a fee dispute.

An attorney-client relationship began when Carrie sat down to discuss her legal problem with Lena Lawyer. As a result, Lena Lawyer must keep all the information that she had received from Carrie Client confidential, unless some exception to the attorney-client privilege applied.³

³ See GEOFFREY C. HAZARD, JR. ET AL., THE LAW AND ETHICS OF LAWYERING 206 (3d ed. 1999) (“Payment of a fee . . . is not required; and preliminary conversations for the purpose of obtaining representation are privileged even if the lawyer subsequently declines the representation.”). The Restatement (Third) of the Law Governing Lawyers states that:
This hypothetical triggers the application of the attorney-client privilege and the ethical rules of confidentiality. In order to encourage "frank and candid" communications between the lawyer and the client, the attorney-client privilege and the ethical rules of confidentiality mandate that the lawyer keep the client's information in confidence. However, circumstances exist where the lawyer may reveal the client's confidential information. One such circumstance is a fee dispute between the lawyer and the client. Consequently, while Lena Lawyer cannot reveal her client's confidential information to assist in a criminal investigation or to assist the family of Victor Victim in burying him, Lena may be able to reveal this information to resolve a fee dispute with Carrie Client.

This Article examines the application of the attorney-client privilege, the ethical rules of confidentiality, and a lawyer's duty to maintain his client's information in confidence. First, this Article will review the "confidentiality principle" and its historical origins. This Article will use the term "confidentiality principle" to describe the lawyer's obligation to keep the client's information secret under the

A relationship of a client and lawyer arises when:

(1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either
   (a) the lawyer manifests to the person consent to do so; or
   (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or

(2) a tribunal with power to do so appoints the lawyer to provide the services.

Restatement (Third) of the Law Governing Lawyers: Formation of a Client-Lawyer Relationship § 14 (2000); see also DeVaux v. Am. Home Assurance Co., 444 N.E.2d 355, 356 (Mass. 1983). In DeVaux, the plaintiff, who was injured in a fall, wrote a letter to the defendant attorney, requesting legal assistance for a possible tort claim. See id. The defendant did not investigate the plaintiff's claim before the statute of limitations expired because a secretary had misfiled the letter. See id. at 357. The court noted that "an attorney-client relationship need not rest on an express contract" and thus denied summary judgment for the attorney. See id. Similarly, in Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686, 693 (Minn. 1980), a client consulted an attorney about a possible medical malpractice claim. See id. The attorney advised the client that the client lacked a strong legal case, but the attorney stated that he would discuss the case with his partner. See id. The attorney charged no fee. See id. at 690. The client waited a year before talking to another attorney, but by then, the statute of limitations had run. See id. at 694. The court concluded that because the client relied upon legal advice provided by the attorney, sufficient evidence of an attorney-client relationship existed to survive a motion for summary judgment. See id. at 693.

4. See discussion infra Part I.

5. See id.
attorney-client privilege, as well as the lawyer’s ethical obligation to keep the client’s information secret. Second, this Article will critique the confidentiality principle and discuss the inherent contradiction that precludes a lawyer from revealing confidential information when there is a strong societal need for that information, yet allows the lawyer to reveal the same confidential information to serve the lawyer’s self-interest, such as the recovery of legal fees. Third, this Article will discuss how courts apply the confidentiality principle in cases where society has demonstrated a strong need for the information. Finally, this Article will apply the confidentiality principle to the hypothetical between Carrie Client and Lena Lawyer to highlight the hypocrisy of the confidentiality principle and the hypocrisy of the ethical rules that govern lawyers. This Article will conclude that courts and bar associations should revise the confidentiality principle and allow lawyers to reveal confidential information when a strong societal need for the information exists. Specifically, the confidentiality principle should not provide greater protection than the Fifth Amendment right against self-incrimination. Consequently, if a party demonstrates a compelling need for confidential information, a court should be able to require the lawyer to disclose that information, unless the information is protected by the Fifth Amendment.

I. CONFIDENTIALITY: THE LAWYER’S DUTY TO KEEP THE CLIENT’S INFORMATION SECRET

The information that a lawyer receives from his client is subject to the laws and rules that protect the confidentiality of client information. These laws and rules derive from the rules of professional ethics and the evidentiary attorney-client privilege. While the rule of confidentiality established by the rules of professional ethics is broader than the attorney-client privilege, the rationale behind each is the same.\(^6\)

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A lawyer owes an ethical obligation to his client to maintain confidences even if the confidences are not privileged. The ethical obligation to maintain confidences is incorporated in Rule 1.6 of the ABA Model Rules of Professional Conduct ("Model Rules"), which provides:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

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

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

The ethical obligation to respect client confidences arises from broad policy considerations. Pursuant to Rule 1.6, the duty of

6.1.1 (1986) ("The professional rules largely duplicate [the attorney-client privilege and agency laws] enjoining a broad ethical duty not to divulge information about a client... The professional rules cover much more than the testimonial privilege and to some extent may extend beyond the agency rules.").

7. See WOLFRAM, supra note 6.

8. See MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. 3 (2002).

9. MODEL RULES OF PROF’L CONDUCT R. 1.6 (2002). The Model Rules were approved by the House of Delegates of the American Bar Associations on August 2, 1983. The House of Delegates amended the rules through the years and subjected them to particularly substantial amendments in August 2001 and in February and August 2002. Although the majority of jurisdictions have adopted the Model Rules, no jurisdiction has adopted the changes. See THOMAS D. MORGAN & RONALD D. ROTUNDA, 2003 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY (2003). This Article therefore applies the 2002 Rules.
confidentiality is directed towards the attorney. Rule 1.6 provides that an attorney should not disclose information that the attorney has learned about a client regardless of where or how the attorney obtained that information.\textsuperscript{10} While either the attorney or the client can waive the attorney-client privilege through disclosure to a third party, this disclosure will not waive the duty of confidentiality under Rule 1.6.\textsuperscript{11} Pursuant to Rule 1.6, an attorney is still ethically obligated to maintain the confidences.\textsuperscript{12}

The attorney-client privilege is an evidentiary privilege applicable primarily in judicial proceedings.\textsuperscript{13} Courts construe the privilege narrowly and only apply it in those situations where the party invoking the privilege “consulted an attorney for the purpose of securing a legal opinion or services . . . and in connection with that consultation has communicated information which was intended to be kept confidential.”\textsuperscript{14} Moreover, the attorney-client privilege protects only the communications themselves, not the underlying facts.\textsuperscript{15}

The attorney-client privilege requires four basic elements: (1) A communication; (2) made between privileged persons; (3) in confidence; (4) for the purpose of seeking, obtaining, or providing legal assistance to the client.\textsuperscript{16} The attorney-client privilege is a rule of evidence that precludes another party in litigation from asking either a client or a lawyer what either has exchanged for the purpose of furnishing or obtaining professional legal advice or assistance.\textsuperscript{17} The policy basis of the attorney-client privilege rests upon three assumptions.\textsuperscript{18} First, the policy assumes that having the assistance of a legal advisor is useful to a person.\textsuperscript{19} Second, the policy assumes that “the lawyer’s legal advice and assistance must be based upon a firm

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  \item[10.] See Model Rules of Prof’l Conduct R. 1.6 cmt. 3 (2002).
  \item[11.] See Brennan’s, Inc. v. Brennan’s Rests., Inc., 590 F.2d 168, 172 (5th Cir. 1979) (noting that attorneys owe an ethical duty of confidentiality even if “others share the knowledge”).
  \item[12.] See id.
  \item[13.] See Model Rules of Prof’l Conduct R. 1.6 cmt. 3 (2002).
  \item[14.] See In re Grand Jury Proceedings, 727 F.2d 1352, 1355 (4th Cir. 1984).
  \item[16.] See Epstein, supra note 6, at 35-36.
  \item[17.] See Black’s Law Dictionary 1215-16 (7th ed. 1999).
  \item[18.] See Wolfram, supra note 6, § 6.1.1.
  \item[19.] See id. § 6.11 (citing Upjohn Co., 449 U.S. at 389).
\end{itemize}
grasp of the facts" and of the client's objectives. The third and most controversial assumption is that lawyers must "be able to assure clients that their private conversations will always remain confidential."

In 1986, the American Law Institute ("ALI"), a group of practicing lawyers, judges, and academics, began drafting the Restatement (Third) of the Law Governing Lawyers. The ALI did not radically change attorneys' duties to maintain their clients' confidential information. Rather, the Restatement (Third) of the Law Governing Lawyers provides black letter rules that are consistent with the rule of confidentiality found in the Model Rules and with the attorney-client privilege as defined by the United States Supreme Court.

II. THE ORIGIN AND HISTORY OF CONFIDENTIAL INFORMATION BETWEEN LAWYER AND CLIENT

The requirement that lawyers keep client information confidential derives from the belief that in order to have an effective attorney-client relationship, a client must feel comfortable that the lawyer will keep the client's information in confidence. Although the history of the legal and professional protection of confidentiality is unclear, the assurance of free and frank discussion between the client and the lawyer was not the original purpose. Rather, lawyers originally owed a duty of loyalty to their clients because the attorney-client relationship was like that of a master-servant. Max Radin, in a

20. Id.
21. Id.
22. See MORGAN & ROTUNDA, supra note 9, at 376. The ALI completed this project in 1998. See id.
24. See Upjohn Co., 449 U.S. at 389; Geoffrey C. Hazard, An Historical Perspective on the Attorney-Client Privilege, 66 CAL. L. REV. 1061 (1978); MONROE H. FREEDMAN, UNDERSTANDING LAWYER'S ETHICS 87 (1990); WOLFRAM, supra note 6, § 6.1.3; MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 4 (2002). "A fundamental principle in the client-lawyer relationship is that [the lawyer maintain confidentiality of information] relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter." MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 2 (2002).
frequently cited article discussing the origins of the confidentiality rule, stated:

A servant must keep his master's secrets, and however honored and influential a servant, an attorney was for a long time definitely in that class and kept something of that standing, although, to be sure, he was never a "servant" in the specific sense which the English law attached to [the] term.

The duty of loyalty on the part of servants was an obvious and general one, based upon normal human feeling, and scarcely needed authority to establish it.26

Attorneys have owed a duty of loyalty to their clients since the time of the Roman Empire.27 Under Roman law, the attorney held the privilege; under today's law, the client holds the privilege.28 Further, the rationale for the rule has changed.29

During the times of the Roman Republic, an attorney owed a duty to his client in the same way that a slave owed a duty to his master.30 An attorney, as an advocate for his client, could not speak against his client while the client's case was in progress.31 The rationale for excluding the attorney's testimony was that an attorney, like a servant or family member, was not credible if he was speaking against the

26. Id.
27. See id. at 487-89.
28. See id. at 489.
31. Radin, supra note 25, at 488. Professor Radin noted that "Cicero in prosecuting the Roman governor of Sicily regrets that he cannot summon the latter's patronus, Hortensius, and the matter had received a statutory regulation in the Acilian law on bribery of 123 B.C." Id. (citing GREENIDGE, THE LEGAL PROCEDURE IN CICERO'S TIME 484 (1901)).
master or family member because he would have an incentive to lie.\textsuperscript{32} If the attorney testified against his client, Roman courts viewed him as "a disreputable person and unworthy of belief."\textsuperscript{33}

Under English law, the notion that an attorney owed a duty of loyalty to his client continued. While no proof exists that the Roman rule was the origin of the English rule, Roman precedent may have influenced its formation.\textsuperscript{34} The privilege has been an effective bar against disclosure under English common law since the reign of Queen Elizabeth I.\textsuperscript{35} The rationale for the privilege was grounded in the belief that the oath and honor of the attorney protected him from being compelled to disclose his clients' secrets.\textsuperscript{36} This early English view placed a greater emphasis on the code of honor, unlike today's view, which puts a greater emphasis on protecting the client.\textsuperscript{37}

In the early 1700s, the view of the attorney-client privilege shifted its emphasis from the attorney's honor to the client's needs.\textsuperscript{38} The belief developed that the client needed assurance that matters shared with the attorney would be kept in confidence.\textsuperscript{39} The development of

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\item 32. See id.
\item 33. Id. Professor Radin described attorneys as servants and family members because during ancient times a slave or servant "was essentially part of [the master's] family and the relationship of all members of the family was based on mutual fidelity." Id.
\item 34. See id. at 489.
\item 35. See 8 John H. Wigmore, Evidence § 2290, at 542 n.1 (McNaughton rev. ed. 1961); see also Williams, supra note 30, at 427 n.9 ("[T]he cases cited by Wigmore between 1577 and 1654 involve solicitors or counsel and not attorneys or counselors. During the Elizabethan period, each of these officers had different roles and functions."); Hazard, supra note 24, at 1070 (recognizing that the Elizabethan cases make reference to the privilege (a term that Elizabethan courts understood as belonging to lawyers), but suggesting that the privilege was not established until 1800). Professor Hazard stated that the privilege:

was applied only with much hesitation, and exceptions concerning crime and wrongdoing by the client evolved simultaneously with the privilege itself. At least in the English cases, an exception to the rule was usually found if proof altunde indicated that the client was indeed engaged in some malfeasance. Taken as a whole, the historical record is not authority for a broadly stated rule of privilege or confidence. It is, rather, an invitation for reconsideration.
\item 36. See Harding, supra note 29, at 483 n.84.
\item 37. See 8 Wigmore, supra note 35, at 543-44; see also Harding, supra note 29, at 483 n.84.
\item 38. See Harding, supra note 29, at 483 n.84.
\item 39. See id.; see also Hazard, supra note 24, at 1070-71. Professor Hazard pointed out that the shift to the client holding the privilege may have been driven not only by the shift in emphasis from the
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the privilege stalled during the 1700s and was not completely developed until the mid-1800s. The privilege made its way into American law in the 1820s and, with the influence of English law, became what it is today.

The attorney-client privilege formed the basis for the ethical rules of confidentiality protections. In the early 1900s, lawyers began developing ethical standards that would govern the legal practice. In 1908, the American Bar Association ("ABA") adopted its first code of professional ethics, the *Canons of Professional Ethics* ("1908 Canons"). The ethical rules governing attorneys have changed over the years, and the confidentiality principle has changed with those rules. The 1908 Canons stated, without much detail, that the lawyer owed a duty to protect a client’s confidences. This duty also

attorney’s honor to the client’s need, but also by the fact that “the privilege came to extend to communications not only to barristers, who stood as members of the court, but also to attorneys, who did not.” *Id.* at 1071 n.39 (citing 8 Wigmore, *supra* note 35). Importantly, Professor Hazard recognized that in analyzing the early English cases one must consider the distinction between barristers, on the one hand, and attorneys, solicitors, and scriveners, on the other hand. He stated:

[H] general, barristers presented the evidence and argued the law in court; attorneys and solicitors prepared cases for litigation, advised clients, and drafted documents; scriveners enscribed documents and may also have given advice on the side. It appears that the term ‘counsel’ was used to refer to barristers, although that term or the term ‘counselor’ may sometimes have been used to refer to attorneys and solicitors. There may have been some overlap of the function then as now; in any event the division of functions within the legal profession had not yet assumed its present form.

*Id.* at 1070-71 (citing W. Holdsworth, *A History of English Law* ch. viii (2d ed. 1937)).

40. See 8 Wigmore, *supra* note 35, at 544-45; Harding, *supra* note 29, at 484 n.84; *see also* Williams, *supra* note 30, at 430.

41. See 8 Wigmore, *supra* note 35, at 545; Harding, *supra* note 29, at 483, 484 n.84; Williams, *supra* note 30, at 432; *see also* Hazard, *supra* note 24, at 1087.


43. *See id.*

44. *See Wolfram, supra* note 6, at 54; *Canons of Professional Ethics* (1908).

45. *See Wolfram, supra* note 6, at 297; Tuoni, *supra* note 42, at 446-52; *see also* David A. Green, *Balancing Ethical Concerns Against Liberal Discovery: The Case of Rule 4.2 and the Problem of Loophole Lawyering*, 8 Geo. J. Leg. Ethics 283, 289-93 (1995) (discussing the development of the professional rules). Hereinafter, this Article will concentrate on the ethical rules that govern the attorneys. Because the ethical rules are broader than the attorney-client privilege, the term "confidentiality principle" will be used to incorporate both the privilege and the ethical rules.

46. *See Canons of Professional Ethics* (1908). Canon 37 provided:

It is the duty of a lawyer to preserve his client’s confidences. This duty outlasts the lawyer’s employment, and extends as well to his employees; and neither of them should accept employment which involves or may involve the disclosure or use of these confidences, either for the private advantage of the lawyer or his employees or to the
prohibited conflicts of interest in successive representations if the representation would require disclosing secrets or confidences of the attorney's former client.\textsuperscript{47} Even from its inception, however, the confidentiality principle was not absolute, and some circumstances allowed or required lawyers to disclose the client's confidences. The 1908 Canons established that the confidentiality principle would yield to an attorney's need to defend against a client's accusation of malpractice or to prevent future crimes.\textsuperscript{48} Further, an attorney could not assist his client in fraud or deception upon the court or against another party.\textsuperscript{49} The 1908 Canons was in place from 1908 through disadvantage of the client, without his knowledge and consent, and even though there are other available sources of such information. A lawyer should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client.

\textit{Id.}

\textsuperscript{47} CANONS OF PROFESSIONAL ETHICS (1908). Canon 6 provided:
The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

\textit{Id.}

\textsuperscript{48} CANONS OF PROFESSIONAL ETHICS (1908). Canon 37 further provided:
If a lawyer is accused by his client, he is not precluded from disclosing the truth in respect to the accusation. The announced intention of a client to commit a crime is not included within the confidences which he is bound to respect. He may properly make such disclosure as may be necessary to prevent the act or protect those against whom it is threatened.

\textit{Id.}

\textsuperscript{49} CANONS OF PROFESSIONAL ETHICS (1908). Canon 29 provided in part:
The counsel upon the trial of a cause in which perjury has been committed owe it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities.

\textit{Id.} Canon 41 provided:
When a lawyer discovers that some fraud or deception has been practiced, which has unjustly imposed upon the court or a party, he should endeavor to rectify it; at first by advising his client, and if his client refuses to forego the advantage thus unjustly gained, he should promptly inform the injured person or his counsel, so that they take appropriate steps.

\textit{Id.} The ABA received inquiries about application of various Canons because there appeared to be a conflict between Canon 37 and Canons 22, 29, and 41. See ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 287 (1953). The ABA Committee on Professional Ethics ("Committee") concluded that "[w]e do not consider that either the duty of candor and fairness to the court, as stated in Canon 22, or the provisions of Canon 29 and 41 . . . are sufficient to override the purpose, policy and express obligations under Canon 37." \textit{Id.} Therefore, the ABA required attorneys to urge their clients to disclose the fact that they had given perjured testimony. \textit{Id.} If the client failed to do so, the ABA only required the attorney to withdraw, not to disclose confidential information. \textit{Id.} This interpretation that
1969, when the *Model Code of Professional Responsibility* ("*Model Code*") largely superseded it.50

The *Model Code* went further than the *1908 Canons* had in defining confidentiality. The *Model Code* used the terms "secrets or confidences" from the *1908 Canons* and established the coverage of the confidentiality principle.51 The confidentiality principle under the *Model Code* was broader than it had been in the *1908 Canons*; the *Model Code* protected secrets that the client did not want revealed, in addition to protecting confidences that the attorney-client privilege already guarded.52 The *Model Code* further established that an attorney owed a duty of loyalty to his client that included a limitation on the use of the client’s information to uses that benefited the client.53 Like the *1908 Canons*, the *Model Code* did not impose on the attorney an absolute duty to maintain a client’s secrets. The *Model Code* included the same exceptions to the confidentiality

the duty of loyalty to the client outweighed the duty of candor to the tribunal was in place from 1953 to 1969. See Tuoni, supra note 42, at 448; see also Freedman, supra note 24, at 90-93.
50. See Wolfram, supra note 6, at 56; Green, supra note 45, at 291.
51. Canon 4 of the *Model Code* provided: "A lawyer should preserve the confidences and secrets of a client." MODEL CODE OF PROF'L RESPONSIBILITY Canon 4 (1981). The disciplinary rules under Canon 4 defined "confidences and secrets" as follows:
   "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101(A) (1981). The ABA described the Canons in the preliminary statement to the *Model Code*:
   The Canons are statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession. They embody general concepts from which Ethical Considerations and the Disciplinary Rules are derived. . . . The Disciplinary Rules . . . are mandatory in character. The Disciplinary rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.


53. See MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101(A) (1981). The disciplinary rules under Canon 4 further provided:
   Except when permitted under DR 4-101(C), a lawyer shall not knowingly:
   (1) Reveal a confidence or secret of his client.
   (2) Use a confidence or secret of his client to the disadvantage of the client.
   (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

Id.
principle as the 1908 Canons had included, but it expanded the circumstances where an attorney could disclose information.\textsuperscript{54} In particular, the Model Code allowed an attorney to disclose his client’s confidential information to protect the attorney’s interests which had developed as a result of his relationship with the client.\textsuperscript{55} However, the Model Code protected attorney-client confidentiality involving possible fraud upon the court more than the 1908 Canons had.\textsuperscript{56} Under the Model Code, an attorney could not disclose past client fraud to the court if the attorney learned of the fraud through privileged communication.\textsuperscript{57} The Model Code made it clear that the confidentiality principle outweighed an attorney’s duty of candor to

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54. See MODEL CODE OF PROF’L RESPONSIBILITY DR 4-101(C) (1981). A lawyer may reveal:

(1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.

(2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.

(3) The intention of his client to commit a crime, and the information necessary to prevent the crime.

(4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

Id.


57. See MODEL CODE OF PROF’L RESPONSIBILITY DR 7-102(B)(1) (1980). A lawyer who receives information clearly establishing that:

(1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication.

Id. “[E]xcept when the information is protected as a privileged communication” did not appear in the Model Code until the ABA amended the code to include that language in 1974. See ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 341 (1975). Prior to the 1974 amendment, the Model Code required an attorney to reveal to the court or affected person any fraud on the part of the client. See FREEDMAN, supra note 24, at 93; Tuoni, supra note 42, at 455. In response to inquiries made regarding the effect of the February 1974 amendment to DR 7-102(B), the Committee issued Formal Opinion 341. See ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 341 (1975). The Committee’s opinion clarified that the attorney’s duty of loyalty to the client and duty to maintain the client’s confidences outweighed the attorney’s duty to avoid a perpetration of fraud upon a person or a tribunal. See id. The Committee stated:

One effect of the 1974 amendment to DR 7-102(B)(1) is to reinstate the essence of Opinion 287 which had prevailed from 1953 until 1969. It was as unthinkable then as now that a lawyer should be subject to disciplinary action for failing to reveal information which by law is not to be revealed without the consent of the client and the lawyer is not now in that untenable position. The lawyer no longer can be confronted with the necessity of either breaching his client’s privilege at law or breaching a disciplinary rule.

Id.
the courts.\textsuperscript{58} The legal profession experienced significant changes between 1969 and 1980, the decade that followed the ABA's adoption of the \textit{Model Code}.\textsuperscript{59} The ABA adopted the \textit{Model Rules} to improve the legal profession's reputation in the post-Watergate era.\textsuperscript{60} However, the \textit{Model Rules} did little to enhance the legal profession's status.

While it may have been relatively unsuccessful in enhancing the profession's status, the \textit{Model Rules} did substantially change the rules that govern attorneys. For example, the \textit{Model Rules} expanded the scope of the confidentiality principle.\textsuperscript{61} As noted earlier, Model Rule 1.6 provides that a "lawyer shall not reveal information relating to the representation of a client . . . ."\textsuperscript{62} The \textit{Model Rules} does not make a distinction between a client’s confidences and a client’s secrets.\textsuperscript{63} Furthermore, the \textit{Model Rules} requires that a lawyer maintain his client's confidences regardless of whether the lawyer acquired the information before or after the formation of the attorney-client relationship.\textsuperscript{64} The other significant difference between the \textit{Model Rules} and the \textit{Model Code} lies in the exceptions to the confidentiality rules. The \textit{Model Rules} allows a lawyer to disclose information where he is impliedly authorized to do so in order to carry out the representation of a client. Under the \textit{Model Code}, however, a lawyer could disclose information only if his client authorized the lawyer to do so after full disclosure.\textsuperscript{65}

\begin{footnotes}
\item[58] See \textit{Model Code of Prof’l Responsibility} DR 7-102(B)(1) (1980).
\item[59] Green, supra note 45, at 292.
\item[60] See \textit{id.}; Tuoni, supra note 42, at 457.
\item[61] See \textit{Wolfram}, supra note 6, at 298. Professor Wolfram noted:

\begin{quote}
The definition in MR 1.6 transcends the \textit{[Model Code]} in three important respects: (1) it includes all information regardless of when it was learned by the lawyer; (2) it includes information without regard to whether disclosure would embarrass or work to the detriment of a client; and (3) it provides a more limited exception for future client wrongdoing.
\end{quote}

\textit{Id.; see also} Tuoni, supra note 42, at 459; \textit{Freedman}, supra note 24, at 98-99 (discussing the development of Rule 1.6).
\item[62] \textit{Model Rules of Prof’l Conduct} R. 1.6 (2002).
\item[63] See \textit{Tuoni, supra note 42, at 459}.
\item[64] See \textit{id.}
\item[65] Compare \textit{Model Rules of Prof’l Conduct} R. 1.6(a) (2002), \textit{with Model Code of Prof’l Responsibility} DR 4-101(B), (C) (1980).
\end{footnotes}
Additionally, the *Model Rules* limited the exception which would allow a lawyer to disclose information regarding ongoing or future crime. The *Model Rules* allows a lawyer to reveal information in order to prevent "imminent death or substantial bodily harm," while the *Model Code* allowed the lawyer to reveal his client's intention to commit a crime, regardless of the crime's seriousness.\(^\text{66}\) Also, while both the *Model Rules* and the *Model Code* allowed a lawyer to use confidential information to defend against a claim arising out of the lawyer's representation of his client, the *Model Rules* expanded this exception. Under the *Model Rules*, the lawyer can reveal confidential information to assert any claim or defense that arises out of the representation, while the *Model Code* limited this exception to a lawyer's fee collection and to defense of a client's legal malpractice claim.\(^\text{67}\)

### III. CRITIQUE OF THE CONFIDENTIALITY RULE

#### A. Historical Attack on the Confidentiality Rule

Scholars have attacked the confidentiality principle since early 1800s,\(^\text{68}\) and this attack continues to the present day.\(^\text{69}\) Jeremy Bentham's critique deserves particular attention because he was the first scholar to attack the confidentiality principle.\(^\text{70}\) Marvin Frankel's comments also deserve attention because he took the radical step of criticizing the confidentiality principle at a time when it was very well respected, and more importantly, as a member of the Kutak Commission, which drafted the *Model Rules*, he influenced some of

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\(^*\text{66}.*\) Compare *Model Rules of Prof'L Conduct R. 1.6(a)(1) (2002)*, with *Model Code of Prof'L Responsibility DR 4-101(B), (C)(3) (1980).*

\(^*\text{67}.*\) Compare *Model Rules of Prof'L Conduct R 1.6(B)(3) (2002)*, with *Model Code of Prof'L Responsibility DR 4-101(B), (C)(4) (1980).*

\(^\text{68}\) WOLFRAM, supra note 6, at 246 ("The first systematic attack on the privilege was made by Jeremy Bentham, whose acidly worded arguments for legal reform rankled official England a century and a half ago.").


\(^\text{70}\) See WOLFRAM, supra note 6, at 246.
the changes in the confidentiality principle. 71 Mr. Bentham and Mr. Frankel also criticized the attorney-client relationship and the role that the confidentiality principle plays in shielding clients and impeding access to the truth.

Mr. Bentham attacked the privilege as anti-utilitarian. 72 He reasoned that because the innocent did not need the privilege, the privilege only protected the guilty. 73 Mr. Bentham observed:

But if such confidence, when reposed, is permitted to be violated, and if this be known . . . the consequence will be, that no such confidence will be reposed. Not reposed? Well: and if it be not, wherein will consist the mischief? The man by supposition is guilty; if not, by the supposition there is nothing to be betray: let the law advisor say everything he has heard, every thing he can have heard from his client, the client cannot have any thing to fear from it. That will often happen that in the case supposed no such confidence will be reposed, is natural enough: the first thing the advocate or attorney will say to his client, will be—Remember that, whatever you say to me, I shall be obliged to tell, if asked about it. What, then, will be the consequence? That a guilty person will not in general be able to derive quite so much assistance from his law advisor, in the way ofconcerting a false defence, as he may do at present. 74

Mr. Bentham further observed that lawyers who assisted criminals in hiding their secrets reflected badly on the profession. 75 He correctly recognized that the privilege is an impediment to the truth

71. See FREEDMAN, supra note 24, at 97.
72. See WOLFRAM, supra note 6, at 246.
74. 8 WIGMORE, supra note 35, at 549 (quoting 7 JEREMY BENTHAM’S WORKS 474 (J. Bowring ed., 1842)).
75. See id.; see also Milich, supra note 73, at 32 n.23 (citing C. W. EVERETT, THE EDUCATION OF JEREMY BENTHAM (1931)).
and promotes a negative image of lawyers. However, to the extent that he suggested that a lawyer should use information that his client gave him and testify against the client, Mr. Bentham went too far. Circumstances exist where the confidentiality principle should not prohibit a lawyer from revealing confidential information, particularly where the need to disclose outweighs the need to keep the information confidential.

The most obvious response to Mr. Bentham’s criticism of the privilege is that a lawyer will not fully and frankly discuss matters with his client unless the attorney-client privilege protects the discussion from disclosure.76 However, that response is only valid if one agree that the client would be reluctant to share information without the existence of the confidentiality principle—an assumption that lacks proof.77 Professor Charles Wolfram raised a valid concern with Mr. Bentham’s criticism of the privilege. Professor Wolfram distinguished between “three types of accused persons: the plainly guilty, the plainly innocent, and the innocent who are the victims of suspicious circumstances.”78 He noted that “[t]hose defenders of the privilege do not argue against Mr. Bentham’s utilitarian frame of argument; they respond in kind that the harm from the concealment of truth caused by the privilege is more than offset by the good of assisting the innocent victim of suspicious circumstances.”79 He further asserted that in a society full of racial, religious, and nationality prejudices, “victims of suspicious circumstances” need (1) the loyalty of their attorneys and (2) a legal system that assures them a competent and fair treatment.80 In order to assure that protection, however, the courts do not have to assure absolute confidentiality between an attorney and a client.

Although some flaws in Mr. Bentham’s attack on the confidentiality principles exist, he did raise a valid concern regarding

76. See Milich, supra note 73, at 33.
77. See, e.g., id. at 31 (“There exists no empirical evidence that the attorney-client privilege significantly affects the flow of information between attorney and client.” (citing Morgan, Some Observations Concerning a Model Code of Evidence, 89 U. PA. L. REV. 145, 152 (1940))).
78. WOLFRAM, supra note 6, at 246.
79. Id. at 247.
80. Id.
the confidentiality principle’s impediment to the truth. Furthermore, he accurately stated that a lawyer’s role in protecting a guilty client reflects badly upon the legal profession.\textsuperscript{81}

Mr. Frankel began his critique with an attack on the adversarial system. He stated “that the American version of the adversary process places too low a value on truth telling; that we have allowed ourselves too often to sacrifice truth to other values that are inferior, or even illusory.”\textsuperscript{82} Mr. Frankel correctly defined the lawyer’s role in the adversarial system. He asserted that whether “[a]cidly stigmatize[d] as ‘hired guns,’ or extolled as loyal champions, the lawyer is classically seen in our system as the client’s zealous [advocate and] against hostile parties or a whole hostile state.”\textsuperscript{83} Mr. Frankel noted that the most effective tool that the lawyer possesses to protect his client’s interests is the “lawyer’s obligation of confidentiality and the attorney-client privilege.”\textsuperscript{84} He stated:

It will be seen without surprise that a privilege fashioned by lawyers has substantial benefits for lawyers. The point, already made, bears clearer statement: the privilege makes it easier to practice law with relative comfort and dispatch. It is difficult enough to extract information from a client in the best of circumstance; a wary and mistrustful client would be unmanageable.

For these benefits, to attorney and client and the public interest in effective legal service, there is, as for everything, a price. The effect of every evidentiary privilege, every grant in the law of a right to withhold information, is an added barrier to the search for truth. The lawyer is authorized and required by the privilege

\textsuperscript{81} See 8 Wigmore, supra note 35, at 551 (quoting 7 Jeremy Bentham’s Works 474 (J. Bowring ed., 1842)).


\textsuperscript{83} Frankel, supra note 69, at 63.

\textsuperscript{84} Id. at 64.
to cover up what may be evil and needed facts. The interests injured by the cover-up may be precious ones. 85

Like Mr. Bentham, Mr. Frankel attacked a principle that interferes with the access to truth and benefits the lawyer. The inherent problems in the confidentiality principle that both Mr. Bentham and Mr. Frankel addressed should cause courts and bar associations to revise the circumstances under which a lawyer may disclose confidential information.

B. Inherent Contradictions in the Application of the Confidentiality Principle

Commentators often take a cynical view of the ethical rules that govern lawyers. 86 The confidentiality principle is an example of an ethical rule that provides an easy target for attack. 87 There are many reasons to attack the confidentiality principle. The most obvious reason is that it impedes access to the truth. 88 Proponents of the confidentiality principle concede that adherence to this principle sacrifices access to the truth to assure effective and frank communication between the attorney and the client. 89 Those who argue that the confidentiality rules in their present form are needed to assure full and frank communications between attorneys and clients are wrong. First, there is no support for the belief that, without confidentiality rules, clients would be reluctant to share information

85. Id.
86. See Green, supra note 45, at 287 (“Commentators have criticized the drafters of the codes as lacking ethical concerns and as being motivated by a desire to maintain a monopoly in the practice of law and its economic benefits.”).
87. This Article uses the term “confidentiality principle” to include the attorney-client privilege as well as the ethical duty to maintain a client’s confidence.
88. See 8 Wigmore, supra note 35, § 2291, at 554. Wigmore contended that the privilege’s “benefits are all indirect and speculative; its obstruction is plain and concrete... It is worth preserving for the sake of a general policy, but it is nonetheless an obstacle to the investigation of the truth.” Id.; see also Hazard, supra note 24, at 1062. Professor Hazard observed that “[t]here may be a sufficient justification for the privilege; indeed the verdict of our legal history is to that effect. But no argument of justification should ignore the fact that the attorney-client privilege, as far as it goes, is not only a principle of privacy, but also a device for cover-ups.” Id.
89. See Hazard, supra note 24, at 1062.
with their attorneys. Second, the lawyer's self-defense and self-interest exception is inconsistent with the need for full and frank communications. Proponents of the confidentiality principle cannot effectively argue that the principle is needed to assure effective communication, yet still allow for an exception when the attorney's interest is at issue. Third, the notion that a lawyer places a premium on assuring that he has frank and candid confidential conversations with clients to facilitate effective representation is a fallacy. To the contrary, lawyers frequently do not want to know certain information about their clients because they do not want to "know" for purposes of Model Rule 3.3 whether the client is being truthful.

Scholars have appropriately referred to the lawyers' self-defense and self-interest exception to the confidentiality principle as "scandalously self-serving." In a profession that the public views with cynicism, the self-defense and self-interest exception leaves the legal community looking foolish. The exception developed long after the establishment of the confidentiality principle. It appeared in 1851 and endured through the enactment of the 1969 Model Code and the 1983 Model Rules. The exception applies in two types of

90. See infra note 136. Attorneys would be able persuade their clients to provide full disclosure to enable the attorney adequate representation, much like doctors persuade their patients to provide full disclosure to enable adequate diagnosis and treatment.


93. See WOLFRAM, supra note 6, at 308 ("No exception to the attorney-client privilege has done as much to draw it into question as the exception allowing lawyer self-protection."); Tuoni, supra note 42, at 469 ("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 lawyers' ability to protect themselves through the use of confidential client information.").

94. See Levine, supra note 69, at 788; Rochester City Bank v. Suydam, Sage & Co., 5 How. Pr. 254 (How. Pr. 1851). In Suydam, the defendant moved to suppress correspondence between with its attorney, asserting the attorney-client privilege. See Suydam, 5 How. Pr. at 254, 255-56. The presiding judge, Judge Selden, denied the motion, ruling that "where the attorney or counsel has an interest in the facts communicated to him, and when their disclosure becomes necessary to protect his own personal rights, he must of necessity and in reason be exempted from the obligation of secrecy [sic]." Id. at 262. Before Judge Selden could decide whether the privilege protected the information at issue, he had to define the scope of the privilege. See id. at 257. He noted that:

[the great point in dispute is, whether the privilege in question, is confined to communications made with a view to the prosecution, defence, or management of some suit, or other judicial proceeding, either actually pending or contemplated at the time, or
cases. The first is in a defensive posture, when a lawyer defends a legal malpractice suit or claim for ineffective assistance of counsel.\(^95\) The rationale for the exception is that the client has waived "the privilege by voluntarily placing the contents of privileged communications into issue."\(^96\) The second instance is in an offensive posture, when a lawyer pursues a claim against a client to recover fees.\(^97\) Professor Wolfram cited three reasons which have been offered to support the exception: (1) "lawyers should be entitled to use privileged information to protect their economic interests"; (2) between a lawyer and a client "there never was any confidentiality, [because] disclosure in litigation between them must have been contemplated"; and (3) "fairness should prevent a client from employing the privilege to the lawyer's disadvantage."\(^98\) However, Professor Wolfram correctly stated that "[t]he plain fact is that the lawyer's public testimony to recover a contested fee chills client disclosure just as much as any other public divulgence of their private conversations. If the testimony is justifiable, it must be for some reason peculiar to fee suits, although none is apparent."\(^99\)

The exception extends to disputes between a lawyer and a third party where the lawyer's client is not involved in the dispute. Both the Model Code and the Model Rules allowed a lawyer to disclose

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whether it extends to all communications, made to an attorney or counsel, by one who employs him on account of his supposed professional skill, to transact any other business.

Id. at 257. Judge Selden concluded that:

the communication to be brought within the protection of the rule, if it does not relate to any suit or legal proceeding commenced or contemplated, should at least be made under cover of an employment strictly professional, and should be such as the business to be done required to be made; it should also be of a confidential nature, and so considered at the time, and should be shown to have been made with direct reference to the professional business upon which it may be supposed to bear.

Id. at 261-61. Judge Selden stated that because Ely was both agent and attorney, and no facts suggested that the information given to the client was in his capacity as a lawyer. See id. at 261. Judge Selden further concluded that even if the information was privileged, an exception exists when the attorney needs to protect his own interest. See id. at 262. The rationale that Judge Selden expressed is implicit in Rule 1.6 of the Model Rules and in DR 4-101 of the Model Code. Compare MODEL RULES OF PROF'L CONDUCT R. 1.6, with MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101 (1980).

95. See WOLFRAM, supra note 6, at 307-08.

96. Id. at 308.

97. See id. With respect to "offensive posture," there is no pun intended.

98. Id. at 308.

99. Id. at 308 n.10.
confidential information to defend against a third party's charges of improper lawyer conduct.\textsuperscript{100}

Thus, lawyers are willing to maintain the confidentiality of information, even if they know that protection of the confidentiality may cause an injustice to occur, but are willing to waive the confidentiality in order to protect their personal interests.\textsuperscript{101} Professor Daniel Fischel appropriately noted that "[c]onfidentiality means everything in legal ethics unless lawyers lose money, in which case it means nothing."\textsuperscript{102} The application of the confidentiality rule suppresses information that could lead to a just result if admitted.\textsuperscript{103}

\textsuperscript{100} See Model Rules of Prof'l Conduct R. 1.6(b) (2002); Model Code of Prof'l Responsibility DR 4-101(c)(4) (1983) (stating that a lawyer may reveal "[c]onfidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct"). Model Rule 1.6(b) and the comment regarding disputes concerning a lawyer's conduct also allow a lawyer to reveal confidential information in claims made by a third party. See Model Rules of Prof'l Conduct R. 1.6 cmt. 18 (2002) ("Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense.").

\textsuperscript{101} See Daniel R. Fischel, Lawyers and Confidentiality, 65 U. Chi. L. Rev. 1, 1-2, 10 (1998). Professor Fischel noted:

If an attorney obtains information from a client that, if disclosed, would prevent another person from being falsely convicted of murder and sentenced to death, he or she must remain silent, even if the disclosure would not implicate the client in the crime. The same duty of silence remains if the attorney learns of kidnapping plans in a contested child custody case.

\textit{Id.} at 1-2. Professor Fischel contrasted a lawyer's freedom to protect his own interests:

The same lawyer who is prohibited from disclosing information learned while representing a client to exonerate someone falsely accused of a capital crime . . . is perfectly free to disclose confidential information when he or she is the one accused, falsely or not. Nor is there any requirement that the lawyer's liberty be at stake, or even that the lawyer be accused of anything criminal. A simple fee dispute with a client is sufficient grounds to disclose confidential information. The lawyer's interest in collecting a fee is apparently a higher priority than exonerating an innocent defendant about to be convicted of a capital crime or helping a distraught family locate an abducted child.

\textit{Id.} at 10.

\textsuperscript{102} \textit{Id.}

\textsuperscript{103} See, e.g., People v. Godlewski, 21 Cal. Rptr. 2d 796, 797 (Cal. Ct. App. 1993) (invoking the attorney-client privilege to avoid revealing that a client confessed that he, and not the other defendant in the case killed his father); \textit{In re John Doe Grand Jury Investigation}, 562 N.E.2d 69, 69-70 (Mass. 1990) (refusing to override the attorney-client privilege to compel an attorney to testify in a grand jury proceeding concerning conversations with his client, the prime suspect in the murder of the client's wife and child, which occurred just prior to the client's suicide); State v. Doster, 284 S.E.2d 218, 220 (S.C. 1981) (barring a lawyer of a deceased client from testifying about matters that may have exonerated a defendant from a drug distribution charge); State v. Valdez, 618 P.2d 1234, 1235-37 (N.M. 1980) (barring a lawyer from testifying that his client had confessed to the robbery for which the defendant had been convicted); People v. Marcy, 283 N.W.2d 754, 756 (Mich. 1979) (invoking the attorney-client
Moreover, there is a fallacy in the idea that lawyers place a premium on assuring that they have frank and candid confidential conversations with their clients in order to effectively represent them. When confronted with the mandate that lawyers be candid with the courts in which they appear, many lawyers will purposefully avoid questioning their clients about certain facts to avoid knowing if their clients have committed perjury. Model Rule 3.3, entitled "Candor Toward the Tribunal," provides:

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;
(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable

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privilege to avoid revealing that a client confessed to murder); State v. Macumber, 544 P.2d 1084, 1086 (Ariz. 1976) (invoking the attorney-client privilege to prevent two attorneys from testifying at a capital murder trial that their deceased client had confessed to them that he, and not the defendant, had committed the murder); People v. Belge, 376 N.Y.S.2d 771, 771 (N.Y. 1975) (invoking the attorney-client privilege to prevent a prosecution of an attorney who failed to disclose the location of three murder victims' bodies).
the tribunal to make an informed decision, whether or not the facts are adverse.\textsuperscript{104}

Because a lawyer would be prohibited from submitting information the lawyer knows to be false, lawyers often refrain from questioning clients about certain facts.\textsuperscript{105} More importantly, the restraint causes a lawyer to not try to assure a full and frank conversation between himself and his client.

Consider the following circumstances: Christopher Stokes represents Kenneth Bell in a criminal child abuse case. Two years earlier, Bell’s seven-year-old child was taken away from him in a civil neglect hearing. Bell admitted during his testimony at the civil neglect hearing that he used force in disciplining his son. Bell further

\textsuperscript{104} Model Rules of Prof’l Conduct R. 3.3 (2002) (emphasis added). The following proposed changes to the Model Rules do not affect the discussion or the analysis in this Article. The new additions are indicated by underline and the deletions by strike-out.

Rule 3.3 Candor Toward the Tribunal
(a) A lawyer shall not knowingly:
(1) make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
(4) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer’s client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaged or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(b) The duties stated in paragraph paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

\textit{Id.}

admitted that his son required medical attention as a result. Because the civil neglect hearing was closed to the public, the local prosecutor lacked access to Bell’s testimony. However, Stokes had access to the taped testimony. Stokes did not listen to the tape because he feared that the tape contained information incriminating his client. During the criminal trial, Bell testified that he never used force on his child and that on one occasion he threw water in his son’s face to calm him. Bell further testified during the criminal trial that his son never needed medical attention because of force that he used against him.\textsuperscript{106}

Many lawyers would not listen to the tape, nor would they question Bell about the extent of the force used upon the child, because any knowledge on the part of the lawyer would affect the lawyer’s ability to place Bell on the stand.\textsuperscript{107} If the lawyer were to listen to the tape and hear Bell admit to excessively beating his child or to question Bell to the extent that he admits to excessively beating his child, the lawyer would not be allowed to put Bell on the stand for him to testify otherwise.\textsuperscript{108} Although it is clear that a lawyer is not obligated to put on the stand a client whom the lawyer knows will commit perjury,\textsuperscript{109} it is equally clear that the disclosure obligation of Model

\textsuperscript{106} I based this hypothetical fact pattern on a case filed in Superior Court in the District of Columbia and substituted fictitious names for the parties’ real names.

\textsuperscript{107} See ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 87-353, at 20 n.9 (1987). At a Continuing Legal Education presentation held at North Carolina Central University on April 12, 2002, with approximately 50 lawyers present, the presenters asked the lawyers whether Stokes owed a duty to prevent Bell’s testimony during the criminal trial. Only one lawyer felt obligated to listen to the tape; that lawyer concluded that lawyers owe a duty to prevent false testimony. The remaining lawyers agreed that lawyers do not “know” of the testimony’s falsity for the purposes of Model Rule 3.3; the lawyer was thus free to put Bell on the stand.

\textsuperscript{108} See MODEL RULES OF PROF’L CONDUCT R. 3.3 (2002).

\textsuperscript{109} ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 87-353 (1987). In Nix v. Whiteside, 475 U.S. 157 (1986), the Supreme Court held that there was no violation of the Sixth Amendment right to effective assistance of counsel when a lawyer refused to cooperate with a criminal defendant in presenting perjured testimony at trial. See id. at 171, 175-76. Relying on Rule 3.3, the Court further concluded that the lawyer’s threats to disclose the perjured testimony to the court and withdraw from representation were in accord with professional standards. See id. at 169; see also ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 87-353 (1987). The Committee stated:

\[\text{[I]f the lawyer knows, from the client’s clearly stated intention, that the client will testify falsely, and the lawyer cannot effectively withdraw from the representation, the lawyer must either limit the examination of the client to subjects on which the lawyer believes the client will testify truthfully; or, if there are none, not permit the client to testify; or, if this is not feasible, disclose the client’s intention to testify falsely to the tribunal.}\]

Rule 3.3 is “strictly limited” to the case where “the lawyer knows that the client has committed perjury . . . . The lawyer’s suspicions are not enough.”

Lawyers often appear hypocritical when they argue that the confidentiality principle is important for candidness because the principle’s exceptions often impair the lawyers’ ability to engage in candid conversations with their clients. Clearly, lawyers can effectively represent their clients with a less rigid application of the confidentiality principle. Courts and bar associations should revise the confidentiality principle to allow lawyers to reveal confidential information when a strong societal need for the information exists.

The present interpretation of the confidentiality principle and its application by lawyers is another example of “loophole lawyering.” “‘Loophole lawyering’ occurs when a lawyer is less concerned with applying the whole law than with finding a way to accomplish the goals of the client by exploiting a perceived ambiguity in the language of the rule or statute.” The ethical rules should be revised to eliminate the lawyer’s ability to manipulate the rules to support the client’s need, thus promoting professional responsibility. The development of the professional rules features a tainted history, and courts and bar associations should therefore carefully critique the rules, including the confidentiality principle.

110. The year after the Supreme Court decided Nix, the Committee issued ABA Formal Opinion 87-353, which elaborated on Rule 3.3:

It must be emphasized that this opinion does not change the professional relationship the lawyer has with the client and require the lawyer now to judge, rather than represent, the client. The lawyer’s obligation to disclose client perjury to the tribunal, discussed in this opinion, is strictly limited by Rule 3.3 to the situation where the lawyer knows that the client has committed perjury, ordinarily based on admissions the client has made to the lawyer. The lawyer’s suspicions are not enough.

ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 87-353 (1987) (footnote omitted). Although the Committee noted that “some trial lawyers report that they have avoided the ethical dilemma posed by Rule 3.3 because they follow a practice of not questioning the client about the facts in the case and, therefore, never ‘know’ that a client has given false testimony[,]” the Committee failed to amend the ethical rule to address this problem. Id.

111. See Green, supra note 45, at 286.

112. See id. at 289. In response to a challenge to have the “ethics of [the legal] profession rise to the high standards which its position of influence in the country demands[,]” [I]lawyers were . . . given the opportunity to devise a set of rules which would establish higher moral standards for the profession.” However, at the time of drafting, “the legal community was dominated by elitist lawyers who designed the ethical rules to preserve their own status.” Id. (citing JEROLD S. AUERBACH, UNEQUAL JUSTICE:
C. Application of the Confidentiality Principle to Lawyers Compared with Other Professions

Lawyers are not the only professionals to argue that in order to hold candid and frank conversations with their clients, the clients need to know that the information will be kept in confidence. Client confidentiality privileges exist in other professions such as accounting, medicine, psychology, and the clergy. In these professions, the courts and the legislators have required the client confidentiality privileges to yield when public policy dictates. For example, the Supreme Court, recognizing the need to eliminate invidious discrimination in employment, refused to recognize the privilege of "academic freedom" and required a university to disclose confidential documents to the Equal Employment Opportunity Commission ("EEOC"). The courts and the legislatures have not, however, allowed the attorney-client privilege to give way, even when compelling public policy reasons dictate otherwise.

Accountants would also assert that a need exists for the information that they receive from a client to be kept confidential. The purpose of the accountant-client privilege has been stated in different ways, including: (1) to encourage free and open communications between the accountant and the client; "to insure

LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 40-41 (1976)). Moreover, at the time of drafting, the ABA excluded African American attorneys and also tried to limit immigrant lawyers' access to the profession. See Green, supra note 45, at 290-91.

113. See discussion supra Part III.C.

114. Univ. of Pennsylvania v. EEOC, 493 U.S. 182, 201 (1990). In University of Pennsylvania v. EEOC, the University of Pennsylvania denied a female professor tenure. See id. at 185. In the process of investigating her charge of sex discrimination, the EEOC subpoenaed university documents relating to her tenure decision, as well as the tenure decisions of five of her male colleagues. See id. at 186. The University refused to produce the documents, asserting a special privilege to not disclose confidential peer review material under both the common law and principles of "academic freedom" protected by the First Amendment. Id. at 186-88. The university argued that its ability to obtain candid assessment of the work of candidates being considered for promotion or tenure in the future would be harmed by compelled disclosure of the documents. See id. at 189. In a unanimous opinion, the Supreme Court rejected this argument and required disclosure of the confidential documents. See id. at 201. The Court reasoned that, for the purposes of discovery, the comparative peer review materials were clearly relevant to determining whether sex discrimination had occurred in the university's tenure process. See id. at 192-93. Moreover, the Court noted that the need to eradicate invidious discrimination outweighed the need to recognize a special privilege. See id. at 193.

115. See discussion supra Part III.C.

an atmosphere wherein the client will transmit all relevant information to the accountant without fear of . . . disclosure[,]" thereby enabling the accountant to adequately perform his services;\textsuperscript{117} and (3) "to protect from disclosure the substance of information conveyed by the client to the accountant."\textsuperscript{118}

Accountant-client privilege allows for more exceptions than the attorney-client privilege does. A common exception exists when the accountant prepares tax documents for a client. Many courts have held that no privilege exists in the reporting of income taxes and have therefore forced accountants to turn over records when they suspect tax fraud, evasion, or underestimation.\textsuperscript{119} Courts have also held that the accountant-client privilege does not exist in bankruptcy or criminal cases.\textsuperscript{120}

The origins and the application of the accountant-client privilege are different from the origins and application of the attorney-client privilege. The accountant-client privilege is purely statutory and did not exist at common law.\textsuperscript{121} One reason advanced for the nonexistence of the accountant-client privilege at common law is that "activities of the accounting profession were very limited" in the 17th and 18th centuries, and "when the common law first recognized most of the present-day privileges," no accountant-client privilege existed.\textsuperscript{122} Thus, because the accountant-client privilege is purely statutory, it must be narrowly construed and not given any broader scope than appears on its face.\textsuperscript{123} Consequently, courts apply a much stricter interpretation of the accountant-client privilege than of the attorney-client privilege. Today, approximately one-third of the states

\textsuperscript{117} See Gearhart v. Etheridge, 208 S.E.2d 460, 461 (Ga. 1974).
\textsuperscript{118} See People v. Paasche, 525 N.W.2d 914, 918 (Mich. Ct. App. 1994) (citing People v. Safiedine, 414 N.W.2d 143, 146 (Mich. 1987)).
\textsuperscript{119} See United States v. Arthur Young & Co., 465 U.S. 805, 817-18 (1984); Couch v. United States, 409 U.S. 322, 335 (1973). Courts have forced accountants to submit their clients' records to the IRS, without express or implied approval from clients for the purpose of IRS audits. See Young, 465 U.S. at 817-18; Couch, 409 U.S. at 335. Courts have frequently held that a "little expectation of privacy" by the client should exist when documents are given to an accountant for the purpose of filing taxes. Id. at 335.
\textsuperscript{120} See Investigation No. 202, 452 A.2d at 461.
\textsuperscript{122} Investigation No. 202, 452 A.2d at 460.
\textsuperscript{123} See MacBride v. Gulbro, 234 A.2d 586, 588 (Md. 1967).
have enacted statutes protecting a client’s communication to his accountant.  

Another difference between the accountant-client and the attorney-client privileges exists with respect to the subsequent hiring of a professional in the same field. If an accountant assists a client who had employed another accountant, the former accountant must release the client’s information to the subsequent accountant without regard to the client’s permission. With respect to attorneys, the attorney-client privilege perpetuates when the client seeks the help of another attorney and can only be waived with the client’s permission.

Physicians also argue the need for confidentiality with their patients. “The purpose of the [physician-patient] privilege is to protect patient[s] by encouraging full and confidential disclosure to [their] physician[s] of all information, however embarrassing, which might aid [their] physician[s] in diagnosis and treatment.” No physician-patient privilege exists under federal law. The rules and exceptions governing the physician-patient privilege, like those governing the accountant-client privilege, are wholly statutory and


(b) Except as provided in subsections (c) and (d) of this section or unless expressly permitted by a client or the personal representative or successor in interest of the client, a licensed certified public accountant or firm may not disclose:

(1) The contents of any communication made to the licensed certified public accountant or firm by a client who employs the licensed certified public accountant or firm to audit, examine, or report on any account, book, record, or statement of the client;

(2) Any information that the licensed certified public accountant or firm, in rendering professional service, derives from:

(i) A client who employs the licensed certified public accountant or firm; or

(ii) The material of the client. . .

(d) (Exceptions). The privilege against disclosure required by subsection (b) of this section does not affect:

(1) The bankruptcy laws;

(2) The criminal laws of the State; or

(3) A regulatory proceeding by the State Board of Public Accountancy under §§ 2-317 and 2-412 of the Business Occupations and Professions Article.

vary widely from state to state.\textsuperscript{128} For example, in North Carolina the privilege for communications between a physician and a patient is "qualified, rather than . . . absolute, . . . in that [a] judge has [the] discretion to ‘compel . . . disclosure, if in his opinion [disclosure] is necessary [for the] proper administration of justice.'"\textsuperscript{129} In some jurisdictions, statutes render the physician-patient privilege and the psychotherapist-client privilege inapplicable in child abuse cases.\textsuperscript{130} In other jurisdictions, courts may choose to override the privilege if doing so is in the state's best interest or for the child in a child abuse or custody case, even if the statute does not address these exceptions.\textsuperscript{131} With respect to the judge's discretion or to the child abuse cases, no such exceptions to the attorney-client privilege exist.

Like physicians, psychotherapists assert the need to keep their patient's information in confidence. The Supreme Court has held that "confidential communications between a licensed psychotherapist and her patients in the course of diagnosis and treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence."\textsuperscript{132} The Court stated that the "psychotherapist . . . and patient[] share a unique relationship, in which the ability to communicate freely without the fear of public disclosure is the key to successful treatment."\textsuperscript{133} In some form, each of the 50 states has

\begin{itemize}
\item \textsuperscript{128} See Whalen v. Roe, 429 U.S. 589, 602 n.28 (1977).
\begin{quote}
No person, duly authorized to practice physic or surgery, shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon, and no such information shall be considered public records . . . . Confidential information obtained in medical records shall be furnished only on the authorization of the patient, or if deceased, the executor, administrator, or in the case of unadministered estates, the next of kin. Any resident or presiding judge in the district . . . may . . . compel disclosure if in his opinion disclosure is necessary to a proper administration of justice.
\end{quote}
\item \textsuperscript{130} See State v. Friend, 385 N.W.2d 313, 318 (Minn. Ct. App. 1986); State ex rel. D.M. v. Hoester, 681 S.W.2d 449, 451 (Mo. 1984) (en banc).
\item \textsuperscript{132} Jaffee v. Redmond, 518 U.S. 1, 15 (1996).
\item \textsuperscript{133} Id. at 6 (quoting Jaffee v. Redmond, 51 F.3d 1346, 1355-56 (7th Cir. 1995)).
\end{itemize}
adopted the psychotherapist-patient privilege.\textsuperscript{134} They have taken different approaches when recognizing the privilege. The states' psychotherapist-patient privilege falls into four categories.\textsuperscript{135} There are "[13] states [that] treat the [psychotherapist-patient] privilege as identical to the attorney-client privilege",\textsuperscript{136} "[22] states revoke the privilege in trials involving specific crimes, most commonly child abuse and homicide";\textsuperscript{137} "[10] states terminate the privilege if the patient poses an imminent threat to an identifiable third person",\textsuperscript{138} and "[t]hree states allow [] court[s] to weigh the value of the evidence obtained against the privacy of the patient on a case-by-case basis."\textsuperscript{139} The Seventh Circuit Court of Appeals, in \textit{Jaffee v. Redmond},\textsuperscript{140} held that the privilege should not apply if "in the interests of justice, the evidentiary need for the disclosure of the contents of a patient's counseling sessions outweighs that patient's privacy interests."\textsuperscript{141}

Finally, clergy also assert that a need exists to keep the information that they receive from the parishioners confidential. Although this privilege did not exist at common law, it has long been a recognized principle of American law and every state has recognized some form of this privilege.\textsuperscript{142} This privilege exists because of "the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return."\textsuperscript{143} For this privilege to apply, "the statements [must have been] made in the usual course of the discipline; . . . the person claiming the privilege [must be] allowed by the statute to claim it; . . . the communication [must have been]\textsuperscript{144}

134. \textit{See id.} (citing \textit{Jaffee}, 51 F.3d at 1355-56).
136. \textit{Id.}
137. \textit{Id.} at 383-84. Virginia and Texas exempt all crime from the privilege. \textit{See id.} at 383 n.75. Washington, D.C. exempts medical fraud, and Nebraska exempts controlled substances. \textit{See id.}
138. \textit{Id.} at 384.
139. \textit{Id.}
141. \textit{Id.} at 7.
secret; and . . . the statements [must have been] penitential in character and made by the penitent."\textsuperscript{144}

In most jurisdictions in which the clergy-penitent privilege applies, statutes expressly prohibit the clergy "from disclosing the contents of a confidential communication 'without the consent of the person making the communications.'"\textsuperscript{145} Most statutes also require that the communication be made while the penitent is seeking spiritual guidance rather than merely conversing with the clergy.\textsuperscript{146} Thus, "the privilege is not absolute. Some states have required the privilege to be abrogated in certain circumstances, including cases of child abuse."\textsuperscript{147} Virginia omits the prohibition against disclosing confidential information: a member of the clergy may disclose any information entrusted to the clergy and "leave . . . it to his conscience to decide when disclosure is appropriate."\textsuperscript{148}

In summation, the client confidentiality privileges that involve professionals such as accountants, physicians, psychotherapists, and clergy serve an important purpose. However, when a society has exhibited a compelling need for the information, the courts and the legislators have been willing to balance that need against the need to preserve confidentiality. In appropriate situations, these courts and legislators have required disclosure. As previously indicated, their willingness to require disclosure by applying this balancing test has not been extended to the attorney-client privilege. Members of the legal profession are not in a position to argue that the need for confidential information is greater in the attorney-client relationship than in these other relationships. Consequently courts and bar associations should similarly balance the need to keep information confidential against the need for disclosure.

Although the privileges in the other professions are statutory (except for the clergy-penitent privilege, which, like the attorney-

\textsuperscript{145} Seidman v. Fishburne-Hudgins Educ. Found., Inc., 724 F.2d 413, 415 (4th Cir. 1984) (quoting In re Williams, 152 S.E.2d 317, 324 (N.C. 1967)).
\textsuperscript{146} See Burger v. State, 231 S.E.2d 769, 771 (Ga. 1977).
\textsuperscript{147} Ross, supra note 142, at 977.
\textsuperscript{148} Seidman, 724 F.2d at 416 & n.2.
client privilege, finds its roots in the common law), the difference in origin should not dictate whether the attorney-client privilege should yield to a compelling need for disclosure. In determining whether the attorney-client privilege should give way, courts and bar associations should look at the rationale for the privilege and determine whether circumstances exist where the privilege can yield without substantially interfering with the privilege's purpose. After a careful review of the rationale for the privilege, courts and bar associations should see that they can maintain integrity of the attorney-client privilege even if the privilege yields in certain situations.

IV. APPLICATION OF THE CONFIDENTIALITY PRINCIPLE WHERE SOCIETY NEEDS THE CONFIDENTIAL INFORMATION

The confidentiality principle clearly impedes courts in searching for the truth. The possibility of a situation arising where the need to assure that the attorney is able to hold an honest conversation with his client does not justify such an impediment. The Supreme Court has applied the confidentiality principle to avail a societal need for the confidential information but has refused to find an exception. At the time of this publication, a case is currently before the North Carolina Supreme Court in which the court must determine whether the confidentiality principle should give way to the State's need for information as part of a criminal investigation.

A. Swidler & Berlin v. United States

In Swidler & Berlin v. United States, the Supreme Court was presented with the opportunity to address whether the attorney-client privilege survived a client's death. Although circumstances exist

151. See id. at 401. In Swidler & Berlin, James Hamilton, an attorney, made notes of an initial interview with his client, Vincent W. Foster, shortly before his death. See id. The Court noted: [The] dispute [arose] out of an investigation conducted by the Office of the Independent Counsel into whether various individuals made false statements, obstructed justice, or committed other crimes during investigations of the 1993 dismissal of employees from the White House Travel Office. [Mr. Foster] was Deputy White House Counsel when the
where the privilege must yield, such as the self-interest exception for attorneys, the Supreme Court concluded that the privilege does survive the client’s death, even when providing the information would further a criminal investigation. The Supreme Court stated that “[t]he attorney-client privilege is one of the oldest recognized privileges for confidential communications” and that “[t]he privilege is intended to encourage ‘full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.’” The Supreme Court failed to address the hypocrisy of simultaneously maintaining the self-interest exception and asserting the privilege’s importance in assuring full and frank communications. The Court opined that existing exceptions to the privilege, such as the crime-fraud and testamentary exceptions, are consistent with the privilege’s purposes, “while a posthumous exception in criminal cases appears at odds with the goals of encouraging full and frank communication and of protecting the client’s interests.” Unfortunately, the Supreme Court provided little support for this conclusion, although the Court did concede that limited empirical evidence existed on the extent that a posthumous exception would discourage full and frank communication. Nevertheless, the

firings occurred. In July 1993, Foster met with [Mr.] Hamilton, an attorney at [] Swidler & Berlin, to seek legal representation concerning possible congressional or other investigations of the firings. During a 2-hour meeting, [Mr.] Hamilton took three pages of handwritten notes. One of the first entries in the notes is the word “Privileged.” Nine days later, [Mr.] Foster committed suicide.

In December 1995, a federal grand jury, at the request of the Independent Counsel, issued subpoenas to [Mr. Hamilton and Swidler & Berlin to seek Mr.] Hamilton’s handwritten notes of his meeting with [Mr. Foster].

*Id.* at 401-02.
152. *Id.* at 410-11.
153. *Id.* at 403 (citing Upjohn Co. v. United States, 449 U.S. 383, 389 (1981), and Hunt v. Blackburn, 128 U.S. 464, 470 (1888)).
154. *Id.* at 409-10.
Supreme Court was willing to maintain the privilege based on long-standing tradition.

In her dissent in *Swidler & Berlin*, Justice O'Connor echoed the sentiments of the Circuit Court of Appeals for the District of Columbia when she raised valid reasons for recognizing an exception to the attorney-client privilege.\(^\text{156}\) In evaluating whether the privilege should yield under the circumstances of *Swidler*, Justice O'Connor argued that "the paramount value that our criminal justice system places on protecting an innocent defendant should outweigh a deceased client's interest in preserving confidences."\(^\text{157}\) Moreover, Justice O'Connor recognized that attorneys cannot argue the importance of the attorney-client privilege to assure full and frank communications and at the same time argue the importance of exceptions for "crime-fraud [or] for claims relating to attorney competence or compensation."\(^\text{158}\) She argued that these exceptions "reflect the understanding that, in certain circumstances, the privilege ceases to operate as a safeguard on 'the proper functioning of our adversary system.'"\(^\text{159}\) Although Justice O'Connor did not go so far as to say that allowing the self-serving exception while refusing an exception as part of a criminal investigation when the client is deceased is hypocritical, her arguments demonstrated this hypocrisy.

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1226 (1962). These articles note that clients are often uninformed or mistaken about the privilege, but suggest that a substantial number of clients and attorneys think the privilege encourages candor. Two of the articles conclude that a substantial number of clients and attorneys think the privilege enhances open communication, Alexander, *supra*, at 244-246, 261, and that the absence of a privilege would be detrimental to such communication, Comment, 71 Yale L.J., *supra*, at 1236. The third article suggests instead that while the privilege is perceived as important to open communication, limited exceptions to the privilege might not discourage such communication, Zacharias, *supra*, at 382, 386. Similarly, relatively few court decisions discuss the impact of the privilege's application after death.

*Id.* at 409 n.4.


\(^\text{157}\) *Swidler & Berlin*, 524 U.S. at 413 (citing Schlup v. Delo, 513 U.S. 298, 324-25 (1995); *see In re Winship*, 397 U.S. 358, 371 (1970) (Harlan, J., concurring)). Justice O'Connor also noted that "our historic commitment to the rule of law . . . is nowhere more profoundly manifest than in our view that the twofold aim of criminal justice is that guilt shall not escape or innocence suffer." *Id.* (quoting United States v. Nixon, 418 U.S. 683, 709 (1974) (internal quotation marks omitted)).

\(^\text{158}\) *Swidler & Berlin*, 524 U.S. at 414.

\(^\text{159}\) *Id.* (citing United States v. Zolin, 491 U.S. 554, 562-63 (1989)).
The court of appeals similarly opined “that the risk of posthumous revelation, when confined to the criminal context, would have little to no chilling effect on client communication, but that the costs of protecting communications after the death were high.” 160 Thus, the court of appeals “concluded that the privilege was not absolute in [the criminal context where the client is deceased], and that instead, a balancing test should apply.” 161

B. Matter Pending Before North Carolina Supreme Court

The Supreme Court of North Carolina considered the question of whether a trial court properly ordered an attorney to reveal a deceased client’s confidential communications regarding any criminal conduct surrounding a suspected homicide. 162 The trial court concluded that a reasonable basis existed to believe that the deceased client had provided his attorney with relevant information regarding the death. 163 Moreover, the trial court found “[t]hat the information sought is highly important, material and relevant to an ongoing homicide investigation” and “[t]hat this specific information does not appear to be available from any other source.” 164 The trial court boldly concluded “that the State’s and public’s interest in determining the identity of the person or persons responsible for the death . . .

160. Id. at 402 (citing In re Sealed Case, 124 F.3d 232, 233-34 (D.C. Cir. 1997)).
161. Id.
162. See In re The Investigation of the Death of Miller, 584 S.E.2d 772, 776 (N.C. 2003). The facts regarding an affair between the deceased client and the murder victim’s wife resembled those of a television soap opera. On December 2, 2000, Dr. Eric D. Miller died of arsenic poisoning. Dr. Miller was a postdoctoral research scientist employed by the Lineberger Cancer Research Center. On the evening of November 15, 2000, Dr. Miller went bowling with several of his wife’s coworkers. Among the coworkers was a man named Derril Willard, who was involved in a romantic relationship with Dr. Miller’s wife, Anne. Mr. Willard served Dr. Miller a cup of beer that Dr. Miller described as tasting strange to several people. A short time later he began experiencing severe nausea, vomiting, and abdominal cramping, which are early symptoms of arsenic poisoning. After hospitalization, Dr. Miller remained at home under the care of his wife and parents. He died in the early morning hours of December 2, 2000. An autopsy established the cause of death as arsenic poisoning. See id.

An investigation following Dr. Miller’s death revealed that Mr. Willard and Ms. Miller were in frequent contact with each other prior to Dr. Miller’s poisoning and subsequent death. Mr. Willard retained attorney Richard T. Garmonto represent him regarding the investigation into the death of Dr. Miller. Mr. Willard and Mr. Garmonto met on several occasions to discuss the investigation. On January 22, 2001, Mr. Willard committed suicide. See id. at 776-77.
163. See id. at 782.
164. Id. ¶ 5.
outweigh the public interest in protecting the attorney-client privilege," particularly where the estate of the deceased has waived the privilege and specifically requested that the information be disclosed by the attorney.165

The facts in this case represent the type of case where the public interest in the information sought outweighs the interests that the rules of confidentiality protect.166

V. CONFIDENTIALITY RULE SHOULD GIVE WAY TO A COMPELLING NEED FOR THE INFORMATION, UNLESS PROTECTED BY THE FIFTH AMENDMENT

Courts and bar associations should revise the confidentiality principle and allow lawyers to reveal confidential information when society has exhibited a strong need for the information. Specifically, the confidentiality principle should not provide greater protection than the Fifth Amendment right against self-incrimination.

The Fifth Amendment "protects a person . . . against being incriminated by his own compelled testimonial communications."167 "To receive Fifth Amendment protection, a person’s statement or act must (1) be compelled; (2) be testimonial; and (3) incriminate the

165. See Death of Miller, 584 S.E.2d at 787.

166. On August 22, 2003, the North Carolina Supreme Court ruled that when a client is deceased, upon a nonfrivolous assertion that the privilege does not apply, with a proper, good-faith showing by the party seeking disclosure of communications, the trial court may conduct an in camera review of the substance of the communications. To the extent any portion of the communications between the attorney and the deceased client relate solely to a third party, such communications are not within the purview of the attorney-client privilege. If the trial court finds that some or all of the communications are outside the scope of the attorney-client privilege, the trial court may compel the attorney to provide the substance of the communications to the State for its use in the criminal investigation . . . . To the extent the communications relate to a third party but also affect the client’s own rights or interests and thus remain privileged, such communications may be revealed only upon a clear and convincing showing that their disclosure does not expose the client’s estate to civil liability and that such disclosure would not likely result in additional harm to loved ones or reputation.

Id. at 791.

person in a criminal proceeding.” A client’s need to keep information confidential is greatest when the information could incriminate the client in a criminal proceeding. Except for this great need by the client to keep incriminating information secret, however, another person’s compelling need may outweigh the client’s need to keep confidential information he has shared with his attorney. In those circumstances where the Fifth Amendment does not protect the information, a court should be allowed to balance the client’s need to keep the information confidential against a person’s compelling need for the information.

The compelling need must be demonstrated by some strong societal reason, such as preventing the conviction of an innocent person. In addition, a person could demonstrate a compelling need if the information is required to locate murder victims in order to give them a proper burial. In circumstances where the client is dead, such as in Swidler and In re the Investigation of the Death of Eric DeWayne Miller, no Fifth Amendment protection exists, and the people needing the information can demonstrate a compelling need for the information. Accordingly, a court should be allowed to compel the attorney to reveal the confidential information shared by the client. In circumstances where the client has been granted immunity and therefore cannot be subject to a criminal conviction but refuses to reveal the information, the court should be allowed to compel the attorney to reveal the information if a person can demonstrate a compelling need. Moreover, if the information is not

168. Stephen Shapiro, Thirty-First Annual Review of Criminal Procedure, 90 GEO. L.J. 1087, 1690-91 (2002) (emphasis added). “The protection enables a defendant to refuse to testify at a criminal trial, and ‘privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.’” Id.

169. Although one may argue that a client also has a great need to keep confidential information shared with an attorney in a civil context, because a client’s property or money are at risk, that need is not as great as the need to keep confidential incriminating information. The right against self-incrimination has constitutional protection, while no such protection exists in the civil context. See U.S. CONST. amend. V.

170. See supra note 88 (discussing cases where the application of the confidentiality rule to suppress information that could lead to a just result).


incriminating but is only embarrassing to the client, and the client refuses to reveal the information, the court should be allowed to compel the attorney to reveal the information if a person can demonstrate a compelling need.

Courts are fully capable of conducting a balancing test where competing interests are at issue. The balancing test adopted should resemble the balancing test established in *Roviaro v. United States*. In *Roviaro*, the Supreme Court recognized the government’s privilege to withhold the identity of a confidential informant. The Court reasoned that “[t]he purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.” However, the Court also recognized the defendant’s right to prepare his case, stating that “[t]he problem is one that calls for balancing the public interest in protecting the flow of information against the individual’s right to prepare his defense.” Courts balancing these interests should consider “the crime charged, the possible defenses, the possible significance of the informer’s testimony, and other relevant factors.” The Court held that “[w]here the disclosure of an informer’s identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way.”

In balancing the client’s need to keep the information confidential against a compelling need for the information, courts should consider “the fundamental requirements of fairness.” Assuming, as most courts and lawyers do, that the confidentiality principle is an important privilege for clients, circumstances still exist where that

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174. Id. at 59.
175. Id.
176. Id. at 62.
177. Id.
178. Id. at 60-61.
privilege must yield. When the information sought does not affect the client’s Fifth Amendment right and the person seeking the information can establish a compelling need, the privilege should give way. In that situation, courts should apply the Roviaro balancing test in determining whether to require an attorney to disclose information when a person seeking the information is charged with a crime. In applying the Roviaro test, courts should consider “the crime charged, the possible defenses, the possible significance of the [attorney’s] testimony, and other relevant factors.”

Courts should not limit the disclosure of confidential information by a client to situations where a person is charged with a crime; courts should also require disclosure when a government agency establishes a compelling need as part of its investigation. Furthermore, courts should require disclosure to determine the location of victims because our society has recognized the importance of allowing people to bury their loved ones. Courts should also follow Roviaro in inspecting the confidential information in camera.

Revisiting the hypothetical involving Lena Lawyer, under the present interpretation of the confidentiality principle, certain circumstances exist which would allow Lena Lawyer to reveal confidential information that she received from Carrie Client, and certain circumstances exist which would prohibit her from disclosing the confidential information. The difference in the circumstances that lead to different results is not explained by any important societal need, but they can only be explained by a rule that is self-serving to lawyers and not to society as a whole. To resolve a fee dispute, Lena Lawyer may “reveal [confidential information] to the extent the lawyer reasonably believes necessary.” Conversely, Lena Lawyer may not reveal that Carrie Client told her that she disposed of the

180. Id. at 62.
181. See id. Many cases have allowed recovery for mental distress at the intentional mutilation or disinterment of a dead body, or for interference with proper burial. See, e.g., Alderman v. Ford, 72 P.2d 981, 984 (Kan. 1937); Gostkowski v. Roman Catholic Church of the Sacred Heart of Jesus and Mary, 186 N.E. 798, 800 (N.Y. 1933); Papies v. Lawrence, 263 A.2d 118, 121 (Pa. 1970).
182. See Shapiro, supra note 168, at 1428.
body on her grandmother’s farm, even though such disclosure would not affect Carrie and would allow the victim’s family to have a proper burial.\textsuperscript{184} Further, Lena Lawyer may not disclose to the police the involvement of Arnold Accomplice, which would lead to the appropriate conviction of a criminal.\textsuperscript{185} Finally, Lena Lawyer may not disclose any information about Carrie Client’s involvement that could lead to the resolution of the manner in which Victor Victim died.\textsuperscript{186}

These differing circumstances that allow a lawyer to disclose information should be eliminated. If the lawyer can reveal confidential information to protect the lawyer’s financial interest, then the lawyer should be able to reveal confidential information where an important societal need exists. Some proponents of the confidentiality principle, in its present interpretation, may agree that it is self-serving to allow lawyers to reveal confidential information to protect the lawyers’ self-interest. Those proponents may nonetheless suggest that the courts and bar associations should fix the inequity by abolishing the self-serving exception and not by changing the interpretation of the confidentiality principle. However, abolishing the self-serving exception will not fix the real issue. The real issue is that the courts have suppressed information that could lead to a just result when no legitimate need exists to suppress that information. The existence of the self-serving exception demonstrates that circumstances exist where a lawyer may reveal confidential information without hampering the lawyer’s effective representation of his client.

The Author’s proposed interpretation of the confidentiality principle would dictate revealing confidential information when a strong societal need exists for the information, unless disclosure implicates the client’s Fifth Amendment right. Under this interpretation, Lena Lawyer would be required to reveal the location of Victor Victim’s body. Although some value to keeping

\textsuperscript{184} See \textit{id.}; supra Part IV.B; supra note 164 and accompanying text.
\textsuperscript{185} See \textit{MODEL RULES OF PROF’L CONDUCT} R. 1.6(b)(2) (2002).
\textsuperscript{186} See \textit{id.}
information confidential may exist, even after the death of the client, that value does not outweigh the societal need to properly bury Victor Victim. Because Carrie Client is dead, she no longer possesses Fifth Amendment rights. Furthermore, Lena would be required to provide information to the police about Arnold Accomplice’s role in Victor Victim’s death. If Lena revealed the information about Arnold Accomplice’s role, Carrie’s Fifth Amendment right would not be implicated, and Arnold is not entitled to request that the information be kept confidential because he is not Lena’s client.

CONCLUSION

Privileged communications between individuals because of their relationship should be narrowly applied to serve their limited purpose. The attorney-client privilege, the accountant-client privilege, the physician-patient privilege, the psychotherapist-patient privilege, and the clergy-penitent privilege all serve legitimate purposes. However, they are also an impediment to the truth and should be narrowly applied.

While courts and legislators have been willing to find exceptions in many of these privileges, the attorney-client privilege continues to have a broad application. Courts and bar associations should revise the confidentiality principle and allow lawyers to reveal confidential information when a strong societal need exists for the information. Specifically, the confidentiality principle should not provide greater protection than the Fifth Amendment right against self-incrimination. Consequently, if a party demonstrates a compelling need for confidential information, a court should be allowed to require the lawyer to disclose that information, unless the Fifth Amendment protects its disclosure.

Attorneys continue to have a tainted image in America, and critics are skeptical of the rules that govern attorneys. The courts and the bar associations need to revisit these rules to ensure the highest integrity; a re-examination of the confidentiality principle should receive their highest priority.