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NOTES

KEEPING SECRETS WITHIN THE TEAM: MAINTAINING CLIENT CONFIDENTIALITY WHILE OFFERING INTERDISCIPLINARY SERVICES TO THE ELDERLY CLIENT

HEATHER A. WYDRA

INTRODUCTION

An attorney serving the elderly client may need to work as part of an interdisciplinary team including physicians, psychologists, social workers, accountants, or clergy.\(^1\) Effectively serving the needs of the elderly client requires approaching client concerns holistically, rather than approaching legal issues in isolation from financial, psychological, medical, and religious issues.\(^2\) For example, loneliness, fear, anxieties about aging, and concerns about family matters often accompany the elderly client's legal problems.\(^3\) The attorney, as opposed to a mental health professional, is not trained to counsel clients in these areas.\(^4\) In addition, the elderly are more likely than other clients to suffer from serious physical illness.\(^5\) The attorney should cooperate with physicians and other


\(^{2}\) See Sangerman, Estate Planning, supra note 1, pt. V.A. Attorney competence demands more than a strict technical knowledge of the law. An attorney serving the elderly must assume an expanded role as advisor, counselor, drafter, supporter, reinforcer, and in some cases, friend. The elderly may depend on the attorney for aid with needs that exceed what would narrowly be categorized as legal. The attorney should explore nonlegal solutions for both legal and nonlegal problems. See Kapp, supra note 1, at 26.

\(^{3}\) See Sangerman, Estate Planning, supra note 1, pt. V.A.


\(^{5}\) See Kapp, supra note 1, at 25.
human service professionals to resolve the older client's disability claims and arrange health care financing. Human service professionals are often the older client's most important advocates against government bureaucracies and insurance carriers. Moreover, the elderly client is more likely to suffer from mental impairment, and the attorney may need to consult a mental health professional to determine client capacity or to receive guidance on how to communicate with a mentally incapacitated client. A mental health professional even may need to be present during attorney-client interviews. Finally, an interdisciplinary team is necessary to deal effectively with the physical, psychological, and economic effects of elder abuse.

The Model Code of Professional Responsibility (the "Code") and the Model Rules of Professional Conduct (the "Model Rules") implicitly recognize the necessity of using an interdisciplinary approach to elderly client services. Code Ethical Consideration ("EC") 7-11 makes a client's age relevant to an attorney's responsibilities, which "may vary according to the intelligence, experience, mental condition or age of a client." Similarly, Model Rule 2.1 recognizes that legal problems are seldom purely legal in nature, and that resolving complex issues usually requires more than purely legal advice: "In representing a client, a lawyer shall exercise independent professional judgment and render candid

6. See id. at 26.
7. See id.; see also Rein, supra note 1, at 1153 (recognizing that other professionals are more experienced in dealing with the elderly client needing assistance applying for entitlement benefits or planning for disability or health care needs (citing Porter & Affeldt, Legal Services Delivery Systems: An Overview of the Present and a Look at the Future, in Aging and the Law: Looking Into the Next Century (AARP 1990))); see generally Marshall B. Kapp, Interprofessional Relationships in Geriatrics: Ethical and Legal Considerations, 27 Gerontologist 547 (1987) (considering the various ways that the elderly need assistance from various professionals).
8. See Kapp, supra note 1, at 25.
9. See Peters, supra note 4, at 15-17. Although Peters focuses on children in need of interdisciplinary services, the ideas expressed in her article apply to all "incompetents." See Lawrence R. Faulkner, Mandating the Reporting of Suspected Cases of Elder Abuse: An Inappropriate, Ineffective and Ageist Response to the Abuse of Older Adults, 16 Fam. L.Q. 69, 76 (1982).
10. See Peters, supra note 4, at 17.
11. See generally Faulkner, supra note 9, at 73 (explaining how abusive treatment encompasses physical, emotional and verbal abuse).
14. The Code contains Ethical Considerations ("EC") and Disciplinary Rules ("DR"). See Code, supra note 12, Preliminary Statement. "The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive .... The Disciplinary Rules ... are mandatory in character. [They] state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." Id.
15. See Kapp, supra note 1, at 25.
advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."\(^{18}\) The comment to Model Rule 2.1 further supports an interdisciplinary approach to resolve complex issues:

Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation.\(^{19}\)

The confidentiality provisions of the Code and Model Rules, however, hinder the use of an interdisciplinary approach. While an effective interdisciplinary team requires a certain flow of confidential information among professionals,\(^{20}\) the Code and Model Rules generally forbid the disclosure of confidential client information to third parties without the client's consent.\(^{21}\) Further, using an interdisciplinary approach to elderly client services creates a risk of loss of client confidentiality.\(^{22}\) For example, suppose an elderly client visits his attorney's office with a bruised and swollen eye. The client explains that his son hit him, in a fit of anger. The client does not want to involve the police, but wants to obtain counseling for himself and his son. If the lawyer or client discloses the abuse to a social worker, however, the social worker may be obligated by statute to inform the authorities.\(^{23}\) Moreover, the social worker may have an ethical standard regulating client confidentiality that allows her to report the abuse if she believes this would serve the client's best interests.\(^{24}\) The risk of violating the Code and Model Rules and the potential for loss of client confidentiality have been barriers to offering interdisci-

19. Id. Rule 2.1 cmt.
20. See discussion infra part I.A.
21. See discussion infra part I.B-C.
22. Throughout this Note, "client confidentiality" refers to the protection of communications afforded by the attorney's ethical duty of nondisclosure. This concept is distinguishable from the attorney-client privilege. The attorney-client privilege, given effect through the law of evidence, applies in judicial and other proceedings where the lawyer may be called as a witness or required to produce evidence concerning the client. See McCormick on Evidence § 87 (Edward W. Cleary ed., 3rd. ed. 1984) [hereinafter McCormick on Evidence]. The ethical duty of non-disclosure, established through the Code and Model Rules, does not legally bar disclosure. The ethical duty protects a broader range of communications than the attorney-client privilege. The attorney-client privilege limits its protection to matters communicated in confidence by the client. See id. § 91; Model Rules, supra note 13, Rule 1.6 cmt. (1983); James H. Feldman, Between Priest and Penitent, Doctor and Patient, Lawyer and Client . . . Which Confidences are Protected? 14 Fam. Advoc. 20, Fall 1991, at 21.
23. See discussion infra part II.A.
24. See discussion infra part II.B.
This Note contends that, despite the necessity of using an interdisciplinary approach to elderly client services and the fact that the Code and Model Rules support this approach, the confidentiality provisions of the Code and Model Rules do not accommodate its use. This Note will attempt to resolve the internal conflict in the Code and Model Rules by suggesting modifications that will allow the offering of interdisciplinary services without jeopardizing client confidentiality. Part I of this Note discusses the Code and Model Rules provisions on confidentiality and examines how these provisions limit the attorney’s ability to offer interdisciplinary services to the elderly client. Part II examines how, under an interdisciplinary approach, a client may risk losing the confidentiality protection that the Code and Model Rules afford. Part III examines and evaluates the viability of two relationships—employer-employee and partnership—that the attorney and nonlawyer professionals could form to offer interdisciplinary services to the elderly client while maintaining client confidentiality. Part IV then suggests modifications to the confidentiality provisions to create an exception for interdisciplinary communications benefitting the elderly client and to allow the formation of lawyer-nonlawyer partnerships. It argues that such modifications would resolve the internal inconsistency in the Code and Model Rules and would not sacrifice client confidentiality. Part V recognizes that using an interdisciplinary approach may destroy the client’s ability to claim the attorney-client privilege and that modification of the Code and Model Rules would not alleviate this problem. This Note nevertheless concludes that the potential for violating the Code and Model Rules and jeopardizing client confidentiality should not be a barrier to offering interdisciplinary services to the elderly client. Rather, viable alternatives to the restrictive ethical standards exist that would permit offering these services while maintaining client confidentiality.

I. THE CODE AND MODEL RULES

This Part presents and compares the confidentiality provisions of the Code and Model Rules, and discusses two theories justifying their broad

25. See Munneke, supra note 17, at 583 (citing American Bar Association Standing Committee on Ethics and Professional Responsibility: Report to the House of Delegates 14 (1991)).

26. A few states have adopted the Restatement of the Law Governing Lawyers (Tentative Draft No. 3, 1990) [hereinafter Restatement]. The Restatement is an ongoing project by the American Law Institute, and is under the direction of several leading scholars in the professional responsibility field. See Fred C. Zacharias, Fact and Fiction in the Restatement of the Law Governing Lawyers: Should the Confidentiality Provisions Restate the Law?, 6 Geo J. Legal Ethics 903, 903-04 (1993) [hereinafter Zacharias, Fact and Fiction]. Its purpose is to identify principles that all jurisdictions can embrace. See id. “Following the failure of both the Model Code and the Model Rules to achieve full acceptance, the Restatement is, perhaps, the next best hope for realizing uniformity.” Id. at 904. See infra note 140 for a list of states that have adopted the Restatement.
protection of attorney-client communications. This Part also illustrates how the confidentiality provisions limit the attorney’s ability to offer interdisciplinary services to the elderly client. Finally, this Part demonstrates that the confidentiality provisions constrain attorneys from fulfilling their duties to incapacitated clients under the Code and Model Rules.

A. Confidentiality Provisions

While the confidentiality provisions of the Code and Model Rules both provide broader protection of client confidences than do the provisions of other professions,\(^\text{27}\) they differ in the breadth of their protection of client confidences and in what disclosures are permitted as exceptions to confidentiality.\(^\text{28}\) Model Rule 1.6 uses a single standard that protects all information about a client “relating to representation.”\(^\text{29}\) An exception to Model Rule 1.6 allows disclosure without client consent where disclosure is “impliedly authorized in order to carry out the representation.”\(^\text{30}\) In contrast, Disciplinary Rule (“DR”) 4-101 protects only those communications that would be protected under the attorney-client privilege, plus any information acquired through 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.”\(^\text{31}\) The Code and Model Rules both contain exceptions allowing disclosures necessary to prevent the commission of a crime, but, again, the scope of the exception is different in both. DR 4-101(C)(3) permits disclosure of the

\(^{27}\) See discussion infra part II.B.

\(^{28}\) See Model Rules, supra note 13, Rule 1.6 Model Code Comparison.

\(^{29}\) Id. Rule 1.6(a). This provision provides in full:

\textbf{RULE 1.6 Confidentiality of Information}

\begin{itemize}
  \item[(a)] A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
  \item[(b)] A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
    \begin{itemize}
      \item[(1)] to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
      \item[(2)] to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client.
    \end{itemize}
\end{itemize}

\textit{Id.} Rule 1.6.

\(^{30}\) Id. Rule 1.6(a).

\(^{31}\) Code, supra note 12, DR 4-101(A). This provision provides in pertinent part:

DR 4-101 Preservation of Confidences and Secrets of a Client

\begin{itemize}
  \item[(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 disclosure of which would be embarrassing or would be likely to be detrimental to the client.
client's intention to commit any crime, and also permits disclosure of information necessary to prevent the crime.\textsuperscript{32} Comparatively, Model Rule 1.6 only permits disclosure 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{33}

There are at least two theories justifying the broad protection that the Code and Model Rules afford attorney-client communications. The primary argument rests on three assumptions.\textsuperscript{34} First, for the adversarial system to work, people must use lawyers to resolve disputes and the lawyers must be able to represent their clients effectively.\textsuperscript{35} Second, attorneys can be effective only if they have access to all relevant facts.\textsuperscript{36} Third, clients will not employ lawyers, or provide them with complete and accurate information, unless all aspects of the attorney-client relationship remain secret.\textsuperscript{37} Thus, attorney-client confidentiality is the foundation of orderly and effective adversarial justice.\textsuperscript{38}

The American Bar Association's justification for broad protection also may be described in three parts.\textsuperscript{39} First, confidentiality enhances the quality of legal representation and facilitates accurate verdicts by encouraging clients to communicate openly with their attorneys.\textsuperscript{40} Second, con-
fidentiality improves the attorney-client relationship. Third, confidentiality may help lawyers discover their client's inappropriate or illegal plans, advise against them, and thus prevent potentially wrongful conduct.

B. Communication Versus Confidentiality: Illustrating the Confidentiality Conflict

An effective interdisciplinary team requires a flow of information among the professionals serving the elderly client. However, the confidentiality provisions of the Code and Model Rules limit lawyers' communications with other professionals. Thus, the lawyer faces a conflict between communicating with the team and complying with the confidentiality provisions. For example, suppose that a lawyer drafting a will for an elderly client learns that the client is making substantial gifts of property to apparently undeserving third parties. The lawyer suspects that the client is experiencing family problems, and fears that the third parties are taking advantage of this situation and encouraging the client to deplete her estate for their benefit. The lawyer does not feel comfortable discussing these non-legal problems with the client and wants to inform the client's social worker. Disclosure to the social worker, however, would be unethical. The information imparted by the client that forms the basis of the lawyer's belief that the client is in need of social services is "secret" within the meaning of DR 4-101(A) of the Code. It also "relates to" the representation, such that disclosure is forbidden under Model Rule 1.6. Even the exception contained within Model Rule 1.6 permitting disclosure when reasonably necessary to conduct the representation generally has not been construed to authorize disclosure to human service professionals. Thus, in a situation like this,

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41. See id. at 358-59 (citing ABA Comm'n on Evaluation of Professional Standards, Model Rules of Professional Conduct 172-73 (Proposed Final Draft 1981)).
42. See id. at 359 (citing American Bar Association, Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information, 31 Bus. Law. 1709-10 (1976)).
43. See Sangerman, Estate Planning, supra note 1, pts. V.A-B.
44. See Munneke, supra note 17, at 565.
45. See id. at 572-73 ("Lawyers walk an ethical tightrope whenever they contemplate any form of multiprofessional practice.").
47. See Code, supra note 12, DR 4-101(A).
48. See Model Rules, supra note 13, Rule 1.6.
49. See supra note 30 and accompanying text.
50. See Jeffrey N. Pennell, Professionalism and Malpractice Issues in Estate Planning and Administration, C756 ALI-ABA 393, 453 (1992). But see ABA Comm. on Ethics and Professional Responsibility, Informal Op. 89-1530 (1989) (allowing a lawyer to disclose confidential information regarding the client's potential medication abuse to the client's physician without the client's consent.) [hereinafter ABA Informal Op. 89-1530]. To validate disclosure, the opinion refers to the Model Rule 1.6 exception permitting disclosures that are impliedly authorized in order to carry out the representation. See id.
the lawyer must choose between getting help for the client, or obeying the ethical standards.\textsuperscript{51}

A more critical example of the conflict between confidentiality and communication exists when a client tells her lawyer that she plans to commit suicide. Unless suicide is a crime in that jurisdiction, the Code and Model Rules forbid disclosure of the client's intentions to a psychiatrist.\textsuperscript{52} Even Model Rule 1.14,\textsuperscript{53} which authorizes the attorney to take protective action on the disabled client's behalf,\textsuperscript{54} would not allow disclosure.\textsuperscript{55} The same conflict exists under the Code. Although EC 7-11 makes age and mental condition relevant to representation,\textsuperscript{56} EC 7-12 states:

If the disability of a client and the lack of a legal representative compel the lawyer to make decisions for his client, the lawyer should consider circumstances then prevailing and act with care to safeguard and advance the interests of his client. \textit{But obviously a lawyer can not perform any act or make any decision which the law requires his client to perform or make,} either acting for himself if competent, or by a duly constituted representative if legally incompetent.\textsuperscript{57}

Under the Code and Model Rules, therefore, unless a lawyer has the consent of the client or her guardian, the lawyer may not disclose to a mental health professional a client's intention to commit suicide.\textsuperscript{58} By

\textsuperscript{51} The lawyer could contact the social worker with the client's consent. \textit{See} Code, \textit{supra} note 12, DR 4-101(C)(1); Model Rules, \textit{supra} note 13, Rule 1.6(a). However, the client may not be willing to give a general consent without knowing the specific content of the intended interprofessional communication. In addition, the client may not have sufficient capacity to consent. \textit{See} Pennell, \textit{supra} note 50, at 453. Part II.C. of this Note discusses the additional responsibilities potential client incapacity places on the lawyer under the Code and Model Rules.

\textsuperscript{52} \textit{See} discussion \textit{supra} part I.A.

\textsuperscript{53} Model Rules, \textit{supra} note 13, Rule 1.14(b). This Rule provides in full:

\textbf{Rule 1.14 Client Under a Disability}

(a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

\textit{Id.} Rule 1.14.

\textsuperscript{54} \textit{See id.}

\textsuperscript{55} \textit{See} Pennell, \textit{supra} note 50, at 453.

\textsuperscript{56} \textit{See} \textit{supra} notes 14-16 and accompanying text.

\textsuperscript{57} Code, \textit{supra} note 12, EC 7-12 (emphasis added). Some states have construed this provision to allow the disclosure of a client's intention to commit suicide. \textit{See infra} note 58 and accompanying text. It also has been construed to allow the disclosure of a client's apparent medication abuse. \textit{See} ABA Informal Op. 89-1530, \textit{supra} note 50.

\textsuperscript{58} Despite no express exception in the Code and Model Rules confidentiality provisions allowing disclosure of a client's intention to commit suicide, such disclosure has been deemed to be ethically sound. \textit{See, e.g.}, \textit{People v. Fentress}, 425 N.Y.S.2d 485, 497 (1980) ("To exalt the oath of silence, in the face of imminent death [suicide], would . . . be not only morally reprehensible, but ethically unsound."); ABA Commission on Ethics
the time an incompetency determination is made and a guardian is appointed, however, it may be too late to help the client. This situation exemplifies how the confidentiality provisions may severely constrain attorneys from providing interdisciplinary services to the elderly client.

C. Conflicts in Serving the Potentially Incapacitated Elderly Client Under the Code and Model Rules

The confidentiality provisions of the Code and Model Rules also constrain attorneys from fulfilling their duties to potentially incapacitated elderly clients under the Code and Model Rules. This conflict is especially ironic because the Code and Model Rules themselves make interdisciplinary communications necessary to serve potentially incapacitated clients. For example, EC 7-12 states that "[a]ny mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf casts additional responsibilities upon his lawyer." The elderly client, due to age or mental incapacity, may fall into this category. The determination of whether a client is "incapable of making a considered judgment on his own behalf" requires an assessment of the cognitive and emotional functioning of the client. Only a social worker or other mental health professional is trained to make this assessment. Yet, it is virtually impossible for an attorney to procure a mental health professional to make the assessment without disclosing secret or confidential client information. Nevertheless, lawyers' fulfillment of their obligations under EC 7-12 seems to require such disclosure. Furthermore, one of the "additional responsibilities" cast by EC 7-12 is that the "lawyer may be compelled in court proceedings to make decisions on behalf of the client."


59. Code, supra note 12, EC 7-12.
60. See Peters, supra note 4, at 16.
61. Code, supra note 12, EC 7-12.
62. See Peters, supra note 4, at 16.
63. See id.
64. DR 4-101 of the Code forbids disclosure of "secret" or "confidential" information. See Code, supra note 12, DR 4-101(A). "Secret" is defined as "information gained in the professional relationship . . . which would be embarrassing . . . to the client." See id. The stigma attached to mental incapacity would make its disclosure embarrassing to the client. Similarly, "confidences" are defined as those communications protected by the attorney-client privilege. See id. An attorney would be unable to procure competent social work services for the elderly client without revealing any privileged communications. See discussion infra part V.
65. See supra notes 57-58 and accompanying text.
66. Code, supra note 12, EC 7-12.
The Code advises the lawyer making decisions on behalf of the client in two ways. First, the attorney should "obtain all possible aid" from a client "capable of understanding the matter in question or of contributing to the advancement of his interest." Again, this requires a cognitive and emotional assessment that only a mental health professional is trained to make. Further, due to the interdisciplinary nature of the elderly client's legal problems, obtaining "all possible aid" must include consulting professionals from other disciplines.

Second, the attorney "should consider all circumstances then prevailing and act with care to guard and advance the interests of his client." Again, the attorney's second duty to "consider all circumstances then prevailing" requires the assistance of a social worker or other professional familiar with the social, mental, physical, and financial aspects of the elderly client's situation. This duty also requires the attorney to ascertain her client's interests. Without consulting an expert, attorneys might improperly "substitute their own personal values for a more educated determination of the [client's] welfare." Even if a client is found to be "capable of understanding the matter in question or of contributing to the advancement of his interests," the client still may be mentally incapacitated. Most attorneys lack training in counseling the mentally incapacitated. Mental health professionals would need to train the attorney, or even be present to facilitate the client interview. Thus, the duties imposed by EC 7-12 place the attorney in a conflict between seeking professional assistance for the client and maintaining client confidentiality as mandated by the Code.

The same conflict exists under the Model Rules. Model Rule 1.14 directs the attorney to maintain "as far as reasonably possible" a normal client-lawyer relationship with the client whose ability to make "adequately considered decisions . . . is impaired." The attorney "may seek

67. See Peters, supra, note 4, at 16.
68. Code, supra note 12, EC 7-12.
69. Id. EC 7-12.
70. See Peters, supra note 4, at 16; see also ABA Informal Op. 89-1530, supra note 50 (stating that expertise beyond that of the lawyer is necessary to evaluate and deal competently with situations regarding a client's mental capacity).
71. See ABA Informal Op. 89-1530, supra note 50; supra notes 1-11 and accompanying text.
72. Code, supra note 12, EC 7-12.
73. Id.
74. See Peters, supra note 4, at 16.
75. See Code, supra note 12, EC 7-12.
76. Peters, supra note 4, at 16.
77. Code, supra note 12, EC 7-12.
78. See Peters, supra note 4, at 16.
79. See id.
80. See id. at 17.
82. Id. See John E. Donaldson, Ethical Considerations in Advising and Representing the Elderly, C682 ALI-ABA 173, 195 (1991); Peters, supra note 4, at 17. Note that
the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client’s own interest.”

3 Being familiar with the special needs of elderly and incapacitated clients, the mental health professional is the most qualified to assess the client’s best interests and determine the most appropriate course of action. However, the attorney may not consult with a mental health professional or seek the appointment of a guardian without disclosing information obtained in the course of representation. Even the ABA has acknowledged that appointing a guardian under Model Rule 1.14 “inevitably requires some degree of disclosure of information relating to the representation to third parties.”

Thus, the Code and Model Rules impose duties on the attorney serving the potentially incapacitated elderly client that are best fulfilled when the lawyer works as part of an interdisciplinary team. Yet, to fulfill these duties the attorney must be able to disclose confidential information that would violate the confidentiality provisions of the Code and Model Rules. Paradoxically, the confidentiality provisions constrain the attorney from offering interdisciplinary services to the potentially incapacitated elderly client—interdisciplinary services that the Code and Model Rules themselves seem to mandate.

II. LOSS OF CONFIDENTIALITY

This Part examines how use of an interdisciplinary approach may cause the client to lose the confidentiality protection that the Code and Model Rules afford. This potential for loss of client confidentiality also has been a barrier to offering interdisciplinary services to the elderly client.

A. Reporting Statutes

For the attorney using an interdisciplinary approach to serve the eld-
Elder abuse is a significant problem in the United States, and has been a "focal point of attention for human service professionals (including lawyers, doctors, social workers and assorted clinicians), legislators, and planners concerned with the elderly." The late 1970s and 1980s saw a proliferation of legislation designed to cope with elder abuse. Most of this legislation includes mandatory reporting provisions that are intended as "case finding tool[s]" facilitating the identification of abused individuals so that assistance can be rendered. Adult and elder abuse statutes prescribe penalties for those professionals who do not comply with the reporting provisions.

Recall the example of the client who tells his attorney that his son hit

88. "Adult abuse" refers to the abuse and/or neglect of adults over eighteen or twenty-one years of age. "Elder abuse" refers to the abuse and/or neglect of adults over sixty-five years of age. See Faulkner, supra note 9, at 69 n.1.
89. See id. at 72.
90. Id. at 69 (citations omitted).
91. See id. at 69-70.


Several states have also adopted specific legislation on the institutional abuse of the elderly that include mandatory reporting provisions. See, e.g., Del. Code Ann. tit. 16, § 1132 (Michie, Supp. 1992) (providing for the mandatory reporting of suspected abuse, mistreatment or neglect of a patient or resident in a facility); N.Y. Pub. Health Law § 2803-d (McKinney 1993) (providing for the mandatory reporting of a reasonable belief that a person in a residential health facility has been physically abused, mistreated or neglected); Or. Rev. Stat. § 441-640 (1987) (providing for the mandatory reporting of a reasonable belief that a patient in a long term care facility has been abused).

93. Faulkner, supra note 9, at 76.
94. See id.
95. See, e.g., N.Y. Pub. Health Law § 2803-d(7) (McKinney 1993) ("In addition to any other penalties prescribed by law, any person who ... fails to report such an act as provided in this section, shall be deemed to have violated this section and shall be liable for a penalty pursuant to section twelve of this chapter after an opportunity to be heard pursuant to this section.").
him in a fit of anger. The client does not want to inform the police, but wants to seek counseling for himself and his son. Because lawyers are exempt from most states' mandatory reporting provisions and may not voluntarily disclose an elderly client's express or implied communication of abuse, the client is guaranteed confidentiality if he communicates only with his lawyer. However, if that state's elder abuse statute requires mental health professionals to disclose any suspected incidents of elder abuse to the police, and the client seeks counseling, he risks losing confidentiality. Thus, this potential for loss of client confidentiality is a barrier to offering interdisciplinary services to the elderly client.

B. The Effect of Other Professionals' Less Restrictive Ethical Standards on Client Confidentiality

Not all professionals' ethical duties of nondisclosure are as restrictive as the attorney's. For example, the accountant's Code of Professional Conduct states that "[a] member in public practice shall not disclose any confidential client information without the specific consent of the client." Accountants concede that this rule does not protect client confidentiality as strictly as the Code and Model Rules protect it. Social workers' ethical duties also are not as strict as the attorney's. Social workers are directed to cooperate with colleagues in other professions, making confidential disclosures when necessary to benefit the client.


97. This information does not fall into any of the exceptions to confidentiality. See supra notes 27-33 and accompanying text. However, if an attorney is obligated by statute to disclose suspected elder abuse, she is not subject to discipline for breaching client confidentiality. See Miss. State Bar Ethics Comm. Miss., Op. 95 (1984).

98. A client also risks losing confidentiality under the mandatory reporting requirements enacted pursuant to Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334 (Cal. 1976). This case imposed a duty on psychotherapists to warn or otherwise protect third parties when a patient has threatened violence. The Tarasoff decision does not apply to lawyers. See Geoffrey C. Hazard, Jr. & Susan P. Koniak, The Law and Ethics of Lawyering 315-16 (1990). Therefore, the attorney may not, in the absence of a client's clear statement of intention, warn a potential victim of the possibility of harm. See supra notes 32-33 and accompanying text.


100. See id.

101. See Peters, supra note 4, at 15. The 1979 Delegate Assembly of the National Association of Social Workers adopted a Code of Ethics to which all its members subscribe. See id. This Code provides that "[t]he social worker should extend to colleagues of other professions the same respect and cooperation that is extended to social work colleagues." Id. (quoting the National Association of Social Workers Code III.J.8). The National Federation of Societies for Clinical Social Work also has created a model set of standards and ethics, the Code of Ethics, for the professional practice primarily of psychotherapists. See id. It provides that "clinical social workers [must] act with integrity in their relationships with colleagues and members of other professions. They know and take into account the traditions, practices, and areas of competence of other professional
Although they are directed to respect the traditions of other professions, social workers are not required to adhere to another profession's ethical standards.102

Because there is no guarantee that the other professionals forming the interdisciplinary team will observe client confidentiality as strictly as the attorney will,103 the interdisciplinary approach may result in a loss of client confidentiality. Again, this raises a barrier to offering interdisciplinary services to the elderly client.

III. RELATIONSHIPS FORMED TO OFFER INTERDISCIPLINARY SERVICES

This Part analyzes two relationships—employer-employee and partnership—that the attorney and nonlawyer professionals could form to offer interdisciplinary services to the elderly client while maintaining client confidentiality. These relationships are not complete solutions, however, because their formation is either impractical or impossible.

A. Employer-Employee Relationships: Possible But Impractical

If a lawyer hires a professional104 to provide non-legal services to a client, there is no risk that the client will lose the confidentiality guarantees afforded by the Code and Model Rules.105 Attorney-client communications either in the presence of or directly to the attorney's employee are protected by the confidentiality provisions of the Code and Model Rules.106 This assurance of confidentiality derives from the Code and Model Rules themselves, which provide that a lawyer is required to take full responsibility for any work performed by employees, who are bound by the same confidentiality considerations as the attorney.107 Specifically, DR 4-101(D) provides that "a lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client."108 In addition, DR 7-107(J) provides that "[a] lawyer shall exercise reasonable care to prevent his employees and associates from making an

102. See id.
103. See, e.g., John D. Conners, Comment, Law Firm Diversification: An Affront to Professionalism? 17 Ohio N.U. L. Rev. 303, 315 (1990) ("[C]lients have no guarantee that any confidential communications acquired by non-lawyer associates will be protected.").
104. A lawyer may hire one professional, or an entire consulting group. See Munneke, supra note 17, at 570.
105. See id. at 564-65. "It is a commonly accepted practice for a law firm to go into the marketplace and purchase nonlegal expertise to provide competent services for individual clients. Little controversy is generated when a law firm retains a salaried professional to provide a specific nonlegal service to a class of clients with similar needs." Id. (footnote omitted).
106. See Sangerman, Estate Planning, supra note 1, pt. V.B.
107. See Conners, supra note 103, at 314 n.92.
108. Code, supra note 12, DR 4-101(D).
extra-judicial statement that he would be prohibited from making under DR 7-107.”

Similarly, Model Rule 5.3(b) states: “a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer.” Additionally, under Model Rule 5.3(c), “a lawyer shall be responsible for conduct of [an employee] that would be a violation of the rules of professional conduct.” The employee’s duty not to reveal client confidences and secrets is confirmed in an ABA Formal Opinion:

A lawyer can employ lay secretaries, lay investigators, lay detectives, lay researchers, accountants, lay scriveners, nonlawyer draftsmen or nonlawyer researchers. In fact, he may employ nonlawyers to do any task for him except counsel clients about law, appear in court or appear in formal proceedings as part of the judicial process, so long as it is he who takes the work and vouches for it to the client and becomes responsible for it to the client. In other words, we do not limit the kind of assistant the lawyer can acquire in any way to persons who are admitted to the Bar, so long as the nonlawyers do not do things that lawyers may not do, or things that only lawyers may do.

Because the lawyer is duty-bound to ensure that an employee complies with all of the lawyer’s ethical obligations, the employer-employee relationship is one through which interdisciplinary services can be offered without losing client confidentiality. This solution is impractical, however, because nonlawyer professionals with substantial experience in their fields are typically highly compensated and may form partnerships with others in the same profession. Therefore, these professionals might

109. Id. DR 7-107(J).
110. Model Rules, supra note 13, Rule 5.3(b). Rule 5.3 provides in full:

RULE 5.3 Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person’s conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the rules of professional conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Id. Rule 5.3.
111. Id. Rule 5.3(c).
See also Legal Ethics Comm. of the D.C. Bar, Op. 93 (1980).
113. See Munneke, supra note 17, at 573-74; Conners, supra note 103, at 306.
resist joining a lawyer or law firm as salaried employees.\textsuperscript{114} The likelihood that these professionals will resist the employer-employee relationship makes this relationship an impractical solution for holistically serving the elderly client.

B. Partnerships: Practical But Impossible

The lawyer-nonlawyer partnership is the better way to offer interdisciplinary services to elderly clients while maintaining client confidentiality.\textsuperscript{115} While a nonlawyer professional may be reluctant to join a law firm as an employee, partnership brings prestige and a measure of power.\textsuperscript{116} Equity in the firm, access to financial data, a voice in decision-making, and equal status are factors that make a partnership more appealing than an employee position.\textsuperscript{117} Despite the advantages of the lawyer-nonlawyer partnership, however, forming a partnership is forbidden under the Code and Model Rules. DR 3-102(A) states that "[a] lawyer or law firm shall not share legal fees with a nonlawyer."\textsuperscript{118} DR 3-103(A) states that "[a] lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law."\textsuperscript{119} DR 5-107 prohibits the formation of a professional corporation in which "[a] nonlawyer has the right to direct or control the professional judgment of a lawyer."\textsuperscript{120} Similarly, Model Rule 5.4(b) states that "[a] lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law."\textsuperscript{121}

Theoretically, a partnership may consist of one lawyer and one nonlawyer professional. Or, the nonlawyer professionals may form a consulting group that exists either as a subsidiary of the law firm or as a separate entity.\textsuperscript{122} The concept of large-scale lawyer-nonlawyer partnerships is known as "firm diversification."\textsuperscript{123} Typically, the firm establishes a committee or governing board, usually dominated by representatives of the law firm.\textsuperscript{124} Nonlawyers are usually responsible

\textsuperscript{114} Conners, supra note 103, at 306 ("[S]uccessful professionals from other fields may not fit comfortably into the traditional law firm hierarchy.") (quoting \textit{Is Ancillary Business the Future?}, Prof. Law., Summer 1989, at 1).

\textsuperscript{115} See Rein, supra note 1, at 1153-54.


\textsuperscript{117} See id.

\textsuperscript{118} Code, supra note 12, DR 3-102(A).

\textsuperscript{119} Id. DR 3-103(A).

\textsuperscript{120} Id. DR 5-107(C)(3).


\textsuperscript{122} See Conners, supra note 103, at 306. Nonlawyer consulting groups also may be structured as corporations or as limited partnerships. See id.

\textsuperscript{123} See generally Munneke, supra note 17, for an overview of the debate surrounding firm diversification.

\textsuperscript{124} See Conners, supra note 103, at 306.
for managing the day-to-day operations of the consulting group.125

Lawyer-nonlawyer partnerships are ideal for providing interdisciplinary services to the elderly client. In fact, these partnerships originally were conceived to provide the types of services that the interdisciplinary team strives to provide for the elderly client.126 For example, partnerships were considered ideal for handling complex client issues.127 They were conceived with the understanding that the lawyer must "struggle to master other legal and non-legal disciplines relevant to solving critical aspects of an overall transaction or dispute in order to perform his or her own duties competently and professionally."128 Additionally, partnerships accommodated the growth of the "lawyer entrepreneur," who is prepared to broker new technologies and other new ventures as a full partner with clients.129 Further, diversified firms utilized the talents of varied professionals, and could "have as their mission the broader goal of [holistic] problem solving."130

Importantly, nonlawyer partners may be compelled, as a condition of partnership, to adhere to the lawyer's ethical standards of confidentiality.131 Thus, the lawyer-nonlawyer partnership is a practical and effective means through which interdisciplinary services may be offered to the elderly client while maintaining client confidentiality. Nevertheless, under the existing ethical standards, "true multiprofessional offices remain beyond the range of feasibility, despite the fundamental appeal of the concept of holistic problem solving centers."132 This is unfortunate for the elderly client, whose needs are best served by an interdisciplinary team that will protect the client's confidences.

IV. PROPOSED MODIFICATIONS

This Part contends that the Code and Model Rules in their present form do not accommodate an interdisciplinary approach to elderly client

125. See id.
126. See discussion supra, Introduction. See also Conners, supra note 103, at 310-11 ("[T]hose in favor of diversification suggest that, by offering ancillary services, lawyers and law firms are better able to serve their clients' needs.").
127. See Conners, supra note 103, at 305.
128. Id. at 311 (quoting Accord Comments Submitted to ABA Special Coordinating Comm. on Professional Affiliations Between Lawyers and Nonlawyers (June 5, 1989) at 1.).
129. See id. at 305.
130. Munneke, supra note 5, at 573 n.71 (quoting James F. Fitzpatrick, Legal Future Shock: The Role of Large Law Firms by the End of the Century, 64 Ind. L.J. 461, 465 (1989)).
131. See Conners, supra note 103, at 312-13 ("As a general rule, 'the affiliated consulting firm and its personnel are held to the same ethical requirements — in terms of conflict of interest, the protection of client confidences, advertising of services, and the like — that apply to the law firm itself.' (quoting Accord Comments Submitted to ABA Special Coordinating Comm. on Professional Affiliations Between Lawyers and Nonlawyers (June 5, 1989) at 7) (emphasis added)).
132. Munneke, supra note 17, at 573. "Despite the fact that multiprofessional offices have been discussed for several years, the chilling effect of the ethical rules has prevented widespread experimentation with the concept." Id. at 573 n.71.
services. It suggests that modifications to the confidentiality provisions to create an exception for interdisciplinary communication benefitting the elderly client and to allow the formation of lawyer-nonlawyer partnerships would not result in a loss of client confidentiality.

A. Present Ethical Standards Do Not Accommodate Interdisciplinary Services

The confidentiality provisions of the Code and Model Rules do not accommodate the use of an interdisciplinary approach to elderly client services. There must be a flow of information among team members to provide effective interdisciplinary services, but the confidentiality provisions limit lawyers' communications with other professionals. Furthermore, although the Code and Model Rules impose duties on the lawyer dealing with the potentially incapacitated client that are best fulfilled using an interdisciplinary approach, the confidentiality provisions of the Code and Model Rules constrain attorneys from using this approach. Moreover, the Code and Model Rules offer no guidance to attorneys who may jeopardize the attorney-client privilege by using an interdisciplinary approach, such as indicating when the risk is justified or how to avoid the risk altogether. In addition, the Code and Model Rules forbid the formation of lawyer-nonlawyer partnerships, thus fully proscribing the best way to offer interdisciplinary services while maintaining client confidentiality.

Several factors demonstrate the perceived insufficiency of the Code and Model Rules' confidentiality provisions. First, different states have adopted different ethical standards regulating confidentiality. Second,

133. See Sangerman, Estate Planning, supra note 1, pts. V.A-B.
134. See Münneke, supra note 17, at 565.
135. See discussion supra part I.C.
136. See discussion supra part I.B-C.
137. See discussion infra part V.
138. At least one state's ethics committee has expressed that it is ethical for an attorney to procure an accountant's services in preparing a client's tax return, as long as full disclosure is made to the client as to the probability of this action resulting in waiver of the attorney-client privilege. See Ethics Comm. of the Bd. of Professional Responsibility of the Supreme Court of Tenn., Formal Op. 82-F-35 (1982).
139. See discussion supra part III.B.
the states disagree about how to interpret the confidentiality provisions that they have adopted. For example, some ethics committees, including that of the ABA, have issued opinions expressly allowing the disclosure of confidential information to protect the elderly client’s interests. Other opinions, in expressly affirming lawyers’ obligations to seek the help of third parties when they believe the client is incompetent, implicitly condone the disclosure of confidential information to procure the necessary assistance. At least one state bar allows a lawyer to serve as


141. See Zacharias, Fact and Fiction, supra note 26, at 903-04.
142. See, eg., ABA Informal Op. 89-1530, supra note 50 ("A lawyer may consult a client's physician concerning a medical condition which interferes with the client's ability to communicate or make decisions concerning the representation even though the client has not consented and is currently incapable of doing so."); Comm. on Rules of Professional Conduct of the State Bar of Ariz., Op. 90-12 (1990) (allowing attorney to disclose confidential information to a diagnostician without the client's consent, if the attorney believes the client is incompetent); Advisory Comm. of the Neb. State Bar Ass'n, Op. 91-4 (undated) (Lawyer who believes client is mentally incompetent may disclose confidential lawyer-client communications "to protect the client's best interests."); Comm. on Professional Ethics of the Bar of the City of N.Y., Op. 87-7 (1987) (indicating that a lawyer may disclose confidential information regarding a client's alcoholism in conservatorship proceedings, but should seek to have such disclosure done in camera and to have the file sealed).
143. See, eg., Professional Ethics Comm. of the Fla. Bar, Op. 85-4 (1985) (indicating that a lawyer should first express doubts regarding mental competence to the client, but ultimately may, over the client's objection, seek the appointment of a guardian if considered in the best interest of the client); Comm. on Professional and Judicial Ethics of the State Bar of Mich., Informal Op. CI-899 (1983) ("A lawyer may be obligated to obtain independent medical advice as to the competence of an elderly client before drafting and executing a will that is contrary to the desires customarily expressed by elderly persons having family."); Professional Ethics Comm. of the Cleve. Bar Ass'n, Op. 89-3 (undated) (stating lawyer should avoid unnecessarily revealing client secrets in moving for the ap-
a witness for a former client in a competency hearing if the client consents and the lawyer withdraws from the representation. In contrast, some opinions expressly forbid the disclosure of confidential information, even though the proscription on disclosure prevents the attorney from commencing guardianship proceedings for the disabled client or from otherwise procuring assistance from third-party professionals. Still others, while recognizing the lawyer's duty to protect the disabled client's best interests, implicitly do not allow for the disclosure of client confidences.

An example of how the states differ in their interpretations of the confidentiality provisions is their various approaches to whether a lawyer may disclose a client's intention to commit suicide. The ABA has stated that disclosure of a client's intention to commit suicide is ethical, even if suicide is not a crime in that jurisdiction. Not all states are in accord, however, and many would consider this disclosure a breach of attorney-client confidentiality.

Another factor demonstrating the perceived insufficiency of the Code and Model Rules is that disciplinary committees will overlook well-intentioned violations of these provisions. This is suggested by the dearth of reported challenges against attorneys for breaching the confidentiality provisions. However, although lawyers may not be disciplined when they fail to comply with the ethical rules, they nevertheless may mislead.

145. See, e.g., Comm. on Professional Responsibility and Conduct of the State Bar of Cal., Formal Op. 1989-112 (undated) ("A lawyer who believes that his client is incompetent to act in his own behalf may not institute conservatorship proceedings . . . [because she] would run afoul of the rules on maintaining client confidences . . . ."); Comm. on Professional Ethics of the Ill. State Bar Ass'n, Op. 89-12 (1990) (providing that an attorney may not seek the appointment of a guardian for a client if this would require revelation of confidential information); Comm. on Professional and Judicial Ethics of the State Bar of Mich., Informal Op. CI-882 (1983) ("Testimony to determine a client's mental competency is not excused from the prohibition against revealing client secrets without the client's consent."); Comm. on Professional Ethics of the Bar Ass'n of Nassau County, Op. 90-17 (1990) (stating that a lawyer retained by an elderly client for estate planning who forms an opinion that the client needs a conservator may not inform family members or medical or psychiatric specialists of his conclusion because of the primary duty to preserve confidences).
146. See, e.g., Professional Ethics Comm. of the Bd. of Overseers of the [Me.] Bar, Op. 84 (1988) ("If no client confidences are involved, and the lawyer reasonably concludes the client is incapable of deciding [in her best interests], his duty to act in the client's best interests takes precedence.").
147. See supra note 58.
149. See Zacharias, Rethinking Confidentiality, supra note 34, at 354.
150. See id.
clients who rely on those rules, breeding distrust of lawyers. Furthermore, this failure to comply with the confidentiality standards encourages clients to expect a lawyer to assist in their own unethical conduct, and also teaches lawyers that noncompliance with other rules may be acceptable.

Absent a nationwide consensus on appropriate confidentiality standards, state and federal bar associations continue to draft new codes and reform old ones. Indeed, one author suggests that "[i]f lawyers, lawmakers, and professional regulators are to come to a meeting of the minds in the future, they will do so in spite of, not because of, the Model Code and Model Rules."

B. Proposed Modifications

This section proposes modifications to the Code and Model Rules to accommodate an interdisciplinary approach to elderly client services while maintaining client confidentiality.

1. Increase Exceptions to Confidentiality

Modifications creating exceptions to confidentiality for inter-professional communications made on behalf of the elderly client would not result necessarily in a loss of client confidentiality. First, nonlawyer professionals may be required, either as employees or partners of the attorney, to adhere to the same standard of confidentiality as the attorney. Further, the lawyer could refrain from disclosing any information that the client has expressly requested remain confidential, and that a professional might by statute be obligated to disclose. Moreover, if lawyers anticipate that a client’s legal issues may go to trial, they can be extremely selective about what information is disclosed to nonlawyer professionals to preserve the attorney-client privilege.

In fact, some states already construe their confidentiality provisions as allowing the disclosure of confidential information in guardianship and conservatorship proceedings, to protect the incompetent client’s interests and to prevent client suicide. Many states have adopted the Restate-

151. See id.
152. See id.
153. See id. at 354-55.
154. See id. at 355.
155. See Zacharias, Fact and Fiction, supra note 26, at 903.
156. Id.
157. This Note argues that only the ethical rules pertaining to civil representation must be changed. "To the extent secrecy helps maintain criminal defendants' trust and contributes to quality representation, the Constitution seems to give confidentiality its blessing." Zacharias, Rethinking Confidentiality, supra note 34, at 357.
158. See, e.g., id. at 400 (noting that modifications creating exceptions to confidentiality based on the client and/or subject matter might not risk a loss of client confidentiality).
159. See id.
ment of the Laws Governing Lawyers (the "Restatement"),\textsuperscript{160} which takes a broader view of what may be disclosed to serve a client. Paradoxically, the Restatement initially defines confidentiality more broadly than do the Code and Model Rules.\textsuperscript{161} The Code protects information "protected by the attorney-client relationship,"\textsuperscript{162} and the Model Rules protect "matters relating to representation."\textsuperscript{163} Comparatively, the Restatement expands the scope of confidential information to include anything learned about a client or a matter at any time, from any source.\textsuperscript{164} The Restatement allows, however, disclosure of confidential information when disclosure will not harm the client and the client has not directed the lawyer not to disclose.\textsuperscript{165} The Restatement also allows disclosure for the benefit of the client,\textsuperscript{166} thus permitting disclosure in circumstances where the attorney suspects that the client is abusing medication or needs medical care.

In addition, the traditional justifications for the existing confidentiality provisions may not be sound.\textsuperscript{167} For example, it is unlikely that clients would utilize or confide in lawyers less if more exceptions to confidentiality existed.\textsuperscript{168} Clients have only a vague understanding that attorney-client conversations usually remain confidential.\textsuperscript{169} Adding a few more exceptions to those currently in existence will not change their view of

\textsuperscript{160} See supra note 26.

\textsuperscript{161} See Zacharias, \textit{Fact and Fiction}, supra note 26, at 906.

\textsuperscript{162} See Code, supra note 12, DR 4-101.

\textsuperscript{163} See Model Rules, supra note 13, Rule 1.6(a).

\textsuperscript{164} See Restatement, supra note 26, § 112, which provides in pertinent part: "[c]onfidential client information consists of information about a client or a client's matter . . . if the lawyer [learns] . . . of the information: (1) [d]uring the course of representing a client . . . or (2) [a]t a time before a representation begins or after it ends . . . and the information is entrusted to the lawyer under circumstances reasonably indicating that the lawyer is to employ and safeguard the information in behalf of the client . . . ." \textit{Id.}

\textsuperscript{165} Restatement § 111 forbids disclosure "if there is a reasonable likelihood that doing so will adversely affect a material interest of the client or if the client has directed that the lawyer not use or disclose it . . . ." Restatement, supra note 26, § 111.

\textsuperscript{166} See id. § 113(1).

\textsuperscript{167} See Zacharias, \textit{Rethinking Confidentiality}, supra note 34, at 361-63. In connection with his article, Zacharias conducted a survey of attorneys and laypersons in Tompkins County, New York. See id. at 379. Practicing attorneys and laypersons were given surveys containing questions on various aspects of attorney-client confidentiality, including the attorneys' practices, the attorneys' understanding of confidentiality, the attorneys' perception of the clients' understanding of confidentiality and the clients' experiences with attorneys. See id. Although conceding that the results of the study are limited in their applicability, see id. at 379-80, Zacharias concluded that:

\[\text{The study shows that both attorneys and clients seem to misunderstand confidentiality rules. Confidentiality in general encourages client use of attorneys and client forthrightness, but perhaps not as much as proponents assume. Moreover, client reliance on confidentiality may be attributable to lawyers who overstate the scope of confidentiality or who close their eyes to client misperception of confidentiality's limits.}\]

\textit{Id.} at 396.

\textsuperscript{168} See id. at 364.

\textsuperscript{169} See id. at 365.
attorney-client confidentiality.\textsuperscript{170} Furthermore, even if increased exceptions do cause clients to censor their communications, attorneys may be just as effective without knowing all of the relevant information.\textsuperscript{171} After all, clients censor their communications all the time, either by lying or withholding information.\textsuperscript{172} Moreover, keeping confidences to an extreme degree is not necessary to preserve client dignity and enhance trust relationships.\textsuperscript{173} Informing the client that some facts may need to be revealed under certain circumstances will maintain the alliance.\textsuperscript{174} Finally, adding limited exceptions to confidentiality may not affect a lawyer's ability to dissuade clients from committing bad acts.\textsuperscript{175} The lawyer's warning that only full disclosure will allow a proper representation should be deterrent enough.\textsuperscript{176} Thus, because marginal increases in exceptions to confidentiality should not have a drastic effect on the attorney-client relationship,\textsuperscript{177} the Code and Model Rules should include exceptions allowing the lawyer to make disclosures that would protect the client's best interests.

2. Allow Lawyer-Nonlawyer Partnerships

The Code and Model Rules also should be modified to allow the formation of lawyer-nonlawyer partnerships, including provisions obligating lawyers to ensure client confidentiality.\textsuperscript{178} Because partnerships allow professionals to work together as equals, these relationships are the most effective means through which interdisciplinary services may be offered to the elderly client.\textsuperscript{179} Proposed Model Rule 5.4\textsuperscript{180} of the Kutack

\textsuperscript{170} See id. at 365-66.
\textsuperscript{171} See id. at 366.
\textsuperscript{172} See id.
\textsuperscript{173} See id. at 367.
\textsuperscript{174} See id. at 368.
\textsuperscript{175} See id. at 369.
\textsuperscript{176} See id.
\textsuperscript{177} See id.
\textsuperscript{178} See Munneke, supra note 17, at 569. \textquoteright{\textquoteright{[E]thical pitfalls do exist [in the formation of partnerships], and arguably these are more pronounced in larger organizations. The better solution may be to regulate lawyers' conduct in the context of specific ethical issues, such as confidentiality, rather than prohibiting prophylactically an entire genre of associations.\textquoteright} Id. See also Rein, supra note 1, at 1153 (recognizing the benefits of multidisciplinary practices while providing safeguards protecting client confidentiality).

\textsuperscript{179} See, e.g., Rein, supra note 1, at 1154 ("Whatever may be the pros and cons of law firm diversification generally . . . diversification in the elderlaw context deserves careful and sympathetic consideration."). Indeed, it may be the best way to offer services to all clients. A District of Columbia Bar Committee chaired by Robert Jordan, in proposing revisions of the Model Rules for consideration by the D.C. Bar's Board of Governors, considered a modification of Rule 5.4 which would allow lawyer-nonlawyer partnerships. See Gilbert & Lempert, supra note 156, at 385 n.6. A committee member, in support of the modification, explained: "the committee perceived a market demand for one-stop shopping—for collaborative services of lawyers with such other professionals as accountants, lobbyists, social workers and economists." Id. at 393 (citing Minutes of the D.C. Bar Board of Governors, at 26-27 (Feb. 25, 1986).

\textsuperscript{180} ABA Special Commission on the Evaluation of Professional Standards, Model
Commission permitted nonlawyer participation in law firms, provided that certain conditions designed to protect the lawyer's ethical obligations were met. This included the assurance that "information relating to representation of a client is protected as required by [the rule on confidentiality of information]." The benefits of such a rule were stated by a North Dakota committee reviewing and recommending modifications to the Model Rules: "Unless prohibited or restricted by law, associating with a nonlawyer to provide legal services is not unethical conduct by a lawyer. Associations with a nonlawyer may, in fact, enable the lawyer to provide the client multidisciplinary services that the lawyer could not alone provide." Nevertheless, the North Dakota Supreme Court, which had the responsibility for making changes to the Rules of Professional Responsibility, denied the committee's proposal. To date, only the District of Columbia has adopted a rule similar to the Kutack Commission's Proposed Rule 5.4. Washington, D.C. Rules Of Professional Conduct Rule 5.4 states in part:

(b) A lawyer may practice law in a partnership or other form of organization in which a financial interest is held or managerial authority is exercised by an individual non-lawyer who performs professional services which assist the organization in providing legal services to clients, but only if:

(1) The partnership or organization has as its sole purpose providing legal services to clients;

(2) All persons having such managerial authority or holding a financial interest undertake to abide by these rules of professional conduct;

(3) The lawyers who have a financial interest or managerial authority in the partnership or organization undertake to be responsible for the nonlawyer participants to the same extent as if nonlawyer participants were lawyers under rule 5.1.

Furthermore, at least one state construes the goal of the ethical restrictions on lawyer-nonlawyer partnerships as preventing improper interference by laypersons in the professional activities of lawyers, as opposed to


181. The Model Rules, which revamped the Code, were the product of five years of hard work by the Special Committee on Evaluation of Professional Standards, chaired by Robert J. Kutack. See Gilbert & Lempert, supra note 116, at 384.

182. See id.

183. Proposed Rule 5.4, supra note 180. See also Conners, supra note 103, at 319 (noting that any ethical issues concerning lawyer-nonlawyer associations could be dealt with by requiring nonlawyers to abide by the lawyers' ethical standards).


185. See Conners, supra note 103, at 319-20.

protecting client confidentiality. Moreover, other non-attorney personnel—such as paralegals and investigators—work in conjunction with lawyers, without excessive concern about jeopardizing client confidentiality.

Thus, allowing the formation of lawyer-nonlawyer partnerships to serve the elderly client is a reasonable modification to the Code and Model Rules, presenting little risk of loss of client confidentiality. Including a provision similar to the Kutack Commission's Proposed Rule 5.4, holding nonlawyer partners to the same ethical standards as lawyers, virtually ensures that client confidentiality will be maintained.

V. DESTROYING THE ATTORNEY-CLIENT PRIVILEGE: THE EFFECT OF COMMUNICATIONS TO THIRD PARTIES

Modification of the Code and Model Rules allowing interdisciplinary communications unfortunately will not alleviate the potential for loss of client confidentiality due to the destruction of the attorney-client privilege. For example, suppose that a lawyer is using an interdisciplinary approach to serve an elderly client who has complex legal and personal problems. If the client's legal issues must be litigated, the inter-professional communications that occurred within the team may jeopardize the client's ability to claim the attorney-client privilege. This Part examines how the interdisciplinary communications inherent in the interdisciplinary approach may destroy the client's ability to claim the attorney-client privilege.

It is necessary to distinguish the attorney-client privilege from the lawyer's ethical duty of nondisclosure. The attorney-client privilege, given effect through the law of evidence, applies in judicial and other proceedings where the lawyer may be called as a witness or required to produce evidence concerning the client. The ethical duty of non-disclosure, established through the Code and Model Rules, does not legally bar disclosure. Lawyers may be charged with ethics violations for breaching any provision of the Code and Model Rules. Moreover, the ethical duty protects a broader range of communications than the attorney-client priv-

188. See Conners, supra note 103, at 312 (quoting Accord Comments Submitted to ABA Special Coordinating Comm. on Professional Affiliations Between Lawyers and Nonlawyers (June 5, 1989) at 3.)
189. See generally Gilbert & Lempert, supra note 116.
190. See Conners, supra note 103, at 313.
191. See id.
192. For an overview of the attorney-client privilege, see McCormick on Evidence, supra note 22, §§ 87-97.
193. See id. § 87.
194. Model rule 1.6 forbids the disclosure of information "relating to representation of a client." Model Rules, supra note 13, Rule 1.6(a). Similarly, Code DR 4-101 forbids the
ilege, which limits its protection to matters communicated in confidence by the client.\textsuperscript{195}

For an interdisciplinary approach to elderly client services to be effective, there must be a flow of information among the professionals.\textsuperscript{196} However, the attorney's communications with third parties outside the attorney-client relationship, even if made on behalf of the client,\textsuperscript{197} ordinarily are not protected by the attorney-client privilege.\textsuperscript{198} The rationale for the privilege extends only so far as putting the clients' minds at ease in their personal communications with attorneys.\textsuperscript{199} Therefore, an attorney's communications with third-party professionals may not be protected in litigation.

On the other hand, attorneys' communications with their agents are privileged.\textsuperscript{200} This protection originally was based on the premise that few lawyers could represent their clients effectively without the assistance of agents not admitted to the bar, such as clerks, typists, and messengers.\textsuperscript{201} As the assistance of these agents was considered indispensable to the attorney's work, the attorney's communications to them were privileged.\textsuperscript{202}

The class of privileged agents has been expanded to include various professionals with whom the attorney must consult to represent the client effectively.\textsuperscript{203} Third-party professionals may be considered agents where they act as conduits of information between the attorney and the client or otherwise aid in the rendition of legal services.\textsuperscript{204} Thus, in a disclosure of "secrets" that would be "embarrassing or would be likely to be detrimental to the client." Code, supra note 12, DR 4-101 (A).

\textsuperscript{195} See Model Rules, supra note 13, Rule 1.6 cmt.; Feldman, supra note 22, at 21.
\textsuperscript{196} See supra note 1 and accompanying text.
\textsuperscript{197} See, e.g., Oliver v. Committee for Re-election of the President, 66 F.R.D. 553, 556 (D.D.C. 1975) (discussing how settlement negotiations by an attorney on behalf of a client are not protected); Scott N. Stone & Ronald S. Liebman, Testimonial Privileges § 1.33 (discussing how communications with third parties will not be privileged even if the communications are made specifically for the benefit of the client).
\textsuperscript{198} See McCormick on Evidence, supra note 22, § 91.
\textsuperscript{199} See Stone & Liebman, supra note 197, § 1.33.
\textsuperscript{200} See id. §§ 1.11, 1.20.
\textsuperscript{202} See Wigmore, supra note 201, § 2301.
\textsuperscript{203} See Smith 425 F. Supp. at 1047.
\textsuperscript{204} See Wigmore, supra note 201, § 2301 ("The assistance of these agents being indispensable to [the attorney's] work, and the communications of the client being often necessarily committed to them by the attorney or by the client himself, the privilege must include all the persons who act as the attorney's agents."). See also United States v. Smith, 425 F. Supp. at 1047 (describing the courts' tendency to expand the class of privileged agents to include various specialists that an attorney must consult to effectively represent a client); Dabney v. Investment Corp. of Am., 82 F.R.D. 464, 465 (E.D. Pa. 1979) (providing examples where the privilege may extend to any law student, paralegal, investigator or other person acting as agent of an attorney "under circumstances that would otherwise be sufficient to invoke the privilege."). Cf Attorney General of United States v. Covington & Burling, 430 F. Supp. 1117, 1120-21 (D.D.C. 1977) (holding that
number of states, when a client consults a physician for litigation purposes, the resulting communications between the physician and attorney are protected by the attorney-client privilege.\textsuperscript{205} "[I]n these circumstances the physician is merely acting as a conduit, relating the client's communications to the attorney."\textsuperscript{206} The extension of the privilege is pragmatically justified. The best representation in a case involving medical issues can occur only if the attorney consults with someone skilled in the medical field.\textsuperscript{207} Additionally, in the non-testimonial setting, consultation with nonlawyer professionals educates attorneys about unfamiliar but important concepts and enables them to better serve their clients.\textsuperscript{208}

Nevertheless, the professionals forming the interdisciplinary team may not be considered agents of the attorney. These professionals will typically act as more than mere conduits of information between the attorney and client. For example, if a client visits his lawyer's office appearing groggy and sedated, the lawyer may request that the client see a doctor. Unlike the example above, the purpose of the visit to the doctor in this scenario will be to check the patient's physical condition and medication, rather than to develop litigation strategies. Thus, the visit to the doctor is solely for the benefit of the client.\textsuperscript{209} Similarly, lawyers may refer their clients to accountants solely for help with financing their health care needs.\textsuperscript{210} These referrals are consistent with the goal of using an interdisciplinary approach to provide holistic client services. Nevertheless, once

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\textsuperscript{205} See, e.g., Smith, 425 F. Supp at 1047 (allowing the attorney-client privilege to protect a defendant's statements to his psychiatrist).
\textsuperscript{206} Id.
\textsuperscript{207} See id. The same argument applies to the client who consults with a psychiatrist. In this case, "the psychiatrist is likened to an interpreter, without whom neither the attorney nor client could understand the significance of the client's information." Id. A prudent attorney would advise consultation with a psychiatrist in any case involving psychiatric issues. See id. Furthermore, "[t]he aid of a psychiatrist informs and guides the presentation of the defense, and perhaps most importantly, it permits a lawyer inexpert in the science of psychiatry to probe intelligently the foundations of adverse testimony." Id. See also United States v. Kovel, 296 F.2d 918, 921-22 (2d Cir. 1961) (analogizing the interpretation of a client's finances by an accountant with the interpretation of a client's foreign language by a nonlawyer proficient in the language).
\textsuperscript{208} See Smith, 425 F. Supp. at 1047; discussion supra Parts I-II. In contrast, some courts "have taken a restrictive view, holding that the privilege will cover communications only with those agents who are 'essential to the lawyer's performance of legal services,' and under his direct personal supervision." Stone & Liebman, supra note 197, § 1.11 (quoting Burlington Indus v. Exxon Corp., 65 F.R.D. 26 (D. Md. 1974)). One court further restricted the application of the privilege to "ministerial" agents of the attorney, holding that "[t]he only recognized exception to the rule that the communication must be directly between client and attorney, is for ministerial agents of the attorney (such as clerks or stenographers) whose assistance is essential in the ordinary performance of legal services." Id. (quoting FTC v. TRW, Inc., 479 F. Supp. 160, 163 n.7 (D.D.C. 1979), aff'd, 628 F.2d 207 (D.C. Cir. 1980)).
\textsuperscript{209} See supra note 5 and accompanying text.
\textsuperscript{210} See supra note 6 and accompanying text.
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the third-party professional’s role goes beyond that of a conduit of information between attorney and client, the client risks losing the confidentiality that the attorney alone could guarantee.

Similarly, the client’s own communications with third-party professionals may not be protected by the attorney-client privilege. This issue was addressed in United States v. Kovel, a case extending the attorney-client privilege to communications made by a client to an accountant who was acting as a fact-gatherer and interpreter for the lawyer. In that case, the court wrote:

Accounting concepts are a foreign language to some lawyers . . . . [I]f the lawyer has directed the client, either in the specific case or generally, to tell his story in the first instance to an accountant engaged by the lawyer, who is then to interpret it so that the lawyer may better give legal advice, communications by the client reasonably related to that purpose ought fall within the privilege . . . . What is vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer. If what is sought is not legal advice but only accounting service . . . or if the advice sought is the accountant’s rather than the lawyer’s, no privilege exists.

In contrast to the approach taken in Kovel, the goal of the interdisciplinary approach is to provide holistic care to the elderly client. Therefore, the services sought from the third-party professionals may be medical, social, or financial, as opposed to legal. Because a client’s communications to third-party professionals for purposes other than assisting the attorney in rendering legal services are not privileged, the client risks losing the protection of the attorney-client privilege under an interdisciplinary approach.

CONCLUSION

The elderly client’s complex needs are best served by using an interdisciplinary approach to client services. The risk of violating the Code and Model Rules and the potential for jeopardizing client confidentiality

211. 296 F.2d 918 (2d Cir. 1961).
212. Id. at 922 (citation omitted). See also United States v. Schwimmer, 892 F.2d 237, 243 (2d Cir. 1989) (“Information provided to an accountant by a client at the behest of his attorney for the purposes of interpretation and analysis is privileged to the extent that it is imparted in connection with the legal representation.”), on remand, 738 F. Supp. 654 (E.D.N.Y. 1990), aff’d, 924 F.2d 443 (2d Cir.), cert. denied, 112 S. Ct. 55 (1991); United States v. Mullen & Co., 776 F. Supp. 620, 621 (D. Mass. 1991) (“The privilege extends to communications made [by the client] to certain agents of an attorney, including an accountant hired to assist the client’s attorney so that the attorney can provide legal advice.”); Cf. J. K. Lasser & Co. v. Duchan, 448 F. Supp. 103, 108 (E.D.N.Y. 1978) (holding privilege does not extend to client’s communications with accountant, where the accountant’s work can tell the lawyer nothing germane to the legal issues).
213. See, e.g., In re John Doe Corp., 675 F.2d 482, 488-89 (2d. Cir. 1982) (holding that disclosures to an accountant to resolve audit issues and to underwriting counsel are not privileged); In re Horowitz, 482 F.2d 72, 80-82 (2d Cir.) (holding disclosures unrelated to the seeking of legal advice not privileged), cert. denied, 414 U.S. 867 (1973).
should not be barriers to using this approach. The Code and Model Rules should be modified to permit the offering of interdisciplinary services while maintaining client confidentiality. Creating exceptions to confidentiality for inter-professional communications made on behalf of the elderly client would facilitate an interdisciplinary approach. The most effective modification would allow the formation of lawyer-nonlawyer partnerships, enabling professionals to work together as equals to provide the most effective interdisciplinary services to the elderly client. Although it is important to consider the destructive effect that communication to third parties may have on the client’s ability to claim the attorney-client privilege, this potential for loss of client confidentiality exists only in the litigation setting. Thus, given the advantages of employing an interdisciplinary approach to elderly client services, the only future risk for elderly clients is that the legal profession will fail to use all of its resources and skills to assist this increasing segment of the population.