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In Defense of Client-Lawyer Confidentiality ... and Its Exceptions ...

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In Defense of Client-Lawyer Confidentiality . . . and Its Exceptions . . .

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I. INTRODUCTION

Two recent events have occasioned reconsideration of the purpose of lawyer-client confidentiality and its exceptions. The Restatement (Third) of the Law Governing Lawyers, completed after twelve years of drafting and debate,1 reexamined both the fiduciary duty of confidentiality, found in both the lawyer professional codes and the law of agency, and the evidentiary client-lawyer privilege, which blocks disclosure of client confidences in litigation. Just as the Restatement process was concluding, the American Bar Association established the Ethics 2000 Commission to reexamine the lawyer codes and recom-

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mend revisions to the Model Rules of Professional Conduct.\textsuperscript{2} Most of the final revisions recommended by the Commission have now met with approval in the ABA House of Delegates, which in turn has led over forty jurisdictions to consider these amendments as a template for their own professional codes.\textsuperscript{3} The Restatement and Ethics 2000 undertakings have resulted in a remarkably similar consensus about the appropriate justifications for client-lawyer confidentiality and the equally important rationales that justify exceptions to the professional obligation.

In this Article, I examine the reasons that confidentiality remains a bedrock fiduciary obligation for lawyers as well as the foundation for the attorney-client privilege. In Part II, I trace the history and purpose of this professional obligation, revealing two main moral justifications, efficient operation of the legal system and the promotion of trust and privacy in the client-lawyer relationship. In Part III, I examine these same rationales as the justification for exceptions to the fiduciary duty, focusing on the exceptions articulated by both the Restatement and the revised Model Rules. I conclude that the current scope of confidentiality protection and most of the exceptions created by these two bodies of law accurately implement the central purposes of confidentiality. Each jurisdiction therefore should seriously consider revising its own lawyer codes and common law to recognize these exceptions and their underlying purposes.

II. DEFENDING CONFIDENTIALITY

The recognition of confidentiality as a core professional obligation first arose in cases applying the attorney-client privilege, which Wigmore dates to the seventeenth century.\textsuperscript{4} In the twentieth century, the idea that lawyers were forbidden from disclosing client confidences in litigation created the basis for the recognition in agency law of a broader professional obligation of confidentiality as an integral part of the fiduciary duty of loyalty that lawyer-agents owe to client-principals.\textsuperscript{5} Beginning about 100 years ago, both the attorney-client privilege and the agency duty of confidentiality became incorporated into


\textsuperscript{5} See Restatement (First) of Agency § 395 (1933) (including a prohibition against using or disclosing confidential information with other duties of loyalty).
lawyer codes as the obligation not to divulge the confidences and secrets of a client.\textsuperscript{6}

Throughout this legal development, two distinct but complementary reasons have been put forward to justify client-lawyer confidentiality. Each is tied to a different philosophical tradition, and each provides some, but not complete guidance in understanding this professional obligation.\textsuperscript{7} Both justifications begin with an understanding of a reciprocal inequality inherent in the client-lawyer relationship. On the one hand, clients have the power to select, supervise and fire lawyers, and to decide when a lawyer acts in the client's best interests. On the other, lawyers have knowledge and skill that enables them to use or abuse client information for their own or others' benefit.\textsuperscript{8}

A utilitarian justification for protecting confidentiality focuses on the consequences of such a legal protection. Such a rationale usually, but not always, concludes that confidentiality promotes the greatest good for the greatest number, because it encourages clients to give lawyers facts, which are essential to making the legal system work. A utilitarian rationale also promotes the use of lawyers and the legal system as an efficient and fair alternative to other means of resolving disputes. The difficulty of measuring the full consequences of confidentiality or its exceptions makes this rationale less than complete. Nevertheless, utilitarian reasoning can be used to focus on competing consequences and as a rough estimation of their relative importance. However, in searching for the greatest good for the greatest number, utilitarians can ignore or discount unjustified harm to a minority of those who do not benefit. For this reason, most moral philosophers supplement utilitarian reasoning with an understanding of fundamental rights that protect individuals from unjust oppression.

\textsuperscript{6} See, e.g., \textit{Neb. Code of Prof'l Responsibility DR 4-101(A) (1998)}; ABA \textit{Canons of Prof'l Ethics} Canon 6 (1908) ("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.").

\textsuperscript{7} Because I focus here on general rules that guide professional behavior, I follow the "theoretical-juridical" template of most discussions of ethics over the past century that pictures "morality as an individually action-guiding system within or for a person." \textit{Margaret Urban Walker, Moral Understandings: A Feminist Study in Ethics} 61 (1998). I do not mean to ignore the fact that morality consists in practice as well as theory, but instead focus here on whether the theory that guides practice makes sense.

\textsuperscript{8} This understanding also informs feminist notions of morality, which begin by seeking to reveal the power in relationships that can favor a particular normative point of view. See, e.g., \textit{Rosemarie Tong, Feminine and Feminist Ethics} 158-84 (1993); Margaret Urban Walker, \textit{Seeing Power in Morality: A Proposal for Feminist Naturalism in Ethics, in Feminists Doing Ethics} 3-14 (Peggy DesAutels & Joanne Waugh eds., 2001).
The moral theory most often relied on to support a concern for individual human rights is deontological. This rationale stems from the proposition that a morally correct action or rule conforms to some principle of duty, which can exist independent of consequences. Actions are blameworthy if they violate these duties. According to this explanation, confidentiality promotes respect for human autonomy by guaranteeing trust and privacy in the client-lawyer relationship. Such a justification also mirrors other rights-based justifications that promote individual respect in our society. Deontological theories have the advantage of focusing on individual rights and are especially helpful in assessing whether or not people are treated fairly. They provide less guidance, however, about what to do when two fundamental values collide because they offer little help in deciding which duty is stronger.

Both of these philosophical justifications can be found in the legal literature justifying the obligation of client confidentiality as well as the cases and rules that justify exceptions to the doctrine. Examining these rationales can help us better understand current law, the exceptions still under debate, and the issues yet to come.9

A. Utilitarian Justifications

Utilitarians begin their analysis of morally right action by counting consequences and searching for the greatest good for the greatest number. Jeremy Bentham and John Stuart Mill, for example, believed that the ethical validity of conduct should be determined by its effect on the aggregate happiness. With respect to client-lawyer confidentiality, utilitarians form two groups: the true believers and the naysayers. The true believers include most lawyers and probably most clients, as well as nearly every court in this country. The naysayers constitute a tiny minority, but use similar utilitarian calculations to reach opposite results. Neither group has good empirical data to support its conclusion.

True believers begin their utilitarian justification of the confidentiality obligation by reminding us that the legal system exists as an alternative to ad hoc results and, ultimately, anarchy. For this reason, citizens with disputes should be encouraged to bring them to the legal system for resolution, where compliance with legal norms will promote peaceful, fair, and efficient results.10 A slightly different variation on this theme emphasizes the importance of the legal system in

9. For a similar discussion of the Kutak Commission’s original Model Rules proposals see Nancy J. Moore, Limits to Attorney-Client Confidentiality: A “Philosophically Informed” and Comparative Approach to Legal and Medical Ethics, 36 CASE W. RES. L. REV. 177 (1986).

10. See generally CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 243 (1986) (discussing the policy behind the confidentiality privilege).
promoting economic efficiency and finds lawyers essential to that function.\textsuperscript{11}

Confidentiality encourages clients to disclose facts that lawyers need to handle a legal matter by assuring them that disclosure will not result in adverse consequences.\textsuperscript{12} To do their job, lawyers need complete and accurate facts, both about what has already occurred and about what the client contemplates doing. Receiving these facts is essential to offering legal advice, because legal obligations and remedies depend upon factual circumstances that justify the legal intervention. Lacking accurate facts, the lawyer will either apply the wrong law, give incorrect legal advice, or both, which in turn will reduce public confidence in the legal system and in lawyers.\textsuperscript{13}

The naysayers use utilitarian reasoning to reach the conclusion that confidentiality actually harms society and the legal system. Jeremy Bentham, for example, argued that the attorney-client privilege should be abolished because it hid the truth from the courts and allowed those with something to hide to get away with unlawful behavior. Bentham reasoned that the object of the criminal law should be to let “no man . . . have it in his power to flatter himself with the hope of safety, in the event of his engaging in the commission of an act which the law, on account of its mischievousness, has thought fit to prohibit.”\textsuperscript{14} To those worried about “the safety of the innocent,” he argued that “an innocent man could not be endangered by his lawyer's telling all he has to tell.”\textsuperscript{15} It is important to note that Bentham wrote at a time when no privilege against self-incrimination existed, so he reasoned that getting the facts from the lawyer was no different than getting them from the mouth of the defendant in a criminal case.\textsuperscript{16}

Bentham wrote about the attorney-client privilege, or the effect of confidentiality on disclosures in litigation. More recent naysayers argue that we should apply his arguments to abolish all confidentiality rules, including the professional codes, which apply both inside and outside of litigation. Nearly all of their examples focus on litigation, however, and their conclusions follow from thinking about the privi-

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\textsuperscript{12} Moore, \textit{supra} note 9, at 215.

\textsuperscript{13} See Deborah L. Rhode & Geoffrey C. Hazard, Jr., \textit{Professional Responsibility and Regulation} 64 (2002).

\textsuperscript{14} 5 Jeremy Bentham, \textit{Rationale of Judicial Evidence} 310 (Garland Publ’g, Inc. 1978) (1827).

\textsuperscript{15} 5 \textit{id.} at 317.

\textsuperscript{16} Or, as Bentham put it: “The party himself having been, as he ought to be, previously subjected to interrogation; his lawyer's evidence, which, though good of its kind, is no better than hearsay evidence, would not often add any new facts to those which had already been extracted from the lips of the client.” 5 \textit{id.} at 324.
lege in the context of whether or not evidence should be presented to a tribunal.

The modern naysayers begin by noting that if the privilege benefits the guilty, it also harms the innocent, because “the privilege makes it more difficult for the innocent credibly to communicate that they have nothing to hide.”17 Beyond harming innocent clients, they argue that lawyers, rather than clients or the legal system, benefit most from confidentiality rules in three ways. First, lawyers easily would become demoralized if they were compelled to testify against clients. Sheltering client confidences and lawyer work product with legal protections results in a more agreeable psychological world, where lawyers can be committed to clients’ goals without conflicting obligations. Second, confidentiality serves as an effective tool that assists lawyers to be competent in representing clients, because it encourages clients to give up important but perhaps embarrassing facts.18 Third, sheltering client communications in professional obligations of confidentiality means that lawyers can compete more effectively in the service economy against other professionals, such as investment bankers and accountants. This is because lawyers can sell confidentiality obligations as part of a professional service, something no other professional group except physicians can guarantee.19 Unfortunately, these benefits inure to lawyers, but not to clients, who might be better off with services from other professionals or with alternative dispute resolution services apart from a governmentally sponsored court system.

It would be wonderful if we could measure the facts behind these assumptions to determine whether the true believers or the naysayers are correct. The little empirical evidence we have suggests that the true believer’s may be correct, but the effect of confidentiality may not be as strong as most lawyers believe. Two small surveys of clients and lawyers, one focusing on the attorney-client privilege20 and one on the general fiduciary duty of confidentiality21 provide the basis for these tentative conclusions.

These studies document that clients have a general understanding of confidentiality and expect it as part of the client-lawyer relationship. Further, some clients rely on this professional obligation when they disclose information to lawyers. This leads most lawyers to subscribe to the “conventional wisdom,”22 that receiving confidential in-

19. See Fischel, supra note 17, at 5-6.
formation assists them in understanding the matter and in helping them dissuade clients from wrongdoing. Finally, however, none of these tentative conclusions tell us much about the extent to which exceptions to confidentiality undermine these assumptions. In fact, clients consistently believe that lawyers are allowed or required to disclose in more situations than currently are recognized by either the privilege or the lawyer codes.

The conventional or true believer’s utilitarian justification appears as a basis for the fiduciary duty of confidentiality found in the lawyer codes and also as the main foundation for the evidentiary equivalent found in the client-lawyer and work product privileges. These assumptions are reflected in the American Law Institute’s Restatement (Third) of the Law Governing Lawyers and in the American Bar Association’s Model Rules of Professional Conduct. The Restatement calls confidentiality “a hallmark of professional practice.” Recognizing that confidentiality can be exploited to violate the law, it relies on exceptions to guard against abuse and concludes that “[t]he law is molded on the premise that a greater good inheres in encouraging all clients, most of whom incline toward complying with the law, to consult freely with their lawyers under the protection of confidentiality in order to gain the benefit of frank communication.”

Similarly, comment 2 to Model Rule 1.6 explains that the prohibition against disclosing information relating to the representation of a client exists to encourage the client “to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.” The comment adds that “[t]he lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct.” It concludes that, “[a]lmost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.”

The Supreme Court has offered parallel justifications for both the client-lawyer privilege and the work product doctrine. In *Upjohn Co.*

24. Zacharias, supra note 21, at 377-88; see also *Rhode & Hazard, supra* note 13, at 65.
26. Id.
27. *Model Rules of Prof’l Conduct R. 1.6 cmt. 2 (2002).*
28. Id.
29. Id.
v. United States, the Court extended both privileges to corporations, and reasoned that these evidentiary doctrines were intended to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." More recently, in declaring that the privilege extends to posthumous attempts to compel lawyer testimony, the Court relied on a similar rationale, finding that clients will be encouraged "to communicate fully and frankly with counsel" if they know that their communications will remain confidential even after their deaths. The Court specifically dismissed concerns that the lawyer would only be required to disclose that which the client could have been required to disclose if alive, finding that the "loss of evidence admittedly caused by the privilege is justified in part by the fact that without the privilege, the client may not have made such communications in the first place."

With respect to the work product doctrine, the Court initially created the evidentiary privilege to protect unnecessary attempts to obtain "written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties." It did so to encourage lawyers to create written accounts of their legal analysis and factual work-up of a case in litigation, thus serving the interest of "clients and the cause of justice." Of course, creating legal protection for a lawyer's work in anticipation of litigation also helped prevent demoralization of the profession by guaranteeing that the opposing party would not be able to make use of the work. The Restatement further explains that the expanded discovery rules of the past half century "presupposed that counsel should be able to work within an area of professional confidentiality . . . in which opposing lawyers competitively develop their own sources of factual and legal information." This rationale in turn depends on a "companion assumption," that "truth emerges from the adversary presentation of information by opposing sides."

31. Id. at 389. Judge Easterbrook characterized the Rehnquist majority opinion as providing "a thoughtful statement of the value of property rights in information and the role of confidentiality in allowing people to realize the return from their investment in information." Frank H. Easterbrook, Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information, 1981 Sup. Ct. Rev. 309, 357.
33. Id. at 408.
35. Id. at 511.
36. Id.
38. Id.
B. Deontological Justifications

Deontologists begin their analysis of the good and right by searching for universal rules, principles or duties that obligate us to respect others. Morally appropriate conduct is measured by the motive of the actor, rather than by the consequences the actor produces. Immanuel Kant, for example, argued that certain categorical imperatives, such as to "treat others only as an end, and never as a means only," should serve as a template in determining whether conduct is ethically justifiable. Similarly, conduct that violates a categorical imperative or fundamental right should be considered blameworthy and subject to sanction.

A deontological justification of the confidentiality obligation might begin by identifying the purpose of the legal system as the protection of "the autonomy of the will" or individual rights, such as the right to contract, to own property or to be entitled to due process. These rights, which respect persons by protecting individual liberty and promoting respect for human autonomy, easily can become vulnerable to infringement by powerful majoritarian interests of the government or others. Law and the legal system provide the means to assure that such infringements are prevented or redressed.

Lawyers trained to recognize the value of individual rights in turn invite clients to trust them in securing justice. When a lawyer agrees to represent a client, she implicitly promises loyalty and confidentiality, because this fidelity is essential to any human relationship where one person seeks to respect and represent the interests of another. Confidentiality promotes both the individual rights of citizens and the trust that is central to a client-lawyer relationship. It is a fundamental ethical value, part of the implied understanding integral to a trusting relationship. Confidentiality is part of the assurance clients need to guarantee them that their lawyers will respect them as moral agents and serve their interests rather than serving as extensions of the public order that judges or shapes their conduct.

40. THOMAS L. BEAUCHAMP, PHILOSOPHICAL ETHICS 123 (1982).
41. Professor Ross called these obligations “prima facie duties.” Ross, supra note 39, at 19-21; see also Beauchamp, supra note 40, at 123.
44. See Ross, supra note 39, at 21.
45. Ross says that the duty to keep promises is a “duty[ of perfect obligation] to which we owe “a great deal of stringency.” Id. at 41-42.
Privacy also promotes the individual rights of citizens by giving them personal space to plan and define their own meaning in life and decide when to share their personal secrets.\textsuperscript{47} The government should not be able to infringe on that private space when it is used to promote that individual's autonomous sense of self. A lawyer's obligation not to share the information further protects the client's own defined sphere of privacy, which can become especially important when government compulsion through the legal system seeks to invade it.

Such a deontological justification appears as the main basis for the fiduciary duty of confidentiality found in the law of agency and the lawyer codes. The protection of individual privacy also justifies the client-lawyer and work product privileges. The Restatement, for example, reminds us that "A client's approach to a lawyer for legal assistance implies that the client trust the lawyer to advance and protect the interests of the client. The resulting duty of loyalty is the predicate of the duty of confidentiality."\textsuperscript{48} Justice Story spoke of the "confidence necessarily reposed in the agent, that he will act with a sole regard to the interests of his principal, as far as he lawfully may" as part of the initial bargain with the agent that included "the exercise of the disinterested skill, diligence, and zeal of the agent" for the principal's exclusive benefit.\textsuperscript{49}

Similarly, comment 2 to Model Rule 1.6 describes the confidentiality obligation not to "reveal information relating to the representation" as a "fundamental principle in the client-lawyer relationship" because it "contributes to the trust that is the hallmark of the client-lawyer relationship."\textsuperscript{50} Professor Monroe Freedman adds that "fidelity to that trust is 'the glory of our profession.'"\textsuperscript{51} All of these justifications depend on the fact that once the lawyer agrees to represent a client, the lawyer has promised fiduciary duties essential to the relationship.\textsuperscript{52}

Deontological reasoning less commonly is seen as a justification for the attorney-client and work product privileges, but occasionally is invoked there as well. The Restatement, for example, acknowledges that the privilege can impair the search for the truth, but concludes that,

\textsuperscript{47} See Sissela Bok, Secrets: On the Ethics of Concealment and Revelation 120 (1982).
\textsuperscript{48} Restatement (Third) of the Law Governing Lawyers § 59 cmt. b (2000).
\textsuperscript{50} Model Rules of Prof'l Conduct R. 1.6 cmt. 2 (2002).
\textsuperscript{51} Freedman & Smith, supra note 22, at 127 n.4 (quoting United States v. Costen, 38 Fed. 24 (1889) (upholding the disbarment of a lawyer who ceased representing a client in pending litigation, and then sought employment with opposing counsel by offering to disclose "facts of great importance" to the other side)).
overall, legal recognition of the privilege "reflects a judgment that this impairment is outweighed by the social and moral values of confidential consultations. The privilege provides a zone of privacy within which a client may more effectively exercise the full autonomy that the law and legal institutions allow." Work-product immunity similarly "seeks to preserve a zone of privacy in which a lawyer can work free from intrusion by opposing counsel."54

III. DEFENDING THE EXCEPTIONS

Exceptions to confidentiality have coexisted with the obligation since its inception. If the rationales that support the obligation of confidentiality in the first place make sense, then the same policies should justify exceptions to lawyer obligations of client confidentiality. In other words, if preserving confidentiality promotes efficient functioning of the legal system, an exception can be justified to restore or promote effective operation of the system of justice. Similarly, if preserving client confidences is deemed important to promote trust or privacy in the client-lawyer relationship, an exception can be justified where preserving client confidences actually operates to breach a trust or foster misuse of the relationship to violate legal norms.

It is important to note that most of the exceptions recognized by the Restatement and the Model Rules are discretionary, not mandatory. That is, they allow, but do not require disclosure of client confidential information, and they allow disclosure only to the extent the lawyer reasonably believes necessary to accomplish the competing goal embodied in the exception. In the case of the client-lawyer privilege and work product immunity, the Restatement requires the lawyer to invoke the privilege or immunity unless the client has authorized the lawyer to waive it, and places the burden of proof on the person seeking the information to demonstrate each element of an applicable exception.56

The recognition of discretion but not mandate indicates that the central purpose of client confidentiality should not be overcome for trivial reasons. Further, even when a competing interest creates an exception, confidentiality should be breached only to the extent necessary to accommodate the competing policy. Of course, it is possible to argue that the strength of an exception compels disclosure. For example, most jurisdictions agree that client frauds on tribunals require

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lawyer disclosure if necessary to remedy the harm.\textsuperscript{57} Similarly, external legal requirements, such as court orders, may compel disclosure.\textsuperscript{58} Even then, however, relevant rules require that lawyers raise applicable privileges and disclose protected information only to the extent reasonably necessary to accomplish the competing purpose.

\textbf{A. Client Consent, Express or Implied}

The most widely recognized exception to client confidentiality, and the easiest exception to justify, occurs when clients decide for themselves whether to allow the use or disclosure of such information. Even here, however, wide latitude exists for lawyers to define or abuse discretion in advising or taking for granted what clients wish to do.

In utilitarian terms, the legal system needs specific facts to function; therefore, clients who wish to take advantage of the system's protections or allowances must agree, as a condition of using the system, to supply the legal system with some information. When the client explicitly consents to the disclosure of certain facts, the client presumably has made her own utilitarian calculation about the balance of benefit and burden in disclosing the information.

An interesting example is \textit{People v. Gonnella},\textsuperscript{59} where a criminal defendant told his lawyer to see to it that the lawyer for his co-defendant was removed from the case, and intimated that if the co-defendant's lawyer did not end the representation, he would be killed. The lawyer told his boss, who informed the prosecutor. When the prosecutor sought the original lawyer's testimony before a grand jury, the court held that the privilege had never attached because the client intended the information to be divulged. The court therefore denied the motion to quash the subpoena, but nevertheless cautioned the prosecutor to limit the scope of the examination to information the client intended to disclose; that is, threats against co-counsel.

Beyond explicit consent, however, the law has recognized that clients implicitly consent in situations such as discovery where the legal system's rules require the information to function. Comments to the Model Rules assign implicit authority to lawyers in most of these circumstances, such as admitting a fact that cannot properly be disputed.\textsuperscript{60} Of course, these rules are far less clear outside of litigation, in situations such as negotiation or various forms of alternative dispute resolution where disclosure of facts commonly occurs without explicit client consent. Even here, except where the client has given

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{57} See, e.g., id. § 120; \textit{Model Rules of Prof'l Conduct} R. 3.3 (2002). But see Neb. Code of Prof'l Responsibility DR 7-102(B) (1996).
\item\textsuperscript{58} See, e.g., \textit{Model Rules of Prof'l Conduct} R. 1.6(b)(4) (2002); \textit{Restatement (Third) of the Law Governing Lawyers} § 63 (2000).
\item\textsuperscript{59} 570 A.2d 53 (N.J. Super. Ct. Law Div. 1989).
\item\textsuperscript{60} \textit{Model Rules of Prof'l Conduct} R. 1.6(b)(4) cmt. 5 (2002).
\end{enumerate}
\end{footnotesize}
specific instructions to the contrary, or “special circumstances limit that authority, a lawyer is implicitly authorized to disclose client confidences when appropriate in carrying out the representation.”61

The Restatement clarifies the circumstances where such a disclosure might be appropriate, by requiring that lawyers not use or disclose clients' confidential information “if there is a reasonable prospect that doing so will adversely affect a material interest of the client.”62 In other words, a lawyer is impliedly authorized to disclose “when the lawyer reasonably believes that doing so will advance the interests of the client in the representation.”63 The comments to this section are explicitly utilitarian, instructing the lawyer to make a “reasonable calculation of advantage to a client,” including consideration of whether a disclosure acts to waive the attorney-client privilege.64 As the risk increases that any disclosure may have a negative impact on the client or the client's matter, the lawyer should check her own judgment with that of the client. This explains why both the Model Rules and the Restatement make all of the implied authority of the lawyer ultimately subject to the client's own definition of the client's best interests.

Deontologists agree that client consent makes sense as an exception to confidentiality, but for different reasons. They view consent as the client’s autonomous authorization to disclosure or use of the information.65 Agency law rests on such a consensual foundation and protects extensions of autonomy by granting individuals the opportunity to act through others.66 This rationale can be seen in Model Rule 1.4, which generally requires lawyers to communicate with clients, and in Model Rule 1.6, which requires that clients give “informed consent” to disclosures of confidential information.67 “Informed consent” means that the client has agreed to a “proposed course of action after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”68

Although this principle seems obvious, two cases illustrate that lawyers are not always aware of the proper scope of this exception. For example, in Perez v. Kirk & Carrigan,69 the lawyers were retained by an insurer to represent a Coca-Cola bottler concerning a serious accident involving one of their trucks, which hit a school bus killing

61. Id.
63. Id. § 61.
64. Id. § 61 cmt. d.
66. See McMeel, supra note 42, at 402.
67. Model Rules of Prof'l Conduct R. 1.6(a) (2002).
68. Id. R. 1.0(e).
twenty-one children. The lawyers visited the bus driver in the hospital, told him they were “his lawyers too,” and took a statement from him. The driver admitted he had not checked the brakes that morning and did not have enough time to apply the emergency brakes. Upon receiving this potentially incriminating information, the lawyers, probably sensing a conflict of interest, withdrew and assigned new counsel to Mr. Perez. Then, in an attempt to cooperate with the district attorney’s office, and without notifying Mr. Perez’s new lawyer, they turned over his statement to the prosecutor, who promptly indicted Mr. Perez for twenty-one counts of involuntary manslaughter. Mr. Perez eventually was tried and acquitted three and one-half years later, after suffering a great deal of emotional distress in addition to a serious brain injury from the crash. Ultimately, his employer was faulted for failing to properly maintain the truck’s brakes.\(^{70}\)

A Texas appellate court upheld Mr. Perez’s claim for breach of fiduciary duty, including his damages for mental anguish. It emphasized the fiduciary nature of the client-lawyer relationship, “one which requires absolute and perfect candor, openness and honesty, and the absence of any concealment or deception.”\(^{71}\) Neither the lawyers’ desire to cooperate with officials nor the threat of subpoena justified their disclosure of Mr. Perez’s statement without his consent. In fact, Mr. Perez’s new lawyer opined that, had he known about release of the statement, he could have had Mr. Perez explain his lack of training to the grand jury, and Mr. Perez would not have been indicted.

The same principle of client autonomy is illustrated by In re Pressly,\(^{72}\) where a divorce client who suspected her husband of abusing their nine-year-old daughter instructed her lawyer not to discuss her suspicions with her husband’s lawyer. When opposing counsel pressed the wife’s lawyer to explain why the wife continued to request supervised visitations, he decided it “would be best” to reveal his client’s suspicions. When the opposing lawyer told the husband, and the husband confronted the wife, she fired the lawyer and filed a grievance. Although the disclosure ultimately had no adverse impact on the pending litigation, the Vermont Supreme Court found that the lawyer’s belief that the disclosure was best constituted no defense to the reality that he had “violated a core component of the attorney-client relationship.”\(^{73}\)

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70. See also Truck Driver Settles Suit from Crash that Killed 21 Schoolchildren in ‘89, DALLAS MORNING NEWS, May 26, 1994, at 29A. The bottler eventually paid over $133 million in settlements to the families of the injured and dead children including $462,619 to Mr. Perez for his injuries. See A Tragedy Remembered, DALLAS MORNING NEWS, Sept. 21, 1999, at 17A.

71. Perez, 822 S.W.2d at 265.

72. 628 A.2d 927, 931 (Vt. 1993).

73. Id.
In both *Perez* and *Pressly*, the lawyers disclosed confidential information of a client because they deemed it best to do so. In *Perez*, they failed to ask their client for consent, despite the obvious inculpatory nature of the client's statement. In *Pressly*, the lawyer thought he knew better than the client even when confronted with an explicit client mandate not to disclose sensitive information. Both of these situations are far distant from those where consent properly could be implied as a true expression of the client's autonomous desire, or from a reasonable calculation of the client's advantage.

An interesting application of the correct rationale for implied consent appears in recently revised Model Rule 1.14 concerning clients with diminished capacity. A lawyer's reasonable belief that a client, because of diminished capacity, would suffer substantial physical, financial, or other harm may take reasonable protective action if the client is not able to do so. Further, the lawyer is impliedly authorized to reveal confidential information in order to protect the client's interests. The comment explains that in taking protective action, “the lawyer should be guided by such factors as the wishes and values of the client, the client's best interests and the goals of intruding into the client's decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.”74 In other words, if the client were capable, she would recognize her interests and consent to the disclosure.75 Consider for example, how such a rule might apply to a client who expresses suicidal wishes.

I recently responded to an inquiry from a lawyer who told me that his client was a “poster child for physician assisted suicide.” When I asked why, the lawyer said that the client was suffering from cancer and had often talked about her right to die. I asked him what stage the cancer was in and whether she might be depressed. He said that her cancer was in remission and that she had a history of depression. I told him I thought he should evaluate whether her expressed desire to die was in fact a plea for help. He went further, asking her whether she thought she needed a psychological evaluation. She checked herself into the hospital that night. This consultation indicates the way the rule should work. Clients, like the rest of us, do not always say exactly what we mean. This client was not suffering from cancer, but

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from depression. Once someone cared enough to ask her about it, she got the treatment she wanted.\textsuperscript{76}

\textbf{B. Physical Harm}

In addition to raising questions about the client's true intent, a client's suicide threat also presents a dramatic clash between client confidentiality and the compelling need to prevent serious physical harm. The same conflict occurs in situations where the client confides a threat of serious physical harm to another.

The utilitarian would begin by returning to the basic principle that we want to encourage citizens to bring their problems, antagonisms, and resentments to lawyers who will channel them into peaceful solutions. Lawyers guarantee confidentiality, in part, to encourage clients to blow off steam, which affords lawyers an opportunity to counsel them to abstain from vigilante justice. Occasionally, this goal fails, either because the lawyer cannot talk the client out of dangerous behavior, or because the client describes the behavior of someone with whom the lawyer has no relationship. In that situation, the lawyer is justified in disclosing client confidences to promote the greater good of preserving human life and preventing injurious behavior. The client has, in the words of John Stuart Mill, exceeded "the rightful limit to the sovereignty of the individual over himself."\textsuperscript{77} Further, the situations in which a lawyer might act to prevent this kind of harm are so few that creating such an exception does little to destroy the utility of confidentiality in encouraging clients to speak.\textsuperscript{78}

The comments to both the \textit{Model Rules} and the \textit{Restatement} reflect this utilitarian rationale, indicating that this exception "recognizes the overriding value of life and physical integrity."\textsuperscript{79} This view, that the value of human life should allow lawyers discretion to disclose client confidences, both expands and contracts the current future crime provisions now in place in a majority of jurisdictions.\textsuperscript{80} On the one hand, the new provision allows disclosure where the act threatening serious bodily harm or death is not criminal, or not the act of a client. On the other, it does not allow disclosure for threatened client crimes that do not pose such a threat, because the competing value of serious physical harm is not present to justify disclosure. The legal classifica-

\textsuperscript{76} The few cases that have addressed this issue have allowed lawyers wide latitude in deciding whether or not to disclose. See, \textit{e.g.}, People v. Fentress, 425 N.Y.S.2d 485 (County Ct. 1980); Hawkins v. King County, 602 P.2d 361 (Wash. Ct. App. 1979).

\textsuperscript{77} \textsc{John Stuart Mill, On Liberty} 75 (1947).

\textsuperscript{78} See \textsc{Freedman & Smith, supra} note 22, at 145.

\textsuperscript{79} \textit{Model Rules of Prof'L Conduct} R. 1.6 cmt. 6 (2002); \textit{Restatement (Third) of the Law Governing Lawyers} § 66 cmt. b (2000).

\textsuperscript{80} See, \textit{e.g.}, \textsc{Neb. Code of Prof'L Responsibility} DR 4-101(C)(3) (1998).
tion of the client's conduct is replaced by the seriousness of the threat to the health and safety of others. The example offered in the Model Rules comment indicates this clear intent. Thus, a lawyer who learns that a client has accidentally discharged toxic waste into the city water supply may reveal such a risk to authorities, regardless of the legal characterization of the discharge, as long as there is a "present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims." 

One example of a court's reliance on this utilitarian justification occurred in Purcell v. District Attorney, where a legal services lawyer conferred with a client about his recent discharge as a maintenance man at an apartment building and his impending eviction because he no longer worked for the management company. During the course of the conversation, the lawyer learned that the client intended to burn the building, and later told a Boston police lieutenant that his client had made such threats. The police arrested the client the next day, just after smoke detectors had been disarmed and gasoline had been poured on the hallway floor. They later sought the lawyer's testimony against the client in his trial for attempted arson.

The court first noted the ethical propriety of the lawyer's disclosure. It then turned to the issue of whether the crime-fraud exception to the attorney-client privilege should justify the lawyer's testimony in the subsequent criminal trial. The court said "no," because the client did not consult the lawyer for the purpose of obtaining advice to further the crime, but rather for the purpose of learning about his legal rights with respect to employment and eviction. The court cautioned against permitting the use of client threats of harm to a lawyer to be used against the client in a subsequent trial, because "lawyers will be reluctant to come forward if they know that the information that they disclose may lead to adverse consequences to their clients." Such a practice also "might prompt a lawyer to warn a client in advance that the disclosure of certain information may not be held confidential, thereby chilling free discourse between lawyer and a client and reducing the prospect that the lawyer will learn of a serious threat to the well-being of others."

82. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 6 (2002).
83. 676 N.E.2d 436 (Mass. 1997).
84. Id. at 440.
85. Id.
In other words, we want lawyers to learn facts that might provide them with the opportunity to prevent serious harm to others. Purcell did the right thing by disclosing, and similar actions by other lawyers should not be deterred by exceptions to the privilege, except where the client's only intent is to use the lawyer's services to harm others.

Focusing on duties required by the client-lawyer relationship yields a similar answer. The deontologist would agree that clients should be encouraged to blow off steam in a safe, trusting, private relationship, where the chances of assisting the client to discover his own best self may be optimal. On the other hand, a client like Purcell's, who expresses his desire to harm someone else, does not deserve the respect promoted by the professional obligation of confidentiality because the client herself proposes to violate a categorical imperative designed to promote human flourishing.86 The autonomy we grant to protect private secrets does not extend to acts of violence against others or to make lawyers complicitous in such acts.87 “The value at stake, human life, is of unique importance.”88

The newly articulated scope and reason for this exception also provide a better basis for understanding a classic case in professional responsibility, Spaulding v. Zimmerman.89 There, a physician hired by an insurance company to examine a teenage boy injured in a car accident discovered a life threatening aneurysm in the boy, which had not been diagnosed by three of the boy's own doctors. The insurer, reasoning that the boy's lawyers did not request the medical report through discovery procedures, and that the existence of the aneurysm might inflate the value of the case, did not disclose the problem either to the boy or his parents before the case settled. When the aneurysm was diagnosed and treated with immediate surgery by another physician a few years later, the boy, now a young man in his twenties, sought to reopen the tort judgment. The court allowed a Rule 60(b) motion to reopen the settlement, but only because the plaintiff had been a minor at the time of the settlement.

Of course, under both revised Model Rule 1.6 and the Restatement, a lawyer for the insurer in Spaulding would have discretion to disclose this fact in order to prevent the boy's death.90 To further encourage such disclosures, the Restatement provides that the lawyer first seek to persuade the client to act appropriately, and then advise the client

86. Ross says that those who violate the rights of others have lost their own prima facie rights to life, liberty, or property “in so far as these rested on an explicit or implicit undertaking to respect the corresponding rights in others.” Ross, supra note 39, at 62.
87. BOK, supra note 47, at 129.
88. FREEDMAN & SMITH, supra note 22, at 145.
89. 116 N.W.2d 704 (Minn. 1962).
90. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2002); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 66 (2000).
of the lawyer's ability to disclose to prevent the harm. Even then, the exception is entirely discretionary. The lawyer is neither subject to discipline nor civilly liable to the third party for choosing to disclose or deciding to remain silent.

C. Financial Harm

Exceptions to client confidentiality that countenance disclosure to prevent, rectify, or mitigate financial harm caused by a client have created the most disagreement among lawyers and the public. Yet, perhaps because human greed is such a pervasive phenomenon, confidentiality exceptions have long been recognized when clients seek to use lawyers to promote fraudulent activity.

Utilitarians recognize that efficient operation of both a market economy and a democratic government requires honesty. Mill argued that "[a]s soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it." In other words, liars can be characterized as "free riders" who unjustly seek their own financial gain by cheating on the basic functioning of the economic and governmental systems and by taking advantage of the

91. Amazingly, the lawyers in Spaulding failed to ask their client, Zimmerman, in whose car Spaulding was riding and who had a personal relationship with Spaulding's family, whether he would consent to the disclosure. This is undoubtedly because they incorrectly viewed themselves primarily as insurance company lawyers rather than Zimmerman's lawyer. Roger C. Cramton & Lori P. Knowles, Professional Secrecy and Its Exceptions: Spaulding v. Zimmerman Revisited, 83 MINN. L. REV. 63 (1998).

92. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 66(2), (3) (2000). Hawkins v. King County, 602 P.2d 361 (Wash. Ct. App. 1979), is the only case to consider whether a lawyer owes some duty to a third party to act. The court refused to extend a duty to warn third persons who already knew that the client was dangerous, concluding that "unless it appears beyond a reasonable doubt that the client has formed a firm intention to inflict serious personal injuries on an unknowing third person," the lawyer has no duty to warn. Id. at 365.

It is also interesting to consider the physician's duty in Spaulding. In a remarkably similar case nearly thirty years later, a Minnesota appeals court concluded that a physician hired by an insurance carrier to determine workers' compensation benefits owed no duty to diagnose or disclose the presence of an aneurysm to the person he examined. Henkemeyer v. Boxall, 465 N.W.2d 437 (Minn. Ct. App. 1991).


93. E.g., Doyle v. Union Ins. Co., 202 Neb. 599, 277 N.W.2d 36 (1979) (recognizing the crime-fraud exception, in what is now NEB. REV. STAT. § 27-503(4) (Reissue 1995), to the lawyer-client privilege if "the services are sought or obtained to enable or aid anyone to commit or plan to commit what the client knew, or reasonably should have know, to be a fraud.").
honesty of others. If everyone could use lawyers to promote their own illegal deception, the market system, many aspects of government, and certainly the legal system would lose the confidence of the citizenry. To prevent this overall erosion in confidence, lawyers should be able to disclose activities of clients who seek to use the lawyer's services to perpetrate a fraud.

Focusing on trust and privacy, the deontologist would start from the premise that the professional guarantee of confidentiality was intended to promote trust so as to assist the client in straightening out a mess or in planning for lawful economic or other activity. When the client seeks to use the relationship and the duties implicit in the relationship to create a legal mess by violating another categorical imperative such as honesty, the client's right to confidence has been lost. Misusing a trusting relationship to cause harm to others forfeits the client's right to trust or privacy. If the lawyer's services have been used to further that fraud, the lawyer's duty of reparation for her own acts also comes into play.

Both of these justifications are articulated in the Restatement's embrace of a discretionary exception to client confidentiality to prevent, mitigate, or rectify a client's crime or fraud that "threatens substantial financial loss," and in its articulation of the crime-fraud exception to the client-lawyer privilege. The exception to the privilege is justified by both the "public interest in preventing clients from attempting to misuse the client-lawyer relationship for seriously harmful ends," a utilitarian rationale, and the fact that such a "client's wrongful act forfeits the protection," a deontological reason.

The Restatement also justifies a discretionary exception to the general obligation of confidentiality by the need to protect the interests of society and third persons in avoiding substantial financial loss, and to protect the integrity, professional reputation, and financial interests of the lawyer, all competing utilitarian rationales. The same exception is justified by a deontological rationale; that "the client is not entitled to the protection of confidentiality when the client knowingly causes substantial financial harm through a crime or fraud . . . and the client has in effect misused the client-lawyer relationship for that purpose." Once again, the lawyer should counsel the client to de-

94. SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 23 (2d ed. 1999).
96. Moore, supra note 9, at 225.
97. Ross, supra note 39, at 21; see also supra note 86.
99. Id. § 82 cmt. b.
100. Id.
101. Id.
sist or remedy the fraud, and warn the client about the lawyer's discretion to disclose before doing so.102

An example of reliance on these rationales can be found in United States v. Chen,103 where a law firm was hired to bring a client into compliance with customs laws. Completely unknown to the lawyers, the clients in fact used their lawyers' services to make false statements to the Customs Service in order to shield their preexisting tax evasion scheme. In considering whether the government could use the lawyer's testimony in a subsequent criminal action against the clients for tax evasion and conspiracy, the court began by noting that "much of what lawyers actually do for a living consists of helping their clients comply with the law."104 Further, "this valuable social service . . . cannot be performed effectively if clients are scared to tell their lawyers what they are doing, for fear that their lawyers will be turned into government informants."105 On the other hand, a client may act in such a way as to forfeit the benefits of confidentiality. Since the privilege was the client's, the court held that the "client's misconduct sufficed to lose it, despite the lawyers' innocence of wrongdoing."106

The question of whether a lawyer should be able to disclose a client's fraud has been the subject of unrelenting debate for over a quarter century. Original drafts of the Model Rules in 1980 included a provision that would have permitted a lawyer to disclose information both to prevent and to rectify criminal or fraudulent acts of clients on both tribunals and third persons. These proposals prevailed where the fraud was perpetrated on a tribunal (Model Rule 3.3), but failed where the fraud occurred outside of tribunals (Model Rule 4.1). As a compromise, the so-called "noisy withdrawal" concept was added in comment 16 to Model Rule 1.6. This comment provides that a lawyer who withdraws to avoid assisting or counseling a client's crime or fraud may "give notice of the fact of withdrawal . . . and may also withdraw or disaffirm any opinion, document, affirmation or the like."

The Ethics 2000 Commission recommended similar discretionary exceptions to the ABA House of Delegates. Once again, the House was willing to retain the long-standing exception for public frauds on courts, but rejected any such exception for private frauds on third parties. As a result, the noisy withdrawal comment remains in Model Rule 1.6. Enron and the ABA's Task Force on Corporate Responsibil-

102. See also Pizzimenti, supra note 52.
103. 99 F.3d 1495 (9th Cir. 1996).
104. Id. at 1500 (citing Upjohn Co. v. United States, 449 U.S. 383 (1981)).
105. Id. (quoting Fisher v. United States, 425 U.S. 391 (1976)).
106. Id. at 1504.
As jurisdictions consider their own versions of the revised *Model Rules*, debate over these provisions will once again intensify. Today, jurisdictions disagree strongly on the lawyer's obligations outside of tribunals when the client contemplates or commits fraud. If the client's conduct is contemplated (future) and criminal, forty-one states, including Nebraska, allow or require disclosure. If the contemplated fraud is not criminal, roughly ten jurisdictions allow disclosure. Individual jurisdictions also differ about the lawyer's ability to disclose for the purpose of rectifying the consequences of past fraud committed by clients using the lawyer's services. Here, where the client's crime or fraud is ongoing, over forty jurisdictions allow or require disclosure. However, if the fraud is past, that is, has already been completed, fewer than twenty jurisdictions allow disclosure of fraudulent activity outside of a tribunal.

Lawyers and jurisdictions that oppose exceptions to confidentiality designed to allow lawyers to warn about or rectify client fraud usually rely on utilitarian arguments. First, they maintain that narrower exceptions to confidentiality in general create more opportunity for lawyers to encourage full and frank communication with clients and, therefore, enhance the ability of lawyers to give legal advice to avoid or mitigate wrongful conduct. Second, they argue that "fraud" is always difficult to identify at the time it occurs, and easier to recognize after the fact, and they worry that adding such an exception might be construed as a duty to warn in a later civil case. Any exception to confidentiality tied to client fraud therefore increases the likelihood that liability will be extended to lawyers who did not warn or rectify. This in turn will force lawyers to practice law defensively, erring on the side of disclosure and undermining client trust. Third, they maintain that exceptions to save human life recognize a competing value of "unique importance," where no remedy will suffice to prevent the harm. Client fraud, on the other hand, usually results in monetary


108. E. Norman Veasey, *The Ethical and Professional Responsibilities of the Lawyer for the Corporation in Responding to Fraudulent Conduct by Corporate Officers or Agents*, 70 TENN. L. REV. (forthcoming 2003); see also *NEB. CODE OF PROF'L RESPONSIBILITY* DR 7-102(B) (1996).

109. This problem is compounded by the problem of "hindsight bias," a cognitive distortion that causes humans to believe that because a past event (like fraud) has occurred, it must have meant the event could have been anticipated in advance. See Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571 (1998).

110. See FREEDMAN & SMITH, supra note 22, at 145.
loss, which can be restored by other legal remedies. Finally, lawyers who oppose client fraud exceptions argue that when client fraud does occur, the lawyer’s withdrawal from the matter is sufficient to extricate the lawyer from the client’s wrongdoing.\footnote{ABA, The Legislative History of the Model Rules of Professional Conduct: Their Development in the ABA House of Delegates 48-49 (1987).}

Lawyers and jurisdictions that support exceptions to confidentiality where client fraud occurs or is threatened address the same issues, but disagree on the result, and are more apt to rely on deontological thinking. Some concede the possibility that some clients might be less willing to confide in lawyers, but maintain that clients who misuse the client-lawyer relationship are not entitled to absolute confidentiality.\footnote{Restatement (Third) of the Law Governing Lawyers § 67 cmt. b (2000). Professor Burt argues that the mistrust which pervades the client-lawyer relationship might actually be addressed and alleviated by more discretionary disclosure exceptions because they would force honest exploration of the basis for the mistrust. Robert A. Burt, Conflict and Trust Between Attorney and Client, 69 Geo. L.J. 1015 (1981).}

Others point out that clients will not fail to confide in lawyers because the “complexity of many transactions requires full disclosure to attorneys regardless of confidentiality.”\footnote{Peter C. Kostant, Sacred Cows or Cash Cows: The Abuse of Rhetoric in Justifying Some Current Norms of Transactional Lawyering, 36 Wake Forest L. Rev. 49, 84 (2001).} Further, they argue that the ability of lawyers to encourage clients to act lawfully will be enhanced by a discretionary disclosure provision. With respect to the threat of civil liability, they note that civil liability already exists in many cases.\footnote{See, e.g., In re Am. Cont’l Corp./Lincoln Sav. & Loan Sec. Litig., 794 F. Supp. 1424 (D. Ariz. 1992) (upholding causes of action under § 10(b) of the Securities Exchange Act, RICO, and state blue sky laws as well as common law fraud and breach of fiduciary duty actions against the Jones Day law firm that assisted Lincoln Savings and Loan in “hiding loan file deficiencies from regulators, offered detailed advice about setting up the bond sales program . . . and lent its name to a misleading legal opinion”). The firm eventually settled the public and private claims for $75 million. Henry J. Reske, Firm Agrees to Record S&L Settlement: Shifting Standards Require Lawyers to Disclose More to Regulatory Agencies, A.B.A. J., July 1993, at 16. The law firm that represented Lincoln Savings and Loan on regulatory matters after Jones Day—Kay, Scholer, Fierman, Nays & Handler—also settled with both private investors ($21 million) and the government ($41 million). Stephen Labaton, Law Firm Will Pay a $41 Million Fine in Savings Lawsuit, N.Y. Times, Mar. 9, 1992, at A1.} To clarify this point, they cite section 67(4) of the Restatement, which provides that any exercise of discretion under this exception does not create grounds for discipline or liability. Finally, lawyers caught in the web of client wrongdoing argue that an exception to confidentiality where the client perpetrates a fraud by using the lawyer’s services actually allows lawyers to extricate themselves from the client’s acts before they otherwise might be able to respond under the self-defense exception in Model Rule 1.6(b)(2). Disclosing
client misconduct when they withdraw from the representation also
avoids the fiction of limited disclosure by notification and disavowal
allowed by the "noisy withdrawal" compromise.

In response to these arguments, the revised Model Rules currently
require disclosure of frauds on tribunals, but apparently not frauds on
third parties. Where the fraud occurs in a public forum and the
participants have the most incentive apart from professional rules to
ferret it out, the rules require disclosure. On the other hand, where
the fraud occurs in private and may harm entirely unrepresented per-
sons, the lawyer should not have a duty to keep quiet, especially when
a client with the worst intent has lied to his own lawyer in order to
obtain the legal services that perpetrated the fraud. The Restatement
and Ethics 2000 Commission recognized that when a client has mis-
used the relationship and threatens serious financial harm to others,
an exception to confidentiality makes sense, both on utilitarian and
deoential grounds. The crime-fraud exception to the privilege rec-
ognizes this, and the law governing lawyers, including the lawyer
codes should as well.

D. Seeking Advice

In a growing number of situations, lawyers themselves seek advice
from other professionals about how to comply with the lawyer codes or
other aspects of the law governing lawyers. In some of these circum-
stances, the lawyer may not know about or understand a professional
rule or fiduciary duty that clearly dictates a course of action. In
others, the lawyer may, by dint of study or intuition, understand the
basics but need advice because of a lack of clarity about how to proceed
when two duties, such as the duty of candor to a court and a duty of
confidentiality to a client, collide. Although in many of these cases a
lawyer can protect a client’s confidences by disguising the facts with a
hypothetical situation, in others the advisor will need a more detailed
disclosure of the facts to offer helpful and accurate advice.

A utilitarian would justify this exception by returning to the con-
clusion that the legal system depends on lawyers and their fiduciary
duties to promote the greatest good for the greatest number, which

115. See Model Rules of Prof’l Conduct R. 3.3 (2002) (Candor Toward the Tribu-
inal); id. R. 4.1 (Truthfulness in Statements to Others). Rule 4.1, unlike Rule 3.3,
limit its disclosure requirements to explicit exceptions found in Rule 1.6. Al-
though explicit exceptions based on client crimes or frauds that threaten severe
financial harm have been rejected by the ABA, Rule 1.6(b)(4) does recognize a
discretionary exception to client confidentiality “to comply with other law.” Id. R.
1.6(b)(4). Insofar as “law” includes the law of fraud, this exception can be read to
justify disclosures to prevent a lawyer from assisting a client fraud under Rule
4.1(b). See Hazard & Hodes, supra note 43, § 9.27.

116. See Drew G. Kershen, The Ethics of Ethics Consultation, Prof. Law., May 1995,
at 1.
translates into a stable and fair legal system and society. Therefore, even if some unfortunate consequence were to occur if one lawyer were to disclose client confidences in order to get advice about these obligations, overall, the system, which depends on lawyers, will work better if lawyers are encouraged to seek such assistance. The Model Rules reflect this kind of thinking when they say that such disclosure is permitted because of “the importance of the lawyer’s compliance with the Rules of Professional Conduct.”

A deontologist would remind us that lawyers, like clients, are moral persons whose need for guidance about how to act ethically should be respected. In situations where the client seeks to use the lawyer or the legal system for some unlawful purpose, the lawyer should be able to clarify the circumstance in her own mind, in order to determine whether to continue advocacy of the client’s interests. Further, in many situations this advice will be sought so that the lawyer can better serve the client by keeping confidences or avoiding conflicts of interest. To that extent, the lawyer’s self-interest or expression of personal autonomy serves the client’s interest. To the extent the lawyer seeks advice to learn more about the appropriate limits to advocacy, the client’s interest may not be served. But when this occurs, the client may be threatening harm to a third party that either the lawyer should advise against, or, at a minimum, stay out of. Seeking advice may help either the client or the lawyer to realize his better self. If the client and lawyer’s interests conflict, the lawyer should be able to learn about the scope of autonomous discretion or mandated duty she or the client may have.

E. Self Defense

When a lawyer is accused of wrongdoing in the course of representing a client, whether by a client, former client, or a third person, the law governing lawyers commonly recognizes an exception for lawyer self defense. It also allows lawyers affirmatively to make a claim against a client, such as a claim for unpaid legal fees. Although relatively uncontroversial, this exception in fact creates the possibility for mischief if improperly justified or extended too far.

Utilitarians return to the notion that when an accusation of misconduct against a lawyer has occurred, the legal system needs accu-

117. Model Rules of Prof’l Conduct R. 1.6 cmt. 7 (2002).
118. See, e.g., Restatement (Third) of the Law Governing Lawyers § 64 (2000) (Using or disclosing information in a lawyer’s self-defense); id. § 83 (Lawyer Self-Protection Exception to the Attorney-Client Privilege); see also Neb. Code of Prof’l Responsibility DR 4-101(C)(4) (1998).
119. See also Crews v. Buckman Labs Int’l, Inc., 78 S.W.3d 852 (Tenn. 2002) (upholding an in house counsel’s cause of action for wrongful termination against her former client/employer).
rate information to produce just outcomes. Lawyers, therefore, should be free to disclose information necessary to defend themselves in this circumstance. Making an affirmative claim for fees also can be justified on utilitarian grounds, but only if the client has violated a legal obligation that should be redressed in order to promote the general availability of lawyers to future clients. On the other hand, lawyers often are in a better position than clients to protect their own financial interests (such as by requiring retainers) and therefore should not be allowed to use such an exception as a "sanction for blackmail."\(^1\)

The deontologist would defend the lawyer's right to respond to an accusation on the ground that the lawyer deserves a chance to explain her conduct, especially when unjustly accused. Similarly, the lawyer who has provided legal services to a client deserves to be paid for those services because the client has promised to do so and promises must be kept. Or, as the comment to Model Rule 1.6 puts it, "the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary."\(^2\)

Both of these justifications can be found in *Meyerhofer v. Empire Fire and Marine*,\(^3\) the classic case on point. There, a lawyer who tried to prevent his former law firm from assisting a client in securities fraud was named later as a defendant in a four million-dollar class action fraud suit by investors. To prove his innocence, the lawyer gave the plaintiffs a thirty-page affidavit he had authored about the matter three months earlier when he left the law firm. The affidavit provided detailed information to the plaintiffs' lawyers about the manner by which the fraud had occurred. The court justified the extent of the lawyer's disclosure on two utilitarian grounds: it was the "most effective way for him to substantiate his story" and the "cost of simply defending such an action might be very substantial."\(^4\) It also referred to the potential for damage to the lawyer's reputation during the pendency of such a suit, and concluded that the lawyer had a right to defend himself by supporting his version of the facts with suitable evidence.\(^5\)

It is important to recognize that, like other exceptions to confidentiality, this self-defense exception is justified only to the extent reasonably necessary to serve the legitimate purpose for which it was crafted. For example, threatening to disclose confidential information to the INS unless a fee is paid takes advantage of the exception, especially when the client reasonably assumed the service was pro

\(^{120}\) See FREEDMAN & SMITH, supra note 22, at 148.
\(^{121}\) MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 9 (2002).
\(^{122}\) 497 F.2d 1190 (2d Cir. 1974).
\(^{123}\) Id. at 1195.
\(^{124}\) Id.
Similarly, many jurisdictions have changed their minds about submitting bills to an insurance company's outside auditor for review. While early ethics opinions seemed to equate such a practice with the lawyer suing a client for a fee, later opinions recognized that the detailed information required for documentation of fees violated client confidences unless client consent is given. Yet, seeking such consent creates a situation where "it is almost inconceivable that it would ever be in the client's best interests to disclose confidences and secrets to a third party." 

F. Other Law

Legal obligations such as court orders, statutes, or procedural rules often require the disclosure of clients' confidential information. Creating an exception to client confidentiality when other law requires or allows such disclosure promotes the policy of that other law. At the same time, allowing other legal obligations to trump lawyer-client confidentiality may compromise a central justification for confidentiality, especially if the purpose of the other law does not mirror one of the five exceptions already justified by the underlying rationales for the protection.

Utilitarians may argue about the precise line to draw in creating an efficient and fair legal system, but they probably would agree that court orders and procedural rules should be obeyed in order to promote the proper functioning of the courts. Some statutes, such as child and elder abuse disclosure provisions, also could justify disclosure if their purpose is to protect child welfare and prevent serious harm. Similar arguments could be made about the law of fraud. Insofar as it prevents unfair use of the market or the legal system and prevents serious financial loss, a lawyer could be justified to disclose

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125. *E.g.*, Counsel for Discipline v. Wilson, 262 Neb. 653, 634 N.W.2d 467 (2001) (resulting in lawyer suspended from practice for two years for threatening to disclose confidential information to INS and reopen client's divorce unless alleged fee, created after client began a relationship with lawyer's estranged wife, was paid).


129. *E.g.*, State v. Hawes, 251 Neb. 287, 556 N.W.2d 634 (1996) (holding that lawyer's communication to client about time, date, and place of scheduled trial was not privileged and was subject to a subpoena under DR 4-101(C)(2) because disclosure was required by law or court order; however, prosecutor must demonstrate a compelling need for such evidence to withstand a motion to quash).
client confidences in order to comply with the criminal or civil law of fraud.  

A deontologist would agree that court rules or laws designed to protect basic human freedoms are important. When a client seeks to infringe these obligations, the client's conduct is blameworthy, which creates a valid reason for the lawyer to prevent such a misuse of others. The scope of such an exception would depend on the extent to which another categorical right that promotes human flourishing is at stake. Otherwise, the value of confidentiality in a trusting relationship could be undermined by the utility of majoritarian interests.

For example, it is extremely difficult to justify such disclosure when the client seeks representation concerning past behavior which the lawyer had no part in advising. Here, all the reasons to grant confidentiality apply. We want the client to seek legal help because we care about efficient operation of the legal system and because we want the system to afford the client respect through due process rights as well as devoted client advocacy. On the other hand, the victims of past client misconduct desperately want access to the information necessary to prove their claims for redress. Although most courts refuse to make exceptions to confidentiality in this circumstance absent evidence of continuing or future threats of harm, some statutes create disclosure obligations that can conflict with this view.

One example can be found in criminal law provisions that require the disclosure of past facts in order to promote law enforcement. For example, in the classic "buried bodies case," an appointed criminal defense counsel learned from his client the location of several buried bodies of persons the client, in confidence, told counsel he had killed. The lawyer went to the site, verified the client's information and photographed the bodies to preserve the evidence. He did not disclose the information until the client did, even when confronting a face-to-face plea from the parents of one of the victims who were searching for their daughter. When these facts emerged, the lawyer was indicted for failure to notify authorities of the location of the dead bodies, a misdemeanor violation of the public health code. The court held that disclosure by the lawyers would have in effect constituted compelled disclosure by the client contrary to his Fifth Amendment right against self-incrimination, and dismissed the indictment based on the attorney-client privilege.

The court noted that its task would have been much more difficult if the lawyer had violated the obstruction of justice statute by hiding the bodies. Subsequent cases have held to this distinction between mere observation of criminal evidence, which is confidential, and tak-

130. See supra note 115.
ing possession or altering evidence, which is criminal unless turned over to the prosecutor after a reasonable period of time.132

Where future harm may be threatened, disclosure also has been required. For example, a Texas court upheld the subpoena of a map the client had provided her lawyer, on the grounds of preventing future harm. The client, who had kidnapped a baby, told conflicting stories about whether the child was still alive, and was unclear whether the map indicated a gravesite or the place the client had hidden a live child. The map enabled police to locate the dead child and secure a conviction for murder.133

Three federal laws create interesting issues regarding the obligations of lawyers to disclose client information. The first involves Treasury Regulations designed to promote compliance with anti-money laundering statutes. These regulations require the disclosure of any cash transaction in excess of $10,000 to the Treasury Department to enable them to trace large sums of cash, which may be part of a money laundering scheme. Lawyers have been uniformly unsuccessful in arguing that the client-lawyer privilege exempts them from the requirements of this disclosure.134 Courts acknowledge the importance of the privilege in promoting compliance with the law and facilitating the administration of justice, but also recognize that the privilege “is not a license for an attorney to act ‘unreasonably’ in willfully failing to comply with clear federal law.”135 An “asserted possibility” that a client may be incriminated by disclosure is not enough to prevent it, because disclosing the name of a client who paid cash does not by itself disclose any underlying crime.136

Two other recent examples threaten to expand the disclosure obligations of lawyers. The first flows from the USA Patriot Act, passed after September 11 to respond to terrorist activities. One goal of the law was to strengthen the initiative of the previously existing Financial Action Task Force on Money Laundering (“FATF”), an inter-governmental body designed to promote national and international policies to combat money laundering. A new initiative of this group, called the “Gatekeeper Initiative,” is directed at professionals, including lawyers, whose clients transact domestic and international financial transactions and business. Should this initiative become law, lawyers could be required to submit Suspicious Transaction Reports regarding client activities (currently required of financial institu-

132. See, e.g., Restatement (Third) of the Law Governing Lawyers § 118 (2000); see also In re Original Grand Jury Invest., 733 N.E.2d 1135 (Ohio 2000); In re Ryder, 381 F.2d 713 (4th Cir. 1967).
135. Lefcourt v. United States, 125 F.3d 79, 85 (2d Cir. 1997).
136. Id. at 86 (quoting United States v. Goldberger & Dubin, 935 F.2d 504 (1991)).
tions) and would be prohibited from telling their clients they had done so. In some countries, such obligations already apply to lawyers who manage client money or who assist in the planning or execution of financial or real estate transactions for clients.

An ABA Task Force recently recommended that requiring lawyers who receive or transfer funds on behalf of clients “to verify the identity of clients, maintain records on domestic and international transactions, and develop training programs that would help attorneys identify potential money laundering schemes” was appropriate. The same group strongly opposes the so-called “tip off” provisions, however, because they would require lawyers to submit Suspicious Transaction Reports to government authorities based on a mere suspicion that the funds involved in the client’s transaction stemmed from some kind of illegal activity, and would prevent lawyers from telling their clients they had done so.

The most recent example of this tendency of law enforcement officials to use the criminal law to create exceptions to client confidentiality involves the Sarbanes-Oxley Act, in which Congress directed the Securities and Exchange Commission (“SEC”) to draft rules requiring lawyers “to report evidence of a material violation of securities law” to those within the corporate family. Proposed SEC Regulations go further, however, by requiring such a lawyer to not only inform the board of directors of a publicly held company, but also to quit and disaffirm documents previously submitted to the SEC if the entity does not appropriately respond. Such a disclosure duty applies both to inside and outside lawyers and is triggered by a lawyer’s “reasonable belief” that such wrongdoing has occurred or is about to happen.

IV. CONCLUSION

The confidentiality rules always will be controversial because they protect an important relationship and prevent disclosure of information to others who could use it. There seems to be little call for abolition of the fiduciary obligation, or its litigation equivalent, the client-lawyer privilege. Most of the controversy has been and will continue to be played out in discussions about the appropriate exceptions to the rule and the contours of those exceptions.

139. Id. at 15.
In considering whether an exception should exist or what its scope should be, rulemakers should focus on the underlying purpose of the obligation in the first place. Utilitarian justifications, which balance the overall benefits of such as rule against its harms, help clarify when and how much of an exception to make. Deontological rationales, which focus on the essential values in the client-lawyer relationship, often help in clarifying whether client and lawyer are treated fairly.

Recent revisions to both the Model Rules of Professional Conduct and articulations of the larger law governing lawyers in the Restatement indicate renewed efforts to explain and implement core values that promote service to clients, as well as creating exceptions where truly serious harm to others justifies disclosure. These efforts are becoming increasingly important in the face of new efforts by the government to create additional exceptions designed to facilitate law enforcement, which may neglect the value and purpose of legal service.

Those of us involved in drafting these rules realize that the task of articulating these premises is an ongoing process. Every day we see new examples of the need for confidentiality as well as new examples of the need for exceptions. We should be most weary of the latter when the government seeks to make lawyers agents of its law enforcement efforts. But this direct regulation of lawyers will not be obviated unless lawyers are able to articulate the basis for confidentiality, the equally important basis for creating exceptions to the professional obligation, and the reasons why a proposed regulation falls short of those benchmarks.