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LEGAL ETHICS: DISCRETION AND UTILITY
IN MODEL RULE 1.6

Charles A. Kelbley*

I. Introduction

The legal profession has recently been subjected to much searching and sometimes unfair criticism of its ethical foundations.¹ Recent proposals for new Model Rules of Professional Conduct² (Rules) have added to this controversy.³ Before making additional criticisms of legal ethics, however, a few prefatory remarks may serve to remind us of the nature of the lawyer’s high calling.

The practice of law by its very nature requires lawyers to abide by an extraordinary and extremely demanding set of ethical rules without parallel in other professional endeavors.⁴ Significantly, no

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¹. See, e.g., G. Hazard, Ethics in the Practice of Law xii-xiv (1978) (while lawyers’ ethics “have always been the subject of popular anxiety and suspicion,” the public has recently become even more distrustful of the legal profession as a repository of “special power, authority [and] duty”) [hereinafter cited as Hazard].
⁴. Lawyers’ conduct is governed not only by “individual conscience [and] vaguely articulated ‘traditions of the profession,’” but also by regulations, or “positive law,” which provide ethical guidelines with which lawyers must comply. Hazard, supra note 1, at 5; see Code of Professional Responsibility (1979) [hereinafter cited as Code]. Violation of the Disciplinary Rules provided by the Code may be the basis for sanctions such as reprimand, suspension, or disbarment of the lawyer. Hazard, supra note 1, at 6.
⁵. See, e.g., Should He Have Let Client Lie?, 7 Nat’l L.J. 5 (1984) (attorney who believed he had duty to advise court his client would commit perjury held
other profession requires practitioners to identify so closely and completely with the interests and confidences of their clients.\(^6\) The explanation is fairly simple: by definition an attorney "act[s] in the place or stead of another."\(^7\) In contrast, physicians and religious professionals do not adopt the point of view of their clients or patients. The very nature of their relationship to clients allows them to maintain more distance and independence of thought and action toward their clients' problems and perspectives.\(^8\) While non-legal professionals may provide remedies, admonish, and counsel reform or prudence, in their professions an adversary relation is built directly into the professional-client relationship.\(^9\) Seldom must they represent a client outside the privacy of their consulting rooms. Whatever information they learn will more often than not remain internal to the relationship. That is the normal, constitutive nature of most non-legal professional encounters.\(^10\)

by Eighth Circuit Court of Appeals to have gone too far, thereby violating client's constitutional rights to fair trial and effective assistance of counsel, as well as duty of confidentiality) (discussing State v. Whiteside, 272 N.W.2d 468 (Iowa 1978)).


7. BLACK'S LAW DICTIONARY 117 (5th ed. 1979); see also BAYLES, PROFESSIONAL ETHICS 49 (1981) [hereinafter cited as BAYLES].

8. The differences presented here between the legal profession and other professions derive largely from conceptual analysis. For discussions of these differences, see, e.g., HAZARD, supra note 1, at 151 (unlike lawyers, accountants see themselves as judges of their clients; doctors make decisions for their patients); BAYLES, supra note 7, at 49 ("[a]ttorneys are supposed to represent their clients' interests against those of others") (emphasis in original).

9. From a purely conceptual point of view, this is most obvious in the medical profession. Doctors, dentists and psychiatrists, for example, normally counsel patients as individuals. Significantly, whether or not their counsel is followed generally will not directly affect others' rights. Indeed, in an imaginary two-person universe, comprising one doctor and one other person, it would still make sense for the solitary person to consult the doctor for the sake of mental or physical health. Similarly, the profession of teaching could also exist in a two-person universe, as long as one individual had something to communicate to the other. Even a one-person universe, comprising a solitary journalist-historian, makes sense for the purpose of recording the events of the natural universe. While professions such as banking and accounting seem to require a more numerous populace, there is no inherent reason why their elementary principles could not apply in a primitive fashion within a two-person universe. In contrast, the legal profession is more dependent upon a populous populace, because one ordinarily consults a lawyer to protect one's rights as against some third party. While this implies the need for at least a three-person universe, further reflection suggests that other institutional supports are necessary for the client to assert his rights and benefit from the lawyer's advice. Thus the functions of law-making, adjudication and enforcement imply a number of persons beyond the original three-person universe. In this sense law seems to be the most social and adversarial of professions.

10. For comparisons between lawyers and other professionals, see GOLDMAN,
The relationship between the lawyer and his client differs from that between other professionals and their clients in at least one crucial respect. The relationship is, in essence, always on the verge of drawing other parties into an adversarial relationship with the client, requiring the attorney to "act in the place or stead" of his client. Since lawyers often "represent" others in the public forum, the information they learn from clients must be treated in precisely the same manner in which their clients regard it. This explains the unusual moral rules of the legal profession. Unlike physicians, priests, rabbis, ministers, and numerous other professionals, the lawyer is not simply an adviser but an advocate too.

It is the role of advocate that engenders the deepest perplexities of legal ethics. On the one hand, this role creates the need for an extraordinary set of ethical rules that non-lawyers do not generally need in order to lead an ethical, professional life. On the other hand, these rules often conflict, or at least seem to conflict, with ordinary ethics. Failure to reconcile legal with ordinary ethics is responsible for much of the persistent criticism of the legal profession.

The Moral Foundations of Professional Ethics 143, 286 (corporate managers), 158, 172, 189-90, 227-28, 284-85 (doctors), 129-30, 140, 144 (judges), 286-87 (journalists), 287-88 (teachers and professors) (1980) [hereinafter cited as Goldman]. See generally Bayles, supra note 7. It might be argued that the profession of social work requires an even higher, qualitative identification with clients than that required of lawyers. The effective social worker must be capable of empathy, sympathy and charity, which are forms of identification not required for effective legal representation. Moreover, the social worker's underlying motive is often altruism, something that is doubtless less common in lawyers.

11. See supra note 9 and accompanying text. Lawyers may also be employed to avoid litigation by helping clients to avoid violating others' rights and by advising them as to how to perform their duties. These functions anticipate the lawyer's role in the adversary process. See supra note 9 and accompanying text.

12. See R. Regan, Professional Secrecy in the Light of Moral Principles 97 (1943) [hereinafter cited as Regan].

13. See supra note 5.

14. See Rules, supra note 2; General Introduction, supra note 3.

15. Ordinary ethics means the body of principles and rules governing the moral conduct of human affairs in general, including professional relationships. Whenever professional ethics deviates from ordinary ethics a conflict arises calling for justification of the deviation. For the purposes of this Article, if the professional rule does not justify a deviation, that is a "violation" of ordinary ethics. This Article contends that Rule 1.6 violates ordinary ethics. See also Bayles, supra note 7, at 16-17; Goldman, supra note 10, at 99ff; The Good Lawyer: Lawyers' Roles and Lawyers' Ethics 1-4 (Luban ed. 1984) [hereinafter cited as The Good Lawyer].

16. See Hazard, supra note 1, at 1 ("inerradicable suspicion" of lawyers in folklore and popular opinion); Bayles, supra note 7, at 5 ("public contempt for lawyers stems . . . from their adherence to an unethical code of ethics . . ."). citing J.K. Lieberman, Crisis at the Bar: Lawyers' Unethical Ethics and What to Do About It 15-16 (1978); Goldman, supra note 10, at 90ff; Luban, The Adversary System Excuse, in The Good Lawyer, supra note 15, at 83-122.
In response to that criticism, legal ethics must justify and explain legal practices to satisfy an increasingly curious and critical public. Legal ethics today are undoubtedly disturbing to the average citizen. Even philosophers who are concerned with ethics find the subject puzzling. Questions such as the following are frequently posed: How can a lawyer defend a client known by the lawyer to be guilty? How can a lawyer justify destroying the credibility of an adverse witness when the lawyer knows the witness is telling the truth? Do lawyers really deserve a third or more of large jury verdicts in medical malpractice actions? Citizens and academicians, moreover, are rarely satisfied with answers that emphasize the peculiar nature of legal ethics. No matter how valid the answers are, non-lawyers continue to criticize legal practices that violate ordinary moral rules and find it very difficult to justify such violations.

Proposed Model Rule 1.6 (Rule 1.6 or the Rule) has become a focal point for this dilemma. One side of the controversy asserts

17. See supra note 16 and sources cited therein.
19. These questions are beyond the scope of this Article. However, satisfactory discussions are available. See M. Freedman, Lawyers' Ethics in An Adversary System 43-49 (1975) (impeaching truthful witness through cross-examination) [hereinafter cited as Freedman]; Babcock, Defending the Guilty, 32 Clev. St. L. Rev. 175 (1983-84) [hereinafter cited as Babcock] (Professor Babcock begins article by observing: "How can you defend a person you know is guilty? I have answered that question hundreds of times, never to my inquirer's satisfaction, and therefore never to my own."); Laufer, Of Ethics and Economics: Contingent Percentage Fees for Legal Services, 16 Akron L. Rev. 747 (1982-83); Wolfram, A Lawyer's Duty to Represent Clients, Repugnant and Otherwise, in The Good Lawyer, supra note 15, at 214-35.
20. This conclusion is based in part on the author's experiences with students and professors who frequently ask questions such as those mentioned above. See Wasserstrom, supra note 18, at 325-37; Babcock, supra note 19.
21. See supra notes 13-20 and accompanying text. Rule 1.6 states:
(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures
that a lawyer, as an officer of the court, should be required to disclose a client’s intention to commit a murder. Advocates of this view say that merely permitting a lawyer to disclose such information (as Rule 1.6 would provide) tears at the fabric that unites both citizens and lawyers in a single moral universe. If the law is truly a learned profession, it should maintain better contact with that universe. Opponents of the mandatory disclosure requirement would adopt a permissive standard, possibly similar to that of Rule 1.6.

A satisfactory conclusion to this controversy will be forthcoming only when the demands of professional ethics can be integrated with the principles of ordinary moral discourse. To the extent that a gap remains, legal ethics will continue to be perceived by outsiders as an “epistle of straw,” a perception that unfortunately is shared by all too many lawyers.

The Rules purport to give lawyers “professional discretion” to disclose the secrets or confidences of a client. Analysis of Rule

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22. See supra note 23; see also Wick, Lawyer-Client Confidentiality: Have We Clamped Down the Lid Too Much?, 51 Ins. Couns. J. 244 (1984) (Rule 1.6 overly restricts attorneys' ability to disclose).

23. For a report on the March 1984 Bureau of National Affairs (BNA) conference on legal ethics which describes views that support either a mandatory or permissive disclosure rule, see [Current Reports Binder] ABA/BNA LAW. MANUAL ON PROF. CONDUCT 117-20 (Mar. 21, 1984) [hereinafter cited as ABA/BNA MANUAL. But see Comment, Proposed Model Rule 1.6: Its Effect on a Lawyer's Moral and Ethical Decisions With Regard to Attorney-Client Confidentiality, 35 BAYLOR L. REV. 561, 577 (1983) (“A disclosure rule must be flexible enough to allow for unforeseen circumstances yet strict enough to prevent abuse.” Such a rule “needs a person to weigh all the variables; the client's interests and the third party's interests who [sic] might be harmed must be balanced.”) [hereinafter cited as Comment, Proposed Rule 1.6].

24. See supra note 23; see also Wick, Lawyer-Client Confidentiality: Have We Clamped Down the Lid Too Much?, 51 Ins. Couns. J. 244 (1984) (Rule 1.6 overly restricts attorneys' ability to disclose).

25. See supra note 20. By an “epistle of straw” is meant a teaching that is ineffective, either because it is not intended to be taken seriously or because it is largely ignored by those to whom it was meant to apply.


27. See RULES, supra note 2, Preamble and Comment (Disclosure Adverse to Client under Rule 1.6, Confidentiality of Information). In general, for the purposes
1.6 suggests, however, that in some cases where a lawyer chooses not to disclose, there is no exercise of professional discretion at all. Indeed, a consideration of several hypothetical cases leads to the conclusion that Rule 1.6 invites a lawyer to make unethical or arbitrary decisions.\textsuperscript{28}

On its face, Rule 1.6 is controversial because of the language in section (b)(1) which provides that “[a] lawyer may reveal such information [relating to representation of a client] to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm . . . .”\textsuperscript{29}

The language of Rule 1.6 creates two problems: (1) whether the Rule’s permissive nature can be justified; and (2) whether it is reasonable to limit permissible disclosures to crimes involving imminent death or substantial bodily injury. There is also a more basic problem created by the Rules’ Preamble and the comment to Rule 1.6 concerning discernment of the meaning of “professional discretion” in light of the utilitarian ethic on which the Rule depends. These problems will be examined in this article.\textsuperscript{30}

Based on the resources of informal logic, ethics and legal phi-
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losophy, this Article argues that the Rule should be reformulated. While the argument does not purport to be flawless, it, hopefully, will provoke the legal profession to evaluate Rule 1.6 more critically before adopting it.

The Article assumes that secrets and confidential information are necessary to the structure of human personality and are justified by a number of ethical and psychological principles. Assuming, then, that secrets and confidences may sometimes be desirable, the crucial problem is defining their limits.

II. The Test of Logic

Rule 1.6 does not obligate a lawyer to disclose client confidences or secrets to prevent serious crimes. Instead, the Rule and its accompanying comment, in conjunction with the Preamble to the Rules, give a lawyer discretion to disclose information under quite limited conditions. If these conditions do obtain, the lawyer remains free not to disclose even if disclosure would prevent death or substantial bodily injury. A rule permitting such consequences requires strong justification because it permits a lawyer to do nothing even though he reasonably believes that his client's criminal act will result in death or substantial bodily injury.

Unfortunately, the foregoing outcome appears to reflect the true intent of those who drafted the Rules. Two provisions in the Rules suggest that the drafters not only allowed for this result but actually intended it. First, the comment to Rule 1.6 states that "[a] lawyer's decision not to take preventive action permitted by paragraph (b)(1) does not violate this Rule." This unambiguous statement allows

not justified. See infra Section V. For criticism of the limited application of Rule 1.6 to crimes involving death or substantial bodily injury, see infra id.

31. See infra Sections II, III and IV.
32. See infra Section V.
33. Although these principles are interesting subjects for philosophical examination, they are beyond the scope of this Article. For a recent and comprehensive treatment of the general subject of the human need for secrets and confidences, see S. Bok, SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION (1982) [hereinafter cited as BOK]; see also W. Bier, PRIVACY: A VANISHING VALUE? (1980).
34. See RULES, supra note 2, Rule 1.6.
35. See supra notes 27-29 and accompanying text.
36. See supra note 29 for a discussion of the conflict between the text of Rule 1.6, which refers to a lawyer's "belief," and the comment to the Rule, which refers to a lawyer's "reasonable belief."
37. RULES, supra note 2, Rule 1.6 comment (Disclosure Adverse to Client). Much of the debate over the Rules concerns whether certain disclosures of confidential information should be allowed, and under what circumstances disclosure is warranted. See Rose, N.J. Adopts Code Tougher than A.B.A.'s, 7 NAT'L L.J.
no other interpretation. Second, two statements in the Scope section of the Rules reinforce this conclusion.\textsuperscript{3} One statement provides that rules cast in the term "\textit{may}" are ""permissive and define areas under the Rules in which the lawyer has professional discretion. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion."\textsuperscript{39} The Scope section also states that "[t]he lawyer's exercise of discretion not to disclose information under Rule 1.6 should not be subject to reexamination. Permitting such re-examination would be incompatible with the general policy of promoting compliance with law through assurances that communications will be protected against disclosure."\textsuperscript{40}

These provisions make clear that a lawyer's exercise of professional discretion under Rule 1.6 can be the subject of reexamination only when the lawyer makes a disclosure.\textsuperscript{4} A decision against disclosure will not be reexamined and the lawyer will not be subject to discipline.

A. Four Hypothetical Cases

The following four hypothetical cases illustrate potential results under the Rule.

1. Case A

A client whose case is going badly tells his lawyer that he intends to kill the judge in charge of his case. After vigorously counseling the client not to carry out his plan, the lawyer, believing the client is serious, discloses the client's intention. Before his arrest, the client changes his mind, follows the lawyer's advice and abandons the plan. The client is later prosecuted for criminal conspiracy. \textit{Model Rules Analysis:} The lawyer made a decision on the basis of a reasonable belief, acted ethically, and is not subject to discipline.


\textsuperscript{38} \textsc{Rules, supra} note 2, Scope.

\textsuperscript{39} \textit{Id.} This last provision suggests that even though Rule 1.6 is permissive, a lawyer disclosing information without a reasonable belief is nevertheless subject to discipline. The Rule is therefore not entirely permissive and not without disciplinary consequences.

\textsuperscript{40} \textit{Id.} (emphasis added). The merits of this "policy" will be discussed \textit{infra}, Section IV.

\textsuperscript{41} See \textit{supra} note 39 and accompanying text.
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2. Case B

Same as case A except that the lawyer, firmly and reasonably believing the client has been dissuaded from carrying out his plan, does not disclose the information. The client carries out the plan successfully. Model Rules Analysis: Same as Case A.

3. Case C

Same as Case B except that the lawyer, believing the client has been dissuaded, discloses the information. Model Rules Analysis: Because he lacked the requisite belief, the lawyer acted unethically and is subject to discipline.

4. Case D

Same as Case A except that the lawyer, still believing that the client will carry out his plan, does not disclose the client's intention, and the client carries out the plan successfully. Model Rules Analysis: The lawyer has not violated the Rule by not disclosing and is not subject to discipline.

5. Analysis

Cases A and B represent responsible lawyers acting within the scope of the Rule. Although, through hindsight, it is evident that both lawyers' beliefs were wrong, their decisions to disclose were ethical because they acted on beliefs that were reasonable under the circumstances. Case C, on the other hand, represents an unethical lawyer who violated the Rule by making a disclosure not based on a reasonable belief. Cases A through C illustrate varying consequences likely to result from application of Rule 1.6.

Case D poses more of a problem. The decision not to disclose in Case D was made despite the fact that the lawyer's reasonable belief would have made disclosure ethically proper. The question, then, is whether the decision not to disclose was an exercise of professional discretion. To answer that question, the elements of the concept of discretion need clarification.

B. The Concept of Discretion

For the purposes of this Article, discretion can best be defined

42. The text of Rule 1.6 does not require the belief to be "reasonable." But see supra note 29 and accompanying text; infra note 51 and accompanying text.
in relation to two types of non-discretionary decisions. The first type involves what may be loosely called the "total freedom" decision. One who orders dinner in a restaurant is wholly free to choose anything on the menu. But one would not say that the diner has "discretion" to choose anything on the menu because "discretion" implies a decision made within restrictive bounds. Limits are precisely what is missing from the diner's situation.

A second category of non-discretionary decision is the "total duty" decision. This type of decision is made in situations where one is morally or legally obligated to do or refrain from doing something. For example, one must support one's family, file an income tax return, and avoid hurting others. Although it is technically true that one is "free" to break the law or act immorally, provided one is prepared to suffer the consequences, it cannot be said that one has discretion regarding the decisions to support one's family or file an income tax return. No true freedom exists in these instances because flouting the law or morality involves a nonchalant attitude rather than the responsible exercise of freedom that discretion imports.

Discretion is therefore out of place in contexts where either total freedom or a pre-existing duty exists. The essence of discretion is "freedom within bounds." The restaurant and tax-filing decisions do not involve discretion; the first allows too much freedom and the second too little.

In light of this definition, discretion applies to disclosure cases but not necessarily to instances of non-disclosure. Plainly, as in

43. This assumes that discretion is by definition "limited." See infra note 60 and accompanying text. "[D]iscretion [is] bounded by the rules and principles of law, and [is] not arbitrary, capricious, or unrestrained. It is not the indulgence of a judicial whim, but the exercise of judicial judgment . . . ." BLACK'S LAW DICTIONARY 419 (5th ed. 1979); cf. Greenawalt, Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges, 75 COLUM. L. REV. 359, 365 n.30 (1975) ("When a person's choice is not constrained at all we would not ordinarily use the term 'discretion.' We say an official has 'discretion' to pick employees for a company, but we do not say a child has 'discretion' to choose the flavor of ice cream he wants.") (hereinafter cited as Greenawalt).

44. For the purposes of the diner's decision, assume that considerations of health or affordability are not applicable "bounds" within which a responsible decision "must" be made, despite the fact that such considerations are often uppermost in the minds of many diners.

45. An analysis of discretion should also consider civil disobedience, which is an act by an individual who disobeys the law out of conscience. In a sense, the individual acts responsibly, and within the bounds of discretion as such bounds may be defined by various political philosophies.

46. See infra note 47.

47. Cf. R. DWORKIN, TAKING RIGHTS SERIOUSLY 31 (1978) ("[d]iscretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction") (hereinafter cited as DWORKIN).
hypothetical Case A, if a lawyer decides to disclose confidential information relating to a client’s criminal intent to cause imminent death or substantial bodily harm, Rule 1.6 would permit disclosure only if the lawyer reasonably believes it is necessary to prevent the crime which he reasonably believes his client will commit. The concept of discretion applies because the two essential elements of a discretionary decision, freedom and limits on that freedom, are present. On the other hand, a lawyer is liable to discipline, as in Case C, if he discloses information without reasonably believing the client will commit a crime. Such a lawyer has abused the grant of discretion.

Similarly, a decision not to disclose may fall within the discretionary bounds of the Rule. For example, as in Case B, a lawyer who reasonably concludes that disclosure is not necessary to prevent a client’s criminal act is justified under the Rule regardless of the client’s future acts. But in situations like Case D where the lawyer reasonably believes, perhaps beyond a reasonable doubt, that disclosure is necessary to prevent death or serious bodily injury and still chooses not to disclose, the concept of discretion in Rule 1.6 breaks down. It becomes unintelligible from the points of view of both logic and morality. Indeed, these four hypothetical cases show that Rule 1.6 is, at best, perplexing.

The conditions under which a lawyer may or may not disclose are defined by Rule 1.6, and Cases A, B and C illustrate the application of these conditions. But the Rule provides no guidance as to the conditions under which a lawyer may choose non-disclosure even though he reasonably believes that death or substantial bodily injury will occur, as in Case D. There is no indication whether there are any conditions under which the Case D decision could ethically be made.

48. See supra Section II.A. Hereafter the reader is referred to Section II.A whenever the text refers to Cases A, B, C, or D.
49. See supra note 39 and accompanying text.
50. See, e.g., State v. Whiteside, 272 N.W.2d 468 (Iowa 1978).
51. The Code, supra note 4, provides in DR 4-101(C)(3) that a lawyer may reveal “[t]he intention of his client to commit a crime and the information necessary to prevent the crime.” Id. ABA Comm. on Professional Ethics, Formal Op. 314 (1965), “indicates that such disclosure may not be made ‘unless the facts in the attorney’s possession indicate beyond reasonable doubt that a crime will be committed.’” Annotated Code of Professional Responsibility 178 (1979). Although the Model Rules of Professional Conduct are not annotated as of the date of this writing, Rule 1.6(b)(1) may also be construed to require a “beyond a reasonable doubt” standard. Cf. Section VII, infra; see also supra note 29 for a discussion of the meaning of “belief” and “reasonable belief” in Rule 1.6.
52. Cf. Section IV.
In Case D, the lawyer's non-disclosure is similar to the diner's decision in the restaurant. Whatever the bases of their decisions, no result can be criticized for there are no bounds within which the lawyer or the diner must decide. However, unlike the diner, who is free to choose any meal, whether it advances or defeats the goals of health or pleasure, the lawyer, given the life-threatening circumstances of Case D, has professional "license" to disclose nothing. One is therefore forced to conclude that Rule 1.6 provides no effective "bounds of discretion" in some cases of non-disclosure.

It follows that the comment to Rule 1.6 is inaccurate when it says that lawyers have "professional discretion" to disclose information. For without limiting that discretion, there is no discretion, professional or otherwise. The Rule is therefore ineffective at best, irrational at worst. Since Rule 1.6, as part of a body of rules of ethics, must be coherent and rational in order to function, it should not be endorsed.

III. The Test of Legal Philosophy

The discretion given the lawyer in Case D is similar to what has been called "strong discretion" in describing judicial decisions in

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53. In discussing the Code provision DR 4-101(C)(3), which permits a lawyer to reveal "[t]he intention of his client to commit a crime . . . ," one commentator observed that "[t]here is little guidance as to how the lawyer is to exercise the discretion to report future crimes." FREEDMAN, supra note 19, at 6. He then states, without any supporting argument, that "[i]t seems clear that the lawyer should reveal information necessary to save a life." Id. While this conclusion may be valid, it cannot be derived from the Code or Rule 1.6. For a similar conclusion, see HAZARD, supra note 1, at 28-29.

54. This presumes that ethical principles are known and defended principally through reason, although the role of intuition and moral feelings also play an important role in the development of ethics. See, e.g., K. BAER, THE MORAL POINT OF VIEW: A RATIONAL BASIS OF ETHICS 138-62 (1958; abr. ed. 1965); J. RAWLS, A THEORY OF JUSTICE 47-53ff (1971) [hereinafter cited as RAWLS] D. RICHARDS, THE MORAL CRITICISM OF LAW 105-06 (1977) [hereinafter cited as RICHARDS].

55. "Strong discretion" describes a situation where an official charged with making decisions is not bound by standards governing the process of decision-making. For example, a sergeant who has been told to pick any five men for patrol has strong discretion because there are no standards to guide his choice. In contrast, if the sergeant has been told to pick five experienced men for patrol, his choice is limited by the standard of experience, making his discretion "weak." DWORKIN, supra note 47, at 32. Strong discretion is therefore like the "total freedom" decision discussed supra notes 43-44 and accompanying text. On the other hand, restricted decision-making implies weak discretion or perhaps no discretion at all. That would be the "total duty" decision described supra notes 45-47 and accompanying text. For a discussion of the distinction between strong and weak discretion, see DWORKIN, supra note 47, at 31-32.
"hard cases." Hard cases are those in which judges are presented with issues to which no prior rule is readily or easily applicable. In such cases, it has been argued, judges must exercise their "discretion" by reaching beyond the law to make new law. In so doing, they are not bound by pre-existing rules or standards, hence their "strong" discretion.

This analogy is flawed, however, because it fails to recognize that all discretionary decisions may be criticized, if not by contrast with precedent or other legal authority, then certainly by reference to standards of rationality, efficiency and fairness. Even where no clear rule applies, judges are bound to decide cases on the basis of principle—not whim, prejudice or dubious policy grounds. Thus, even if a decision not to disclose can be defended on the ground of "strong discretion," it must also be rational and fair. However, the Rule provides no insight into its standards of either rationality or fairness.

56. See Dworkin, supra note 47, ch. 4 (Hard Cases).
57. Id. at 81. It is tempting to identify "hard cases" with cases of "first impression" which present novel issues never before raised. However, novelty does not necessarily entail difficulty; in some cases a novel issue may be easily decided by a slight extension of a prior rule. In contrast, a "hard case" is one in which no clear or settled rule can be appropriated to dispose of the novel issue. Thus, although all hard cases are by definition cases of first impression, not all cases of first impression are hard cases. But cf. Parent, Interpretation and Justification in Hard Cases, 15 Ga. L. Rev. 99 (1980) (hard decisions are those that "cannot be made with... logical certainty and precision, ... usually because either pertinent legal standards are in need of interpretation or no standards seem pertinent." Such decisions allow judicial creativity and test "the intellectual and moral faculties of our judges.") [hereinafter cited as Parent.]
58. This is Dworkin's characterization of a key provision of H.L.A. Hart's legal positivism. See Dworkin, supra note 47, at 17, 35; H.L.A. Hart, The Concept of Law 138-44 (1961) [hereinafter cited as Hart]. For a definition of legal positivism, see infra note 120 and sources cited therein.
59. See Dworkin, supra note 47, at 34.
60. Id. at 33.
61. Id. at 84-86; see Feld and Sons, Inc. v. Pechner, Dorfman, Wolfe, Rounick and Cabot, 312 Pa. Super. 125, 458 A.2d 545 (1983), appeal dismissed,— Pa.—, 470 A.2d 525 (1984) (where lawyers raise in pari delicto defense in preliminary objections to clients' allegations of professional malpractice and breach of contract, court refuses to follow in pari delicto doctrine, because founded on uncertain public policy choices, relying instead on principle that no court will lend aid to one whose action is based on immoral or illegal act). Dworkin, supra note 47, at 83-84, argues that judicial decisions in hard cases should be based on principle, not policy. This is a controversial issue that cannot be examined fully here. For a position contrary to Dworkin's, see Greenawalt, Policy, Rights and Judicial Decisions, 11 Ga. L. Rev. 991, 992 (1977). For a reply to Greenawalt, see Dworkin, supra note 47, at 295-327.
62. See supra Section II.
63. See infra Section IV.
Regardless of the acceptability of "strong discretion" on grounds of legal theory, the analogy to judicial discretion is flawed for other reasons. Since the Rule provides unambiguous criteria for deciding when disclosure is ethical and when it is not, it is simply false to argue that the lawyer is faced, as many judges certainly are, with a hard case with no clear rules to guide him. The question therefore remains: Why is the non-disclosing lawyer free to ignore the permissive disclosure rule even when it applies? That lawyers are simply permitted to ignore it is a puzzle that calls for an explanation.

The same analysis applies to two other meanings of "strong discretion." According to the first, discretion is appropriate wherever judges and lawyers find that there is no right answer to a legal or ethical problem.\(^6\) In such a situation no party would have a right to a particular decision. According to the second meaning, discretion is required wherever more than one decision could result from a sincere and responsible effort to reach the right decision.\(^6\) Here, too, no party would have a right to a particular decision. These meanings of strong discretion present possible justifications for non-disclosure in situations like Case D.\(^6\) Yet both are flawed for the reasons that follow.

First, Rule 1.6 was not intended to apply to situations where there is no right answer.\(^7\) The comment to the Rule certainly contemplates situations in which "[i]t is very difficult for a lawyer to 'know' when such a heinous purpose will actually be carried out, for the client may have a change of mind."\(^8\) However, the Comment merely recognizes that the lawyer's discretion, restricted by the Rule's disclosure criteria, can be very difficult to exercise; but it does not mean that there is no right answer. A fair reading of the Rule suggests that a lawyer applying the Rule makes a decision that in his judgment is "right," based on available information. To say that the Rule authorizes either of two judgments, neither of which

\(^{64}\) See, e.g., Greenawalt, supra note 43, at 381-86; Parent, supra note 57.
\(^{65}\) See Dworkin, supra note 47, at 327-30. See generally Greenawalt, supra note 43, at 139-41 (discussing judicial discretion in deciding cases); Parent, supra note 57, at 99-141 (discussing judicial discretion and rejecting Dworkin's views on the subject).
\(^{66}\) See infra notes 67-75 and accompanying text.
\(^{67}\) The thesis that there is "no right answer" to a legal question is extremely controversial and will not be examined here. See Dworkin, supra note 47, at 279-90; Greenawalt, supra note 43, at 366-68; Parent, supra note 57, at 113-17. Although parties often settle their cases out of court on the assumption that there is "no right answer" to their disputes, such decisions would appear to depend more on psychological and strategic considerations than on philosophical principles, which are the subject of Dworkin's discussion. Dworkin, supra note 47, at 279-90.
\(^{68}\) Rules, supra note 2, Rule 1.6 comment.
is "right," would vitiate the either/or nature of the ethical problem facing the lawyer: either there are grounds for a reasonable belief that a client will cause death or injury or there are not. The Rule does not allow for a third alternative.

Second, it is true that a sincere and responsible decision-making effort can often result in more than one appropriate outcome. But this is an acceptable version of a weaker form of discretion that is well-known in judicial and legal circles, and it is the kind of discretion that the Rule properly mandates. For the duty of a judge or lawyer faced with a Rule 1.6 problem is defined by standards that reasonable persons can interpret differently. For example, both the disclosing lawyer in Case A and the non-disclosing lawyer in Case B made "wrong" but ethical decisions. Faced with the same situations, other lawyers might have reached "right" decisions. However, their decisions would not have been more ethical than those of the first two lawyers because their reasonable beliefs (products of sincere and responsible judgments) would have differed. Of course the possibility that there may be different results does not mean that they all are equally sound. The decision reached by the lawyer in Case C was plainly unethical.

69. See DWORKIN, supra note 47, at 327-30; Greenawalt, supra note 43, at 363-66; Parent, supra note 57, at 141.

70. See supra note 55 and accompanying text. It is "weaker" because the decision-maker, the lawyer, is constrained to make his decision in accordance with certain standards. This constraint is absent in strong discretion contexts.

71. For example, a trial court has weak discretion in imposing a sentence in a criminal case. See supra note 55; Greenawalt, supra note 43, at 363-65. Although an appellate panel may not necessarily agree with the sentence imposed, it will not reverse except where there has been an abuse of discretion, for example, ignoring standards set forth in a sentencing code. Nevertheless, presented with the same case, two trial judges could impose disparate sentences by applying and interpreting the sentencing code differently. This illustrates that the exercise of discretion involves judgment and is not a mechanical process. Indeed, variable results reflect differences between those individuals who are making the decisions, rather than defects in the judicial process. Nevertheless, both judges are required to base their decisions upon the same standards. If they were at liberty to ignore or change the standards they would not be exercising their discretion. Rather, they would have "license" or freedom to decide without limits.

72. See DWORKIN, supra note 47, at 69.

73. See supra Section II.A for a discussion of hypothetical Cases A and B. The decisions in those cases were "wrong" only in the sense that the judgments (that the client would murder the judge in Case A or would not do so in Case B) were in fact mistaken. The decisions were ethically "right," however, because they were based on the attorneys' reasonable beliefs.

74. The designation of a decision as "right" or "wrong" merely reflects whether the predicted result occurred. See supra note 73.

75. See supra Section II.A for a discussion of hypothetical Case C. In that case the lawyer's decision was not only unethical, but "wrong" from the point of view of the outcome. See supra note 74.
Redefining "discretionary decision" in light of the above discussion indicates that it is a judgment restricted by certain standards. These standards dictate a process of decision-making rather than a particular result. The lawyer must assess a situation and reach a decision in conformity with these standards. Insofar as Rule 1.6 authorizes Case D, our objection to it can now be rephrased: The Rule permits a lawyer to either forego the judgmental process, or to go through the process and ignore the standards governing the process or the results to which the process reasonably leads. The Rule cannot, therefore, be justified by legal philosophy.

IV. The Test of Ethics

A. Policy and Utilitarianism

Even if there were not grave problems with Rule 1.6 because of its reliance on "professional discretion" and its potential reliance on legal philosophy, it might be argued that the strongest defense of the Rule is based on policy grounds. The Preamble to the proposed Rules states that the lawyer’s exercise of discretion not to disclose should not be the subject of re-examination; "permitting such re-examination would be incompatible with the general policy of promoting compliance with law through assurances that communications will be protected against disclosure."

If the Rule is premised on confidentiality grounds, however, it is objectionable. Although valid, the principle that confidentiality promotes compliance with law is not served where attorneys are permitted to disclose confidential communications. If the policy is to have any weight at all, it must not be discarded by lawyers who have a reasonable belief that a client will cause death or serious bodily injury. If prevention of death or injury is an exception to the general policy, however, that exception ought not be ignored by the lawyer who chooses to protect his client's confidence, as, for example, in Case D. In short, either promoting the policy of confidentiality has greater weight than preventing death or injury, or it is meaningless. But if the policy is more important, the purpose behind lawyers' "professional discretion" to disclose would be vitiated. Regardless of one's point of view, no sense can be made of the policy underlying

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76. See supra Section II.
77. See supra Section III.
78. RULES, supra note 2, Preamble.
Rule 1.6. If the policy is merely one more component of an "epistle of straw," then lawyers are simply free to believe it or not, and this analysis can conclude on that agnostic note. This Article assumes however, that the Rule is founded on rational considerations.

An alternative policy rationale exists in support of Rule 1.6. While superficially useful for advocates of the Rule, this rationale is actually strong evidence against it, as is shown by the following analysis. The introduction to the comment to Rule 1.6 states that, "[b]ased upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld." Even though the Rules offer no proof that this is so, let us assume that almost all clients follow their lawyers' advice. The comment also states, under "Disclosure Adverse to Client," that

to the extent a lawyer is required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of conduct. The public is better protected if full and open communication by the client is encouraged than if it is inhibited.

Even if we could ignore the virtually insuperable problem of reconciling the weight that is attributed to the policy with the bald fact that lawyers may freely ignore it, these two statements together establish that the underlying ethic of the Rule is utilitarianism.

Utilitarianism holds that right conduct is that which promotes the greatest happiness of the greatest number of people. As one of the great philosophies of modern times, the complex doctrine of utilitarianism is embodied in two major schools of thought: act utilitarianism and rule utilitarianism. Neither of these schools of thought justifies Rule 1.6.

Act utilitarianism holds that one should perform that act which

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79. See supra notes 20 & 25 and accompanying text.
80. RULES, supra note 2, Rule 1.6 comment.
81. Id.
82. Id.
83. See infra notes 84-105 and accompanying text.
84. Bentham described the Principle of Utility as the fundamental axiom according to which "[i]t is the greatest happiness of the greatest number that is the measure of right and wrong." J. Bentham, A Fragment on Government, in THE WORKS OF JEREMY BENTHAM 221-95 (J. Bowring ed. 1962). Mill's definition is similar. "Utility, or the Greatest Happiness Principle, holds that actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness. By happiness is intended pleasure, and the absence of pain; by unhappiness, pain, and privation of pleasure." J.S. MILL, UTILITARIANISM 257 (World Publishing Co. 1962) (1861) [hereinafter cited as MILL].
will cause the greatest good for everyone affected by the act. This form of utilitarianism rejects absolute rules such as those against killing, stealing, and lying. What makes an act ethical, according to this doctrine, is not its conformity with a rule but its consequences in particular situations. If an act produces a generally "good" result, the action is right regardless of its agreement with a general rule. For example, if one lies to an assassin about the location of an intended victim, the lie produces a good result by saving the victim's life. Under act utilitarianism, Case D is not justifiable, since the putative result of the failure to disclose is death without any redeeming, greater good. There remains only the hope either that future lawyers will dissuade clients from such conduct, or that most clients will be dissuaded in Case D situations.

Rule utilitarianism provides a better rationale for Rule 1.6. It holds that one should always follow the rule or rules which will bring about the greatest good for the greatest number of people. Thus, an action is right by virtue of its conformity to a rule. Although a rule is chosen because actions in accordance with it are expected to generally produce good consequences, bad consequences will not defeat the ethical nature of the conduct. Under rule utilitarianism, the rightness of an action is derived from following rules.

Rule utilitarianism commonly underlies legal rules. Many procedural court rules are based on the reasonable belief that the administration of justice will be fairer and more efficient in the long run if, for example, parties are required to file complaints and appeals within specific time limitations. Such rules may seem like a victory of form over substance since many parties will lose or waive their substantive rights by default. Yet, justice and its administration would surely be compromised without procedural rules.

85. See ETHICAL THEORY AND BUSINESS 6-8 (Beauchamp & Bowie eds. 1979).
86. Id. at 7.
87. Id. at 7-8.
88. Id.
89. Id.; see also J. NARVESON, MORALITY AND UTILITY 16, 124 (1967); RICHARDS, supra note 54, at 234-35, 270.
90. This is the author's interpretation of a possible consequence of rule utilitarianism. For a contrary view, see RICHARDS, supra note 54, at 234-35. There are many forms of utilitarianism. The problems raised by them, although important, cannot be treated here. For a discussion of classical utilitarianism, see RAWLS, supra note 54, at 22-27 and the references cited therein at 22 n.9.
91. Rule 1.6 would be a model of rule utilitarianism if it prohibited lawyers from disclosing client confidences in situations such as Case D. The comment to Rule 1.6 states that "almost all clients follow the advice given [by lawyers]." RULES, supra note 2, Rule 1.6 comment. If this premise is true, then a lawyer is at least theoretically ethical when he follows the example of Case D, even though it results in bad consequences.
However, utilitarianism cannot be made into a master rule governing all ethical situations, particularly the situation of the non-disclosing lawyer in Case D. The lawyer in Case D cannot be analogized to a court or other institution which seeks overall efficiency and fairness because the situations are incomparable. The client whose claim is dismissed for failure to conform to a procedural rule is still alive and may have grounds for redress from a negligent lawyer, for example in a malpractice action. The lawyer's decision in Case D, however, may determine whether an individual lives or dies. Moreover, there are other flaws to this analogy. Less apparent is the fact that persons subject to rule utilitarianism are generally aware of how their rights may be affected by following or not following rules. More generally, legitimate expectations, indeed life opportunities, are often built on the somewhat arbitrary bases of entrance exams, deadlines, personal appearance and a thousand other "rules" that contribute to success or failure in life. But seldom is one's bodily safety or life so acutely dependent on another's exercise of an inscrutable "discretion." Rarely, if ever, does society deliberately deposit in either a public servant or a private entrepreneur the unreviewable discretion and awesome power to determine whether others may continue to enjoy life and liberty.

92. Procedural rules are promulgated and give notice to parties. In many jurisdictions courts are required by statute to inform parties of their rights to appeal and of the applicable time limits. See, e.g., Fed. R. Crim. P. 32(a)(2) (notification to defendant of right to appeal).

93. Although there is no legal duty in the United States to aid an individual in peril, there is general agreement that one has a moral obligation to help. Prosser states:

[T]he law has persistently refused to recognize the moral obligation of common decency and common humanity, to come to the aid of another human being who is in danger, even though the outcome is to cost him his life. Some of the decisions have been shocking in the extreme. The expert swimmer, with a boat and a rope in hand, who sees another drowning before his eyes, is not required to do anything at all about it, but may sit on the dock, smoke his cigarette, and watch the man drown. A physician is under no duty to answer the call of one who is dying and might be saved, nor is anyone required to play the part of Florence Nightingale and bind up the wounds of a stranger who is bleeding to death, or to prevent a neighbor's child from hammering on a dangerous explosive, or to remove a stone from the highway where it is a menace to traffic, or a train from a place where it blocks a fire engine on its way to save a house or even to cry a warning to one who is walking into the jaws of a dangerous machine. The remedy in such cases is left to the "higher law" and the "voice of conscience," which, in a wicked world, would seem to be singularly ineffective either to prevent the harm or to compensate the victim. Such decisions are revolting to any moral sense. They have been denounced with vigor by legal writers. W. Prosser, The Law of Torts 340-41 (4th ed. 1971).
Should the Case D lawyer draw up a balance sheet of good and bad consequences, a preposterous calculus emerges. Most shocking is the notion that the lawyer is allowed to determine consequences for abstract and distant others while, at the same time, he is permitted to ignore the real victims which will be produced by his "beneficence." The greatest good for the greatest number may, therefore, be nothing more than the greatest good for an unknown majority of the future.\textsuperscript{44}

Only the crudest forms of utilitarianism are vulnerable to the classic objection that utilitarianism sacrifices the lives of innocent persons for the benefit of others.\textsuperscript{45} Unfortunately, Rule 1.6 is a crude

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\item \textsuperscript{44} Legislatures frequently must weigh relative "good results." Whether courts must also do so is controversial. See Dworkin, supra note 47, at 83-84. Since public funding of health research is limited, for example, the funding of research which benefits the greatest number of people may be justified. If research on a rare disease is funded, however, some people may be cured of that disease in the future. This result simply illustrates that the government cannot commit itself to fund all health research immediately or simultaneously, but must choose a limited number of projects for funding. In any case, it is doubtful that those who contract an unresearched disease have a right to funding for such research. Failure to conduct research which might save unspecified lives in the future is quite distinct from failure to aid an individual in peril. The differences concern the specificity of the identity of the persons and the causal connections involved. See Wasserstrom, \textit{On the Morality of War: A Preliminary Inquiry}, in \textit{War and Morality} 78, 97 (1970) [hereinafter cited as \textit{War and Morality}]. Even if it is theoretically impossible to distinguish the failure to disclose in Case D from the failure to fund health research, as a practical matter it is necessary to draw a line beyond which liability will not lie. Cf. Palsgraf v. Long Island R.R., 248 N.Y. 339, 352, 162 N.E. 99, 103 (1928) (Andrews, J., dissenting) ("[w]hat we do mean by the word 'proximate' [cause] is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point").

\item \textsuperscript{45} Evidence that even Bentham's highly regarded Principle of Utility, supra note 84, may be viewed in this light, however, is found in the remarks of a distinguished philosopher of law: Utilitarianism, which for long was regarded as the sober, workmanlike English manifestation of the European Enlightenment and which was certainly the fountain of great reforms of the archaic English legal system as well as the inspiration of progressive thought in England and elsewhere, is now seen by many thinkers to have a darker, more sinister side, licensing anything to be done to individuals, condoning any sacrifice, in the pursuit of the ultimate goal of maximizing the aggregate or average welfare of a community. Moreover, much of the most interesting current work among American political philosophers—and I am thinking here of John Rawls's \textit{A Theory of Justice} and Robert Nozick's \textit{Anarchy, State, and Utopia}—is not only frankly hostile to Utilitarianism but identifies as Utilitarianism's cardinal sin its failure to recognize that the division of humanity into separate individuals is a fact of great moral importance which confers on certain interests of individuals a title to inviolability to be maintained even where to maintain it may reduce the level of aggregate or average welfare below that which could otherwise be achieved.
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form of utilitarianism. But the great utilitarian philosopher, John Stuart Mill, the author of *On Liberty* and *The Subjection of Women,* had the deepest respect for justice and the rights of individuals. Mill wrote:

In the golden rule of Jesus of Nazareth, we read the complete spirit of the ethics of utility. To do as you would be done by, and to love your neighbour as yourself, constitute the ideal perfection of utilitarian morality. . . . In the case of abstinences indeed—of things which people forbear to do from moral considerations, though the consequences in the particular case might be beneficial—it would be unworthy of an intelligent agent not to be consciously aware that the action is of a class which . . . would be generally injurious, and that this is the ground of the obligation to abstain from it.

The difficulty with utilitarianism lies in uniting its central insight, "the greatest good for the greatest number," with the equally important thesis that utility must be compatible with individual rights, as argued by Mill. A lawyer who refuses to disclose vital information affecting the safety of others is like an experimental scientist who performs dangerous experiments or surgery on ten persons in the hope of saving ten million later. Even if the scientist could be assured in advance that good consequences would flow from the surgery, our moral disapproval would not be altered. We must protect rights, or we will destroy the very foundations of Justice.


96. This conclusion is reinforced by a statement contained in the Final Draft of the *Model Rules of Professional Conduct.* "To the extent a lawyer is prohibited from making disclosure, the interests of the potential victim are sacrificed in favor of preserving the client's confidences even though the client's purpose is wrongful." *Model Rules of Professional Conduct,* Final Draft, reprinted in 68 A.B.A.J. 1411 (1982) (emphasis added) (at 9 of pullout supplement; Disclosure Adverse to Client). This statement was deleted, however, in the draft which was proposed and adopted at the August, 1983 ABA meeting of the House of Delegates. See *Rules,* supra note 2.


100. Mill, supra note 84, at 268, 270.

101. Id. at 270.

102. See *Rawls,* supra note 18, at 3-4.
Cost-benefit analysis\textsuperscript{103} may be appropriately employed in the extreme situations of war or natural disaster when military leaders and doctors must make immediate and difficult choices to attain victory or save lives.\textsuperscript{104} In contrast, the lawyer’s “triage” under Rule 1.6 is inappropriate: as in Case D, a judge will be sacrificed today to save, perhaps, another two in a hundred years, or maybe never. The impossibility of predicting the future is not the only problem. Even if the future were known, an ethic which authorizes lawyers to sacrifice a client’s victim merely because most clients, uninhibited by the threat of disclosure, will follow their lawyers’ advice would be disturbing.\textsuperscript{105}

B. When Disclosure is Ethically Required

The policies promoting “compliance with law”\textsuperscript{106} and utility\textsuperscript{107} do

\textsuperscript{103} In economics, the source of the concept of cost-benefit analysis, the benefits and costs of a policy are defined primarily by the effect of the policy on some fundamental objectives of the economy. RAY, COST-BENEFIT ANALYSIS: ISSUES AND METHODOLOGIES 9 (1984). Cost-benefit analysis invariably attempts to describe and quantify the social advantages and disadvantages of a policy in terms of money. For example, building a new highway entails construction and maintenance costs which are disadvantages to society. The benefits of the new highway consist of such things as shorter traveling time, reduction in highway congestion, and time saved, which may be translated into monetary values. See D. PEARCE, COST-BENEFIT ANALYSIS 8-9 (1971).

\textsuperscript{104} See, e.g., WAR AND MORALITY, supra note 94, at 78-101.

\textsuperscript{105} However, this ethic is a tacit assumption of the Rules. See Rules, supra note 2. The author has not found any research supporting the claim that “[b]ased on experience, lawyers know that almost all clients follow the advice given [by lawyers], and the law is upheld.” Id. Comment. On the contrary, that claim is somewhat counter-intuitive inasmuch as a client, once assured that his lawyer will not disclose his criminal plan, may have even more reason to commit the crime. He knows not only that the lawyer will remain silent, but he may also have inadvertently obtained advice on how to cover up the crime.

\textsuperscript{106} See supra Section IV.A for a discussion of these policies.

\textsuperscript{107} Id.
not provide a defensible ethical basis for determining a lawyer’s duty to maintain the confidentiality of his client. Policy arguments are rarely advanced unless other arguments fail. Considering Case D situations from the client’s point of view, the client may have an antecedent right to keep a criminal plan secret. This introduces a consideration foreign to the Rule’s Preamble and the comment to Rule 1.6, which speak solely in terms of policy. If, however, the client has a right ab initio to expect confidentiality, then Rule 1.6 would be on more solid ethical ground. But if the client does not have such a right, rejection of the rule would be strongly indicated. In such a case, the Rule could resort to neither policy grounds nor grounds of principle for its justification.

A client must have some right to expect his lawyer to keep past crimes secret because, in securing legal representation, the client seeks an ally who will shield him from the harm that disclosure would bring. Without such a right, legal representation in our adversary system would be literally meaningless. A defense attorney could, by sheer fiat, turn on the client as a prosecutor. Therefore, a client’s right to confidentiality must be included in the rationale for supporting lawyer non-disclosure of information relating to past crimes. Details aside, both the present Code and the new Rules agree on that premise. Otherwise, the adversary system could not exist.

On the other hand, there appear to be no substantial arguments in favor of lawyer non-disclosure of future crimes. Beyond counseling

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109. See Rules, supra note 2, Preamble and Rule 1.6 comment.

110. The Code provides that “a lawyer shall not knowingly reveal a confidence or secret of his client.” Code, supra note 4, DR 4-101(b) (1). The language of this provision applies to past and future crimes. However, DR 4-101(C)(3) permits disclosure for future crimes. Similarly, Rule 1.6(B)(1) provides an exception for future crimes. Rules, supra note 2; see also ABA/BNA Manual, supra note 23, at 55:901 (“A lawyer may not reveal information about a client’s past criminal or fraudulent behavior, other than that committed before a tribunal, which the lawyer learns about in a confidential manner.”).

111. This thesis is known as a “rights thesis.” See Dworkin, supra note 47, at 82-90 for a discussion of this concept. Although a “rights thesis” is a necessary ingredient of the rationale for confidentiality, a third form of utilitarianism, “institution utilitarianism,” could also provide a rationale. According to institution utilitarianism, the adversary system as an institution leads to the greatest good, because it encourages, for example, greater overall truthfulness in dispute resolutions and fuller communications with lawyers. While this view is compatible with the rights thesis advanced in this Article, utility is accepted only if it violates no other right.
the client not to commit the crime, the lawyer possesses no "representative" capacity in such a matter.112 Because representation in this situation is impossible, the client has no right to expect confidentiality. Consequently, the information is per se invalid.113

Returning to the Case D illustration,114 assume that the client, whose case is going badly, makes an appointment with counsel solely for the purpose of communicating the plan to murder the judge. Suppose further that the client knows that the lawyer’s hands are tied by professional confidentiality.115 Plainly, the client is no longer using confidentiality as a lawful shield but as an avenging sword to accomplish an unjust end. Additionally, there is no matter capable of being “represented” by the lawyer until after the client has accomplished the evil deed. One must conclude from this scenario that the Case D client has no right to confidentiality. Consequently, a lawyer has no duty to preserve confidentiality.116

While the invalidity of a client’s secret frees a lawyer from the duty of confidentiality, not every invalid secret should be disclosed.


“In order that the [privilege] may apply there must be both professional confidence and professional employment, but if the client has a criminal object in view . . . one of these elements must necessarily be absent. The client must either conspire with his [counsel] or deceive him. If his criminal object is avowed, the client does not consult his advisor professionally, because it cannot be the [lawyer’s] business to further any criminal object. If the client does not avow his object, he reposes no confidence . . . . The [lawyer’s] advice is obtained by a fraud.” State v. Phelps, 24 Or. App. 329, 545 P.2d 901, 904 (Or. Ct. App. 1976) (quoting Queen v. Cox, [1884] 14 QBD 153, 168). Accord Gebhardt v. United Rys. Co. of St. Louis, 220 S.W. 677, 679 (Mo. 1920).

Id.; see also ABA/BNA Manual, supra note 23, at 55:902.

113. Regan, supra note 12, at 99; see Samuel Taylor Coleridge, Duties and Needs of an Advocate, in The Table Talk and Omminia of Samuel Taylor Coleridge 140-41 (Ashe ed. 1888) (“There is undoubtedly a limit to the exertions of an advocate for his client, [for] the advocate has no right, nor is it his duty, to do that for his client which his client in foro conscientiae has no right to do for himself.”) [hereinafter cited as Coleridge].

114. See supra Section II.A.

115. Since Rule 1.6 permits disclosure under certain circumstances, the lawyer’s hands are not always “tied.” See Rules, supra note 2, Rule 1.6(b). This fact has caused much confusion regarding the policy grounds of the Rule. See supra notes 76-83 and accompanying text.

116. This conclusion assumes a Case D situation where the lawyer, after vigorously counseling the client not to commit the murder, has a reasonable belief that the client will do so anyway. See Bok, supra note 33, at 124-31. “Most theologians agree that certain types of secrets [are] not binding on professional recipients, foremost among them grave threats against the public good or against
For example, a client might tell his lawyer that the client does not intend to file an income tax return in circumstances which clearly require him to do so. The law will be broken, yet disclosure is not necessarily required. While the secret is invalid and the lawyer cannot represent the client with respect to his criminal purpose, the confidentiality of the communication is merely cancelled and disclosure is not required.

There are at least two situations in which a lawyer's disclosure is required. The first occurs when the client's aggression is unjustly directed against an innocent person. The aggression is unjust because the victim has a right not to be killed. The second situation occurs when direct and serious harm to the common good has been threatened. Either or both of these situations require disclosure. On that principle, virtually every philosopher, from Plato and Aristotle through Aquinas and Kant to Rawls, would agree. Even the distinguished legal positivist, H.L.A. Hart, who advocated the separation of law and morals, recognized the necessity of a "minimum content of natural law." Without rules condemning the use or condonation of unjust aggression, "what point could there be for beings such as ourselves in having rules of any other kind?"

While it is interesting to contemplate these philosophies, such a discussion attributes to Rule 1.6 a value it does not merit. In addition

innocent third persons." Id.; see also COLE RIDGE, supra note 113, at 140-41.
117. Although the Code would permit disclosure under these circumstances, the proposed Rules would not, since Rule 1.6 limits permissible disclosures to crimes leading to imminent death or substantial bodily injury. See CODE, supra note 4, DR 4-101(c)(3); RULES, supra note 2, Rule 1.6(b)(1).
118. See BOK, supra note 33, at 124-31.
120. Legal positivism is a complex doctrine or philosophy of law that has several meanings. H.L.A. Hart, Positivism and the Separation of Law and Morals, 71 HARV. L. REV. 593, 601-02 n.25 (1958) [hereinafter cited as Positivism], has distinguished five meanings of "positivism" in contemporary jurisprudence: (1) laws are commands of human beings; (2) there is no necessary connection between law and morals or law as it is and as it ought to be; (3) the analysis of legal concepts is worth pursuing in its own right; (4) a legal system is a "closed logical system" in which correct legal decisions can be deduced logically from pre-existing legal rules; (5) moral judgment cannot be established or defended as statements of facts can, by rational argument, evidence or proof. See also W.G. FRIEDMAN, LEGAL THEORY 256-58 (1967); Walker, Positivism, in THE OXFORD COMpanion TO LAW 969-70 (1980); Richards, supra note 54, at 11-23.
121. Positivism, supra note 120, at 593.
122. HART, supra note 58, at 189-95.
123. Id. at 190 (emphasis in original).
to the many bases for criticism already advanced against the Rule, the one that devalues it the most is the provision in Rule 1.6(b)(2) authorizing a lawyer to disclose information to collect a fee.\textsuperscript{124} Whereas a Case D lawyer is free to withhold information relating to an imminent death, he is also permitted to disclose information to collect a fee. Surely lawyers have a right to make a living, and perhaps certain disclosures may be justified in order to collect fees. Nevertheless, the juxtaposition of subsections (b)(1) and (b)(2) suggest that a small economic gain could have more intrinsic worth than a human life. This possibility reflects poorly on the legal profession.

V. Reformulating the Rule

Although the permissive nature of Rule 1.6 may be criticized, an absolute rule of mandatory disclosure would not be preferable. Nevertheless, ethical principles would mandate disclosure when two conditions are met: (1) the information communicated to the lawyer is an invalid secret that cannot be the subject of legal representation;\textsuperscript{125} and (2) the content of the invalid secret relates to unjust aggression or is against the public good.\textsuperscript{126} However, even these conditions, while necessary, will not always be sufficient. For example, a client’s invalid secret and aggression may be justifiable where they are necessary to avoid an even greater evil. Consider the scenario where, in order to avoid an “imminent” nuclear war, an individual performs acts that could cause death or substantial bodily injuries. A lawyer would have to consider whether the individual’s defenses of “justification” and “necessity” are valid reasons which prohibit the lawyer’s disclosure of the information.\textsuperscript{127} Better than Rule 1.6 is the following compromise between the mandatory and permissive disclosure schools of thought:

(1) A lawyer is \textit{required} to disclose a client’s intention to commit

\textsuperscript{124} Rule 1.6(b)(2) provides, in pertinent part, that a lawyer may reveal information “‘to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client . . . .’” \textsc{Rules, supra} note 2. The comment to Rule 1.6 states that “[a] lawyer entitled to a fee is permitted by paragraph (b)(2) to prove the services rendered in an action to collect it.” \textit{Id.} comment (Dispute Concerning Lawyer’s Conduct).

\textsuperscript{125} \textit{See supra} notes 113-23 and accompanying text.

\textsuperscript{126} \textit{Id.}

\textsuperscript{127} \textit{See} Commonwealth v. Capitolo,\textemdash Pa. Super.\textemdash\textemdash, 471 A.2d 462, 468 (1984) (individuals charged with criminal trespass arising from demonstration against nuclear power at nuclear power plant should have opportunity to prove through expert testimony and documentary evidence that their conduct met requirements of defense of justification).
a crime when the client has no right to confidentiality and the lawyer reasonably believes, based on clear and convincing evidence, that disclosure is required to avoid unjustified conduct leading to death or substantial injury to the rights or interests of others;

(2) A lawyer is permitted to disclose a client’s intention to commit any other crime when the client has no right to confidentiality and the lawyer reasonably believes, based on clear and convincing evidence, that disclosure is required to avoid unjustified conduct that is unjustified.

This proposed rule would establish that mandatory disclosure is appropriate for crimes involving serious invasions of others’ rights. On the other hand, the current Rule mandates disclosure only to protect bodily rights. Such a distinction indicates that the current Rule imbues bodily rights with greater value than intellectual or financial rights. Because a broken arm may be mended, but the theft of a trade secret or one’s life’s savings may be more lasting and more devastating, the better rule would protect against serious invasions of rights.

With respect to the standard of evidence which must be met before a lawyer could disclose, “clear and convincing,” rather than “beyond a reasonable doubt,” is sufficient. Unless the lower standard is adopted, virtually no disclosures would ever have to be made, since lawyers could always find a reasonable doubt to justify non-disclosure.

Although valid arguments exist to support the view that all future crimes should be disclosed, there are equally valid reasons for allowing lawyers discretion to disclose where the rights of others and the public good would not be seriously infringed. If section 2 were adopted, however, it would be wise to define more precisely the bounds of this discretion. This definition would be important if reliance on “professional discretion” is to make any sense.129

VI. Theory and Practice

Throughout this Article, criticism has been directed at the lawyer who does not disclose his reasonable belief that a client will commit murder or other serious crimes. Since the lawyer’s decision in those situations is neither justified by “professional discretion” nor supported by legal philosophy or ethics, Rule 1.6 should be reformulated to require disclosure whenever clients have no right to confidentiality.

128. See supra notes 29 & 51 and accompanying text.
129. See supra Sections II.B and III for discussions of “discretion.”
and their conduct would constitute unjustified aggression or seriously invade the interests of others.

Arguably, even though the principles defended in this Article may be theoretically valid, they are not practical because of the realities of the attorney-client relationship. The Case D situation may be unrealistic because a lawyer faced with a client who begins to reveal a criminal intent may respond in the following manner: "Listen. If you've any intention of committing this crime I've got to warn you that I may be obligated to disclose that information to the police. You'd best forget about that." Of course, such a response is likely to stop the sophisticated client from discussing the contemplated crime any further. It may even lead the client to disavow the crime completely, which is just what our practical lawyer may want, for it relieves him of the burden of knowledge.

However, this strategy is open to two serious objections. First, the lawyer is evading the open and full communication with the client contemplated by the policies underlying Rule 1.6. Second, the lawyer is merely making a token effort to "advise" the client, since the advice given is designed either to end further discussion of the criminal plan or to invite the client's deception by feigning a change of mind. The only practicality served is obviously self-serving: the lawyer retains a client and a fee by means of conduct designed to make a "reasonable belief" extremely unlikely if not impossible. This hypocrisy is only a specious adherence to the Rule.

Ethical principles, therefore, imply that the practicing lawyer cannot be purely a pragmatist who reserves theory and principles for the ethics classroom and expediently abandons them in order to "do business." The unsophisticated client who is not dissuaded by the lawyer


131. See supra Section IV.A.

132. See KANT, supra note 130, at 62.

[No-one can pretend to be practically versed in a branch of knowledge and yet treat theory with scorn, without exposing the fact that he is an ignoramus in his subject. . . . Yet it is easier to excuse an ignoramus who claims that theory is unnecessary and superfluous in his supposed practice than a would-be expert who admits the value of theory for teaching purposes, for example as a mental exercise, but at the same time maintains that it is quite different in practice, and that anyone leaving his studies to go out into the world will realize he has been pursuing empty ideals and [a] philosopher's dreams—in short, that whatever sounds good in theory has no practical validity.

Id.
from reciting his criminal plan creates even more of a "straw man" situation than does the sophisticated client. Nevertheless, for the criminal defense lawyer, this situation may be the veritable Achilles' heel of a mandatory disclosure rule. He may contend that such clients have a reasonable expectation that their criminal plans will be held in confidence and that such expectations are simply the price of doing business with those clients.\footnote{133} This argument is hopelessly transparent because the lawyer is, in essence, making a principle out of the practice of the blind leading the sighted. The lawyer becomes precisely Kant's ignoramus\footnote{134} who not only rejects theory but has the audacity to come back to the classroom and presume to teach us that practice "can see further and more clearly with its mole-like gaze fixed on experience than with the eyes which were bestowed on a being designed to stand upright and to scan the heavens."\footnote{135}

VII. Conclusion

A. The Rule as Written

The profession of law demands that its practitioners follow an extremely demanding set of ethical rules\footnote{136} which are generally reflected in the Code and the Rules. Rule 1.6 is a major, and perhaps the only significant, flaw in the legal profession's exceptional history of self-discipline. The Rule fails the test of logic because the concept of discretion which it reflects is self-contradictory.\footnote{137} Legal philosophy does not prevent this failure because it does not endorse a discretion which is indistinguishable from license.\footnote{138} Most distressing of all, Rule 1.6 is inconsistent with the general ethics which have shaped Western concepts of rightness and goodness. By endorsing this crude and indefensible form of utilitarianism, the drafters of Rule 1.6 have exhibited a profound misunderstanding of our ethical heritage.\footnote{139} Rule 1.6 should not be adopted as proposed but should be amended to reflect common ethical principles and the important policies that would protect confidentiality.\footnote{140}

\footnote{133} This hypothesis is based on the author's conversations with criminal defense lawyers.\footnote{134} See KANT, supra note 130, at 62.\footnote{135} Id. at 63.\footnote{136} See supra Introduction.\footnote{137} See supra Section II.B.\footnote{138} See supra Section III.\footnote{139} See supra Section IV.\footnote{140} See supra Section V.\footnote{133} 1985
B. Looking Behind the Rule

Throughout this Article, Rule 1.6 has been addressed and criticized as a rule of legal ethics. This discussion has presumed that the Rule reflects the demands of ethics and professional responsibility rather than extrinsic motives of a quasi-political nature which may have influenced its final form and adoption. This presumption restricts the analysis to the merits of the Rule and its accompanying comment. However, such treatment risks misunderstanding the Rule.

Rule 1.6 was adopted in August of 1983 by the ABA House of Delegates at the ABA's annual Convention.\(^{141}\) Several amendments to Rule 1.6 were proposed and considered by the House of Delegates which finally adopted the amendments proposed by the American College of Trial Lawyers (ACTL).\(^{142}\) Although similar to the version of Rule 1.6 which was formulated by the ABA Commission on Evaluation of Professional Standards, the ACTL's amendments drastically restricted the confidentiality exceptions that were set forth in the Commission's Rule.\(^{143}\)

During its discussions of the proposed Rules, there were at least two conflicting forces at work within the ABA House of Delegates.\(^{144}\) One force favored mandatory disclosure of confidential material under certain circumstances, while the other favored absolute confidentiality. Rule 1.6, as a result, is a compromise that embodies two antithetical concepts. The first concept appears in the text of the Rule itself. Rule 1.6(b)(1) authorizes disclosure of a client's intent to commit crimes that are likely to result in imminent death or substantial bodily injury.\(^{145}\) The disclosing lawyer must reasonably believe that disclosure is necessary to prevent the client from committing these crimes.\(^{146}\) The second concept, derived from the Preamble and the comment to Rule 1.6, represents the underlying policy of the Rule and prohibits disclosure under all circumstances.\(^{147}\) While

\(^{141}\) See 52 U.S.L.W. 2077 (1983).
\(^{142}\) See Comment, Proposed Rule 1.6, supra note 23, at 563.
\(^{143}\) Id. at 563.
\(^{144}\) Id.
\(^{145}\) Id. Rule 1.6(b)(1).
\(^{146}\) Id. Rule 1.6(b).
\(^{147}\) Id. Preamble and Rule 1.6 comment. The comment to Rule 1.6 states:
[T]o the extent a lawyer is required or permitted to disclose a client’s purposes, the client will be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. The public is better protected if full and open communication by the client is encouraged than if it is inhibited.

Id. This policy statement is so strong that it could be used to justify an absolute rule against disclosure, even when a lawyer is certain that a client is about to
the Rule calls for the exercise of discretion, the policy statement does not. Indeed, the policy, being a prohibition, tends to negate the force of the Rule.

In effect, Rule 1.6 represents two incompatible views. The permissive language of the text of the Rule accommodates the view which favors disclosure. The policy statements accommodate the view which would prohibit disclosure.

The discretion called for by the Rule cannot be applied to all decisions. In some situations, as in Case D, the underlying policy prohibiting disclosure applies instead, justifying the lawyer’s apparent “license” not to disclose. While the text of the Rule conforms to ethical principles such as preventing serious harm intended by clients, the policies expressed by the Rule’s comment contravene these principles by endorsing the twin goals of confidentiality and protection of the public.

These conflicting concepts inherent in Rule 1.6 may be the result of compromises made during the development of the Rule and its comment. Nevertheless, they pose serious ethical problems. Moreover, there are equally serious conceptual problems with the notion that Rule 1.6 provides lawyers with guidance on how to make decisions by exercising their discretion. It is hoped that the Bar will consider these problems when evaluating Rule 1.6 for adoption.

commit murder, for the policy states unequivocally that “the public is better protected” when clients can speak with assurance that their communications will be held in confidence.