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SCHAFER'S DILEMMA: CLIENT CONFIDENTIALITY VS. JUDICIAL INTEGRITY

A VERY DIFFERENT PROPOSAL FOR THE REVISION OF MODEL RULE 1.6

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INTRODUCTION

Douglas Schafer, an attorney with a solo practice in Tacoma, Washington, was frankly and almost boastfully told by the president of a small local bank, one of his clients, that the banker planned to bribe a newly elected Superior Court judge who was a former associate and old friend.[1] At the time, Schafer took no action, saying only that "he did not want to hear about it."[2] Later, however, Schafer encountered that same judge in a courtroom and, either irritated by an adverse ruling or angered by an apparent favoritism, Schafer began to privately investigate the earlier allegation of improper conduct.[3] Schafer found evidence

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1. Doug Schafer, *Declaration Under Penalty of Perjury*, *at* http://www.dougschafer.com/Ans_Ex1.htm (last visited Oct. 23, 2003) (on file with Loyola Law Review) [hereinafter Schafer, *Declaration*]. The historical sequence of events involved in the client confidentiality situation faced by Doug Schafer will be more fully described in Section I of this article.

2. *Id.*

3. *In re* Schafer, 66 P.3d 1036, 1038 (Wash. 2003) (en banc); Wash. State Bar

that the judge, shortly before taking the bench, had financially exploited an estate of which he was trustee, and that his client, the banker, substantially benefited from that exploitation.[4] Schafer revealed this information to county, state, and federal authorities in February 1996.[5] Their reactions were disappointing, but eventually Schafer was able to bring the information to the attention of the Washington state legislature.[6] The legislature's influence proved decisive. The Washington State Supreme Court removed the judge from office in July 1999 for violating the standards of judicial integrity.[7] However, the Washington State Bar Association recommended that Schafer's right to practice law be suspended for one year for violating the professional standards governing client confidentiality.[8] The Supreme Court of Washington reinstated the hearing officer's recommendation, suspending Schafer for six months for violating rules governing client confidentiality.[9] The court expressly rejected the argument that the statements fell into an exception to Washington Rule of Professional Conduct 1.6.[10] The court made no reference to the fact that none of the investigation agencies Schafer contacted were willing to proceed with an investigation of Judge Anderson until he went public with the

Ass'n Disciplinary Bd., Findings of Fact, Conclusions of Law, and Hearing Officer's Recommendations, *In re* Schafer, No. 00#00031 (Aug. 18, 2000) [hereinafter Disciplinary Bd., Findings of Fact], *available at* http://www.dougschafer.com/Mills Ruling.htm (last visited Oct. 23, 2003).

4. *See In re* Anderson, 981 P.2d 426, 429 n.3 (Wash. 1999) (discussing the sale of a bowling alley at a substantial discount). The transcript of Anderson's five day hearing before the Washington Commission on Judicial Conduct is on Doug Schafer's website, available at http://www.dougschafer.com/AndersonHearing.pdf (January 12-16, 1998).

5. Interview with Douglas Schafer in Washington State (Oct. 1, 2001) [hereinafter Schafer, Interview] (on file with Author).

6. Doug Schafer, *Legislative Interest in Constitutionally Recalling Judge Anderson; Call for Legislative Overhaul of Lawyer and Judge Disciplinary Systems* (1999), *at* www.dougschafer.com or http://home.mindspring.com/~schafer3/ #Legislature [hereinafter Schafer, *Legislative Interest in Constitutionally Recalling Judge Anderson*].

7. *Anderson*, 981 P.2d at 427.

8. Disciplinary Bd. of the Wash. State Bar Ass'n, Order, *In re* Schafer, PUB. NO. 00#00031, at *4 (May 1, 2001) [hereinafter Disciplinary Bd., Order], *available at* http://www.dougschafer.com/DBdOrder.pdf (last visited Oct. 23, 2003).

9. *In re* Schafer, 66 P.3d 1036, 1048 (Wash. 2003). The supreme court held that Schafer unnecessarily revealed client confidences and secrets. *Id*. *See* Doug Schafer, *To Kill a Messenger—for Reporting a Corrupt Judge*, *at* http://www.dougschafer.com (last visited Oct. 23, 2003) (discussing the procedural history of the dispute).

10. *Schafer*, 66 P.3d at 1048.

information.

The Schafer case is very current and, in our view, very relevant to the ongoing debate regarding the proper form and content of Model Rule 1.6, governing client confidentiality.[11] There is no question whether Douglas Schafer violated the standards expressed in that rule; he did so deliberately. The question is whether those are the correct standards. This case contrasts the value to society of client confidentiality with the value of judicial integrity. Despite the explicit priority expressed in Rule 8.3 in favor of client confidentiality,[12] its impact upon the efficient and effective processes of the law and, consequently, upon the overall benefits and individual rights of society, is not readily apparent.

We will examine the impact the current version of Rule 1.6 has had upon the efficient and effective processes of the law and upon the overall benefits and individual rights of society. We expect to arrive at a very unique proposal for the revision of Model Rule 1.6, and we want to accomplish these two objectives in a logical sequence of thought extending through four Sections.

Section I–The Sequence of Disciplinary Events. The events that constitute the concrete and specific situation faced by Douglas Schafer started with a meeting with a client who frankly told Schafer of his plan to bribe a judge.[13] These events ended nine years later, following an expansion of the allegations against the judge from accepting a relatively small bribe to exploiting a reasonably large estate, with the removal of the judge from office for disregarding the importance of judicial integrity,[14] and the suspension of Schafer for ignoring the provisions of Rule 1.6.[15] The sequence from start to finish is lengthy and complex, with many details poorly recorded, but it fully portrays one type of

11. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2002). Client confidentiality should not be confused with the attorney-client privilege. We distinguish the two in Section II, The Development of Professional Standards.

12. Rule 8.3(b) provides in part that "[a] lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority." MODEL RULES OF PROF'L CONDUCT R. 8.3(b) (2002). However, Rule 8.3(c) provides that "[t]his Rule does not require disclosure of information otherwise protected by Rule 1.6 . . . ." MODEL RULES OF PROF'L CONDUCT R. 8.3(c) (2002).

13. Schafer, *Declaration*, *supra* note 1, at 2.

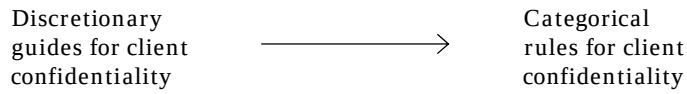
14. *Anderson*, 981 P.2d at 427-29.

15. *Schafer*, 66 P.3d at 1046.

confidentiality dilemma faced by many attorneys at various points during their careers. Schafer was not alone in his dilemma; he merely felt abandoned. We wish to make this quandary as clear as possible so as to use his singular situation as an illustration of similar dilemmas faced by other attorneys in subsequent portions of this article.

Section II–The Development of Professional Standards. The professional standards governing client confidentiality have developed gradually but steadily over an extensive period of time, from discretionary guides that relied primarily upon the moral character of the attorney, to categorical rules[16] that are based largely upon the effective performance of the profession. Competent scholars have examined this historical sequence frequently in the past.[17] Consequently, we will address only the major steps or stages in the progression between these very different end positions. Our intent is to show that alternative positions on the professional standards governing client confidentiality can legitimately be arrayed along a vector ranging from discretionary guides to categorical rules.

Introduction Figure 1. Vector of alternative end positions that have been proposed governing client confidentiality:



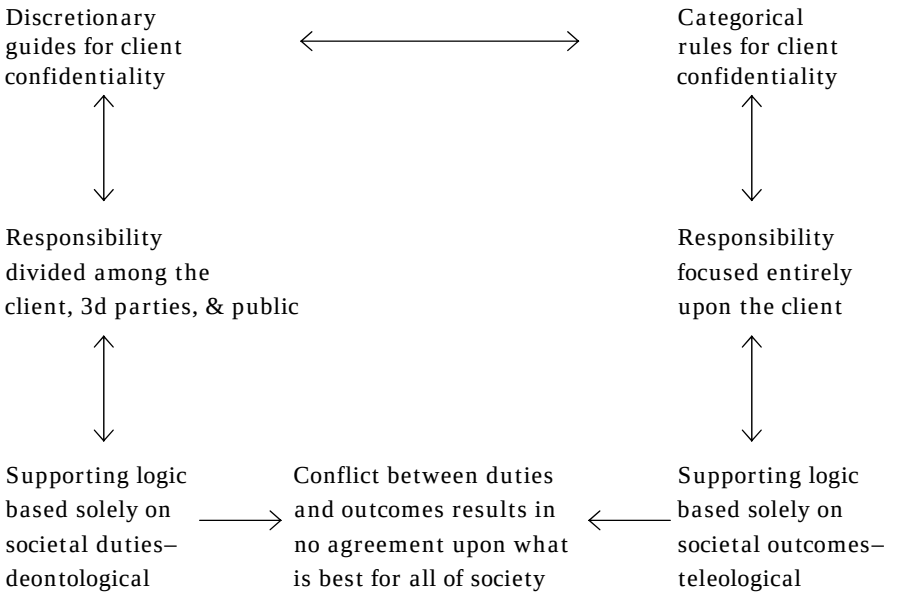
Section III–The Rationale for Alternative Positions. The first problem in evaluating alternative positions on this vector of professional standards governing client confidentiality is that the different end positions are associated with different views of the responsibilities of the legal profession. The end point of discretionary guides is associated with a view of attorney responsibilities divided between client, third parties, and the public. The end point of categorical rules is associated with a view of those responsibilities focused solely upon the interests of the client. The second problem in evaluating alternative positions on this vector of professional standards is that each of these views of proper professional responsibility is based upon different methods of moral reasoning. The supporting logic for

16. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT.

17. *See, e.g.*, Mark H. Aultman, *The Story of a Rule*, 2000 L. REV. M.S.U.D.C.L. 713 (2000).

responsibility divided among client, third parties, and the public is deontological: concerned with social duties. The supporting logic for responsibility focused solely upon the client is teleological: concerned with social outcomes. These forms of reasoning conflict; and, consequently, there can be no agreement on what is best for all of society.

Introduction Figure 2. Vector of alternative end positions governing client confidentiality, together with the supporting professional rationales and underlying moral systems:



Section IV–The Proposal for Change. Given that a moral rationale based on duties (deontological) differs in irreconcilable ways from one based on outcomes (teleological), there can be no single agreement upon what is best for society, and consequently no single source for the proper form of the professional standards governing client confidentiality. Our recommendation is for these reasoning methods to be applied concurrently, given that they cannot be combined jointly, and to both the original action by the client and the proposed revelation by the attorney. Disclosure should be permitted only when the action by the client could be judged to be "wrong" in a strict moral sense (both outcomes and duties) and the disclosure by the attorney could be judged to be "right" in the same strict moral sense (both outcomes and duties).

Introduction Figure 3. Matrix of the sole condition under which disclosure of confidential client information would be permitted according to underlying moral systems:

		Moral Worth of Client Action: "Right"	Moral Worth of Client Action: "Wrong"
Moral Worth of Attorney Disclosure: "Wrong"		No disclosure	No disclosure
Moral Worth of Attorney Disclosure: "Right"		No disclosure	Disclosure permitted

Section IV concludes with specific proposals for a substantially altered form of Rule 1.6 that permits the disclosure of confidential client information only, as illustrated above, when the action by the client could be judged to be "wrong" in a strict moral sense (both outcomes and duties) and the disclosure by the attorney could be judged to be "right" in that same strict moral sense (both outcomes and duties) *according to set professional standards*.

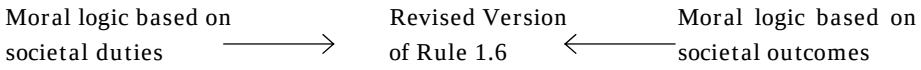
We believe that concrete professional standards for the permitted public disclosure of confidential client information have taken on a new urgency following the recent public acknowledgements of deliberate corporate wrongdoing by numerous large firms that, without question, have brought substantial financial harms to investors, creditors, employees, and others[18] and the new reporting provisions of the Sarbanes-

18. Examples of these companies would certainly include Enron, Global Crossing, Tyco, WorldCom, Adelphia, and Dynergy. For a general discussion, see Mark Grimein, *You Bought, They Sold*, FORTUNE, Sept. 2, 2002, at 64-79 (discussing how top company officials made more money as stock prices plummeted); Joseph Nocera, *System Failure*, FORTUNE, June 24, 2002, at 62 (proposing a method for restoring investor confidence). For a more detailed examination, see BRIAN CRUVER, ANATOMY OF GREED: THE UNSHREDDED TRUTH FROM AN ENRON INSIDER (2002) (providing a factual account of the author's life at Enron).

Oxley Act of 2002,[19] which is designed to obstruct such wrong-doing and prevent those harms. Section 307 of the Sarbanes-Oxley Act requires both in-house and outside counsel who encounter a material violation of security laws or a serious breach of fiduciary duty to report the violation or breach to the chief financial officer or chief executive officer of the company. Should the corporate officer fail to respond accordingly, the breach must be reported to the audit committee, the outside members, or the full membership of the board of directors.[20] Through promulgation of a new regulation, the Securities and Exchange Commission (SEC) requires the attorney to notify the SEC and publicly withdraw from representing the client in the event the members of the board do not respond properly.[21] In brief, the "substantial financial harm" provision of the SEC[22] now conflicts with the "death or substantial bodily injury" limitation of the Model Rules of Profession Conduct.[23]

This conflict must be resolved. A favorable resolution will require an understanding of the historical developments (Section II) and the ethical foundations (Section III) of Rule 1.6. The result will be a broad combination of the moral logic based on outcomes and the moral logic based on duties (Section IV), generating a new set of professional standards to govern client confidentiality.

Introduction Figure 4. Graphic of the dual sources of the proposed set of new professional standards governing client confidentiality:



SECTION I–THE SEQUENCE OF DISCIPLINARY EVENTS

As explained in the Introduction, the sequence of events that eventually led to the Washington State Bar's recommended suspension of Douglas Schafer's right to practice law started in

19. Sarbanes-Oxley Act of 2002 (Public Company Accounting Reform and Investor Protection Act), Pub. L. No. 107204, 116 Stat. 745 (codified as amended in scattered sections of 15 & 18 U.S.C.).

20. *Id.* § 307.

21. Standards of Professional Conduct For Attorneys Appearing and Practicing Before the Commission in the Representation of an Issuer, 17 C.F.R. § 205.

22. *Id.*

23. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2002).

August 1992.[24] Schafer received a telephone call from William Hamilton, a client for whom Schafer had provided personal and business legal services, including forming a bank of which Hamilton was the Chairman and CEO.[25] Hamilton asked Schafer for a meeting to set up a personal corporation to purchase a bowling alley.[26] At that meeting, Hamilton told Schafer that Grant Anderson, the front-runner for election to Superior Court judge, was serving as attorney for the estate of Charles Hoffman, a local businessman who died in 1989.[27] Hamilton informed Schafer that the estate owned and operated a bowling alley.[28] Hamilton further stated that Anderson was about to start his service on the Superior Court and, consequently, wanted to sell the bowling alley quickly so that he could close the estate before assuming the bench.[29] Hamilton explained that there was no time for a proper appraisal, but he said that Anderson promised to give Hamilton a "good deal" on the bowling alley purchase.[30]

According to Schafer, Hamilton then added that he would "repay" Anderson for the "good deal" at some time in the future,[31] to which Schafer responded, "I don't even want to hear about it!"[32] While Hamilton has denied telling Schafer that he intended to reward Anderson for his concessions on the purchase price, he does admit he told Schafer, "I wanted to make him [Anderson] an officer of the corporation so he would be employed; he would be compensated, however minuscually [sic], and therefore be obliged to be available to me to answer specific questions that otherwise I knew I wasn't going to be able to ask or answer."[33] In any case, Schafer accepted Hamilton's assignment and prepared routine

24. Schafer, Interview, *supra* note 5.

25. *Id.*

26. *Id.*; Craig Coley, *Former Fircrest Judge Disciplined: Grant L. Anderson Disrobed, Disbarred After State Investigations*, U. PLACE J. (Washington), Mar. 31, 2000, *available at* http://www.dougschafer.com/UPJ000331.htm.

27. *In re* Schafer, 66 P.3d 1036, 1038 (Wash. 2003).

28. *In re* Anderson, 981 P.2d 426, 427 (Wash. 1999). The transcript of Anderson's five day hearing held on January 12-16, 1998 before the Washington Commission on Judicial Conduct is on Doug Schafer's website, at http://www.dougschafer.com/AndersonHearing.pdf.

29. *Schafer*, 66 P.3d at 1038.

30. *Id.*

31. *Id.*

32. Schafer, *Declaration*, *supra* note 1.

33. *See* Transcript of Bill Hamilton's Washington State Commission on Judicial Conduct deposition 25-26 (Jan. 21, 1997) (on file with the Loyola Law Review).

papers to form a one-person corporation used to purchase the bowling alley.[34] Over the next three years, Schafer had limited contact with Hamilton and took no action regarding Hamilton's comments about Anderson.[35]

In July 1995, Schafer came before Anderson, the lawyer turned judge, in a contentious probate case, *In re Estate of Barovic*.[36] Immediately Schafer recognized him as the lawyer who allegedly violated his duties as an executor.[37] Then, because rulings adverse to Schafer caused him "to doubt his [Anderson's] competency as a judge," Schafer decided to follow-up on Hamilton's comments about the integrity of Anderson.[38]

STARTING THE INVESTIGATION

Regardless of whether Schafer was motivated more by retaliation than by propriety, he began a purposeful and diligent investigation into the past activities of Judge Anderson.[39] First, Schafer checked Hamilton's corporate file to get the name of the estate (the Charles Hoffman Estate) that had sold Hamilton the bowling business.[40] Then, he copied the estate's public court file and reviewed it for irregularities.[41] After telephoning a few persons named in the file, Schafer asked Hamilton to meet with him to discuss the events surrounding the estate, specifically as they related to Judge Anderson's integrity.[42]

Schafer met with Hamilton at the Pine Cone Restaurant on December 18, 1995.[43] There he explained to Hamilton why he was inquiring about Judge Anderson and also told Hamilton that he recalled his comment from 1992 about repaying Anderson at some later date for the good price he was promised for the bowling alley.[44] Then, Schafer asked about Judge Anderson's integrity, to which Hamilton replied that the judge was "as

34. *Schafer*, 66 P.3d at 1038.
35. Schafer, Interview, *supra* note 5.
36. *In re* Estate of Barovic, 946 P.2d 1202, 1203-04 (Wash. 1997).
37. Schafer, Interview, *supra* note 5.
38. Schafer, *Declaration*, *supra* note 1.
39. Schafer, Interview, *supra* note 5.
40. *Id.*
41. *Id.*
42. *Id.*
43. Schafer, *Declaration*, *supra* note 1.
44. *Id.*

honest as most any lawyer."[45]

They conversed for nearly three hours, Hamilton telling Schafer about the bowling alley business, his long friendship with Anderson, Anderson's handling of the Hoffman Estate, and a substantial price discount he was offered for a prompt decision on the bowling alley purchase.[46] Hamilton also claimed that he had contributed a five-figure sum to one of Anderson's election campaigns (Anderson had run for the state supreme court in 1994).[47] Finally, the meeting concluded with Hamilton telling Schafer to "stop looking for dirt" on Anderson.[48]

Despite Hamilton's warning at the Pine Cone Restaurant meeting, Schafer continued his investigation.[49] He studied Judge Anderson's public election campaign and public disclosure financial reports.[50] While he found no five-figure contribution by Hamilton, he did find that Anderson reported a five-figure stock investment in Hamilton's Sound Banking Company.[51] So, he asked the bank's corporate secretary if Judge Anderson received his bank stock from Hamilton, but learned that he had not.[52] A day or two later, Hamilton telephoned Schafer expressing anger that he had been inquiring about Anderson's bank stock[53] and told Schafer in "quite stern terms that I [Schafer] should just drop it."[54]

Schafer's continued investigation of Anderson's pre-judicial activities led him to discover further improprieties surrounding another entity of Charles Hoffman's estate: the Surfside Inn, a forty-eight-unit condominium resort on the Washington coast.[55] Documents showed proceeds of about $1.4 million from the sale of Surfside Inn assets.[56] When added to the $1 million from the sale of the bowling alley, the total greatly exceeded the less than

45. Schafer, *Declaration*, *supra* note 1.
46. Schafer, Interview, *supra* note 5.
47. *Id.*
48. Schafer, *Declaration*, *supra* note 1.
49. Schafer, Interview, *supra* note 5.
50. *Id.*
51. *Id.*
52. *Id.*
53. Schafer, *Declaration*, *supra* note 1.
54. *Id.*
55. Schafer, Interview, *supra* note 5.
56. *Id.*

$900,000 Anderson reported as the total value of the estate's assets in papers he filed in December 1992.[57] Schafer also learned from public real estate records that Anderson sold twenty-one timeshare weeks at this resort to friends and colleagues for only $1,000 per week at the time he closed the estate, when the going rate paid by public consumers was $3,625 per week.[58] Schafer found that Judge Anderson failed to disclose these transactions in his report to the commissioner when he closed the estate.[59]

DISCOVERING THE FACTS

In January of 1996, Schafer continued his investigation and tried to contact Judge Anderson's ex-wife, Diane Anderson, about the judge's handling of the Hoffman Estate.[60] Schafer received a return call from the attorney for Anderson's wife in the divorce proceedings.[61] Schafer informed the attorney that he was investigating Anderson's handling of the estate and that he had found apparent misconduct involving the Surfside Inn resort and the sale of the bowling alley.[62] As soon as Schafer mentioned this, the attorney said, "I was wondering when that shoe was going to drop."[63] The attorney suggested that Schafer check into Anderson's acquisition of a new Cadillac because Anderson had been very evasive about it throughout the divorce proceedings.[64]

That same day, presumably after learning Schafer had confronted Anderson's accountant about the Hoffman Estate, Hamilton faxed Schafer a curt letter severing Schafer's relationship with Hamilton and his bank, and directing Schafer not to reveal any confidential information.[65] Schafer asked

57. Schafer, Interview, *supra* note 5.

58. Doug Schafer, *Judiciary's Integrity Called Into Question by Anderson Case*, U. PLACE J. (Washington), Apr. 30, 1998, *available at* http://home.mindspring.com/~schafer3/980414_UPJournal.htm. For a discussion of this matter not including the price figures, see Barry Siegel, *Risking It All on a Legal Crusade: Lawyer defied professional standards to get a corrupt judge disbarred. But his practice, home life suffered*, L.A. TIMES, June 10, 2000, at A1, *available at* 2000 WL 2249480.

59. Doug Schafer, *Overview of the "Pattern of Dishonest Behavior" by Former Judge Anderson and His Colleagues*, *at* http://home.mindspring.com/~schafer3/#Overview (last modified Feb. 17, 2003).

60. Disciplinary Bd., Findings of Fact, *supra* note 3, at *5.

61. *Id.*

62. Schafer, *Declaration*, *supra* note 1.

63. Schafer, Interview, *supra* note 5.

64. *Id.*

65. *Id.*

Hamilton to meet with him to discuss the overwhelming documentation illustrating Anderson's corruption.[66] Schafer, Hamilton, and Hamilton's lawyer met in Hamilton's lawyer's office.[67] At that meeting, both Hamilton and his lawyer told Schafer that he was not allowed to disclose any information that Hamilton revealed earlier about Anderson.[68] Additionally, Hamilton told Schafer that if he revealed any of the information, he would file a complaint against Schafer with the Washington State Bar and, according to Schafer, also sue for damages.[69]

Despite these threats, Schafer proceeded to investigate the purchase of Anderson's Cadillac.[70] He first asked the presiding judge to provide him with Judge Anderson's vehicle license plate number, obtainable from judicial parking space assignment records.[71] When she declined, Schafer met with the county prosecutor about his investigation of Anderson, and the prosecutor directed Schafer to where the judges park their cars.[72] After that meeting, Schafer walked to the parking lot and identified Judge Anderson's Cadillac by his mail lying on the front seat.[73] He copied the number from the license plate and later that day delivered a letter to the Washington Department of Licensing requesting their records regarding the car.[74]

Schafer learned from the state's vehicle ownership records, that Anderson bought the Cadillac from a local dealer in December 1992, and that Hamilton's Sound Banking Company held a lien on the Cadillac from its purchase until May 1995.[75] In August of 1997, during the procedure initiated by the Commission on Judicial Conduct's formal charges against Judge Anderson, it came to light that Hamilton (actually his bowling business corporation, Pacific Recreation, Inc.) paid Anderson's $800 monthly car note to Sound Banking Company from January 1993 to May 1995, paying $31,185 during that period.[76]

66. Schafer, Interview, *supra* note 5.
67. Disciplinary Bd., Findings of Fact, *supra* note 3, at *6.
68. *Id*.
69. *Id*.
70. Schafer, Interview, *supra* note 5.
71. *Id*.
72. *Id*.
73. *Id*.
74. Disciplinary Bd., Findings of Fact, *supra* note 3, at *8.
75. Schafer, Interview, *supra* note 5.
76. *Id*.

Anderson's ex-wife, Diane Anderson, later testified by sworn statement and orally that Anderson told her that his Cadillac was a commission from Hamilton for the sale of the bowling alley.[77] Despite Hamilton's insistence during Anderson's judicial disciplinary hearing that the payments were a friendly gift, they had been treated as a business expense on the accounting records of Pacific Recreation, Inc. and deducted for income tax purposes.[78] Later, it was discovered that Judge Anderson failed to report these payments on his judicial disclosure forms, which require judges to make public any income or election contributions they receive, nor did Anderson disclose these payments as part of the purchase price to the subsequent trustee of the Hoffman Estate, his former law partner.[79]

In return for making the car payments, Schafer alleged, that as executor of the Hoffman Estate, Anderson sold the bowling alley well below value.[80] The bowling alley business, including the operating company, building and land, had been appraised at a total of $1,334,000 in 1989, and at $1,775,000 in mid-1993.[81] In mid-1992, Anderson, as President of Pacific Lanes and executor of the estate, approached Hamilton, as a private investor and chairman of Sound Bank, and offered to sell Hamilton the bowling alley (the building and the land) for $1,000,000.[82]

REPORTING THE FINDINGS

Early in 1996, Schafer began notifying various official agencies about what he had learned from his investigation of Judge Anderson. On February 6, 1996, he met with the Pierce County Prosecuting Attorney.[83] During that time, he also met

77. Statement of Charges, Washington State Commission on Judicial Conduct, *In re* Anderson, No. 96-2179-F at 4 (Aug. 3, 1997) [hereinafter CJC, Statement of Charges], *available at* http://www.cjc.state.wa.us/publications/SOC/1997/2179%20Statement%20of%20Charges.pdf; Transcript of Proceedings, Washington State Commission on Judicial Conduct, *In re* Anderson, No. 96-2179-F at 20 (Jan. 12-16, 1998) [hereinafter CJC, Transcript of Proceedings], *available at* http://www.dougschafer.com/AndersonHearing.pdf.

78. *In re* Anderson, 981 P.2d 426, 430 (Wash. 1999).

79. Bob Van Voris, *The High Cost of Disclosure: Violating Client Relations in Order to Accuse a Judge Exacts a Big Price*, 22 NAT'L L.J. 120 (Jan. 4, 2000).

80. Schafer, Interview, *supra* note 5.

81. *Anderson*, 981 P.2d at 429 n.3.

82. *Id.* According to Anderson's time slip records, the first meeting between them was in March of 1992. *Id.* at 429.

83. *In re* Schafer, 66 P.3d 1036, 1039 (Wash. 2003).

with agents from the Federal Bureau of Investigation and the Internal Revenue Service's Criminal Investigation Division, and an investigator for the Washington Commission on Judicial Conduct (CJC).[84] After Schafer spent approximately seven hours with the investigator from the CJC reviewing all of the documents he had collected, Schaffer was told that the matter would be taken very seriously, ranking it "a 13 on a scale of 1 to 10."[85] She copied for him six sets of all of his investigatory documents so that he could provide a full set to each of several other agencies she believed should investigate the matter.[86]

Schafer welcomed these expressions of intent to continue the investigation on an official basis, and to assist those efforts he drafted a document entitled "Declaration Under Penalty of Perjury" laying out all of the facts that he discovered in his earlier work.[87] In it he described his initial contacts with William Hamilton, his subsequent actions in setting up the corporation for the purchase of the bowling alley, the Cadillac allegations, and the many other details he had discovered regarding Anderson's handling of Charles Hoffman's estate.[88] Schafer sent his Declaration, along with memos, to the Washington Attorney General's Office, the Washington State Bar Association's Office of Disciplinary Counsel (ODC), the Internal Revenue Service Criminal Investigation Division, the CJC, and the FBI.[89]

However, Schafer's frustrations with the reporting process began soon after submitting his Declaration. In March 1996, following Schafer's petition for transfer, the Barovic Estate cases were moved from Judge Anderson's courtroom to that of Judge Donald H. Thompson.[90] Declaring that Schafer violated ethics rules including Rule of Professional Conduct 8.2(a), making false or reckless statements about the integrity of a judge, Judge Thompson immediately disqualified Schafer from representing

84. *In re* Schafer, 66 P.3d 1036, 1039 (Wash. 2003).

85. Disciplinary Bd., Findings of Fact, *supra* note 3, at *9; Siegel, *supra* note 58, at A1.

86. Disciplinary Bd., Findings of Fact, *supra* note 3, at *9.

87. Schafer, *Declaration*, *supra* note 1.

88. *Id*. The disciplinary proceeding ultimately brought against Schafer by the Washington State Bar is the direct result of his reporting Hamilton's comments during the initial contacts.

89. *Schafer*, 66 P.3d at 1039.

90. *In re* Estate of Barovic, 946 P.2d 1202, 1203-04 (Wash. 1997).

his client in any of the Barovic Estate cases.[91] Schafer offered in writing to show Judge Thompson, either in chambers or in open court, the materials he had collected, but Thompson ignored the offer and summarily ordered Schafer disqualified from further participation in any of his client's cases.[92] Schafer appealed Judge Thompson's decision to the Washington Court of Appeals, which vacated the decision in November 1997, stating that Schafer had not been given sufficient notification and an opportunity to respond.[93]

In his appeal of Judge Thompson's disciplinary ruling, Schafer recognized an opportunity to publish publicly—shielded from Hamilton's threatened lawsuit by the litigation privilege—his Declaration and other documentation showing Judge Anderson's corruption.[94] So, in late April 1996, Schafer filed as part of his Petition for Review with the court of appeals an appendix with fifty-seven pages of such documents illustrating Judge Anderson's corruption.[95] Immediately after filing the documents in the appellate court's public file, he attempted to expose Judge Anderson by informing local newspapers about the story. He faxed selected pages from the Petition and twelve pages from its appendix to the newsrooms of the *Tacoma News Tribune*, the *Seattle Times*, and the *Seattle Post-Intelligencer*, hoping they would further investigate and expose the earlier actions of Judge Anderson.[96] No journalist showed any interest and Schafer became "extremely frustrated at the reluctance of journalists to go beyond news reporting and into investigative reporting."[97] He complained that the attitude of the reporters seemed to be that "most people expect that lawyers and judges are corrupt, so where's the news?"[98] Eventually, in 1998, a number of news articles openly referred to Judge Anderson as "corrupt" or used the derogatory phrase "Cadillac Judge" in their

91. Response by Respondent to Bar Association Counterstatement at 4, *In re* Schafer, PUB. NO. 00#00031 (Wash. State Bar Assoc. Dec. 7, 2000), *available at* http://dougschafer.com/Response2Bar.pdf.

92. *Id*.

93. *Barovic*, 946 P.2d at 1204-05.

94. Schafer, Interview, *supra* note 5.

95. *Id*.

96. *In re* Schafer, 66 P.3d 1036, 1039 (Wash. 2003).

97. Doug Schafer, *News Clippings About Judge Anderson's Corrupt Conduct*, *at* http://www.dougschafer.com (last visited on Oct. 23, 2003).

98. *Id*.

titles.[99] No articles on the story appeared from 1996 to 1997 except for the reporting of the formal judicial misconduct charges of Anderson in August of 1997. From 1996 to 1997, Schafer received many discouraging replies from the authorities that he had contacted.[100]

The Pierce County prosecuting attorney's office informed Schafer that they had "carefully reviewed all of the evidence in the case and they had found no basis for a criminal complaint against Judge Anderson."[101] Similarly, the Attorney General's Office simply bowed out, with no effort to investigate the claims.[102] The Washington State Bar Association (WSBA) deferred its investigation into Judge Anderson until the county prosecutor closed his investigation, which occurred in May 1996, because the first step in the WSBA's investigation procedure is to send the accused lawyer all the grievant's accusatory documents.[103] In August 1996, the WSBA Disciplinary Counsel dismissed Schafer's grievances against Anderson and his law firm due to "insufficient evidence to prove unethical conduct."[104]

JUDGE ANDERSON'S REMOVAL FROM OFFICE

Finally, on August 4, 1997, the CJC publicly filed a statement of charges.[105] On April 3, 1998, the CJC concluded that Judge Anderson "placed his friendship with William Hamilton above his ethical responsibilities as a judge."[106] The CJC's contract prosecuting attorney sought Anderson's removal,

99. Rick Anderson, *Spilling the Sacred Beans: Attorney Faces Discipline for Turning in the "Cadillac Judge"*, SEATTLE WKLY., Mar. 23, 2000, http://www.Seattleweekly.com/feathers/0012/featuresanderson2.shtml [hereinafter Anderson, *Spilling the Sacred Beans*]; *see also* Siegel, *supra* note 58.

100. Schafer, Interview, *supra* note 5.

101. Doug Schafer, *Pierce County Prosecutor John W. Ladenburg's Closing of His Investigation on May 1, 1996*, *at* http://www.dougschafer.com/96BarCoverup.htm (last visited Oct. 23, 2003).

102. Anderson, *Spilling the Sacred Beans*, *supra* note 99; Siegel, *supra* note 58.

103. Doug Schafer, *Washington State Bar Association, Office of Disciplinary Counsel Letters of May 2, 1996 Beginning Its Investigation*, *at* http://www.dougschafer.com/96BarCoverup.htm (last visited Oct. 23, 2003).

104. Doug Schafer, *Washington State Bar Association, Office of Disciplinary Counsel Letters of August 15, 1996 Closing Its "Investigation,"* *at* http://www.dougschafer.com/96BarCoverup.htm (last visited Oct. 23, 2003).

105. CJC, Statement of Charges, *supra* note 77, at *1.

106. *In re* Anderson, Commission Decision, No. 96-2179-F-64 at *7 (Comm'n on Judicial Conduct State of Wash. Apr. 3, 1999) [hereinafter CJC, Decision], *available at* http://www.cjc.state.wa.us/publications/decisions/1998/2179%20Decision.pdf.

arguing that the evidence presented at the hearing showed him willing to betray his obligations for personal gain.[107] Later, in oral argument to the Washington Supreme Court, that prosecutor openly referred to Anderson as a judge who "was for sale."[108] Further findings of the CJC were that Judge Anderson failed to uphold the integrity and independence of the judiciary, failed to avoid impropriety in all activities, failed to regulate his extra-judicial activities to minimize the risk of conflict with his judicial activities, and failed to file reports for compensation received.[109] The CJC also found that Judge Anderson violated the Code of Judicial Conduct by continuing to serve as President of two corporations, Hoffman-Stevenson, Inc. and Pacific Lanes, Inc., after being elected to the judiciary.[110]

The CJC also expressed disapproval of Judge Anderson's acceptance of car payments while at the same time reducing the purchase price of the bowling alley.[111] The CJC declared that Judge Anderson's actions resulted in "the public confidence in the integrity of the judiciary [being] substantially eroded by such actions."[112] In reference to Anderson's failure to report the car payments, the CJC further explained that "a judge who hides compensation from public scrutiny severely damages the public's confidence in the integrity of the judiciary."[113] The commission report concluded by recommending that Judge Anderson be suspended for four months without pay, that he take a course on Judicial Ethics, and that he be required to amend his financial disclosure filings with the state's Public Disclosure Commission.[114]

By August 1997, Schafer was shocked by what he felt was extremely lenient punishment handed down. Consequently, prior to the CJC filing charges against Judge Anderson, Schafer shared his documents with Ocean Beach Hospital, a charity that, according to Charles Hoffman's will, was entitled to receive

107. Anderson, *Spilling the Sacred Beans*, *supra* note 99; Siegel, *supra* note 58.

108. Anderson, *Spilling the Sacred Beans*, *supra* note 99.

109. CJC, Decision, *supra* note 106, at *6-8.

110. *Id*. at *6. The Code of Judicial Conduct makes it clear that "judges are not to serve as officers, directors, managers, advisors, or employees of any business." MODEL CODE OF JUD. CONDUCT Canon 4(D)(3), 5(C)(1) (2000).

111. CJC, Decision, *supra* note 106, at *6.

112. *Id*.

113. *Id*. at *7.

114. *Id*. at *9.

ninety percent of his estate.[115] By the spring of 1998, Schafer understood that the hospital was threatening to file a $1 million fraud lawsuit against Anderson and his colleagues.[116] But secret negotiations ensued and the hospital formally settled for $500,000.[117] Schafer obtained the settlement documents and papers on the threatened lawsuit from the hospital district under the state's public records laws and immediately shared them with the local newspaper, which gave the story front-page coverage.[118]

Still, Schafer remained convinced that the only acceptable outcome would be removal of Judge Anderson.[119] Therefore, he decided to take the matter to the state legislature.[120] Schafer sent a letter to each member of both houses urging them to address the issue, and he provided the legislative leaders with considerable documentation, including papers from the hospital's million-dollar fraud claim and its half-million dollar settlement.[121] It happened that the hospital was located in the district of the Majority Leader of the State Senate.[122] At a legislative hearing in March 1999, the hospital's administrator testified to her belief that Judge Anderson had "robbed" the hospital of $1.5 million.[123] As a result of Schafer's letters and direct contacts with legislators, as well as the subsequent involvement of the Majority Leader and the hospital, in April 1999 the State Senate and House of Representatives both unanimously passed a resolution directing the judiciary committees of both chambers to begin a process to remove Judge Anderson from the bench by employing the legislature's long-unused constitutional power to do so, unless the state supreme court acted sooner.[124] Ultimately, the legislative action became unnecessary.

The CJC's findings and recommendations were reviewed by

115. Schafer, Interview, *supra* note 5.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. Siegel, *supra* note 58.

121. Schafer, *Legislative Interest in Constitutionally Recalling Judge Anderson*, *supra* note 6.

122. Siegel, *supra* note 58.

123. *Id.*; Schafer, *Legislative Interest in Constitutionally Recalling Judge Anderson*, *supra* note 6.

124. Schafer, *Legislative Interest in Constitutionally Recalling Judge Anderson*, *supra* note 6.

the Washington State Supreme Court in *In re Disciplinary Proceedings Against Anderson*.[125] The court focused on the facts and circumstances surrounding three events: the sale of the bowling alley business, Judge Anderson's acceptance of car loan payments from 1993 to 1995, and Judge Anderson's continued role as president of three corporations for ten months after he was sworn in as Pierce County Superior Court Judge.[126] In regards to the Cadillac payments, the court said, "Judge Anderson's testimony that the car loan payments were a gift, unrelated to the sale of the bowling alley business, is simply not credible."[127] The court, more forcibly, declared that his multiple acts of deception "clearly exhibit a pattern of dishonest behavior unbecoming of a judge," and, not surprisingly, did not agree with the CJC regarding the limited sanctions of Judge Anderson.[128] The court iterated, "[w]e find a four-month suspension far too lenient in this case. Instead, the appropriate sanction is removal of Judge Anderson from his judicial office."[129]

Regarding Judge Anderson's argument that the incidents were too insignificant to justify punishment, the court said, "[t]his argument demonstrates Judge Anderson's complete failure to understand or his willful denial of the magnitude of his misconduct. It demonstrates his disregard of the importance of the integrity of the judiciary."[130] On July 29, 1999, the court removed Judge Anderson from office and stated that he could not return unless the court reinstated his eligibility.[131] This marked the very first time in state history that the supreme court found the sanctions of the CJC too lenient, and it was also the first time the court removed a superior court judge from office for ethical violations.[132]

Eventually, the ODC reopened its investigation of Anderson, which it previously closed due to lack of evidence.[133] However, the

125. *In re* Anderson, 981 P.2d 426 (Wash. 1999). The transcript of Anderson's five day hearing before the Washington Commission on Judicial Conduct is on Doug Schafer's website, at http://www.dougschafer.com/AndersonHearing.pdf.

126. *Anderson*, 981 P.2d at 428.

127. *Id*. at 434.

128. *Id*. at 437-39.

129. *Id*. at 439.

130. *Id*. at 438.

131. *Id*. at 439.

132. Siegel, *supra* note 58.

133. Doug Schafer, *The Public Judicial Disciplinary Case Removing Former Judge*

ODC and Disciplinary Board of the WSBA approved Anderson's offer to stipulate, without formal bar disciplinary proceedings, to the suspension of his license to practice law for two years.[134] Subsequently, the Washington State Supreme Court approved this sanction.[135]

CHARGES AGAINST SCHAFER

In July 1996, Schafer's former client, William Hamilton, filed a grievance with the ODC claiming that Schafer unethically disclosed client confidences in reporting Judge Anderson's corruption to authorities, and that he made untrue statements.[136] After an initial exchange of letters between the ODC and Schafer, the grievance laid dormant until February 1999, when the legislature began listening to Schafer's reports of the ODC's ineffective investigation of Judge Anderson.[137] But then, the ODC publicly announced that it intended to charge Schafer with breaching Hamilton's confidences.[138] On May 26, 1999, after receiving approval by a review committee, the ODC filed a formal complaint with the Disciplinary Board of the WSBA against Schafer.[139] The complaint alleged that Schafer violated Rule 1.6(a) of the Rules of Professional Conduct in revealing confidences and/or secrets relating to his representation of Hamilton.[140] The complaint also alleged that Schafer violated Rule 8.4(c) by misrepresenting himself in two efforts to gain information concerning the judge.[141] However, in January 2000, the ODC admitted they were unable to prove the misrepresentation claims, and the claims were dropped.[142] From July 7 to July 14, 2000 the sole remaining charge, the alleged

Anderson; But Ineffective Bar Discipline, *at* www.dougschafer.com (last visited Oct. 23, 2003).

134. *Id*.; Schafer also reproduces Anderson's *Stipulation to Suspension*, March 15, 2000, at www.dougschafer.com/GLA_Stipulation.htm (last visited Oct. 23, 2003); Washington State Bar Association, *Disciplinary Notices Number 4016* (May 4, 2000), *available at* http://www.wsba.org/notice/4016.htm (last visited Oct. 23, 2003).

135. Washington State Bar Association, *Disciplinary Notices Number 4016* (May 4, 2000), *available at* http://www.wsba.org/notice/4016.htm (last visited Oct. 23, 2003).

136. *In re* Schafer, 66 P.3d 1036, 1039 (Wash. 2003); Schafer, Interview, *supra* note 5.

137. Schafer, Interview, *supra* note 5.

138. Siegel, *supra* note 58.

139. Disciplinary Bd., Findings of Fact, *supra* note 3, at *1.

140. *Id*. at *2.

141. *Id*.

142. Disciplinary Bd., Findings of Fact, *supra* note 3, at *2.

violation of Rule 1.6, was argued before a single hearing officer, one of many lawyers who voluntarily serve the bar's disciplinary system.[143]

The hearing officer found that Schafer owed a duty of confidentiality to Hamilton as a former client.[144] Schafer argued the applicability of various recognized policies, interpretations and exceptions to the duty of confidentiality, including Rule 1.6(b)(1) under which he claimed that a lawyer could reveal client information "to prevent the client from committing a crime," and added that it applied not only to a future crime but to stopping a continuing crime, which he said was a gray area in the law.[145] None of these arguments were effective. While admitting that Schafer should be commended for "his extraordinary efforts and careful, meticulous research in the public records . . . to expose the 'pattern of dishonest behavior' . . . that resulted in Anderson's removal from judicial office," the hearing officer recommended that Schafer be suspended from the practice of law for six months and ordered him to pay all costs of the disciplinary proceedings.[146]

These findings and recommendations were then reviewed by the entire WSBA Disciplinary Board, which released its ruling on May 1, 2001.[147] The WSBA adopted all of the findings of fact, conclusions of law, and sanction recommendations of the hearing officer, except it increased Schafer's suspension from six months to one year.[148] As did the hearing officer, the Board praised Schafer for his investigation of public documents relating to the matter, but stated that "the Board [did] not support Mr. Schafer's disclosures of his client's secrets and confidences during his investigation . . . . It is not reasonable to believe that any of these disclosures were necessary to support suspected judicial or lawyer misconduct."[149] While awaiting the decision of the Washington Supreme Court, Douglas Schafer, in response to this potential end to his career, stated, "If a lawyer may not disclose clear evidence of a judge's corruption, I decline to be a lawyer."[150] The

143. Disciplinary Bd., Findings of Fact, *supra* note 3, at *1.
144. *Id*. at *14.
145. *Id*. at *16.
146. *Id*. at *15-16, 21.
147. Disciplinary Bd., Order, *supra* note 8, at *5.
148. *Id*. at *1.
149. *Id*. at *2.
150. Doug Schafer, *The State Bar's Disciplinary Case Against Whistle Blower Me*,

Washington Supreme Court decided to suspend Schafer for six months.[151]

The Washington Supreme Court concluded that "a one-year suspension is not necessary to protect the public from similar misconduct and that a six-month suspension will suffice."[152] The court went on to state, "[w]hile we applaud the results of Schafer's research into public records revealing Anderson's misconduct, we do not condone his unnecessary revelation of client confidences in the process . . . ."[153] The court also stated that, in its opinion, Schafer was "obsessed with Judge Anderson."[154] The court made no reference to the difficulty Schafer encountered in attempting to get anyone to investigate the activities of Judge Anderson. Arguably, client confidences could have been better protected had the Judicial Commission shown a willingness to investigate the matter. Ultimately, Schafer was held solely responsible for the breadth of the revelations.

SECTION II–THE DEVELOPMENT OF PROFESSIONAL STANDARDS

The professional standards governing client confidentiality that eventually led to Douglas Schafer's statement "If a lawyer may not disclose clear evidence of a judge's corruption, I decline to be a lawyer," have developed gradually over time. Fifty years ago Schafer doubtless would have been applauded for revealing the prejudicial manipulations of Judge Anderson. Twenty-five years ago he probably would have been permitted to make those revelations. Last year he was formally censored for taking exactly those actions.

The standards of client confidentiality, similar to those under which Schafer was suspended, have recently been reviewed by the Ethics 2000 Commission of the American Bar Association (ABA).[155] Before discussing our recommendations for alternative

at http://www.dougschafer.com (last visited Oct. 23, 2003).

151. *In re* Anderson, 66 P.3d 1036, 1047 (Wash. 2003).

152. *Id.* at 1047.

153. *Id.*

154. *Id.* at 1039.

155. The ABA in an effort entitled, "Ethics 2000," met and considered a widescale revision of the current rules including MODEL RULES OF PROF'L CONDUCT R. 1.6 (2000) addressing client confidentiality. The ABA Commission submitted a report,

changes to Model Rule 1.6 (Section IV), we wish to discuss the gradual development of the increasingly restrictive rules (Section II) and the underlying rationale for those restrictions (Section III). Notably, the restrictions were not adopted without thought, and do not exist without cause. This gradual progression of the professional standards governing client confidentiality has been examined many times in the past by competent scholars.[156] Consequently, in this discussion we plan to address only the major steps or stages in that progression, primarily as a means of then considering their rationale and causation.

We also plan to discuss only the issue of client confidentiality, not that of attorney-client privilege. Both obligate an attorney to maintain the confidential disclosures of a client except under certain conditions, but the attorney-client privilege has a much more explicit focus and a much more dominant position. Privilege protects the client in judicial proceedings, applies to information received directly from the client (as part of the prohibition against "self-incrimination"), and can be broken only by direct order of the court. Confidentiality is not limited to judicial proceedings, covers all information regarding the client received from a range of sources, and may be ignored under a set of conditions established by the profession. Privilege, of course, takes precedence over confidentiality. An attorney could not use the professional code of confidentiality to make a disclosure that would otherwise be prohibited by the constitutional provision of privilege.[157] Consequently, in this article we will focus on the professional standards of client confidentiality and thus clearly consider their rationale and causation.

1836 TO 1887 DECLARATIONS

Early resolutions on legal ethics, many of which included oblique references to client confidentiality problems, usually were

which is online at http://www.abanet.org/cpr/ethics2k.html (Aug. 2002). For the purposes of this discussion, the differences in Washington's Model Rule 1.6, as adopted and amended, and the ABA's Model Rule 1.6 are insignificant.

156. *See generally* THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION (Geoffrey C. Hazard, Jr. & Deborah L. Rhode eds., 3d ed. 1994).

157. For a more detailed discussion on the differences in the obligations imposed by the rules and the attorney-client privilege, see MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 3 (2002), and Carolyn Crotty Guttilla, *Caught Between a Rock and a Hard Place: When Can or Should an Attorney Disclose a Client's Confidence?*, 32 SUFFOLK U. L. REV. 707, 714 n.63 (1999).

drafted in the form of advisory guides to promote civility and truthfulness among lawyers with the intention, apparently, of maintaining public confidence and trust in the law. David Hoffman, one of the first faculty members at the University of Maryland, drafted "Fifty Resolutions in Regard to Professional Deportment" in 1836.[158] His major message was that there could be harmful ramifications to society when lawyers used a strict application of legal rules to practice unfettered devotion to their clients, but, as academics have so frequently been alleged to do, he qualified his recommendations.[159] Lawyers, he wrote, should "never permit professional zeal to carry [them] beyond the limits of sobriety and decorum, but bear in mind, with Sir Edward Coke, that 'if a river swell beyond its banks, it loseth its own channel.'"[160] In short, Hoffman's message was to stay with the client except under unnamed circumstances.

The next declaration of guiding principles for legal conduct came in 1854 in the form of a series of essays written by legal theorist and Pennsylvania judge, George Sharswood.[161] As one source noted, "Judge Sharswood's writings reflect a notion of legal ethics more attuned to a moral code of conduct than to prescriptions for avoiding conflicts in a sophisticated corporate and commercial marketplace."[162] That is, he was addressing legal conduct in what we often forget was a much more simply structured economic environment. Sharswood urged every lawyer to "'cultivate, above all things, truth, simplicity, and candor.'"[163]

The authors of these early guiding principles that cautioned against the danger of professional zeal and recommended the cultivation of truth, simplicity, and candor also emphasized, but apparently did not recognize, they created the clear potential for fealty conflict, the ideal of a focus of effort on behalf of the

158. 2 DAVID HOFFMAN, *Fifty Resolutions in Regard to Professional Deportment*, *in* A COURSE OF LEGAL STUDY: ADDRESSED TO STUDENTS AND THE PROFESSION GENERALLY 752 (2d ed. 1836). *See also* Lee Cooper & Stephen Humphreys, *Beyond the Rules: Lawyer Image and the Scope of Professionalism*, 26 CUMB. L. REV. 923, 926 (1995-1996).

159. HOFFMAN, *supra* note 158, at 752.

160. *Id*.

161. GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 169 (5th ed. 1884).

162. HOFFMAN, *supra* note 158, at 924.

163. *Id*. at 924-25 (quoting SHARSWOOD, *supra* note 161, at 169).

client.[164] For example, in one of his essays Sharswood explained that "[e]ntire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights, and the exertion of his utmost learning and ability—these are the higher points, which can only satisfy the truly conscientious practitioner."[165]

Influenced by these early writings on proper legal conduct, in 1887 Alabama was the first state to adopt a formal Code of legal ethics.[166] This Code proclaimed that "[t]he purity and efficiency of judicial administration [depends] on the character, conduct, and demeanor of attorneys."[167] Alabama's Code continued the earlier beliefs that the professional standards of legal conduct depended much more on the mores and character of the individual than on the rules and sanctions of the profession.[168]

1908 STANDARD CODE

The first national statement on legal ethics was an attempt to standardize the diverse efforts of the separate states.[169] This statement (the 1908 Standard Code) consisted of thirty-two Canons and was approved by the ABA in 1908, substantially revised in 1928, slightly amended in 1937, and eventually adopted by all but thirteen states and the District of Columbia.[170] In reference to client confidentiality, Canon 6 of the 1908 Canons recognized that lawyers have an "obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences."[171] Canon 37, which was first adopted in a 1928 revision and later amended in the 1937 edition, specifically identified the duty of a lawyer and a lawyer's employees to protect a client's confidences even after the lawyer was no longer

164. HOFFMAN, *supra* note 158, at 926.

165. Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L. J. 1239, 1250 (1991) (quoting SHARSWOOD, *supra* note 161, at 78-80).

166. THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION, *supra* note 156, at 108.

167. Cooper & Humphreys, *supra* note 158, at 926 (quoting CODE OF ETHICS preamble (Ala. St. B. Ass'n 1887)).

168. *Id.*

169. *See generally* Gregory Sisk, *Iowa's Ethics Rules: Its Time to Join the Crowd*, 47 DRAKE L. REV. 279 (1999) (describing the history of the Codes and the advantages of the adoption of a uniform Code).

170. *Id.* at 283 (citing THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION, *supra* note 156, at 117).

171. ABA CANONS OF PROF'L ETHICS Canon 6 (1969).

employed by the client.[172]

The values of protecting clients' confidences were enunciated very clearly in these early Canons. But there were also a number of wide ranging exceptions, some discretionary and some required. For example, Canon 37 of the 1908 Standard Code, as amended in 1928, gave the lawyer the right to breach this duty of confidentiality when necessary to reveal a client's criminal intentions of any type,[173] and Canon 29 required disclosure when perjury had been committed.[174] Canon 41 also mandated disclosure for past fraud or deception, stating that

> [w]hen 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 this unjustly gained, he should promptly inform the injured person or his counsel, so that they may take appropriate steps.[175]

At that time, the exceptions to full confidentiality were perjury, fraud, and deception upon a third party and criminal intent of any type. We assume these exceptions would have protected Douglas Schafer's effort to reveal Judge Anderson's mismanagement of the Hoffman Estate for Anderson's own benefit.

1969 MODEL CODE

In 1969 the Canons in the 1908 Standard Code that advocated behaviors and proposed goals but did not specify penalties were substantially rewritten into the ABA's Code of Professional Responsibility (1969 Model Code) that to a large extent did all three.[176] This Model Code, which was quickly adopted in almost every state, has three categories of standards: Canons, Ethical Considerations, and Disciplinary Rules.[177] Canons are defined as "statements of axiomatic norms, expressing in general terms the standards of professional conduct

172. ABA CANONS OF PROF'L ETHICS Canon 37 (1969).
173. *Id.*
174. ABA CANONS OF PROF'L ETHICS Canon 29 (1969).
175. ABA CANONS OF PROF'L ETHICS Canon 41 (1969).
176. MODEL CODE OF PROF'L RESPONSIBILITY Preliminary Statement (1981).
177. *Id.*

expected of lawyers *in their relationships with the public, with the legal system, and with the legal profession*."[178] Nine Canons provide the organizing format for the 1969 Model Code, and each of them is divided into Ethical Considerations and Disciplinary Rules.[179] Ethical Considerations are defined as "aspirational in character and represent the objectives toward which every member of the profession should strive."[180] Disciplinary Rules, the other portion of each Canon, "state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action."[181]

The approval of the 1969 Model Code began the "legalization" process by which the new standards in the form of Disciplinary Rules were given legal effect in malpractice and misconduct proceedings, unlike the prior much more advisory role of the discretionary guides in the 1908 Standard Canons.[182] However, this transmission was not complete. The 1969 Model Code retained many moral exhortations in the Ethical Considerations that were a formal part of each Canon. These articulated the role that character should play in professional standards. Thus, the 1969 Model Code was halfway between specifying what a lawyer should do, and what he or she must do. This was a midpoint recognized clearly by Geoffrey Hazard, "whereas the [1969] Canons and the Ethical Considerations represented fraternal understandings that memorialized a shared group discourse, the DR's [Disciplinary Rules] functioned as a statute defining the legal contours of a vocation whose practitioners were connected primarily by having been licensed to practice law."[183]

Canon 7 of the 1969 Model Code combined Canons 29 and 41 from the 1908 Standard Canons into a single statement that continued to require disclosure in the event of perjury, fraud, and deception.[184] Canon 4 from 1969 replaced Canon 37 from 1908 on the duty of confidentiality and expanded this duty by saying that,

178. MODEL CODE OF PROF'L RESPONSIBILITY Preliminary Statement (1981) (emphasis added).

179. *Id.*

180. *Id.*

181. *Id.*

182. Hazard, *supra* note 165, at 1249.

183. *Id.* at 1251.

184. MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (1969).

in addition to maintaining a client's "confidences," the lawyer must also protect a client's "secrets."[185] Disciplinary Rule 4-101, entitled "Preservation of Confidences and Secrets of a Client," provides:

> A. "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.
>
> B. 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.
>
> C. 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.
>
> a. The intention of his client to commit a crime and the information necessary to prevent the crime.
>
> b. 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.[186]

The 1969 Model Code did not represent a substantial change from the Canons of 1908 in the area of confidentiality. An attorney had discretion to reveal confidences or secrets to collect a fee, defend against an accusation, or to prevent a crime.[187] Our belief is that Douglas Schafer probably, though not certainly,

185. Harry I. Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 IOWA L. REV. 1091, 1148 (1985) (quoting MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101(C)(4) (1980)).

186. MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101 (1980).

187. MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101 (1980).

would have been protected under "the intention of his client to commit a crime" terminology of DR 4-101(C)(2)(a)[188] in that he continued to benefit from the use of the improperly obtained Cadillac.

1983 MODEL RULES

In 1983, the 1969 Model Code was replaced with the Model Rules of Professional Conduct (1983 Model Rules).[189] The 1983 Model Rules consist of fifty-four Rules with accompanying Comments. The Rules can be compared to the Disciplinary Rules of the prior Model Code in that they serve as a basis for sanctions or other penalties. But there are no accompanying ethical considerations to soften their impact or explain their intent. The result, Professor Glendon explained, was that "almost all of the language of the moral exhortation that had characterized previous codes of lawyers conduct has been removed."[190] Such words as "right," "wrong," "good," "bad," "conscience," and "character" were replaced with words like "prudent," "proper," and "permitted."[191] Professor Hazard, who was one of the key draftsman of the Model Rules, explained that the Comments were not meant to be "coexistent norms going above and beyond, or standing beside, the Rules"; instead they simply provide "background, rationale, and explanation for the Rules," offering assistance to lawyers in maintaining compliance with the requirements.[192]

In reference to the specific confidentiality provisions, Model Rule 1.6 from 1983 replaced Canon 4 from the 1969 Model.[193] Model Rule 1.6 rejects the "confidences" and "secrets" distinction in the 1969 Model in favor of a standard which protects any information related to a lawyer's representation of his or her client.[194] The current version provides:

> (a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed

188. MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101(C)(3) (1980).

189. MODEL RULES OF PROF'L CONDUCT ANN. 3-5 (1984).

190. MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY 58 (1994).

191. *Id*.

192. Hazard, *supra* note 165, at 1251.

193. MODEL RULES OF PROF'L CONDUCT R. 1.6, cmt. (1983).

194. *Id*.

> consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
>
> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> (1) to prevent reasonably certain death or substantial bodily harm;
>
> (2) to secure legal advice about the lawyer's compliance with these rules;
>
> (3) 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; or
>
> (4) to comply with a court order.[195]

This clearly is a very different standard. This most recent version of 1983 Model Rule 1.6(b)(1) provides that a lawyer is permitted, but is not required, to disclose confidential information "to the extent the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm."[196] Unlike the prior version, at least the current version of Model Rule 1.6 does not require that the conduct involved be criminal in nature.[197] But it is still more stringent than 1969 Disciplinary Rule 4-101(C)(2)(a), which permits the disclosure of the "intention of [a] client to commit a crime and the information necessary to prevent the crime" without limiting that permission to any specific level of harm.[198]

With only a few exceptions, almost all states have adopted either the national standard or an amended version of the 1983 Model Rules.[199] The state of Washington adopted the 1983 Model

195. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2002).

196. *Id.*

197. *Id.*

198. MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101(C)(2)(a) (1980).

199. For a complete listing of jurisdictions that have adopted a version of the 1983 Model Rules, see Jeffrey A. Van Detta, *Lawyers As Investigators: How Ellerth and Faragher Reveal a Crisis of Ethics and Professionalism Through Trial Counsel*

Rules with a number of variations from the ABA's national version in September 1985.[200] However, the Washington Supreme Court has amended its version of these nearly every year since the adoption.[201] One significant variation from the national standard is that in Rule 1.6(c) Washington retained the words "confidences" and "secrets," as those terms were defined in the earlier Model Code of Professional Responsibility.[202] The language of a prior version of ABA Model Rule 1.6, "to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm,"[203] was in effect at the time Schafer revealed his client's confidences and remains unchanged in Washington.[204] Obviously, Douglas Schafer contravened the existing state and national versions of Rule 1.6 that define the professional standards governing client confidentiality. No imminent death or substantial bodily harm could have been anticipated in the case involving Hamilton and Judge Anderson.

In summary, it is clear that the professional standards governing client confidentiality have changed markedly over time from a group of discretionary guides that relied primarily upon the moral character of the attorney to a set of categorical rules that emphasize largely the operational effectiveness of the profession. It doubtless will seem excessive, but we would like to portray this gradual but substantial change in graphic terms. This portrayal as a vector will help in explaining the logical rationale supporting each of those end positions. Our thought, and the issue that we pursue in Section III, is that these changes did not take place without regard for third parties and the public. The issue is not—as has been suggested so many times[205]—how

Disqualification and Waivers of Privilege in Workplace Harassment Cases, 24 J. LEGAL PROF. 261, 374 n.57 (2000).

200. For internet access to the Washington Rules of Professional Conduct, see Doug Schafer, *Washington State's Rules of Professional Conduct for Lawyers*, *available at* http://www.courts.wa.gov/court_rules/?fa=court_rules.list&group=ga&set=RPC (last visited Oct. 29, 2003).

201. WASH. RULES OF PROF'L CONDUCT R. 1.6 (2003).

202. *Id.* Schafer argued that the difference should have affected the application of the "crime-fraud exception," as discussed in the final section of this paper and in Doug Schafer, *Legal Arguments by Letter to Hearing Officer Mills* (Dec. 7, 1999), *at* http://www.dougschafer.com/991207.html.

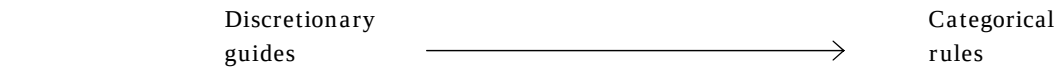
203. MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (2000).

204. WASH. RULES OF PROF'L CONDUCT R. 1.6.

205. *See, e.g.*, Gilda M. Tuoni, *Society Versus the Lawyers: The Strange Hierarchy of*

to get third parties and the public, or the general society, back into the mixture. Instead, the issue is how best to serve those third parties and the general society.

Section II Figure 1. Vector of alternative end positions that have been proposed governing client confidentiality:



Before moving on to the logical rationales supporting the gradual changes between the end positions on this vector, one last comment must be made concerning the cause of the change. The professional standards for the practice of law have changed because the economic conditions of the practice have also changed. Law firms, rightly or wrongly, have become much larger and far more competitive. The result has been a substantially increased focus on the client. This is a change that has been noted by practitioners[206] as well as scholars.[207] It is also one that has been expressed, as with other problematic aspects of law practice, most elegantly by Professor Glendon:

> Forced to compete aggressively for business, firms find it nearly impossible to maintain a discrete distance from their clients. They cannot take the posture of neutral experts seeking to achieve a just resolution of conflicting positions. Thus, the professional ideal of independence has begun to recede while the client loyalty ideal advances. Heightened competition has put much less strain on lawyers' ethical obligations to their clients than on their duties to court and community.[208]

SECTION III–THE RATIONALE OF ALTERNATIVE POSITIONS

The professional standards governing client confidentiality have, in a historical process that was briefly summarized in

Protections of the "New" Client Confidentiality, 8 ST. JOHN'S J. LEGAL COMMENT. 439 (1993); Limor Zer-Gutman, *Revising the Ethical Rules of Attorney-Client Confidentiality: Towards a New Discretionary Rule*, 45 LOY. L. REV. 669 (1999).

206. *See, e.g.*, SOL M. LINOWITZ, THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY (1994).

207. *See, e.g.*, GLENDON, *supra* note 190, at 34-38; ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 273-74, 284-86 (1993) (explaining the large firms' relationship with their corporate clients); Zer-Gutman, *supra* note 205.

208. GLENDON, *supra* note 190, at 58.

Section II, steadily changed over the past 100 plus years from a range of discretionary guides that left disclosure decisions primarily to the moral character of the lawyer, to a set of categorical rules that more clearly reflect the economic realities of the profession.[209] These changes have been both supported and opposed by explicit rationales. The purpose of this Section is to describe and discuss those rationales.

This description and discussion is structured along the vector of increasing restrictiveness between the end points of discretionary guides and categorical rules that were proposed—and shown in very simplified graphic format—at the conclusion of Section II. Absolute categorical rules at one extreme end position of this vector would prohibit any disclosure of any confidence at any time, with very exact penalties for all deviations. No one advocates the extreme end position today, but the current version of Rule 1.6 is not too far distant with its confidentiality exceptions limited only to an attorney's knowledge of information likely "to prevent reasonably certain death or substantial bodily harm."[210]

Absolute discretionary guides at the opposite end of the vector would permit any disclosure of any confidence at any time. Here there would be no penalties for there could be no deviations from a guide rather than from a rule. Again, no one advocates this extreme end position either, but the often-repeated dictum of Elihu Root that "half the practice of a decent attorney consists of telling would-be clients that they are damned fools and should stop"[211] comes close. That half of his practice—given most people's impression of the "public be damned"[212] character of many of his contemporary rail and steel baron clients—would probably have been totally ineffective were it not for an implied threat of public disclosure.

Clearly the "proper" position for professional standards governing client confidentiality is somewhere on the vector

209. *Supra* Section II.

210. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2002).

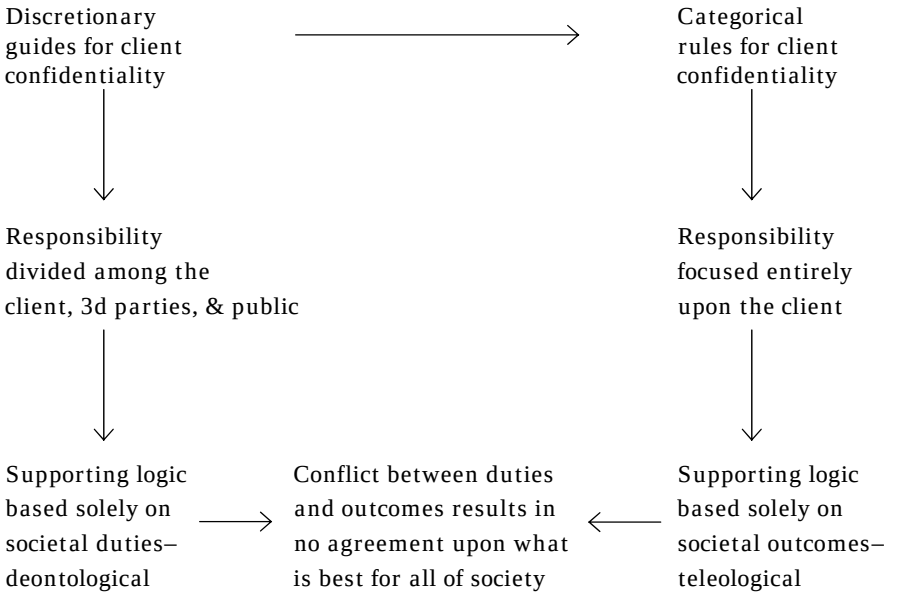
211. GLENDON, *supra* note 190, at 35.

212. JOHN BARTLETT, FAMILIAR QUOTATIONS: A COLLECTION OF PASSAGES, PHRASES, AND PROVERBS TRACED TO THEIR SOURCES IN ANCIENT AND MODERN LITERATURE 496 (Justin Kaplan ed., 16th ed., Little, Brown & Co. 1992) (1919) (quoting Commodore William H. Vanderbilt, replying to a newspaper reporter on October 2, 1882).

between the two absolute extremes. Equally clear, is that the way to determine what indeed should be the "proper" position is through a method of evaluation or analysis that applies equally to both of the extremes. For this reason we propose to examine the rationales supporting each end position and attempt to discover the common elements that benefit society. It would be difficult to argue against a "proper" position on the vector between the extremes of absolute discretionary guides and absolute categorical rules that clearly could be shown to recognize the rights and improve the outcomes for everyone.

An attempt to discover common elements that clearly benefit all of society is hampered because the two very different positions on client confidentiality have become irrevocably linked with the two very different views of professional responsibility: focused duties owed solely to the client versus divided duties spread equitably among client, third parties, and the public. These two different views of professional responsibility have been explained or supported by two different logical structures: one based upon outcomes that are thought to be best for society, and the other based upon duties that are said to be owed to society. There may be no immediately obvious common elements and no apparent ways of reaching an agreement as to what is best for all members of society. This possible conundrum can be shown in an expanded version of the earlier graphic from Section II:

Section III Figure 1. Vector of alternative end positions governing client confidentiality, together with the supporting professional rationales and underlying moral systems:



A supporting logic based upon outcomes that are considered to be best for society is termed teleological in moral reasoning. Utilitarianism, as proposed by Bentham[213] and Mill,[214] is a teleological concept. A supporting logic based upon duties that are thought to be owed to society is termed deontological in moral discourse. Universalism, as proposed by Kant,[215] is a deontological concept. The two cannot be reconciled in moral analysis, but they can be used jointly to add insight to practical matters. This is the manner in which we propose to use them. First, however, the logical sequences among: 1) the different standards on client confidentiality, 2) the different views of attorney responsibility, and 3) the different forms of moral rationality must be established.

EARLIER STUDIES ON THE MORAL RATIONALE OF ALTERNATIVE

213. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 125-29 (J.H. Burns & H.L.A. Hart, eds., Menthuen 1982) (1789).

214. JOHN STUART MILL, UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT 132 (E. P. Dutton & Co. 1951) (1863).

215. IMMANUEL KANT, THE GROUNDWORK FOR THE METAPHYSICS OF MORALS 47-51 (Mary Gregor ed. & trans., Cambridge Univ. Press 1998) (1785).

STANDARDS

This proposed conceptual framework, with extreme end points on client confidentiality that are associated with alternative conceptual views of legal responsibility, is not too far distant from one suggested previously by Professor Simon.[216] He also set up end points, which at the time he depreciatingly called "two crude models,"[217] that he termed "regulatory" and "non-regulatory" positions governing the public disclosure of client confidence.[218] He then adopted a "law as economics" viewpoint and associated the non-regulatory end point (analogous to our "categorical rules") with the free operations of the market, not with the voted constraints of the profession, and the regulatory end point (analogous to our "discretionary guides") with the imposed obligations of the government, not with the self-selected duties of the individual.[219]

Simon's use of the terms "non-regulatory" and "regulatory" may seem counter-intuitive, given the existence of explicit professional rules governing client confidentiality under his first condition, and the absence of those rules under the second.[220] It is necessary to remember, however, that Simon viewed non-regulatory as non-interference with the market demand for client centered services. He explained, "[t]he first model [non-regulatory] emphasizes the lawyer's role as advocate and her duty of loyalty to the client; the second [regulatory] emphasizes the lawyer's role as officer of the court and her duty of loyalty to the public."[221] He went on to provide further contrasts of these two positions:

> The first [model] might be called the libertarian approach. Its basic maxim is that the lawyer is obliged—or at least authorized—to pursue any goal of the client through any arguably legal course of action and to assert any nonfrivolous

216. *See generally* William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988) (arguing that lawyers should have discretion to refuse to pursue a cause of action that she deems not to be in furtherance of justice).

217. *Id.* at 1084-90 (We do not accept Prof. Simon's statement that his constructs are "crude.").

218. *Id.* at 1084-86.

219. *Id.*; RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (5th ed., Aspen Law & Bus. 1998) (1973).

220. Simon, *supra* note 216, at 1084-85.

221. *Id.* at 1084.

> legal claim. In this approach the only ethical duty distinctive to the lawyer's role is loyalty to the client. Legal ethics impose no direct responsibilities to third parties of the public other than those the system imposes on citizens generally.
>
> . . . .
>
> The secon[d] model can be called the regulatory approach. Its basic maxim is that the lawyer should facilitate informed resolution of the substantive issues by the responsible officials. . . . The job still involves advising the client on ways to advance her interests and presenting the client's case, but it also involves a duty to develop and disclose adverse information that would be important to the responsible official. The duty applies in negotiation as well on the theory that disclosure is likely to move settlements closer to the resolution that the responsible officials would have imposed.[222]

Essentially we agree with Professor Simon, though we use distinctly different terms. Each proposition contains one end position oriented primarily towards professional responsibilities centered on the client, and one end position oriented substantially towards professional responsibilities divided between the client, the court, and the public. We disagree with the terminology because we believe that regulations restricting or permitting the release of confidential client information have come in the past—and without question should come in the future—from the profession and not from the government. Interestingly, Professor Simon later in that same article adopted the terms employed in this article:

> [T]here remains a tendency to treat the issues considered in this essay—those seen in terms of conflicts between the interests of clients and those of third parties and the public—in *categorical* terms. The norms that bear most importantly on these issues do tend to be relatively *categorical*. These include . . . the confidentiality norms of both the Code and the Model Rules that prohibit disclosure of adverse information subject only to narrowly specified exceptions.
>
> . . . .

222. Simon, *supra* note 216, at 1085-86.

> The basic maxim of the approach I propose is this: The lawyer should take those actions, that considering the relevant circumstances of the particular case, seem most likely to promote justice. This "seek justice" maxim suggests a kind of noncategorical judgment that might be called pragmatist, ad hoc, or dialectical, but that I will call *discretionary*.[223]

Regardless of the terms that are employed, the absolute or end positions concerning client confidentiality are seldom encountered:

> Hardly anyone subscribes to the libertarian or the regulatory approaches in the unqualified form that I have described . . . . They function, often tacitly, as basic starting points. For example, the libertarian approach figures importantly in the norms of "representing a client zealously within the bounds of the law" of the Model Code of Professional Responsibility. The regulatory approach resembles Marvin Frankel's proposal for truth-focused advocacy.[224]

Professor Simon implicitly concludes that the "proper" position for professional standards governing client confidentiality must lie somewhere on this vector between the extreme end points.[225] The problem comes in locating that position which, despite the frequently observed benefits of evenhanded compromise, will not necessarily come at the midpoint of the vector. Both end positions lead to well being for all of society. Discretionary guides lead *directly* to societal well being by recognizing attorney responsibilities and, consequently, legal actions and outcomes divided among clients, third parties, and the public. Categorical rules lead *indirectly* to that same societal well being by assigning attorney responsibilities solely to the client but with legal actions and outcomes subsequently moderated by markets and the courts. This indirect impact is critical to the eventual resolution of the client confidentiality conundrum, and will be explained next in somewhat greater detail.

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223. Simon, *supra* note 216, at 1088-90 (emphasis added).

224. *Id.* at 1087 (citing Marvin Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975)).

225. *Id.* at 1093.

INDIRECT BENEFITS FOR THE PUBLIC GOOD

The indirect benefits towards the public good of the categorical rules approach to client confidentiality come from Adam Smith's argument that individual members of society may act aggressively in their own self interests and through the influence of moderating institutions such as markets and—in the current instance—courts, there will be social benefits as well.[226] In economic theory this concept of the social benefit of competitive actions moderated by market forces is termed *Pareto Optimality*.[227] Basically, it expresses the proposal that, if all members of society are permitted to exercise informed choices in free output product (goods and services) markets and free input factor (capital, labor and material) markets, and if the productive functions of the manufacturing (or service) firms are as efficient as possible to maximize profits, then it would be impossible to make any single person materially better off without depriving someone else; consequently, the society would be collectively as well off as possible.[228] That is the moral underpinning of economic theory: strongly contending economic positions, given the existence of fully competitive markets as moderating institutions, lead to the maximization of individual benefits and therefore the maximization of the public good. It also serves as the moral underpinning of an economic or market-based approach to the law. For example, Luban stated that "[t]he adversary system, like the free market to which it is sometimes analogized, is supposed to be led by the Invisible Hand from individual competing interests to collective well being."[229]

PROFESSIONAL ISSUES IN THE DETERMINATION OF CLIENT CONFIDENTIALITY

Consequently, the issue in the rationales supporting

226. 2 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 708-31 (R. H. Campbell & A. S. Skinner eds., Liberty Classics 1981) (1776).

227. *See, e.g.*, ALAN S. BLINDER, HARD HEADS, SOFT HEARTS: TOUGH-MINDED ECONOMICS FOR A JUST SOCIETY 83 (1987).

228. *Id*.

229. David Luban, *The Social Responsibilities of Lawyers: A Green Perspective*, 63 GEO. WASH. L. REV. 955, 974 (1995) (adding the amusing supplement that "collective action problems represent situations in which the rational pursuit of individual interests propels us, as though kicked by an Invisible Foot, into collective ruination."). In a footnote he ascribed the use of the invisible foot metaphor to Mark Sagoff. *Id*. at n.44.

alternative positions along the vector between discretionary guides (divided responsibility between the client, third parties, and the public) and categorical rules (focused responsibility to the client) is not one of broad public good versus narrow professional and/or client self interest, though the former has been inferred more than once in the past.[230]

It does no harm, and may even be accurate, to assume that many if not most members of the professional bar are sincerely interested in advancing the public good. The difficulty comes in defining that good. Even if our assumption of altruistic impulses among attorneys could be shown to be invalid, it does not improve anyone's understanding of the issues involved in the client confidentiality dispute to simply allege narrow self-seeking motives. Doubtless lawyers are as interested as others in limiting their risks of financial liability, but that does not mean that those limitations form their sole consideration in public debate.

OPERATIONAL AND INSTRUMENTAL ISSUES IN THE DETERMINATION OF CLIENT CONFIDENTIALITY

The debate in the rationales supporting alternative positions along the vector between discretionary guides (responsibilities divided among client, third parties, and the public) and categorical rules (responsibility concentrated solely upon the client) is also not focused upon the influence of the confidentiality rules in encouraging or constraining client communications, although this has been discussed. Professor Subin is the main proponent of these operational (will a changed policy restrict the desired input?) and instrumental (will a changed policy result in the desired output?) questions:[231]

230. Zer-Gutman, *supra* note 205, at 670. Zer-Gutman stated:

> The current rules [on confidentiality] are dominated by the defensive ethics approach, where the rules do not tackle ethical conflicts, as ethical rules should, but minimize or bypass them. They mostly seek to protect the lawyers themselves from the risk of financial liability even at the expense of important societal and third-party interests . . . .
>
> The "remedy" . . . is a discretionary confidentiality rule. The reluctance to embrace discretionary confidentiality rules is not rooted in lawyers' lack of competency to exercise their own ethical discretion. In fact, lawyers already make discretionary decisions in their daily practice. The legal profession fears that discretionary ethical rules might expose lawyers to increased financial liability because such rules seem vague and incoherent.

Id.

231. Subin, *supra* note 185, at 1159.

> The [operational] conclusion that confidentiality is essential to adequate representation rests upon the premise that without it clients would not disclose all the facts that the attorney needs to know to perform competently. But that premise lacks empirical support. Little data exists, and that which does exist is at best inconclusive. We do not even know whether clients believe promises of confidentiality.
>
> . . . .
>
> The instrumental defense of confidentiality posits that if clients are encouraged to disclose their plans and activities to lawyers, lawyers will be able to dissuade them from engaging in wrongful conduct, that lawyers will in fact do so, and that this will better protect society than would a requirement of disclosure. What might be gained by disclosure in the immediate case—preventing a particular client from harming others—would be outweighed by the loss in terms of future protection, because future clients would no longer disclose wrongdoing.
>
> If anything, the instrumental defense of confidentiality is less persuasive than the [operational] defense. First, it assumes that clients now reveal wrongdoing because of the pledge of confidentiality, and would not do so if there were no such pledge. As I have suggested, this is a rather slim reed upon which to anchor a defense of confidentiality. It is not strengthened by the assertion that attorneys at present adequately perform the policing role.
>
> . . . .
>
> The right or duty of the attorney to withdraw from representation to avoid participating in client misconduct is another major flaw in the instrumental argument. Proponents of confidentiality usually uphold without a second thought this power or duty to withdraw. Withdrawal, however, creates problems that are almost identical to those used to justify nondisclosure. Thus, if the client knows that revealing misconduct will keep the secret but lose the lawyer, will the client not quickly learn not to reveal such things? Even worse, will the client not be encouraged to continue revealing them until he finds the profession's lowest common denominator, who will lend the misconduct active support? Moreover, withdrawal may simply be a devious form of disclosure [noisy withdrawal], as even a layperson might

realize.[232]

The operational and instrumental issues raised by Professor Subin are important. It must be admitted that it is uncertain what will happen if the standards governing client confidentiality are relaxed. Will there be less open communication from a client to an attorney regarding the possible commission of a future crime? Will there be less frank counseling from an attorney to a client to avoid the commission of that crime? And, does the current threat of "noisy withdrawal" really substitute for the future possibility of public disclosure? However, these are basically empirical matters. There is one way to find the answers to these questions, beyond speculation, and that is to change the rules and observe the results. This method, however, assumes that the proposed change would improve the effectiveness of the legal system and the well being of society, something that has not as yet been established.

LOGICAL SUPPORT FOR CATEGORICAL RULES

The thesis in favor of the Categorical Rules, the responsibility focused solely upon the client end position on the vector of standards governing client confidentiality, is that non-disclosure promotes and protects individual autonomy and the rights of members of society to act in their own self-interests within the constraints of the law.[233] This is an argument that has been advanced most cogently and most forcefully in the famous statement by Lord Brougham:

> (a) the primary objective of the legal system is the preservation of individual autonomy, through the protection of an individual's rights against encroachments by other individuals or the state; (b) in a complex society individuals can have meaningful access to the legal system, and therefore to the mechanism by which their rights can be protected, only if they are represented by attorneys who have the skill to guide them through the process; (c) attorneys can perform this function only if they are privy to all the client's information, because otherwise they would not be able to diagnose properly the legal problem or prescribe a resolution of it; (d) clients will not provide attorneys with all of the facts,

232. Subin, *supra* note 185, at 1163-68.

233. *Id.* at 1160.

> including possibly damaging and embarrassing facts, if they believe that the attorney will disclose those facts; (e) therefore, confidentiality is essential to the preservation of individual autonomy.[234]
>
> . . . .
>
> [A]n advocate, in the discharge of his duty, knows but one person is all the world, and that person is the client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.[235]

This is not a rights-based (deontological) argument. Lord Brougham, and the many other less forcefully articulate authors who have defended his position, make no claim that somehow the rights of the client take precedence over the rights of all other members of society.[236] They do not say that the rights of the client to informed and dedicated counsel are more important than the rights of the other individuals to protection from alarm, torments and destruction.[237] Instead, they say that for the full society, the benefits to the many are greater than the harms to the few. This, specifically, is the outcome based (teleological) argument that: 1) society will be much more productive with an efficient and effective legal system; 2) that an efficient and effective legal system is necessarily adversarial; and 3) that an adversarial legal system is dependent upon complete confidentiality between an attorney and his or her client.

Essentially, this is the Social Contract argument of Hobbes,[238] later modified by Smith with the substitution of an

234. Subin, *supra* note 185, at 1160 (citing Greenough v. Gaskell, 39 Eng. Rep. 618, 620-21 (Ch. 1833)).

235. *Id.* at 1170 (quoting Lord Brougham in his speech to the House of Lords defending the Queen's royal defense action).

236. *Id.*

237. *Id.* at 1172.

238. THOMAS HOBBES, LEVIATHAN (Richard Tuck ed., Cambridge Univ. Press 1991) (1651).

Invisible Hand for the Social Contract.[239] People are approximately equal in strength of body and mind and they compete for benefits.[240] As a result of this equality, competition for benefits can easily become a war, and "such a warre, as is of every man, against every man."[241] It is continual, like bad weather, not intermittent like a shower,[242] resulting in a lack of security, industry, and trade. This eventually culminates in the social condition described in the famous quotation: "the life of man, solitary, poore, nasty, brutish, and short."[243]

To stop this struggle and avoid that life, Hobbes proposed that people living in a state of nature—a free association of equal individuals, before corrupting social, political, and economic institutions have been added—would reach two major conclusions: 1) men and women will seek the benefits of peace by all means available to them; and 2) the only means available to them is to surrender their rights to a central authority.[244] For Hobbes, the central authority was the king, but has since come to mean a democratic government supported by an effective legal system.

This is the rational connection between the categorical rules of the legal profession, limiting the disclosure of client information, and the overall well being of society. The application of any one of those rules in any given instance may not be considered favorable, but it is necessary to accept this application to avoid social chaos and generate social prosperity, unless it can logically be shown that individuals living in a state of nature would reach a different conclusion and would alter their original agreement to reflect these concerns. This is the concept known as the Social Contract.[245]

THE SOCIAL CONTRACT AND THE SOCIAL GOOD

Belief in the "justness" of any conclusion reached by men and women living in a state of nature, with no influence from social, political, and/or economic systems, comes from the apparent

239. SMITH, *supra* note 226, at 708-30.
240. HOBBES, *supra* note 238, at 86-87.
241. *Id*. at 88.
242. *Id*. at 88-89.
243. *Id*. at 89.
244. *Id*. at 92.
245. *Id*.

absence of self-interest. If no one knows their self-interests, no one can manipulate the outcome to serve their self-interests. Consequently, the selected outcome must reflect their common interests. The Locke version of the Social Contract, in which it was believed that people living in a state of nature did not have pressing self-interests because everyone was assumed to have "enough,"[246] is difficult to apply in the modern world where some people clearly do not have adequate supplies of the essentials.

The modern version of the Social Contract, proposed to adjust for this reality, is known as the Veil of Ignorance.[247] The argument now is that men and women who are ignorant of their positions within society, and thus ignorant of their social, political, and economic interests, will select rules for the distribution of benefits or the governance of lives that are devoid of self-interests, reflect common interests, and thus are "fair."[248] Two such rules have been proposed by two very well known Veil of Ignorance contractarians.

John Rawls has proposed a rule for the distribution of benefits based upon the concept of the Social Contract.[249] What agreement, he asked, would people who were ignorant of their positions within society make for the distribution of the benefits of social cooperation?[250] Human society, he wrote, is marked by a conflict in interests as well as an identity of interests.[251] The identity of interests comes from the social cooperation needed to produce the benefits—the goods and services—of society.[252] The conflict comes from the individual striving generated in the distribution of those benefits.[253] Each person obviously prefers a greater to a lesser share to further his or her own self-interest.[254]

Rawls then proposed that all of the methods currently in use for the distribution of benefits—to each equally, to each according to his or her need, to each according to his or her effort,

246. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 17-27 (J. W. Gough ed., 3d ed., Basil, Blackwell & Oxford 1976) (1690).

247. JOHN RAWLS, A THEORY OF JUSTICE 136-42 (1971).

248. *Id.*

249. *Id.*

250. *Id.* at 12.

251. *Id.*

252. *Id.*

253. RAWLS, *supra* note 247, at 14-15.

254. RAWLS, *supra* note 247, at 14-15, 142-43.

to his or her contribution, to his or her competence, etc.—are, to some extent, unfair.[255] If benefits are made available equally or based upon need, then those who put forth greater effort, make a greater contribution, or possess greater competence will suffer.[256] Rawls suggested a totally different method of distributing benefits, to establish the rule that inequalities in distribution are arbitrary and unjust unless it is reasonable to expect those inequalities will work for the benefit of all.[257] For example, it is perfectly all right to pay scientists more than laborers, for the additional pay will attract more scientists who will invent or improve more products and processes that will make life better for all of us, including the laborers.

Rawls said that it is difficult to compute the impact of most inequalities in benefit distribution upon the life prospects of everyone within society—unlike the example of the scientists who, it is hoped, will benefit everyone by their inventions. Consequently, he suggested that we should compute the impact upon the "least among us," those with the least education, the least income, and the least skills and, consequently, the ones most likely to be left out of the usual distribution methods.[258] There is no need to help these people; there is just the prohibition against harming them, for then the proposed distribution of benefits would clearly not work out for the benefit of all.[259] We would propose that this prohibition against harming the least among us can be used as a further test of the fairness of the categorical rules for client confidentiality. Such a rule should not harm those people.

Robert Nozick contributed a very different prohibition based upon Veil of Ignorance concepts that also can be used as a test of the categorical rules for client confidentiality.[260] Nozick essentially agreed with John Rawls that society is an association of individuals, and that cooperation between those individuals is necessary to generate social benefits, both goods and services.[261] However, he then proposed a totally different standard for the

255. *Id*.
256. *Id*.
257. *Id*. at 15.
258. *Id*.
259. *Id*.
260. ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 149-74, 198-204 (1974).
261. NOZICK, *supra* note 260, at 149-74, 198-204.

distribution of those benefits. He argued that social cooperation comes about as the result of the exchange of goods and services to satisfy individual desires, and that any exchange that was voluntary had to be just.[262] He used the example of Wilt Chamberlain, a well-known basketball player of the 1960s and 1970s, to establish this point.[263] Nozick claimed that you could set up whatever distribution of the benefits of social cooperation you might like—everyone was to have an equal share, or everyone could have differing shares based upon some mixture of social contribution and personal need—but, if people were willing to pay to see Wilt Chamberlain play basketball, that ideal distribution would be different after the season ended.[264] Wilt Chamberlain would have more, and many others would have less.[265] Would the new distribution be unjust? It would be hard to make that claim, Nozick concluded, because all of the benefit exchanges between Wilt and the fans who paid to see him play would have been fully voluntary.[266]

If fully voluntary exchanges of benefits are just, then the rule from Distributive Justice that all inequalities in benefit holdings have to be shown to work for the benefit of everyone in society—and particularly for the benefit of those least able to look after their own interests due to a lack of education, income, position, or power—was, in the opinion of Professor Nozick, obviously wrong.[267] Nozick instead proposed the standard that we should not interfere with those voluntary exchanges, and particularly that we should never interfere with people's self-development, so that all persons could maximize their incomes and arrange their exchanges to the best of their abilities.[268] According to Nozick, liberty, the right to self-development and self-fulfillment, was more important than justice because self-development led to greater personal skills and abilities and, consequently, to greater social benefits.[269] People with greater skills and abilities could accomplish more and produce more,

262. *Id.*
263. *Id.* at 160-64.
264. *Id.* at 160-62.
265. *Id.* at 160-64.
266. *Id.* at 161.
267. NOZICK, *supra* note 260, at 183-231.
268. *Id.* at 160-74.
269. NOZICK, *supra* note 260, at 160-74.

which could then be fairly distributed by voluntary exchanges.[270] Nozick believed that people behind the Veil of Ignorance would recognize the importance of self-development and would place liberty before justice in their version of the Social Contract.[271]

In summary, a teleological evaluation of the "proper" position on the vector of client confidentiality between the alternative end points of discretionary guides and categorical rules might be expressed as follows. A guide or rule to govern the public release by an attorney of confidential information gained from a client must be logically shown to: 1) represent the probable nature of a conjectural agreement by people who were ignorant of their true social, political and economic interests in the matter at hand; 2) not harm the least among us, those with the least economic, social, and/or political power to influence that guide or rule; and 3) not interfere with any member of society's right to self-development and self-fulfillment to forward his or her voluntary exchanges of the benefits of social cooperation.

LOGICAL SUPPORT FOR DISCRETIONARY GUIDES

The thesis in favor of discretionary guides governing client confidentiality and the proposal that the responsibilities of an attorney should be divided among the client, third parties, and the public is that disclosure promotes and protects the rights of members of society from being injured by others. We may not have as ringing a declaration in support of this position as was provided by Lord Brougham in support of the alternative proposal that the sole responsibility of the attorney should be towards his or her client, but the need for the recognition of a far wider range of duties in the practice of law has been expressed with vigor many times:[272] "Reduced confidentiality would probably entail

270. *Id.* at 183-231.

271. *Id.*

272. Subin, *supra* note 185, at 1159. Subin states:

> The question is whether the moral balance shifts when the client's wrongful acts threaten harm to others, for then a conflicting moral proposition—that we should prefer the victim of wrongdoing over the perpetrator—emerges. The answer given by the advocates of strict confidentiality is that the values served by confidentiality require sacrificing the victim in almost all cases. The principle of confidentiality is thought to be so important that the Model Rules, the organized bar's most recent pronouncement about the matter, barely recognize the propriety of subordinating it [strict confidentiality] to the value of human life.

Id. *See also* Zer-Gutman, *supra* note 205, at 676. Zer-Gutman states:

> [A] major deficiency with the current confidentiality ethical rules is that they

some costs to clients, but the important issue is whether these costs outweigh the costs to third parties and the legal system from the prohibition of disclosure. I suspect that few non-lawyers find the balance struck by the prevailing rules plausible."[273] These are not outcome based (teleological) arguments. It is safe to assume that Professors Subin, Zer-Gutman, and Simon are not indifferent to the efficient productive and effective distributive functions of society, but they would make the claim that benefits to the many cannot justifiably override harms to the few. This is a rights-based (deontological) argument: 1) that society will be much more "fair" with a just and equitable legal system; 2) that a just and equitable legal system is necessarily all encompassing; and 3) that an all encompassing legal system must recognize the rights of all, and not merely the rights of a limited number of those who have retained legal counsel.

The difficulty in any rights-based argument comes in deciding whose rights take precedence in any given situation. A client has a right to dedicated legal counsel. However, an uninvolved third party has a right to be protected against intentionally harmful acts of the client and members of the public have a right to be protected from the secondary consequences of those harmful acts. Frequently, the choice between rights is dependent upon the situation and the intent. Let us give a brief and—we hope—amusing illustration.

"Your right to swing your arms around wildly ends where my nose begins"[274] is a fairly graphic example of a conflict of rights, though it has little relevance to the standards governing client confidentiality. A more relevant example would be that you, as a client, tell the co-authors of this piece as your attorneys,[275] that you plan to swing your arms about wildly at a meeting that you are about to attend in an effort to physically intimidate and

> do not provide adequate protection for important societal interests. When examining the confidentiality provisions in the Model Rules as well as the ABA ethical opinions interpreting them, we can clearly identify which interests are highly protected by the ethical duty of confidentiality, and which are almost ignored. I call this "the hierarchy of protection," where the confidentiality rule places the courts and lawyers on top, clients a close second, and society and third parties far behind at the unprotected end of the spectrum.

Id.

273. Simon, *supra* note 216, at 1143.

274. *Cf*. Weirum v. RKO General, Inc., 539 P.2d 36, 38-40 (Cal. 1975).

275. One of the co-authors is a graduate of a law school and has practiced law; the other is relying upon the tolerance of the readers.

financially deprive other persons at that meeting. If the proposed meeting were to be a gathering of current performers in the World Wrestling Federation, then we would probably be indifferent. If that meeting was of elderly patients in a nursing home, then we would likely be concerned, and rightly so.

Should we reveal—in the case of the nursing home—your aggressive intentions to the proper officials? It would seem that under the "substantial bodily harm"[276] provision of Rule 1.6, we would have a legitimate reason to do so, provided you had also informed us that you intended to go beyond legal boundaries in a way that would lead to actual physical contact and "substantial bodily harm." Suppose you had earlier told us that you planned to act in such an aggressive manner only to frighten badly, and not to substantially injure. The problem in conflicts of rights is that so much depends upon the situation and upon the intent. Fortunately, there is a way in philosophical theory of dealing with both the situation and the intent. That is the "Universal Duty" doctrine of Kant.[277]

UNIVERSAL DUTIES AND THE SOCIAL GOOD

Immanuel Kant wrote "Groundwork for the Metaphysics of Morals" essentially as a response to Isaac Newton. Newton had earlier explained all earlier work in physics (which at the time was primarily based upon astronomical observations; the similarly acting building blocks of matter had not as yet been discovered) with one elegantly simple formula on gravitational forces.[278] Kant wanted to duplicate for moral philosophy the accomplishments of Newton in natural philosophy. He explained in the introduction to his major work that there were only two sets of laws in the world: natural philosophy, which had already determined the law by which *everything in the physical sphere does happen*, and moral philosophy, which needed to discover the law by which *everything in the human sphere ought to happen*.[279]

According to Kant, that law had to be based upon intent.[280]

276. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2002).

277. KANT, *supra* note 215, at 51.

278. For those who are interested the formula is F (force) = G (gravity, that is, acceleration) x Mn (the product of the masses of the objects divided by R (the square of the distance between them)).

279. KANT, *supra* note 215, at 43, 51.

280. *Id.* at 7.

The opening sentence of the first section of his major work reads, "Nothing can possibly be conceived in the world, or even out of it, which can be called good without qualification except a good will."[281] "Good will" has been interpreted as a general wish, sense of duty, or feeling of obligation towards others, but primarily as the intent of the actor within a given situation.[282]

How can we tell if the intent of the actor is "good" within the given situation? According to Kant there is a very simple means to determine what is "good," and that is the Categorical Imperative—"Act only upon the maxim that you can at the same time will that it [your act] should become a universal law."[283] In other words, the intent is "good," and therefore the act is "right," if everyone facing the same situation should be free—or preferably required—to take the same action. Should everyone attending a meeting of current performers in the World Wrestling Federation be free to act in an aggressive manner in order to intimidate? Perhaps the answer is "yes." Should everyone attending a meeting of elderly patients in a nursing home be free to act in an aggressive manner in order to intimidate? Perhaps here the answer is "no." There are definite problems with the Kantian approach to moral behavior—in particular it is difficult to think in terms of gradations. Acts are either "right" (yes, I can will that this maxim become a universal law) or "wrong" (no, I can't will that), and there are few neutral shades of gray[284]—but it does provide a very strong logical guide to many actions involving rights.

Kant then proceeded to provide a second formulation of the Categorical Imperative derived from the first. Specifically, if everyone acted such that his or her intent should become a universal law, then everyone would treat others as ends, worthy of dignity and respect, and never simply as a means to their private, personal ends.[285] In very simplified form the logic is that everyone wishes to be treated as an end, worthy of dignity and respect, and therefore everyone has to treat others in exactly the same way. These two formulations of the Categorical Imperative can be combined into a deontological evaluation of the "proper"

281. *Id*.
282. LARUE T. HOSMER, MORAL LEADERSHIP IN BUSINESS 118 (1994).
283. KANT, *supra* note 215, at 51.
284. HOSMER, *supra* note 282, at 120.
285. KANT, *supra* note 215, at 198.

position on the vector of client confidentiality between the alternative end points of discretionary guides and categorical rules as follows. A guide or rule to govern the public release by an attorney of confidential information gained from a client must be logically shown to: 1) represent the probable nature of a universal law applicable to all people in all similar situations; and 2) treat each person involved in those situations as ends worthy of dignity and respect, and never as means to private, personal, or organizational ends.

The next Section will propose a number of examples of client confidentiality, starting with the situation encountered by Douglas Schafer, and attempt to discover if these two moral definitions of the "proper" outcomes of the legal system and "right" duties of the legal profession provide insight and understanding.

SECTION IV–PROPOSAL FOR COMBINED GUIDES AND RULES

We started this discussion of the proper nature and extent of the professional provisions governing client confidentiality by recounting the dilemma faced by Douglas Schafer. We wanted to describe a set of circumstances we believe most practicing attorneys and legal scholars would agree warrant full disclosure. It is hard, after all, to argue that an attorney who exploited an estate for which he was professionally responsible and, subsequently, during his period of service as judge, received regular monthly checks from one of the other beneficiaries to repay the loan on a luxury automobile he owned, should not be removed from the bench.[286] It is particularly hard to argue that this judge should not be removed from the bench because of fears that revealing confidential client information gained from the individual actually making the bribery payments in some way imperils the adversarial practice of the law as a means of resolving disputes. The argument that the adversarial practice of law benefits the full society is certainly sustainable, but the adversarial practice requires for its foundation, absolute judicial integrity. In short, this was a conflict between client confidentiality and judicial integrity. We believe that there can be only one resolution to this conflict, in favor of judicial integrity, and facilitating that resolution would require a change in the

286. *In re* Anderson, 981 P.2d 426, 429-31 (Wash. 1999).

current provisions of Rule 1.6.[287]

One possible change in the current provisions of Rule 1.6(b) would be a simple and direct addition to the rule to include the possibility of severe judicial harms to litigants within the courtroom:

> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> (1) to prevent reasonably certain death or substantial bodily harm;
>
> **(2) to prevent the client from committing a criminal act that the lawyer believes is likely to result in substantial judicial harm to litigants in a court of law;**
>
> (3) to secure legal advice about the lawyer's compliance with these rules;
>
> (4) 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; or
>
> (5) to comply with other laws or a court order.

We believe, however, that further changes in the provisions of Rule 1.6 are needed to eliminate other harms imposed upon third parties and members of the general public, and to adjust to alternative duties owed to those same third parties and members of the general public that are not currently covered by the existing categorical rules. These other harms and alternative duties can be grouped into six general classifications and would include criminal acts leading to:

1. Substantial legal harms. Legal harms may be improper influences upon the processes of a court, as in *Anderson*, or wrongful outcomes in the decisions by a court, as described by

287. Rule 8.3(c) governs the reporting of professional misconduct of both attorneys and judges but specifically provides that "[t]his rule does not require disclosure of information otherwise protected by Rule 1.6 . . . ." MODEL RULES OF PROF'L CONDUCT R. 8.3(c) (2002).

Professor Green.[288] Professor Green provides the example of an attorney whose client admits he has committed a murder for which an innocent person has been convicted and is to be executed.[289] Our belief, once again, is that it would be difficult to argue that this legal harm should not be corrected; yet, the provisions of Rule 1.6 currently prohibit disclosure of the needed information.

2. Substantial financial harms. Examples of substantial financial harms include the losses to certificate of deposit customers and members of the general public during the Savings and Loan debacle described by Professor Luban.[290] He cites the statement by Judge Stanley Sporkin regarding implied social responsibilities of lawyers in *Lincoln Savings & Loan Association v. Wall*:[291] "Where were the professionals [accountants and attorneys] . . . when these clearly improper transactions were being consummated?"[292]

3. Substantial environmental harms. The widespread wildlife and fisheries destruction resulting from the wreck of the Exxon Valdez is an example of substantial environmental harm. It was reported at the time that the Alyeska Corporation, a joint venture of five major oil companies including Exxon, had not adhered to the terms of its contract with the state of Alaska regarding the stocking of emergency equipment and the training of emergency personnel for oil spill containment and recovery.[293]

4. Substantial political harms. Potential harms here include knowledge of illegal campaign contributions made by a client or deliberate regulatory evasions committed by a client. Professor Levinson provides the example of an attorney asked "to prepare false documents for filing with the SEC."[294] He states that an attorney could conclude that his or her duties to the client

288. Bruce A. Green, *The Role of Personal Values in Professional Decisionmaking*, 11 GEO. J. LEGAL ETHICS 19, 29 (1997).

289. *Id.*

290. Luban, *supra* note 229, at 957-60.

291. Lincoln Sav. & Loan Ass'n v. Wall, 743 F. Supp. 901 (D.D.C. 1990).

292. *Id.* at 920, *quoted in* Luban, *supra* note 229, at 959.

293. For a reasonably complete description of the events leading up to and following the wreck of the Exxon Valdez, including quotations from the Wall Street Journal and New York Times, see LARUE TONE HOSMER, THE ETHICS OF MANAGEMENT 143-57 (4th ed. 2003).

294. L. Harold Levinson, *Making Society's Legal System Accessible to Society: The Lawyer's Role and its Implication*, 41 VAND. L. REV. 789, 793-98 (1988).

permitted compliance, provided the falsity was unlikely to be discovered. He also states that the duties to the profession and society are clearly in opposition, and it is society that should take precedence.[295]

5. Substantial social harms. Zitrin and Langford provide the example of an attorney, working for an automobile company, who learned of an engineering flaw in the design of the braking system that could lead to complete brake failure under certain climatic conditions.[296] The attorney asked senior executives to immediately correct the problem; they refused, saying that a new model was close to production.[297] The authors equate this situation to that in the tobacco industry, implying that revealing client information would in this instance be preferable.[298]

6. Substantial emotional harms. Zitrin and Langford also recount the example of two attorneys who represented a serial killer who confessed to them full details of other murders for which he was not a suspect, including one in which the bodies of the victims had never been found.[299] As part of an insanity defense, the defendant took the stand and calmly related the other murders in court.[300] The two attorneys were indicted for not revealing the location of the bodies, as required by the health code and as desired by the families of the victims.[301] The appellate court found in favor of the two attorneys, but expressed "serious concerns" about their earlier reliance on complete client confidentiality, and stated that professionals "also must observe basic human standards of decency."[302]

Listed above are six examples of legal, financial, environmental, political, social, and emotional situations in which at least one attorney and/or scholar believed that the benefits of client confidentiality were outweighed by the duties of full disclosure. As explained previously, and as repeated below for emphasis, this is a conflict between social outcomes and

295. *Id*.

296. RICHARD ZITRIN & CAROL M. LANGFORD, THE MORAL COMPASS OF THE AMERICAN LAWYER: TRUST, JUSTICE, POWER AND GREED 115-17 (1999).

297. *Id*.

298. *Id*.

299. *Id*. at 117-26.

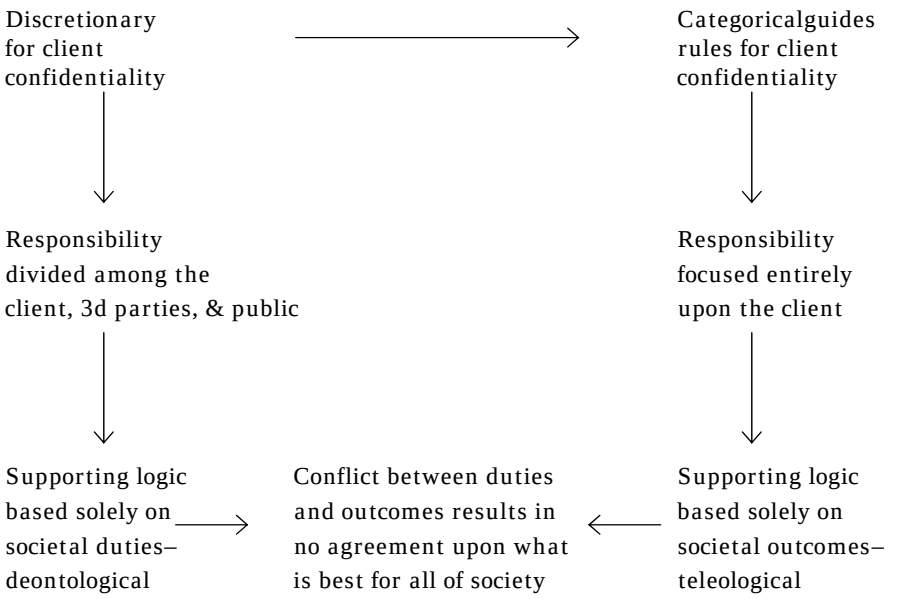
300. *Id*.

301. *Id*. at 117-29.

302. ZITRIN & LANGFORD, *supra* note 296, at 118.

professional duties that cannot be resolved easily due to the necessary use of two totally different moral reasoning methods:

Section IV Figure 1. Vector of alternative end positions governing client confidentiality, together with the supporting professional rationales and underlying moral systems:



Our recommendation is that the conflict between social outcomes and social duties be resolved by using the two moral reasoning methods *concurrently* to develop, in the format of the 1969 Model Code, statements that would combine the values that are expected of lawyers with the constraints that are demanded of lawyers. Ideally, these combined statements would fall approximately at the midpoint of the historical vector between discretionary guides and categorical rules, thus expressing a compromise that will be acceptable to both sides in the current debate.

Before proposing the use of these combined statements and a potential compromise, let us strongly suggest that the public disclosure of confidential information gained from a client concerning any of the legal, financial, environmental, political, social or emotional problems described earlier—in other words, those beyond the presently proscribed physical damages of imminent death or substantial bodily injury—should never be taken lightly. Clearly there will be harms imposed upon the client. Clearly there will be rights denied to the client.

Disclosure of this information can be justified only when it can reasonably be argued that the harms to the client will be substantially overridden by benefits to third parties and the public, and that the rights denied to the client will be greatly over-balanced by rights exercised by the third parties and the public. In short, there must be a determination of the moral worth of *both* the action by the client and the disclosure by the attorney. Disclosure can be permitted only when the action by the client can be judged to be "wrong" in a strict moral sense (both outcomes and duties), and the disclosure by the attorney can be judged to be "right" in that same strict moral sense (both outcomes and duties):

Section IV Figure 2. Matrix of the sole condition under which disclosure of confidential client information would be permitted according to underlying moral systems:

		Moral Worth of Client Action: "Right"	Moral Worth of Client Action: "Wrong"
Moral Worth of Attorney Disclosure: "Wrong"		No disclosure	No disclosure
Moral Worth of Attorney Disclosure: "Right"		No disclosure	Disclosure permitted

The conditions under which public disclosure of client confidences will be permitted depend upon a determination of the moral worth of the original client action and the subsequent attorney disclosure, and it involves both the outcomes of those actions and the duties of those individuals. Next, is a brief review of the moral reasoning methods that apply to outcomes and to duties.

TELEOLOGICAL DETERMINATION OF THE MORAL WORTH OF OUTCOMES

A moral problem can be viewed as consisting of a mixture of benefits for some individuals or groups and harms for other

individuals and groups. It is the balance of these benefits for some and harms for others that creates the moral issue. Clearly an action that results in benefits for all would not merely be permissible; it should be forwarded. Equally clear is that an action that results in harms to all would not merely be impermissible; it should be stopped. It is the mixture that creates the problem.

How should decisions be made when there are benefits to some and harms to others? One methodology is the Utilitarian approach in which the decision-maker adds up all the benefits, subtracts all the harms, and arrives at a net figure which can be considered to be the overall benefits that will accrue to the full society.[303] There are two problems with this methodology. The first is that it is difficult to estimate some of the benefits and almost all of the harms on a common financial scale. What is a person's life or health worth? What is a person's desired style of living worth? These are not easy questions to answer with neat dollar figures.

The second problem with Utilitarianism is that the distribution of benefits and the allocation of harms matter most to the people most directly affected. Both the authors and readers of this article might be willing to accept somewhat less in a distribution decision so that the welfare of the overall society could be improved, but there are limits to that acceptance, particularly if all of the benefits were to go to a single individual rather than spread equitably among society as a whole. Comparative self-interest[304] dominates many of our decisions and actions. This is the reason for the development of the Social Contract concept that essentially eliminates the influence of self-interest in the moral evaluation of those decisions and actions.

A Social Contract can be viewed as a unanimous agreement between all members of a society regarding the set of rules that are to regulate the activities of the members and the distribution

303. *See, e.g.*, BENTHAM, *supra* note 213; MILL, *supra* note 214.

304. Comparative self-interest forms one of the pivotal concepts in the Behavioral Science theory of organizational justice. *See, e.g.*, Yochi Cohen-Charash & Paul E. Spector, *The Role of Justice in Organizations: A Meta Analysis*, 85 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 278 (2001); Russell Cropanzano & Jerald Greenberg, *Progress in Organizational Justice: Tunneling Through the Maze*, 12 INT'L REV. OF INDUS. & ORGANIZATIONAL PSYCHOLOGY, 317 (C. L. Cooper & L. T. Robertson eds., 1997).

of the benefits and/or harms within that society. This agreement has to be reached under conditions that deny knowledge of their self-interests to all members of the society. People—either living in a State of Nature[305] before the advent of social, political, or economic systems that are subject to manipulation for private interests, or existing under a Veil of Ignorance[306] in which those interests cannot be known with certainty—must approve the set of rules as being in everyone's interests before they can be adopted. Given that it is often difficult to think in terms of either State of Nature or Veil of Ignorance conditions, people generally understand the workings of their social, political, and economic systems and usually recognize their separate places within those systems. Rawls[307] and Nozick[308] have proposed specific conditions that demonstrate the desired lack of self-interest.

Rawls suggested that if people did not know whether they would be rich or poor, educated or uneducated, or powerful or powerless, then they would not approve any rule that favored one group over another.[309] People would be fearful that they might find themselves in one of the non-favored groups, and even though they understand that some groups deserve more than others because they contribute more to the society of which they are all a part, people would be hesitant to agree to any rule that legitimizes that "more" because it might mean "less" for them.[310] Consequently, the only rule that people would unanimously accept would be that the least amongst us—those with least income, least education, and least ability to influence events—should never be harmed.[311] Those groups would not have to benefit, except perhaps marginally, but they should never be harmed.[312] A distribution method, then, could be considered to be based upon a Social Contract, and to be "just" if the least among us were marginally benefited and/or absolutely unharmed.

On the other hand, Nozick felt that liberty, defined as the right to participate fully in the productive system of a society,

305. *See, e.g.*, HOBBES, *supra* note 238; LOCKE, *supra* note 246, at 4-10.
306. *See, e.g.*, RAWLS, *supra* note 247, at 136-42; NOZICK, *supra* note 260.
307. RAWLS, *supra* note 247, 15-19.
308. NOZICK, *supra* note 260.
309. RAWLS, *supra* note 247, at 18-22.
310. *Id.*
311. *Id.*
312. *Id.*

was more important than equity, the right to be treated justly in the distribution system of that same society.[313] He used the example of Wilt Chamberlain, a then famous basketball player.[314] Nozick explained that participants in a Social Contract agreement could set up whatever system they wished for distribution of the benefits of social cooperation, but at the end of the basketball season Wilt Chamberlain would have more of the benefits than others.[315] It would be hard to argue that the resulting distribution was not "just" because all of the benefit exchanges would have been voluntary.[316] A distribution system is "just" if all of the exchanges are voluntary; whereas, the related productive system is "just" if everyone, not just the least among us, is free to develop their skills to the fullest and participate to the best of their ability in the exchanges.[317]

The general terms of an imagined Social Contract—what rules we would accept if we did not know how the application of those rules would affect the achievement of our self-interests—supplemented by the more precise conditions of Distributive Justice—never harm the least amongst us—and Contributive Liberty[318]—never interfere with one's right to self development and self-fulfillment—provide explicit means for the teleological determination of the moral worth of outcomes.

DEONTOLOGICAL DETERMINATION OF THE MORAL WORTH OF DUTIES

A moral problem can also be viewed as consisting of a mixture of rights exercised by some individuals and groups and constrained for other individuals and groups. It is the balance of rights freely exercised by some and totally denied to others that constitutes the moral issue. How should decisions be made when there are rights freely exercised by some and apparently denied by others?

One approach is to attempt to rank those rights by order of

313. NOZICK, *supra* note 260, at 161-62.

314. *Id.* at 161-63.

315. *Id.*

316. *Id.* at 161.

317. *Id.* at 213-27.

318. The Contributive Liberty term has been contrasted with the much better known Distributive Justice term. *See* HOSMER, *supra* note 282, at 164-66 (discussing the principles of Distributive Justice and Contributive Liberty).

priority. Hobbes based his "follow the sovereign and obey the law" doctrine on the priority of an individual's right to life.[319] Locke modified that doctrine and provided the rationale for constitutional democracy with the sequence of each individual's right to life, liberty, and property.[320] After the primary position of our rights to life and liberty is firmly established, the relative ranking of the next few in the series becomes controversial.[321] Thus, a rule to recognize social rights becomes engulfed in a debate over precedence.

Kant did not attempt to rank each individual's rights in a logical order of priority. Instead, he wanted to devise a logical rule that would: 1) recognize all legitimate rights in all conceivable situations (that is, be categorical); and 2) require all to participate in all governance decisions (that is, be imperative).[322] That was the origin of the Categorical Imperative. Kant argued that it was the decision-maker's intent that mattered—whether a person was making a particular decision because he or she sincerely believed that it would recognize the rights of all members of society equitably, or whether he or she was making the decision because he or she hypocritically believed that it would forward the exercise of his or her rights primarily—and that it is impossible to tell the difference between sincerity and hypocrisy from the verbal reassurances of the decision-maker.[323] According to Kant, the only way to tell the difference between sincerity and hypocrisy is to ask the decision-maker whether he or she is willing to have everyone, in roughly similar situations, be free or even forced to make exactly the same decision or take exactly the same action.[324] This rule that each decision or action must be universalized is the first formulation of the Categorical Imperative.

The Second Formulation can be logically derived from the First. What is the single most basic decision or action that everyone in society should be free or even forced to take?

319. HOBBES, *supra* note 238, at 459.

320. LOCKE, *supra* note 246, at 65-66.

321. *See, e.g.*, Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., pt. 1, U.N. Doc. A/217A (1948) (outlining the sequence of rights in the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations).

322. KANT, *supra* note 215.

323. *Id.*

324. *Id.*

Everyone in society should treat others within that society as ends, worthy of dignity and respect, and never as means to the decision-maker's ends. Once again, self-interest has been eliminated so that other interest or social interest must prevail. The two formulations of the Categorical Imperative—whether we are willing to have everyone else in society free to take exactly the same action in roughly the same situation, and whether we are treating other people within our society as ends, worthy of dignity and respect, rather than as a means to our own ends—provide explicit means for the deontological determination of the moral worth of our duties.

APPLICATION OF MORAL REASONING TO THE TERMS OF RULE 1.6

Our first recommendation, to repeat our earlier statement from this Section, is that the disclosure of confidential client information can be permitted *only* when the action by the client can be judged to be "wrong" in a strict moral sense (both outcomes and duties) *and* the disclosure by the attorney can be judged to be "right" in that same strict moral sense (both outcomes and duties). Our second recommendation is that the more general terms of teleological and deontological reasoning be applied to the determination of the moral worth of the action by the client and, in order to meet a higher standard, the more precise requirements of both forms of moral reasoning be applied to the moral worth of the disclosure by the attorney. The wording of the relevant portions of Rule 1.6 would then read as follows:

> An attorney may reveal the confidences of a client only when it can reasonably be expected that this disclosure will avoid or mitigate substantial harms to the welfare and/or substantial infringements to the rights of uninvolved third parties and the public, and only when it can reasonably be argued that the action by the client is "wrong" in a strict moral sense and that the disclosure by the attorney is "right" in that same strict moral sense.
>
> 1) An action by a client may be considered "wrong" in a strict moral sense if:
>
> a) It can reasonably be argued that persons who did not know their position in the situation would agree that the proposed action by the client would *not* result in a distribution of benefits and imposition of harms that they consider to be just.

b) It can reasonably be argued that persons who did know their position in the situation would agree that the proposed action by the client should *not* become a universal duty, required by all participants in similar situations.

2) A disclosure by an attorney may be considered "right" in a strict moral sense if:

a) It can reasonably be argued that the "least among us," those with least income, wealth, education, and power to influence events, will be marginally benefited or at least absolutely unharmed by the disclosure.

b) It can reasonably be argued that no one within society uninvolved in the original action by the client or in the subsequent decision by the attorney will be prevented from developing his or her marketable skills to the fullest.

c) It can reasonably be argued that all of those affected by the disclosure will be treated as ends, worthy of dignity and respect, and not in any way as means to the ends of the attorney who proposes the disclosure.

APPLICATION OF PROPOSED CHANGES IN RULE 1.6 TO THE SITUATION FACED BY DOUGLAS SCHAFER

Douglas Schafer disclosed that one of his clients made monthly payments to a judge serving on the Superior Court of the State of Washington in return for financial benefits the client had received earlier through the deliberate exploitation of an estate administered by the judge.[325] The Washington Supreme Court determined as fact both the monthly payments and the deliberate exploitation.[326] A complaint was filed, however, alleging that Schafer had violated Rule 1.6(a) of the Rules of Professional Conduct by disclosing confidential information gained from his client.[327] The Disciplinary Board of the Washington State Bar

325. *In re* Anderson, 981 P.2d 426, 431 (Wash. 1999). The transcript of Anderson's five day hearing held on January 12-16, 1998 before the Washington Commission on Judicial Conduct is on Doug Schafer's website, at http://www.dougschafer.com/AndersonHearing.pdf (last visited Oct. 23, 2003).

326. *Anderson*, 981 P.2d at 431.

327. *See supra* notes 136-43 and accompanying text (discussing the *Schafer* case).

Association, the hearing officer, and the Washington Supreme Court found that Schafer owed a duty of confidentiality to his former client, breached that duty, and in consequence recommended a suspension of Schafer's license to practice law for six months.[328] That finding and recommendation were reviewed by the full WSBA Disciplinary Board, which increased Schafer's suspension from six months to one year.[329]

Both the hearing officer and the full board praised Douglas Schafer for his meticulous use of the public documents that led to the removal of Judge Anderson from the Superior Court, but both also stated that they could not condone his disclosures of his client's confidences as a part of that process, due to the existing restrictions of Rule 1.6. The Washington Supreme Court was likewise glad to remove a corrupt judge from the bench, but found Schafer's violations of Rule 1.6 merited a six-month suspension.[330] How would Douglas Schafer have fared under the changed terms we have proposed? Essentially three conditions must be met:

1. An attorney who seeks to reveal the confidences of a client must reasonably establish that the disclosure will avoid or mitigate substantial harms to the welfare and/or substantial damages to the rights of uninvolved third parties and the public.

A judge who previously accepted an exceedingly mundane bribe (monthly payments on the loan needed to buy a Cadillac) in return for the extensive exploitation of an estate can reasonably be expected to be capable of accepting a bribe for the manipulation of a trial. Both the welfare and the rights of uninvolved third parties and the public would be put at risk.

2. An attorney may reveal the confidences of a client only when it can reasonably be argued that the past, current, or proposed action by the client can be considered to be "wrong" in a strict moral sense according to two general standards.

It would certainly be hard to argue, as a person who did not know whether he or she would be the judge, an attorney, a party before the court, or an uninvolved third party at the trial, that the payment of a bribe to the judge would result in an outcome of

328. *In re* Schafer, 66 P.3d 1036, 1039 (Wash. 2003); Disciplinary Bd., Findings of Fact, *supra* note 3.

329. Disciplinary Bd., Order, *supra* note 8, at *1.

330. *Schafer*, 66 P.3d at 1046.

the trial that could be considered "just."

It would also be hard to argue, even as a person who did know his or her position in the situation, that a bribe to a judge should be considered to be a universal duty, expected of everyone who had the money and the need to improperly influence the outcome of a trial. A truly universal duty could even be said to warrant a public subsidy for the money.

3. An attorney may reveal the confidences of a client only when it can reasonably be argued that the proposed action by the attorney can be considered to be "right" according to three specific standards.

It would be fairly easy to argue that the "least among us," those with least income, education or power, would not be harmed by the disclosure of client information regarding the payment of the bribe to Judge Anderson.

Also, it would be easy to argue that no one within society, uninvolved in the payment of the bribe to Judge Anderson, would be prevented from developing his or her skills to the fullest by the disclosure of client information.

Finally, it would be easy to argue that those affected by the disclosure of the payment of the bribe to Judge Anderson would be treated as ends, worthy of dignity and respect, and not as means to the ends of Douglas Schafer. In retrospect, it is particularly hard to argue that Douglas Schafer benefited from his decision to disclose.

In conclusion, we recommend the provisions of Rule 1.6 be expanded to include substantial legal, financial, environmental, political, social, and emotional harms to the welfare or damages to the rights of uninvolved third parties and the public. We also recommend that the conditions in Rule 1.6 be changed to permit the disclosure of confidential client information only when it can clearly be shown: 1) that the disclosure will avoid or mitigate those harms to the welfare or damages to the rights of other people; 2) that the past, present, or proposed action by the client can be considered to be "wrong" in a strict moral sense (both outcomes and rights); and 3) that the proposed disclosure by the attorney can be considered to be "right" in a similarly strict moral sense (again, both outcomes and rights).