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Attorney Papers, History and Confidentiality: A Proposed Amendment to Model Rule 1.6

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ATTORNEY PAPERS, HISTORY AND CONFIDENTIALITY: A PROPOSED AMENDMENT TO MODEL RULE 1.6

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INTRODUCTION

On November 22, 1963, President John F. Kennedy was assassinated in Dallas, Texas.[1] That evening, the government arrested Lee Harvey Oswald and charged him with the assassination.[2] Two days later, on November 24, 1963, Jack Ruby shot and killed Oswald.[3] Since that weekend, conspiracy theorists have speculated that Oswald may have acted in concert with others.[4] What if, during the two days between his arrest and murder, Oswald had spoken with an attorney? What if he had told that attorney what really happened? What if he had told the attorney the name of the assassin and provided proof, but told the attorney not to reveal this information because he feared what could happen to his family?[5]

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1. Hugh Trevor-Roper, *Introduction* to Mark Lane, Rush to Judgment 7, 7 (1966).

2. Mark Lane, Rush to Judgment 81 (1966).

3. Trevor-Roper, *supra* note 1, at 7.

4. *See, e.g.*, David W. Belin, November 22, 1963: You Are the Jury 475 (1973) (inviting readers to draw their own conclusions about whether Oswald killed Kennedy); Lane, *supra* note 2, at 36 (stating that one would have to ignore the accounts of several witnesses to believe that the only shots came from Oswald's location); Leo Sauvage, The Oswald Affair: An Examination of the Contradictions and Omissions of the Warren Report 273-81 (Charles Gaulkin trans., The World Publishing Co. 1966) (1965) (offering three different conspiracy theories to explain the Kennedy assassination).

5. This hypothetical is not unlike one used to begin a 1988 National Law Journal article addressing the same issue as this Note. *See* David A. Kaplan, *A Matter of Truth or Confidences: Does Attorney-Client Privilege Outweigh Demands of History?*, Nat'l L.J., July 4, 1988, at 36. The hypothetical in that article described John Wilkes Booth seeing an attorney after the assassination of Abraham Lincoln but before Booth's death. *Id.*

Under the current ethics rules, that attorney would not be able to disclose the information that Oswald gave him, even after Oswald's death.[6] The Model Rules of Professional Conduct ("Model Rules") prohibit an attorney from disclosing information that clients communicate in confidence,[7] and this prohibition survives the death of the client.[8] Thus Oswald's hypothetical attorney, though she possessed information of incredible historical import, would have to take the information to her grave because of the duty of confidentiality.[9] While attorney confidentiality rules have persuasive justifications,[10] such a result is unnecessary. An amendment to existing attorney ethics rules, if carefully crafted, could allow historical disclosure while still encouraging client candor.

This Note examines the relevant ethics rules pertaining to lawyers' duty of confidentiality and proposes an exception to that duty. Although currently the duty of confidentiality prohibits disclosure of client confidences, the proposed amendment to the rule would allow attorneys to donate their files that pertain to deceased clients to historical repositories, as long as the potential benefit to history outweighs the harm that may be done to the deceased client or his family. The exception to the duty of confidentiality proposed by this Note will benefit history by making significant information available while limiting the chilling effect on attorney-client communication that could accompany such a proposal. Part I discusses the historical and legal sources and justifications for the duty of confidentiality. Part II outlines the conflict that exists between the duty of confidentiality and the potential value of attorneys disclosing confidences that have historical significance. Part III argues that an exception allowing disclosure, if carefully crafted, would not conflict with the justifications for the current nondisclosure rules. This part then details previous attempts to craft an exception for historical disclosure, and demonstrates their shortcomings. Finally, Part III proposes a new amendment to Model Rule 1.6 that would allow attorneys to donate their files and at the same time protect deceased clients' reputations and property interests.

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6. *See infra* notes 90-91 and accompanying text.

7. Model Rules of Prof'l Conduct R. 1.6(a) (1998) [hereinafter Model Rules].

8. *See infra* note 90 and accompanying text.

9. *See* Jerold S. Auerbach, *Lawyers' Papers as a Source of Legal History: The 20th Century*, 69 Law Libr. J. 310, 310 (1976) ("The principle of lawyer-client confidentiality has virtually removed from historians' scrutiny the inner workings of the professional practice of any modern lawyer."). *But see infra* notes 131-39 and accompanying text (discussing attorneys who have donated their files to historical repositories despite the duty of confidentiality).

10. *See infra* Part I.C (discussing the justifications behind the duty of confidentiality).

I. BACKGROUND AND JUSTIFICATIONS FOR THE DUTY OF CONFIDENTIALITY

Confidentiality of client information is a "cornerstone of the attorney-client relationship"[11] and is deeply ingrained "in the traditional notion of the Anglo-American client-lawyer relationship."[12] The duty of confidentiality stems from two separate but related bodies of law: the ethical rules that require confidentiality and the attorney-client privilege.[13] The ethical rules require an attorney to hold client confidences inviolate in and out of court.[14] The attorney-client privilege, on the other hand, is an evidentiary privilege that addresses when an attorney may be compelled to testify about communications with a client.[15] Therefore, although the two doctrines are based on similar justifications,[16] they differ in scope.[17] This Note primarily addresses issues pertaining to the duty of confidentiality; the attorney-client privilege is discussed only as it relates to the ethical duty.[18] This part examines the sources of the ethical duty to hold clients' confidences inviolate, as well as the justifications for this duty.

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11. Lee A. Pizzimenti, *The Lawyer's Duty to Warn Clients About Limits on Confidentiality*, 39 Cath. U. L. Rev. 441, 443 (1990).

12. Charles W. Wolfram, Modern Legal Ethics § 6.1.1, at 242 (1986).

13. Model Rules, *supra* note 7, R. 1.6 cmt. 5. Some commentators argue that the two sets of rules covering confidentiality should be unified into one body of law. *See* Harry I. Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 Iowa L. Rev. 1091, 1159 (1985) ("The coexistence of two disparate sets of confidentiality rules has resulted in incoherent and unprincipled standards governing disclosure of client misconduct. In order to rationalize the law, one standard must be adopted.").

14. 24 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure: Evidence § 5472, at 90 (1986).

15. The most commonly cited description of the attorney-client privilege is:

> (1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived.

8 John Henry Wigmore, Evidence in Trials at Common Law § 2292, at 554 (John T. McNaughton rev. ed., 1961).

16. *Compare,* Wolfram, *supra* note 12, § 6.1.3, at 243 (stating that the attorney-client privilege rests upon, *inter alia*, the idea that lawyers must be able to ensure confidentiality "to obtain client disclosure"), *with* Model Rules, *supra* note 7, R. 1.6 cmt. 4 (indicating that the obligation of confidentiality encourages clients "to communicate fully and frankly with the lawyer").

17. 24 Wright & Graham, Jr., *supra* note 14, § 5472, at 90. Furthermore, the two doctrines "are administered in a different spirit; ethics committees tend toward expansive notions of confidentiality, while courts, in similar situations, lean toward narrower constructions of the privilege." *Id.* For a discussion of the conflicting views of the State and the bar on the law governing lawyers, see Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. Rev. 1389 (1992).

18. In general, the ethical duty of confidentiality sweeps more broadly and covers more information than the attorney-client privilege. *See* Brian R. Hood, Note, *The Attorney-Client Privilege and a Revised Rule 1.6: Permitting Limited Disclosure After the Death of the Client*, 7 Geo. J. Legal Ethics 741, 745-46 (1994).

A. *Agency Law*

An attorney's duty not to disclose client confidences derives from agency law,[19] which governs lawyers because attorneys act as their clients' agents.[20] According to the Second Restatement of Agency, an agent owes "a duty to the principal not to use or to communicate information confidentially given him by the principal or acquired by him during the course of or on account of his agency or in violation of his duties as agent."[21] This prohibition applies even after the end of the agency relationship.[22] Similar to the attorney ethics rules,[23] agency law provides certain exceptions to the duty of confidentiality.[24] The scope of the exceptions in agency law, however, conflicts with the prevailing view in ethics codes about the scope of confidentiality.[25]

B. *American Bar Association Ethics Codes*

Although the duty of confidentiality has its origins in agency law,[26] it has recently been dominated by attorney ethics codes. For most of the twentieth century, a separate code of professional conduct has governed lawyers.[27] The American Bar Association[28] ("ABA") has been the primary source of the rules defining the lawyer's duty of confidentiality.[29] The ABA's ethics codes evolved from a quick

19. Geoffrey C. Hazard, Jr. et al., The Law and Ethics of Lawyering 203 (3d ed. 1999); *see also* Wolfram, *supra* note 12, § 6.7.3, at 300 ("It is simply false professional posturing to pretend that self-regulation alone has resulted in lawyers assuming obligations of confidentiality toward their clients that external law does not already largely impose.").

20. *See* Fred C. Zacharias, *Rethinking Confidentiality*, 74 Iowa L. Rev. 351, 361 (1989) ("At the heart of attorney-client confidentiality rules is the notion that lawyers are clients' agents . . . .").

21. Restatement (Second) of Agency § 395 (1958).

22. *Id.* § 396.

23. *See infra* notes 37, 55-58, 73-75 and accompanying text.

24. *See, e.g.*, Restatement (Second) of Agency § 395 (allowing disclosure if "the information is a matter of general knowledge").

25. *See* Hazard, Jr. et al., *supra* note 19, at 203; *see also* Zacharias, *supra* note 20, at 362 ("[S]trict confidentiality rules forbid attorneys to disclose in a variety of situations in which other agents might have free rein to follow their consciences."). For example, agency law allows disclosure of information that is "general knowledge." Restatement (Second) of Agency § 395. The Model Rules contain no such exception. *See* Model Rules, *supra* note 7, R. 1.6 (b) (listing exceptions to confidentiality rule, none of which involve allowing disclosure if the information is generally known).

26. *See supra* note 19 and accompanying text.

27. Wolfram, *supra* note 12, § 2.6.1, at 48.

28. The purpose of the ABA, founded in 1878, *see id.* § 2.6.2, at 53, was for "'the advancement of the science of jurisprudence, the promotion of the administration of justice and a uniformity of legislation throughout the country.'" ABA, Division of Media Relations and Public Affairs, ABA History, *at* http://www.abanet.org/media/overview/phistory.html (last visited Mar. 28, 2001) (quoting the original ABA Constitution).

29. Hood, *supra* note 18, at 750. At its inception, the ABA was not concerned with devising standards of attorney conduct. *See* Wolfram, *supra* note 12, § 2.6.2, at

reference to the duty of confidentiality to substantial involvement with confidentiality regarding client information.[30] A brief history of the evolution of the duty of confidentiality in ABA codes follows.

1. The Canons of Professional Ethics

In 1908, the ABA adopted the Canons of Professional Ethics ("Canons").[31] While the ABA did not originally intend the Canons "to serve as a regulatory blueprint for enforcement through disbarment and suspension actions,"[32] it nevertheless anticipated that the Canons would play a significant role in the discipline of attorneys.[33]

The Canons, as amended in 1928, are comprised of a Preamble and forty-seven Canons. Canon 37, added in 1928, addresses the duty of confidentiality,[34] and states that an attorney must "preserve his client's confidences"[35] and that "[t]his duty outlasts the lawyer's employment."[36] At the same time, Canon 37 provides an exception to the prohibition against disclosure in two instances: (1) if an attorney is sued by his client; or (2) if a client intends to commit a crime.[37] In time, legal commentators argued that the Canons were "outdated and vague."[38] In response to these complaints, the ABA replaced them with the Model Code of Professional Responsibility ("Model Code").[39]

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53. Since 1928, however, it has been substantially involved in crafting attorneys' duty of confidentiality. *See infra* Part I.B.1-3.

30. Wolfram, *supra* note 12, § 6.7.2, at 297.

31. Canons of Prof'l Ethics (1928) [hereinafter ABA Canons].

32. Wolfram, *supra* note 12, § 2.6.2, at 54.

33. *See id.* at 55.

34. The Canons as promulgated in 1908 made only a passing reference to the duty of confidentiality. Canon 6 states that a lawyer's "obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed." ABA Canons, *supra* note 31, Canon 6. The ABA did not squarely address attorney-client confidentiality until the 1928 amendments.

35. *Id.* Canon 37. The Canons, however, do not define confidences. *See* Wolfram, *supra* note 12, § 6.7.2, at 297.

36. ABA Canons, *supra* note 31, Canon 37.

37. *Id.* Canon 41 seems to provide another exception to the duty of confidentiality. It states that when an attorney learns that his client has perpetrated a fraud on the court or a party, he should attempt to "rectify it; at first by advising his client, and if his client refuses to forego the advantage thus unjustly gained, he should promptly inform the injured person or his counsel." *Id.* Canon 41.

38. Wolfram, *supra* note 12, § 2.6.3, at 56.

39. Model Code of Prof'l Responsibility (1981) [hereinafter Model Code].

2. The Model Code of Professional Responsibility

In 1969, the ABA adopted the Model Code,[40] which consists of three types of provisions: Canons,[41] Ethical Considerations[42] and Disciplinary Rules.[43] The Canons in the Model Code are defined as "axiomatic norms,"[44] and are "general concepts from which the Disciplinary Rules and Ethical Considerations derive."[45]

The Ethical Considerations are "aspirational in character and represent the objectives toward which every member of the profession should strive,"[46] and as such, are "recommended but not required."[47] The Disciplinary Rules, however, are "mandatory in character"[48] and directly govern attorney conduct.[49] They provide the floor for lawyer conduct, below which an attorney is subject to a disciplinary sanction.[50]

According to Canon 4 of the Model Code, a "lawyer should preserve the confidences and secrets of a client."[51] The Disciplinary Rules associated with Canon 4 prohibit an attorney from "knowingly reveal[ing] a confidence or secret of his client."[52] The Model Code defines confidence as "information protected by the attorney-client privilege under applicable law,"[53] and a secret as "other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."[54] The Model Code, however, contains several exceptions to the prohibition on disclosure. A lawyer may reveal that which is normally prohibited if the client

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40. The Model Code does not have the force of law until adopted by a jurisdiction. *See* Wolfram, *supra* note 12, § 2.6.2, at 56. By the mid-1970s, almost every state had adopted some form of the Model Code. *Id.*

41. For an example, see Model Code, *supra* note 39, Canon 6 ("A lawyer should represent a client competently.").

42. For an example, see *id.* EC 6-5 ("A lawyer should have pride in his professional endeavors. His obligation to act competently calls for higher motivation than that arising from fear of civil liability or disciplinary penalty.").

43. For an example, see *id.* DR 6-102(A) ("A lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice.").

44. *Id.* Preliminary Statement.

45. Wolfram, *supra* note 12, § 2.6.3, at 58.

46. Model Code, *supra* note 39, Preliminary Statement.

47. Wolfram, *supra* note 12, § 2.6.3, at 59 (citation omitted).

48. Model Code, *supra* note 39, Preliminary Statement.

49. Wolfram, *supra* note 12, § 2.6.3, at 59.

50. Model Code, *supra* note 39, Preliminary Statement. Each state administers its own disciplinary process. *See, e.g.*, N.Y. Judiciary Law § 90(2) (McKinney 1983) (authorizing the four Appellate Divisions in New York to punish attorneys for ethical violations).

51. Model Code, *supra* note 39, Canon 4.

52. *Id.* DR 4-101(B)(1).

53. *Id.* DR 4-101(A).

54. *Id.*

consents,[55] if a court orders disclosure,[56] if the client intends to commit a crime and "the information [is] necessary to prevent the crime,"[57] or if the disclosure is necessary for the attorney to collect a fee or to defend herself against claims of wrongful conduct.[58]

3. The Model Rules of Professional Conduct

As with the Canons,[59] complaints quickly arose from the legal community about the Model Code.[60] As a result, in 1977, the ABA appointed a committee to redraft the Model Code.[61] The committee's work led to the adoption of the Model Rules of Professional Conduct in 1983.[62]

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55. *Id.* DR 4-101(C)(1).
56. *Id.* DR 4-101(C)(2).
57. *Id.* DR 4-101(C)(3).
58. *Id.* DR 4-101(C)(4).
59. *See supra* note 38 and accompanying text.
60. *See* Wolfram, *supra* note 12, § 2.6.4, at 60. Critics argued that the Model Code could be "clearer and more responsive to modern practice realities." *Id.* Additionally, some felt that the Model Code does not adequately address issues concerning attorneys in nonlitigation practices, and does not give adequate guidance to solo practitioners in "economically marginal practices." *Id.* For critiques of the Model Code, see Jerold S. Auerbach, Unequal Justice: Lawyers and Social Change in America 288 (1976) (indicating that the Model Code "restrict[s] access to legal services to a privileged clientele and monopolize[s] legal business for the established bar"); Jethro K. Lieberman, Crisis at the Bar: Lawyers' Unethical Ethics and What to Do About It 65 (1978) (stating that the Model Code assumes the bar is "homogeneous" when it is not); Thomas D. Morgan, *The Evolving Concept of Professional Responsibility*, 90 Harv. L. Rev. 702, 706 (1977) (stating that the Model Code places the interests of the attorney over the interests of the client or the public); Alvin B. Rubin, *A Causerie on Lawyers' Ethics in Negotiation*, 35 La. L. Rev. 577, 578 (1975) (indicating that the Model Code does not contain any provisions dealing specifically with the lawyer as a negotiator); Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 Cal. L. Rev. 669, 672 (1978) (criticizing the Model Code for focusing mainly on the lawyer as a litigator and largely ignoring an attorney's role as a nonadvocate); John F. Sutton, Jr., *How Vulnerable Is the Code of Professional Responsibility?*, 57 N.C. L. Rev. 497, 514 (1979) (reporting that many provisions in the Model Code "all too often create a false sense of simplicity by ignoring complicating factors"); Note, *Legal Ethics and Professionalism*, 79 Yale L.J. 1179, 1183 (1970) ("[T]he approach embodied in the [Model] Code has slight chance either of lessening the incidence of 'unethical' conduct or of improving the quantity of legal services available to the poor and the middle class.").
61. Wolfram, *supra* note 12, § 2.6.4, at 60-61. The committee was named the Kutak Commission after its chair, Robert Kutak. *Id.* § 2.6.4, at 61 & n.72.
62. Much controversy and debate arose during the adoption of the Model Rules, particularly concerning "proposals to expand and contract disclosure obligations." Mary C. Daly, *To Betray Once? To Betray Twice?: Reflections on Confidentiality, a Guilty Client, an Innocent Condemned Man, and an Ethics-Seeking Defense Counsel*, 29 Loy. L.A. L. Rev. 1611, 1620 (1996); *see also* Hood, *supra* note 18, at 753 (indicating that Rule 1.6's "expanded protection of client confidences was by a wide margin the most controversial rule during the drafting and ultimate adoption of the Model Rules").

The Model Rules consist of a preamble, a statement of scope, a section defining several relevant terms,[63] and fifty-two rules.[64] Explanatory comments follow each Rule[65] to illustrate what the Rule means and to explain the purposes behind it, but only "the text of each Rule is authoritative."[66] An attorney who does not comply with the rules is subject to the state disciplinary process.[67]

Model Rule 1.6 addresses the duty of confidentiality.[68] It does not distinguish between confidences and secrets,[69] but states that an attorney may not "reveal information relating to representation of a client."[70] This prohibition applies to all information that is related to the representation and is not limited to matters communicated by the client.[71] Yet, similar to the Model Code,[72] the Model Rules articulate limited exceptions to the duty of confidentiality. An attorney may reveal client information in three circumstances: (1) if a client consents;[73] (2) if it is necessary to prevent the client from committing a crime that "the lawyer believes is likely to result in imminent death or substantial bodily harm;"[74] or (3) if the disclosure is necessary "to

63. For an example, see Model Rules, *supra* note 7, Terminology ("'Reasonable' or 'Reasonably' when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.").

64. For an example, see *id.* R. 1.1 ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

65. For an example, see *id.* R. 1.1 cmt. 6 ("To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances.").

66. *Id.* Scope.

67. *Id.* Like the Model Code, the Model Rules do not have the force of law until they are adopted by a jurisdiction. *See supra* note 40. As of January 2001, forty-three states have adopted the Model Rules. *See* 2 Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering app. B at B-3 to B-4 (3d ed. 2001). Many of these states, however, made various changes to Model Rule 1.6 in the adoption process. *See* Harris Weinstein, *Client Confidences and the Rules of Professional Responsibility: Too Little Consensus and Too Much Confusion*, 35 S. Tex. L. Rev. 727, 733-36 (1994).

68. Model Rules, *supra* note 7, R. 1.6.

69. The Model Code, however, did distinguish between confidences and secrets. *See supra* notes 52-54 and accompanying text.

70. Model Rules, *supra* note 7, R. 1.6(a). Unlike the Model Code, the Model Rules do not limit the duty of confidentiality to situations in which disclosure would be embarrassing or detrimental to the client. *See supra* note 54 and accompanying text. Instead, the Model Rules prohibit disclosure regardless of whether the information "would embarrass or work to the detriment of a client." Wolfram, *supra* note 12, § 6.7.2, at 298.

71. Model Rules, *supra* note 7, R. 1.6 cmt. 5. The Model Code, in contrast, only protects information gained "in the professional relationship." Model Code, *supra* note 39, DR 4-101(A).

72. *See supra* notes 55-58 and accompanying text.

73. Model Rules, *supra* note 7, R. 1.6(a). This exception includes disclosures that are not expressly authorized but are necessary "to carry out the representation." *Id.*

74. *Id.* R. 1.6(b)(1). This exception is more limited than its counterpart in the Model Code, which allowed disclosure for future crimes without the imminent death

establish a claim or defense on behalf of the lawyer."[75] Otherwise, the attorney must adhere to the duty of confidentiality.

C. *Justifications for the Duty of Confidentiality*

Several justifications underlie the professional requirement of confidentiality.[76] Most prominently, the promise of confidentiality encourages clients to "communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter."[77] This frank communication allows the attorney to develop fully the "facts essential to proper representation of the client."[78] Absent the promise

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or substantial bodily harm requirement. *See* Model Code, *supra* note 39, DR 4-101(C)(3); *supra* note 57 and accompanying text; *see also* Wolfram, *supra* note 12, § 6.7.2, at 298 (stating that the Model Rules provide "a more limited exception for future client wrongdoing"). Some scholars have criticized this expansion of the duty of confidentiality. For example, one commentator has postulated that attorneys have limited discretionary disclosure in situations involving client misconduct "to avoid being sued." Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. Chi. L. Rev. 1, 12 (1998).

75. Model Rules, *supra* note 7, R. 1.6(b)(2). Some commentators have criticized the fact that the Model Rules, and the Model Code before it, *see* Model Code, *supra* note 39, DR 4-101 (C)(4), allow an attorney to disclose information to collect a fee or to defend herself, but do not allow the same lawyer to disclose confidences to protect or defend an innocent third party. *See, e.g.*, Fischel, *supra* note 74, at 10 ("The lawyer's interest in collecting a fee is apparently a higher priority than exonerating an innocent defendant about to be convicted of a capital crime .... Confidentiality means everything in legal ethics unless lawyers lose money, in which case it means nothing."); Hood, *supra* note 18, at 758-59 (characterizing Model Rule 1.6(b)(2) as a "moral double standard[]" and "mean-spirited and selfish"). A response to this argument is that

> lawyers may be deterred from taking cases and rendered excessively cautious in legal proceedings when they fear nonpayment or malpractice charges. Other plausible responses are that it is unfair and expects too much to require lawyers not to defend themselves from clients who are swindling or accusing them, or that by refusing to pay or accusing the lawyer the client is violating an implicit contract so that the lawyer's duty of confidentiality is voided.

Bruce M. Landesman, Confidentiality and the Lawyer-Client Relationship, *in* The Good Lawyer: Lawyers' Roles and Lawyers' Ethics 191, 193 (David Luban ed., 1983) (citation omitted). While not stated expressly in Canon 37, the Canons were interpreted to allow disclosure of client confidences in order to collect a fee. *See* ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 250 (1943).

76. For a discussion of the justifications of the confidentiality requirement in philosophical terms, see Pizzimenti, *supra* note 11, at 444-47.

77. Model Rules, *supra* note 7, 1.6 cmt. 4; *see also* Model Code, *supra* note 39, EC 4-1 ("A client must feel free to discuss whatever he wishes with his lawyer ....").

78. Model Rules, *supra* note 7, 1.6 cmt. 2; *see also* Model Code, *supra* note 39, EC 4-1 ("A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system."); People v. Belge, 372 N.Y.S.2d 798, 801 (Onondaga County Ct. 1975), *aff'd*, 376 N.Y.S.2d 771 (App. Div. 1975), *aff'd*, 359 N.E.2d 377 (N.Y. 1976) ("The effectiveness of counsel is only as great as the confidentiality of its client-attorney relationship. If the lawyer cannot get all the facts about the case, he can only give his client half of a defense."). One commentator placed this argument into a three-step syllogism:

> First, for the adversary system to operate, citizens must use lawyers to

of confidentiality, clients may not disclose all of the relevant facts needed for complete representation.[79]

Additionally, some argue that protecting client confidences encourages obedience to the law. Because the duty of confidentiality "encourages laymen to seek early legal assistance,"[80] laypersons who consult with an attorney before they act are advised about what the law is. Many clients follow the advice given by their attorneys and, as a result, the law is followed.[81]

Client autonomy provides another justification for the duty of confidentiality. This argument begins with the observation that a growing imbalance exists in the amount of power individuals possess in relation to both the government and private enterprises.[82] Increasingly, the State is regulating many relationships, both commercial and personal.[83] As a result, "the substantive and procedural complexity of the law" makes the process of autonomous decision-making nearly impossible for individuals who do not have a firm grasp of the law.[84] A general right to privacy relates to this idea.[85]

> resolve disputes and the lawyers must be able to represent clients effectively. Second, attorneys can be effective only if they have all the relevant facts at their disposal. Third, clients will not employ lawyers, or at least will not provide them with adequate information, unless all aspects of the attorney-client relationship remain secret. Thus . . . attorney-client confidentiality is the foundation of orderly and effective adversarial justice.

Zacharias, *supra* note 20, at 358 (citations omitted). More simply stated, "[T]he secret man heareth many confessions; for who will open himself to a blab or a babbler?" Sarah Helene Sharp, *On Being a Blab or a Babbler: The Ethics and Propriety of Divulging Client Confidences*, 11 Geo. J. Legal Ethics 79, 79 (1997) (citing Francis Bacon, *Of Simulation and Dissimulation*, *in* Essays and New Atlantis 22 (Walter J. Black ed., 1942)).

79. *See* Baird v. Koerner, 279 F.2d 623, 629-30 (9th Cir. 1960) (stating that proper assistance from an attorney "can be made safely and readily available only when the client is free from the consequences of apprehension of disclosure by reason of the subsequent statements of the skilled lawyer"); N.Y. St. Bar Ass'n. Comm. on Prof'l Ethics, Op. 479 (1978) ("If the client [suspects] that his confidences will not be adequately protected . . . , he will be far more likely to withhold information which he believes may be to his detriment or which he does not want generally known.").

80. Model Code, *supra* note 39, EC 4-1; *see also* Model Rules, *supra* note 7, R. 1.6 cmt. 2 (stating that the duty of confidentiality "encourages people to seek early legal assistance").

81. Model Rules, *supra* note 7, R. 1.6 cmt. 3 ("Lawyers know that almost all clients follow the advice given, and the law is upheld."); *see also* Deborah L. Rhode, *Institutionalizing Ethics*, 44 Case W. Res. L. Rev. 665, 673 (1994) ("By encouraging individuals to seek legal advice and to disclose relevant information, the attorney-client privilege and related ethical rules facilitate compliance with legal norms and appropriate resolution of legal disputes."). This voluntary compliance with the law is "particularly important to a free society which neither has nor should want sufficient law enforcement resources to search out and punish every violation of every law." *In re* Sealed Case, 124 F.3d 230, 237 (D.C. Cir. 1997) (Tatel, J., dissenting), *rev'd sub nom.* Swidler & Berlin v. United States, 524 U.S. 399 (1998).

82. Daly, *supra* note 62, at 1623.

83. *Id.*

84. *Id.* at 1623-24.

The client's right to control private information about himself "is a privacy right that is inherent to human dignity and to the development of trust."[86] A client's innermost thoughts should not be disclosed just because the client is compelled to give his attorney the information "to ensure the autonomy to which [he is] entitled."[87] Thus, confidentiality is necessary to preserve autonomy in the complex modern state.[88]

The duty of confidentiality, derived from agency law and codified in the Model Rules, has important and significant justifications.[89] It poses, however, severe obstacles when information is sought for the purpose of documenting history. The next part describes the conflict between the requirement that attorneys hold client confidences inviolate and the demands of history.

II. THE CONFLICT BETWEEN THE DUTY OF CONFIDENTIALITY AND THE DEMANDS OF HISTORY

The duty of confidentiality does not include an exception for historical disclosure after the death of the client.[90] Thus, an attorney could not ethically donate his files relating to a deceased client to an historical repository, even after his own death.[91] An exception to the duty of confidentiality allowing historical disclosure would supply historians with the information necessary to tell the story of the country's past.[92] Such an exception, however, may chill client communication[93] and does not comport with the notion that attorneys act as their client's fiduciaries.[94]

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85. *See* Pizzimenti, *supra* note 11, at 446.
86. Sharp, *supra* note 78, at 81.
87. Pizzimenti, *supra* note 11, at 446.
88. Daly, *supra* note 62, at 1624.
89. *See supra* Part I.C.
90. *See* Model Rules, *supra* note 7, R. 1.6(b) (listing exceptions to confidentiality rule, none of which involve disclosure for historical benefit); *see also* Miss. St. Bar, Op. 123 (1986) (the duty of confidentiality is owed to a deceased client); Miss. St. Bar, Op. 119 (1986) (same); Wash. St. Bar Code of Prof'l Responsibility Comm'n, Formal Op. 175 (1982) (same); Va. St. Bar Ethics Comm., Op. 812 (1986) (stating that the passage of time does not affect the duty of confidentiality). Apparently, such an exception was never even considered. *See* Kaplan, *supra* note 5 (quoting Geoffrey C. Hazard, Jr., the "principal draftsman" for the Model Rules, as saying "[t]he notion of an historical exception never was mentioned when we were writing the rules"). The Model Code also contains no such exception. *See* Model Code, *supra* note 39, DR 4-101(C) (listing exceptions to confidentiality rule, none of which involve disclosure for historical benefit).
91. Legal Ethics Comm. of the D.C. Bar, Op. 128 (1983) (stating that an attorney cannot donate his files to a university absent client consent if the files contain client confidences); Okla. Bar Ass'n Legal Ethics Comm., Legal Ethics Op. 301 (1983) (stating that the files of an attorney, whether he is dead or alive, cannot be donated to an historical institution even if they contain historically significant information).
92. *See infra* Part II.B.1.
93. *See infra* notes 97-105 and accompanying text.
94. *See infra* notes 111-15 and accompanying text.

Additionally, such a rule may not be necessary since many attorneys are already donating their files to historical repositories.[95] This part addresses the tension between Model Rule 1.6 and the potential value of information that attorneys possess.

A. *The Case Against Historical Disclosure*

Although a minimal amount of legal scholarship has been written either advocating or condemning a possible historical exception to the duty of confidentiality,[96] the probable arguments advanced against such a proposal are not difficult to predict. The primary argument against allowing attorneys to make their files available to historians lies in the justifications put forth for the existence of the confidentiality requirement.[97] If clients know that their attorneys will be able to make their files available to researchers in the future, they will be reluctant to be candid.[98] Thus, the danger is not to deceased clients but to current and future clients who may not be as frank with their attorneys if they know their communications may someday be revealed.[99] The knowledge that their secrets will remain confidential after their death "encourages . . . client[s] to communicate fully and frankly with counsel."[100]

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95. *See infra* notes 131-39 and accompanying text.

96. The National Law Journal addressed the issue in an article, *see* Kaplan, *supra* note 5, and an editorial. *See History vs. Ethics*, Nat'l L.J., July 4, 1988, at 12. A few years later, a student Note advocated an exception for historical disclosure. *See* Bonnie Hobbs, Note, *Lawyers' Papers: Confidentiality Versus the Claims of History*, 49 Wash. & Lee L. Rev. 179 (1992); *see also infra* notes 267-76 and accompanying text (discussing the rule proposed by Hobbs). Other students have addressed the more specific issue of disclosure by prosecutors. *See* Rita M. Glavin, Note, *Prosecutors Who Disclose Prosecutorial Information for Literary or Media Purposes: What about the Duty of Confidentiality?*, 63 Fordham L. Rev. 1809 (1995); Rachel Luna, Note, *The Ethics of Kiss-and-Tell Prosecution: Prosecutors and Post-Trial Publications*, 26 Am J. Crim. L. 165 (1998); *see also infra* note 266 (discussing these two Notes). A 1998 article discussed post-representation disclosure in general. *See* Hannibal B. Johnson, *The Propriety of Post-Representation Public Communication Defining the Contours of Lawyer-Client Confidentiality in the Information Age*, 22 J. Legal Prof. 85 (1998); *see also infra* notes 277-85 and accompanying text (discussing Johnson's proposal).

97. *See supra* Part I.C.

98. *See History vs. Ethics*, *supra* note 96 ("[I]f public perception is that [confidentiality] is merely one interest to be balanced against many others, individuals may be less candid with counsel."). A somewhat analogous argument partially justifies the secrecy that shrouds grand jury proceedings. *See* Fed. R. Crim. P. 6(e)(2) (mandating secrecy for those involved in grand jury proceedings). One reason often put forth in support of this rule is that it encourages grand jury witnesses to come forward and testify "fully and frankly, without fear of retribution." *In re* Craig, 942 F. Supp. 881, 882 (S.D.N.Y. 1996). For other commonly asserted justifications of Rule 6(e)(2). see *In re* Am. Historical Ass'n, 49 F. Supp. 2d 274, 282-83 (S.D.N.Y. 1999). For a discussion of a judicially crafted exception to Rule 6(e)(2) for historical purposes, see *infra* notes 164-75 and accompanying text.

99. Kaplan, *supra* note 5.

100. Swidler & Berlin v. United States, 524 U.S. 399, 407 (1998). One court stated it this way:

If the historical disclosure exception is limited to posthumous disclosure, clients may fear disclosure less, but this limitation is not likely to allay their fears completely.[101] Clients may still be concerned about their reputation,[102] potential harm to friends and family,[103] or exposure of their estate to civil liability.[104] Disclosure only of information that is not detrimental to the client's reputation and has significant historical value may still chill client candor. "Even a limited disclosure of relatively innocuous information" could end the client's confidence in the attorney's ability to keep the client's secrets inviolate.[105]

> The rationale behind [the duty of confidentiality] is as sound as it is elementary. The confidences communicated by a client to his attorney must remain inviolate for all time if the public is to have reverence for the law and confidence in its guardians. It is traditional in the legal profession that the fidelity of a lawyer to his client can be depended upon. The client must be secure in his belief that the lawyer will be forever barred from disclosing confidences reposed in him. It follows that if, in order to protect his secret utterances to counsel, the client or former client is required to reveal these utterances, the very purpose of the rule of secrecy will be destroyed, and the free flow of information from client to attorney, so vital to our system of justice, will be irreparably damaged.

United States v. Standard Oil Co., 136 F. Supp. 345, 355 (S.D.N.Y. 1955).

101. *Swidler & Berlin*, 524 U.S. at 407; *see also In re* John Doe Grand Jury Investigation, 562 N.E.2d 69, 71 (Mass. 1990) (stating that a rule that would allow an attorney to disclose client confidences, "even though such disclosure might be limited to the period after the client's death, would in many instances, ... so deter the client from 'telling all' as to seriously impair the attorney's ability to function effectively"); Simon J. Frankel, *The Attorney-Client Privilege After the Death of the Client*, 6 Geo. J. Legal Ethics 45, 60 (1992) ("Certainly some, indeed many, clients would actually be more reluctant to confide fully in an attorney if they knew that their death would leave their communications unprivileged.").

102. A great deal of evidence suggests that people are indeed concerned with their reputation after their death. *See In re* Sealed Case, 124 F.3d 230, 240 (D.C. Cir. 1997) (Tatel, J., dissenting), *rev'd sub nom.* Swidler & Berlin v. United States, 524 U.S. 399 (1998) ("From Andrew Carnegie's libraries to Henry Ford's foundation, one need only count the schools and universities, academic chairs and scholarships, charitable foundations, research institutes, and sports arenas ... bearing the names of their founders, benefactors, or authors to understand that human beings care deeply about how posterity will view them."). One author has argued that people's concern with their reputation even after their death is good for society because if they did not care about their reputation, "they would likely behave worse—morally and legally—while alive." Frankel, *supra* note 101, at 63.

103. *See* 2 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 199, at 380 (1994) ("Clearly a client is concerned not only about himself but about his larger human situation that includes spouses, parents, children, siblings, and extended family, friends, and business associates."). Evidence that people are concerned about the friends and family they leave behind after their death can be found in the fact that people write wills, purchase life insurance, invest money for their children's education and have guardianship arrangements in place. *In re Sealed Case*, 124 F.3d at 240 (Tatel, J., dissenting).

104. *Swidler & Berlin*, 524 U.S. at 407.

105. *See* Alan B. Vickery, Note, *Breach of Confidence: An Emerging Tort*, 82 Colum. L. Rev. 1426, 1434 (1982).

Given the competing interests of history and confidentiality, some scholars have asserted that the need to record history does not outweigh the need for client confidentiality. For example, Professor Monroe Freedman has argued that compared to the duty of confidentiality, "'[t]he demands of history are not that important.'"[106] In light of the fact that the information exists only because of the attorney-client relationship, he "scoffs at the notion of historians' rights."[107] Freedman concludes, "'So what if we don't find out that so-and-so had co-conspirators?'"[108] In a recent case in which the Supreme Court held that the attorney-client privilege survived the client's death,[109] the Court made a similar point. In response to the argument that posthumous application of the privilege causes valuable evidence to be unavailable, the Court indicated that absent an assurance that the attorney-client privilege will extend past the client's death, "the client may very well not have made disclosures to his attorney at all, so the loss of evidence is more apparent than real."[110]

Another possible objection to any proposed exception to Model Rule 1.6 for historical purposes is based on the "unique position of trust and confidence" between an attorney and client,[111] which is a result of their fiduciary relationship.[112] When a lawyer discloses information about a former client, she "undermines the fiduciary duty owed to that client."[113] Because the information that the attorney discloses is to be used only in the representation of the client,[114] critics are likely to claim that a proposal to allow historical disclosure offends the notion of lawyer as fiduciary.[115]

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106. Kaplan, *supra* note 5.

107. *Id.*

108. *Id.*

109. Swidler & Berlin v. United States, 524 U.S. 399 (1998).

110. *Id.* at 408.

111. Milbank, Tweed, Hadley & McCloy v. Boon, 13 F.3d 537, 543 (2d Cir. 1994); *see also In re* Cooperman, 633 N.E.2d 1069, 1071 (N.Y. 1994) (stating that the attorney is in a situation that requires the "ultimate trust").

112. *See, e.g.*, Lakoff v. Lionel Corp., 137 N.Y.S.2d 806, 809 (Sup. Ct. 1955) (recognizing "the grave fiduciary relationship between attorney and client"); *see also* Sharp, *supra* note 78, at 80 ("The obligation to maintain client confidences arises from the attorney's role as fiduciary.").

113. Mark E. O'Neill, Note, *Curtailing Post-Representation Extrajudicial Speech*, 47 Drake L. Rev. 379, 394 (1999). As one court wrote many years ago:

> Now, it is the glory of our profession that its fidelity to its client can be depended on; that a man may safely go to a lawyer and converse with him upon his rights or supposed rights in any litigation with the absolute assurance that that lawyer's tongue is tied from ever disclosing it; and any lawyer who proves false to such an obligation, and betrays or seeks to betray any information or any facts that he has attained while employed on the one side, is guilty of the grossest breach of trust. . . . In all things he must be true to that trust, or, failing it, he must leave the profession.

United States v. Costen, 38 F. 24, 24 (C.C.D. Colo. 1889).

114. O'Neill, *supra* note 113, at 394.

115. In a case in which the Supreme Court found that there is a therapist-patient

Moreover, any exception to the duty of confidentiality that includes a balancing test, such as the amendment to Model Rule 1.6 proposed in this Note,[116] increases the uncertainty of the duty. At the time the client communicates with her attorney, she often does not know whether the information imparted will later have historical value.[117] If the purposes of the duty of confidentiality are to be served, clients "must be able to predict with some degree of certainty whether particular discussions will be protected."[118] Because any type of exception to the duty of confidentiality that includes a balancing test will create uncertainty regarding future disclosure, the client may chose not to reveal information she fears may later be disclosed.[119]

Some have argued that, in light of the several exceptions to the duty of confidentiality that already exist,[120] adding an additional exception would not have a substantial effect on client candor.[121] This rationale, however, could lead to a "general erosion" of the duty, one exception at a time.[122] A few extra exceptions with individual marginal effects could collectively reduce clients' willingness to tell their attorneys embarrassing information.

Finally, an amendment to Model Rule 1.6 may not be necessary. Many attorneys have determined on their own that the historical

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privilege, the Court spoke about the importance of trust in that relationship. The Court indicated that communications made in counseling sessions may cause embarrassment and because of that, "the mere possibility of disclosure may impede development of the confidential relationship necessary." Jaffee v. Redmond, 518 U.S. 1, 10 (1996). This reasoning also applies to a lawyer-fiduciary. *See In re* Sealed Case, 124 F.3d 230, 238 (D.C. Cir. 1997) (Tatel, J., dissenting), *rev'd sub nom.* Swidler & Berlin v. United States, 524 U.S. 399 (1998).

116. *See infra* Part III.C.1.

117. *Cf. Swidler & Berlin*, 524 U.S. at 409 ("[A] client may not know at the time he discloses information to his attorney whether it will later be relevant to a civil or a criminal matter, let alone whether it will be of substantial importance.").

118. Upjohn Co. v. United States, 449 U.S. 383, 393 (1981). It has been argued, however, that:

> This stress on the need for certainty... conflicts with the underlying rationale for the privilege. So long as attorney-client privilege is justified... as a means to the end of maximum [client candor] courts should not neglect the competing costs incurred by its application. Certainty... may not itself be absolutely necessary, and even if it is, not all clients have an equal need for its protections.

Note, *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement*, 91 Harv. L. Rev. 464, 464 (1977).

119. The Supreme Court has made this point several times when rejecting balancing tests for different privileges. *See Swidler & Berlin*, 524 U.S. at 409 (rejecting a balancing test for the attorney-client privilege after the death of the client); Jaffee, 518 U.S. at 17-18 (rejecting a balancing test for a therapist-client privilege); *Upjohn Co.*, 449 U.S. at 393 (rejecting a balancing test for the corporate attorney-client privilege and stating that a privilege that is not certain "is little better than no privilege at all").

120. *See supra* notes 73-75 and accompanying text (listing exceptions to Model Rule 1.6).

121. *See infra* notes 224-29 and accompanying text.

122. *Swidler & Berlin*, 524 U.S. at 410.

benefit of the information in their files is more important than the duty of confidentiality. These lawyers have recognized the historical value of their papers and, in contravention of their ethical duties,[123] have disclosed confidential information, either by writing "tell-all" books[124] or by donating their files to historical repositories.[125] If lawyers are willing to breach confidentiality for the sake of history, an amendment to Model Rule 1.6 may not be needed to accomplish the benefits of historical disclosure.

Attorneys in highly publicized cases, whether lured by money, fame or a genuine desire to inform the public, have published books about their representations of clients[126] or the government.[127] Some of these attorneys have done so with the blessings of their clients,[128] while others may have written without consideration of their duty to keep their clients' confidences inviolate.[129] Several factors, such as television cameras in the courtroom, the large amount of coverage the media give high-profile cases and "the public's insatiable appetite for the inside story on sensational criminal trials" create increasing temptations for lawyers involved with high-profile cases to cash in on the public's interest and publish what they know.[130]

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123. *See supra* notes 90-91 and accompanying text.

124. *See infra* notes 126-27 and accompanying text.

125. *See infra* notes 131-39 and accompanying text.

126. *See, e.g.*, Alan M. Dershowitz, Reasonable Doubts: The O.J. Simpson Case and the Criminal Justice System (1996); William L. Dwyer, The Goldmark Case: An American Libel Trial (1984).

127. *See, e.g.*, Christopher A. Darden, In Contempt (1996); Leon Jaworski, The Right and the Power: The Prosecution of Watergate (1976); Alice Vachss, Sex Crimes (1993).

128. After representing Claus von Bulow in a highly publicized case, Alan Dershowitz wrote *Reversal of Fortune—Inside the von Bulow Case. See In re* von Bulow, 828 F.2d 94, 96 (2d Cir. 1987). The book "chronicle[d] the events surrounding [von Bulow's] first criminal trial, the successful appeal, and von Bulow's ultimate acquittal." *Id.* at 96. In *In re von Bulow*, the Second Circuit held that *Reversal of Fortune* constituted a waiver of von Bulow's attorney-client privilege for matters discussed in the book. *Id.* The decision was based upon, *inter alia*, the finding that von Bulow "acquiesc[ed] in and encourag[ed] the publication" of the book. *Id.* at 100.

129. Johnny Cochran, the lead defense attorney in the O.J. Simpson trial, "has publicly suggested that colleagues Robert Shapiro and Robert Kardashian may have violated attorney-client confidence for money in post-trial publishing ventures." John Gibeaut, *Defend and Tell: Lawyers Who Cash in on Media Deals for Their Clients' Stories May Wish They'd Kept Their Mouths Shut*, A.B.A. J., Dec. 1996 at 64, 65; *see also* Johnson, *supra* note 96, at 93 ("It is highly unlikely that every lawyer who has written a book or appeared on a television talk show actually consulted with and obtained the consent of the former clients about whose legal affairs he or she wrote or spoke.").

130. Glavin, *supra* note 96, at 1809; *see also* Johnson, *supra* note 96, at 87 ("The intense public interest in certain types of information and the hypnotic allure of pecuniary gain attendant to its release cannot be overestimated. Some lawyers will inevitably succumb to the temptation to breach lawyer-client confidences."). Lawyers who violate confidentiality rules often do so without punishment because, in many instances, these rules are simply not enforced. *See infra* notes 237-42 and accompanying text. For a discussion of the effect of allowing attorneys to violate the

Additionally, a number of lawyers have donated their papers to historical repositories. Harvard University houses the files of several prominent retired or deceased attorneys, including Louis Brandeis, Zechariah Chafee, Jr., Felix Frankfurter, Manley O' Hudson, Roscoe Pound, Thomas Reed Powell and Oliver Wendell Holmes.[131] At least some of these files are open for research. For example, Learned Hand's papers were donated "with the stipulation that they be prepared for research as soon as possible."[132] The Library of Congress also has the papers of several attorneys whose files are available for research purposes.[133]

When attorneys donate their files to historical repositories such as Harvard or the Library of Congress, they often do not address the duty of confidentiality.[134] Before 1987, even the Library of Congress never addressed this issue.[135] In that year, Joseph Rauh, Jr., an attorney who had been involved in the labor and civil rights movements and had represented Arthur Miller before the House Un-American Activities Committee, donated his files to the Library of Congress.[136] Rauh inquired about client confidentiality considerations and was surprised to learn that the Library had never before dealt with the issue.[137] After some discussion, Rauh and the Library eventually decided that researchers would be able to look through the files. They agreed that if an historian or journalist wished to publish information about living clients or those with active estates, she must obtain the consent of the former clients or the former clients' executors.[138] An historian, however, is free to publish any information from the files of deceased clients without active estates.[139]

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duty of confidentiality without punishment, see *infra* notes 243-47 and accompanying text. The issue of why ethics rules may be under enforced in some circumstances is beyond the scope of this Note.

131. Marsha Trimble, *Archives and Manuscripts: New Collecting Areas for Law Libraries*, 83 Law Libr. J. 429, 431 (1991). Harvard's collection "of over two thousand linear feet of papers dating from the sixteenth to the twentieth century is the largest and most significant in any law library." *Id.*

132. *Id.*

133. *See* R. Michael McReynolds, The Organization of American Historians Report on Historians and Access to the Files of Lawyers—An Archivist's Review 6 (Sept. 1995) (unpublished paper presented to The Organization of American Historians, on file with the Fordham Law Review). The list of attorneys whose papers are in the Library of Congress includes Thomas Corcoran, Joseph Rauh, Jr., Thurgood Marshall, William O. Douglas and Clement Haynsworth. *Id.*

134. *See* R. Michael McReynolds, The Archivist and Lawyers' Records 2 (Oct. 2, 1988) (Presentation to Society of American Archivists, on file with the Fordham Law Review).

135. Kaplan, *supra* note 5.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* Rauh settled for this agreement because it "was the most practical one [he] could think of." *Id.* For a discussion of the ethical problems involved with Rauh's agreement, see *infra* note 258 and accompanying text.

Moreover, the approaches taken by various archivists to address donations from attorneys that include client confidences may make an amendment to allow for historical disclosure unnecessary. One such approach is a sealed collection, an arrangement where, for a time period, normally set by the donor, only the donor himself has access to the files.[140] Another approach is a closed collection.[141] Unlike a sealed collection, in a closed collection the archivist processes the papers before the collection is closed to "glean valuable information from the papers before the archive forecloses access."[142] In a limited access collection, the donor sets restrictions on who has access to the documents and under what conditions the archives may grant access.[143] Additionally, repositories may employ a screening method in which attorneys look through papers to identify documents that contain client confidences and remove them.[144]

Because attorneys are already disclosing client confidences for historical purposes and because archivists have developed methods to address confidentiality concerns, an amendment to Model Rule 1.6 to allow for historical disclosure may be unnecessary.[145]

B. *The Case for Permissible Historical Disclosure*

Despite the importance of maintaining client confidences, some have argued for disclosure of client information for historical documentation. Mainly, commentators argue that such disclosure could provide overwhelming historical benefit[146] and there is little evidence to show that such an exception would significantly chill clients' communications with their attorneys.[147]

1. The Historical Benefit of Attorney Records

Regardless of how one feels about the propriety of lawyers making their confidential files available to researchers, such a practice would benefit the study of history. Attorneys shape history because they are involved "in events and with persons in the forefront of historical movements."[148] Their files contain the details of important people and

140. Hobbs, *supra* note 96, at 195.
141. *Id.* at 196.
142. *Id.*
143. *See id.* Joseph Rauh's agreement with the Library of Congress appears to be a limited access agreement. *See supra* notes 136-39 and accompanying text.
144. Hobbs, *supra* note 96, at 197.
145. *But see infra* notes 243-62 and accompanying text (arguing that nonenforcement of the current confidentiality rule creates disrespect for all of the ethics rules and that the methods developed by archivists to deal with the issue do not fully protect client confidences).
146. *See infra* Part II.B.1.
147. *See infra* Part II.B.2.
148. Hobbs, *supra* note 96, at 211; *see also* Trimble, *supra* note 131, at 442 ("[L]awyers have always played such a predominant role in our society.").

events "and document an ever-changing society."[149] These stories cannot be told if ethics rules remain in their present form.[150]

Lawyers' files may improve the accuracy of historical studies by "fill[ing] in important gaps" that are left by the initial recording of history.[151] Properly documenting history is important because a country that celebrates its heritage should "have no illusions about its past."[152] For example, what if Lee Harvey Oswald had not acted alone? It can hardly be argued that history books are complete if he had indeed acted with co-conspirators and the information is now languishing in an attorney's files, forever sealed by Model Rule 1.6.

Attorneys have made disclosures that have informed history despite the duty of confidentiality. In 1913, Leo Frank, a Jew, was convicted of murdering Mary Phagan, a thirteen-year old girl employed at his factory in Georgia.[153] His conviction was later attributed to anti-Semitism.[154] After Frank was sentenced to death, Governor Jack Slaton commuted his sentence to life in prison.[155] William Smith, the attorney for Jim Conley,[156] another employee of the factory,[157] was among those who petitioned Slaton to commute Frank's sentence.[158] After Frank's conviction, Smith disclosed to the trial judge that Conley had confessed to Smith that he was at the factory the day Phagan was murdered.[159] Conley, who had been drinking that day, remembered struggling with a girl and later seeing her dead body in the basement.[160] He hid the body and fled from the factory.[161] Smith's disclosure not only contributed to the commutation of Frank's sentence, but also provides more evidence for historians that Frank was innocent.[162] Thus, Leo Frank's story may be used to illustrate the benefits of lawyers' disclosures in correcting misunderstandings of events that have shaped history.[163]

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149. Hobbs, *supra* note 96, at 211.

150. *See supra* notes 90-91 and accompanying text.

151. *In re* Am. Historical Ass'n, 49 F. Supp. 2d 274, 297 (S.D.N.Y. 1999).

152. Street v. NBC, 645 F.2d 1227, 1236 (6th Cir. 1981).

153. Nancy MacLean, *Gender, Sexuality, and the Politics of Lynching: The Leo Frank Case Revisited*, *in* Under Sentence of Death: Lynching in the South 158, 158 (W. Fitzhugh Brundage ed., 1997).

154. Daly, *supra* note 62, at 1619 n.31.

155. Arthur G. Powell, I Can Go Home Again 289 (1943). Unfortunately, soon after the commutation, a mob broke into the prison where Frank was being held and lynched him. *Id.* at 291.

156. *See* Robert Seitz Frey & Nancy Thompson-Frey, The Silent and the Damned: The Murder of Mary Phagan and the Lynching of Leo Frank 38 (1988).

157. *Id.* at 15.

158. *Id.* at 78.

159. *Id.* at 58.

160. *Id.* at 58-59.

161. *Id.* at 59.

162. Georgia posthumously pardoned Frank in 1986. *Id.* at 156.

163. Smith was not the only one who had confidential information that confirmed Frank's innocence. Arthur Powell, a Georgia attorney during the Frank affair,

Some courts have addressed the historical exception issue in other fields of law, such as grand jury testimony. Although Federal Rule of Criminal Procedure 6(e)(2) mandates that testimony before a grand jury remain confidential,[164] courts have developed a history-based exception to this rule.[165] Arguably, the crafting of an historical exception to Rule 6(e)(2) is relevant to Model Rule 1.6 because one of the reasons for the grand jury secrecy rule is similar to an oft-stated justification for the lawyer's duty of confidentiality—that it encourages full and frank disclosure.[166]

In *In re American Historical Ass'n*,[167] a federal court considered whether to compel the Justice Department to release transcripts of testimony before two grand juries that investigated Alger Hiss,[168] ultimately deciding to order release of most of the requested portions of the transcripts.[169] In ordering the disclosure, the court found that the "public must acquire, at an appropriate time, a significant, if not compelling, interest in ensuring the pages of history are based upon the fullest possible record."[170]

The court made its determination by considering two plausible interests in keeping the material confidential.[171] Most importantly for the purposes of this Note, the court was concerned that future witnesses before a grand jury would be less forthcoming because of fears that their testimony would later be disclosed.[172] Although the court found this interest to be significant,[173] it was not enough to prevent the release of most of the requested material when other factors such as the historical importance of the transcripts were

published a book in 1943. *See* Powell, *supra* note 155. In his discussion of the Frank case, he indicated that he knew who actually killed Phagan and implied that he obtained the information when someone attempted to retain him as counsel. *See id.* at 291. Powell wrote that he would write down what he knew and seal it for later release. *Id.* at 291-92. No such letter from Powell, however, has been found. *See* Frey & Frey, *supra* note 156, at 137.

164. *See* Fed. R. Crim. P. 6(e)(2).

165. *See infra* notes 167-75 and accompanying text (discussing *In re Am. Historical Ass'n*).

166. *See supra* notes 77-79.

167. 49 F. Supp. 2d 274 (S.D.N.Y. 1999).

168. *See id.* at 277-78. In 1948, Whittaker Chambers, an admitted Communist, accused Alger Hiss, a former high-ranking State Department official, of spying for the Soviet Union. *Id.* at 279. The allegations "received immediate and focused public attention" because of the prominent positions that Hiss had held and because of his powerful friends. *Id.* Hiss was eventually convicted of perjury. *Id.* at 277.

169. *See id.* at 297.

170. *Id.* at 295.

171. *Id.* at 292.

172. *Id.* The second interest the court considered was the "interest in protecting the privacy" of others investigated in the grand jury proceedings whose names were not disclosed. *Id.* at 292. The court addressed this consideration by refusing to order the release of some of the pages of testimony. *Id.* at 293.

173. *Id.* at 292 (stating that this "interest should not be underestimated").

considered.[174] The court indicated that it was "confident that disclosure will fill in important gaps in the existing historical record, foster further academic and other critical discussion of the far-ranging issues raised by the Hiss case, and lead to additional noteworthy historical works on those subjects, all to the immense benefit of the public."[175]

In addition to providing history with more complete information about specific cases, some have argued that allowing attorneys to donate their confidential client files would open up the work of courts to public scrutiny. The justice system "play[s] a critical role in a democratic state and... the public has a legitimate interest" in observing that role.[176] As James Madison said, "[a] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both."[177] Lawyers play a substantial role in the justice system and, therefore are uniquely situated to inform the public about the workings of courts.[178] When attorneys reveal their experience with the legal system, they "enhance public understanding of the underlying incident, serving academic as well as practical functions."[179] The disclosing attorney shows the public how its government and court system operate, which is important knowledge for citizens in a democracy.[180] The country

174. *See id.* at 278, 297.

175. *Id.* at 297. Other cases have addressed these issues and reached similar conclusions about the release of grand jury testimony for historical benefit. *See, e.g., In re* Craig, 131 F.3d 99, 105, 107 (2d Cir. 1997) (holding that historical interest on its own can justify release of grand jury material but declining to order release in the immediate case). *But see* Hiss v. Dep't. of Justice, 441 F. Supp. 69, 71 (S.D.N.Y. 1977) (denying a request for release of grand jury testimony because of public interest and calling such an idea "mischievous").

176. Comm. on Prof'l Responsibility, Ass'n of the Bar of the City of New York, *The Need for Fair Trials Does Not Justify a Disciplinary Rule That Broadly Restricts an Attorney's Speech*, 20 Fordham Urb. L.J. 881, 881 (1993).

177. Glavin, *supra* note 96, at 1843 (quoting Letter from James Madison to W.T. Barry (Aug. 4, 1822), *in* 9 The Writings of James Madison, 1819-1836, at 103 (Gaillard Hunt ed., 1910)).

178. *See* Johnson, *supra* note 96, at 96-97 ("Lawyers are the best poised to keep the public informaed [sic] because they directly participate in and are responsible for the administration of justice.").

179. Luna, *supra* note 96, at 182; *see also* Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 839 (1978) ("The operations of the courts and the judicial conduct of judges are matters of utmost public concern."); Mills v. Alabama, 384 U.S. 214, 218-20 (1966) (discussing the importance of free information about the government).

180. *See* Johnson, *supra* note 96, at 87 ("The public's 'right to know' about matters affecting the administration of justice goes to the heart of life in an open and vibrant democracy."); *see also* Scott M. Matheson, Jr., *The Prosecutor, the Press, and Free Speech*, 58 Fordham L. Rev. 865, 883 (1990) ("The [Supreme] Court has recognized a state interest in fostering confidence in and preventing public misunderstanding of the judicial process."); Glavin, *supra* note 96, at 1843 ("The public interest in understanding how its government and representatives operate is a basic tenet of our democracy.").

"depends on 'robust debate' to determine the best answer to public controversies"[181] and such debate is possible only if sufficient information is available to the debaters.[182] Allowing attorneys to make their files available would provide some of this information.

2. Intuitive and Empirical Arguments for Historical Disclosure

An exception to Model Rule 1.6 to allow for historical disclosure may not significantly affect client candor. The duty of confidentiality is justified because it encourages clients to communicate fully and frankly with their attorneys.[183] There is little evidence, however, that allowing lawyers to make their files available for historical benefit would stop clients from openly communicating with their representatives. Legal scholars criticize the justifications for the confidentiality rule on both intuitive and empirical grounds.

Several legal scholars have questioned the premise that clients would be less forthcoming absent a promise of confidentiality because it is in the client's own self-interest to be candid.[184] In the complicated legal environment of American society, people often need attorneys' assistance. When a lawyer indicates that she needs complete information to provide adequate representation, the client is likely to disclose all of the relevant facts.[185] A client who receives poor assistance from his attorney because he did not provide full information "has only himself to blame."[186] Furthermore, many clients need immediate legal assistance simply to function, such as in an ongoing commercial transaction. In these instances, "the added inducement of confidentiality is unnecessary to encourage the client's candor."[187]

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181. Street v. NBC, 645 F.2d 1227, 1236 (6th Cir. 1981).

182. For a discussion of the importance of a general "right to know" in a democratic society, see Thomas I. Emerson, *Legal Foundations of the Right to Know*, 1976 Wash. U. L.Q. 1.

183. *See supra* notes 77-79 and accompanying text.

184. *See, e.g.*, Rhode, *supra* note 81, at 674; Zacharias, *supra* note 20, at 356-76; Subin, *supra* note 13, at 1163-66.

185. Subin, *supra* note 13, at 1163.

> [The] very need [for legal services] suggests that potential clients will use lawyers even if confidentiality is circumscribed. As matters become complex, laypersons have no choice but to consult the experts. The threat of being sued or the need to sue for redress of grievances necessarily drives clients to lawyers.

Zacharias, *supra* note 20, at 364.

186. Zacharias, *supra* note 20, at 366; *see also* City of San Francisco v. Superior Court, 231 P.2d 26, 30 (Cal. 1951) (en banc) ("Unless [the client] makes known to the lawyer all the facts, the advice which follows will be useless, if not misleading; the lawsuit will be conducted along improper lines, the trial will be full of surprises, much useless litigation may result." (internal quotation omitted)).

187. Subin, *supra* note 13, at 1164-65; *see also* Rhode, *supra* note 81, at 674 ("Historical, cross-cultural, and cross-professional research makes clear that practitioners [of other professions such as accounting and social work] have long

Additionally, the myriad of existing exceptions to the confidentiality rule[188] may call into question whether clients really understand the scope of the protections they are afforded. If clients speak freely to their attorneys after a full explanation of the exceptions to the duty of confidentiality, some argue that the justification for confidentiality becomes questionable.[189] A fully informed client could not be confident "as to what could safely be revealed."[190] If a lawyer, however, does not ensure that his clients fully understand the limits to confidentially, then another justification of the duty not to disclose—client autonomy—is sacrificed,[191] because confidentiality helps clients make informed decisions, which "enhances their dignity and autonomy."[192] Manipulation of clients hardly increases client autonomy.[193] An attorney "who seeks to encourage the client to reveal all by stating a rule of absolute confidentiality is hardly faithful" to client autonomy.[194] Moreover, some clients, despite honest attempts by attorneys to explain the rules, "are likely to remain confused at least as to details."[195]

Even if clients fully understand the confidentiality rules, they may still withhold information from their attorneys. For instance, clients may not believe their lawyers' promises of confidentiality.[196] Despite their assurances of confidentiality, attorneys have indicated that some clients are still reluctant to tell all; indeed, some clients even lie to their lawyers.[197] One practicing attorney recently noted that only "a naive lawyer . . . believes that clients tell everything."[198] Clients are most likely to be frank with a lawyer with whom they have a lasting attorney-client relationship.[199] That type of relationship creates a trust which "cannot be institutionalized by any code of ethics."[200] Thus,

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provided counseling on confidential matters without the sweeping protections from disclosure that the American bar has now obtained.").

188. *See supra* notes 73-75 and accompanying text (listing the exceptions to Model Rule 1.6).

189. *See* Subin, *supra* note 13, at 1165.

190. *Id.*

191. *See id.* at 1166; *see also* Swidler & Berlin v. United States, 524 U.S. 399, 414 (1998) (O'Connor, J., dissenting) ("[A]n attorney who tells his client that the expected communications are absolutely and forever privileged is oversimplifying a bit." (internal quotations and citations omitted)).

192. Zacharias, *supra* note 20, at 381 (internal quotations omitted).

193. *Id.*

194. *See* Subin, *supra* note 13, at 1166.

195. Zacharias, *supra* note 20, at 365.

196. *See* Subin, *supra* note 13, at 1163; *see also* Rhode, *supra* note 81, at 674 ("[W]hatever the rules, many individuals will be unwilling to trust their lawyers with compromising disclosures.").

197. Subin, *supra* note 13, at 1164.

198. Sharp, *supra* note 78, at 81.

199. *Id.*

200. *Id.*

confidentiality rules may not necessarily serve to enhance the attorney-client relationship.

Empirical studies have, to some degree, supported these intuitive attacks on the theoretical underpinnings of the duty of confidentiality. The two empirical studies conducted with regard to attorney-client confidentiality call into question the justifications for the duty.[201] In 1962, the *Yale Law Journal* conducted a study of the importance and effect of the attorney-client privilege, primarily in comparison with other professions.[202] The journal surveyed a number of attorneys, members of other professions and laypeople.[203] Although the Yale study results should not be given too much weight because the researchers did not use scientific sampling techniques,[204] the results still "provide valuable food for thought."[205] According to the Yale study, only about half of the laypersons surveyed felt that elimination of the attorney-client privilege would deter clients from speaking candidly with their attorneys.[206] Additionally, only 71 of 108 nonlawyers knew that attorneys are generally not allowed to disclose confidential client information.[207] These results indicate that although confidentiality has some effect on client disclosures, it is questionable "whether the effect is as substantial as proponents of confidentiality presume."[208] The Yale study at least shows that the degree to which confidentiality rules facilitate client disclosure is not obvious[209] and may "call into question the need for unlimited attorney-client confidentiality rules."[210]

A more recent study seems to support the *Yale Law Journal's* findings. In 1989, Professor Fred Zacharias undertook his own empirical study of confidentiality.[211] He conducted a survey of practicing attorneys and laypeople in Tompkins County, New York.[212] While Professor Zacharias' study suffers from similar limitations to the Yale study,[213] the results nonetheless offer some insights into how

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201. *See* Zacharias, *supra* note 20; Note, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 Yale L.J. 1226 (1962).

202. *See* Note, *supra* note 201.

203. *See id.* at 1226-27.

204. *See* Zacharias, *supra* note 20, at 377 n.119 ("First, the number of subjects was limited. Second, subjects were not chosen with sufficient randomness to assure the significance of the results. Third, the study was conducted by a legal periodical, without statistical rigor." (citations omitted)).

205. *Id.*

206. *See* Note, *supra* note 201, at 1236 n.59.

207. *See id.* at 1239 n.81.

208. Zacharias, *supra* note 20, at 378.

209. *Id.* at 379.

210. *Id.*

211. *See id.* at 352.

212. *Id.* at 379.

213. *See supra* note 204 and accompanying text. Professor Zacharias recognized the limitations of his study. *See* Zacharias, *supra* note 20, at 396 ("I would be the first

attorneys and clients view the duty of confidentiality, how that view affects how they act and the degree to which lawyers misunderstand the importance of nondisclosure to client candor.[214]

Although the results of Professor Zacharias' study support the idea that the nondisclosure rule "serves confidentiality's basic rationales,"[215] some of his findings call into question whether an additional exception to Model Rule 1.6 would have a chilling effect on client disclosure. According to the study, about half of the lay respondents stated that they would withhold information from their lawyers if there were no confidentiality guarantee.[216] Moreover, slightly less than a third indicated that they have given information to their lawyers that they would have withheld absent promises of confidentiality.[217] The responses suggest, however, "that many clients give information not because of confidentiality guarantees, but because they view lawyers as honorable professionals who customarily promise discretion."[218] The study revealed that many lay respondents misunderstood attorney confidentiality rules in relationship to confidentiality rules that may or may not govern other professions. A large percentage thought that doctors, psychologists and psychiatrists are just as obligated to preserve confidences as attorneys.[219] Even though lawyers are governed by more stringent nondisclosure rules, most nonlawyer respondents indicated that they would give information more readily to priests, doctors, psychologists or psychiatrists than to attorneys.[220] This result casts doubt on the importance and emphasis that attorneys and the ABA place on strict confidentiality rules.[221]

Additionally, the Zacharias study calls into question whether clients actually believe promises of attorney confidentiality.[222] Less than twenty percent of lay respondents believed that attorneys always keep matters confidential.[223] Arguably, if clients do not believe promises of

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to caution against overreliance on the Tompkins County study. Its sampling was limited, though substantial, and its methodology somewhat unscientific.").

214. Zacharias, *supra* note 20, at 380-81.

215. *Id.* at 380.

216. *Id.*

217. *Id.* at 381.

218. *Id.* This view is congruent with how some early courts viewed the attorney-client privilege. *See* Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 Cal. L. Rev. 1061, 1070 (1978) (indicating that some of the earliest cases that recognized the attorney-client privilege based it on the idea that "a gentlemen does not give away matters confided to him").

219. *See* Zacharias, *supra* note 20, at 384.

220. *Id.*

221. *Id.*

222. *See supra* note 196 and accompanying text (stating that clients may not believe attorney promises of confidentiality).

223. *See* Zacharias, *supra* note 20, at 383.

confidentiality to begin with, an additional disclosure option would have minimal effect on client frankness.

The study asked if the laypeople would communicate with their attorneys candidly if there were no guarantee of confidentiality, assuming that lawyers would normally keep their information secret.[224] Most respondents answered that they would not be frank.[225] They were then asked if they would still withhold information if the attorney guaranteed confidentiality except for "specific types of information which he/she described in advance."[226] In response, approximately fifteen percent said they would still withhold information.[227] Fifteen percent is a small percentage, especially in comparison to the slightly more than eleven percent of laypersons who indicated that they currently withhold information from their attorneys under the rules now in place.[228] As a result, based on this study, "[l]iberalizing disclosure exceptions apparently would not have a significant impact on most clients."[229]

Because of the immense potential benefit of historical disclosure and the arguments that a new exception would not have a substantial impact on client communications, an historical disclosure exception to the duty of confidentiality should be adopted. The next part concludes that the conflict between the duty of confidentiality and the demands of history can be resolved in a manner that addresses both concerns. Part III discusses the reasons for adopting an amendment allowing disclosure for historical purposes. It then reviews previous attempts to address historical disclosure of client information and analyzes the shortcomings of these attempts. Finally, addressing the problems in the previous proposals, Part III sets forth an amendment to Model Rule 1.6 that authorizes historical disclosure.

III. A NEW PROPOSAL TO AMEND MODEL RULE 1.6 TO ALLOW FOR HISTORICAL DISCLOSURE

While there is currently a conflict between attorney confidentiality rules and the possible historical benefits of information in attorney files, an amendment to those rules could address both concerns. A few commentators have recognized the benefits of historical disclosure and have suggested amendments to the duty of confidentiality. While these proposals have a laudable goal, they do not adequately address significant issues that arise in crafting this type of exception, such as improper motive and the proper time period for disclosure.

224. *Id.* at 386.
225. *Id.*
226. *Id.* (internal quotations omitted).
227. *Id.*
228. *Id.*
229. *Id.* at 395.

A. *Reasons to Adopt an Amendment for Historical Disclosure*

Because historical disclosure can be immensely beneficial,[230] an exception to the duty of confidentiality should be adopted. Intuitive and empirical arguments against the justifications for confidentiality[231] show that an exception for historical disclosure, if properly crafted, would not compromise client candor. The amendment proposed in this Note allows disclosure only after the death of the client. Once a deceased client's estate has been settled and the client is beyond the reach of both physical and financial harm, the only reason for concern about post-death disclosure is possible harm to reputation.[232] To suggest that clients have a great concern about how future generations view their communications with their attorneys, "[o]ne would have to attribute [to them] a Pharaoh-like concern for immortality."[233] While this may be an exaggeration, it is likely that in the "high-adrenalin situation likely to provoke consultation with counsel," posthumous reputational interests are likely not a predominant concern.[234] Given Professor Zacharias' finding that a limited exception, if explained in advance, would only marginally affect client candor,[235] an exception to allow for disclosure in some circumstances after the client's death will likely have little effect on client frankness.

Furthermore, while it may be argued that because attorneys are already donating their files, an historical disclosure exception to Model Rule 1.6 is unnecessary,[236] this argument misses an important point. The fact that attorneys already donate their papers in contravention of Model Rule 1.6 without punishment is evidence that steps need to be taken either to ensure compliance with the rule or to change it. One possibility is more stringent enforcement and punishment for violating attorneys by the state attorney discipline boards.[237] This approach, however, does not consider the vast

230. *See supra* Part II.B.1.

231. *See supra* Part II.B.2.

232. *See* Hood, *supra* note 18, at 767. *Cf.* Swidler & Berlin v. United States, 524 U.S. 399, 412 (1998) (O'Connor, J., dissenting) ("I agree that a deceased client may retain a personal, reputational, and economic interest in confidentiality. But, after death, the potential that disclosure will harm the client's interests has been greatly diminished . . . ." (citations omitted)).

233. 24 Wright & Graham, *supra* note 14, § 5498, at 484. *But see supra* note 102 (arguing that clients likely do care about their reputation after their death).

234. *In re* Sealed Case, 124 F.3d 230, 233 (D.C. Cir. 1997), *rev'd sub nom.* Swidler & Berlin v. United States, 524 U.S. 399 (1998). In that case, the court also stated that against the posthumous reputational interest, the client "may even view history's claims to truth as more deserving." *Id.*

235. *See supra* notes 224-29 and accompanying text.

236. *See supra* notes 123-39 and accompanying text.

237. *See* D'Alessio v. Gilberg, 617 N.Y.S.2d 484, 485 (App. Div. 1994) ("So strong is the State's regard for the confidentiality of attorney-client communications that an attorney exposes himself to possible disciplinary charges if he fails to keep confidential a communication from his client without the client's consent."); Pizzimenti, *supra* note 11, at 463 ("[A] state disciplinary board may discipline an

potential benefits of historical disclosure.[238] Moreover, those charged with enforcement of attorney ethics might not be interested in taking up this charge. For example, Robert Saltzman, President-Elect of the National Organization of Bar Counsel,[239] recently indicated that, absent a complaint about an attorney donating files that contained confidential information of deceased clients to an historical repository, "it's not likely that a disciplinary agency would open an investigation on its own."[240] Another possibility is for clients to sue their attorneys for breach.[241] Clients, however, are either uninterested in this course of action or do not have sufficient means available to protect their rights.[242] Thus, tighter enforcement does not appear to be the best option.

If the duty of confidentiality is not going to be enforced to prevent attorneys from donating their files to historical repositories, Model Rule 1.6 should be amended. If one rule is not enforced, respect for all ethics rules is diminished. Nonenforcement of Model Rule 1.6 "teaches lawyers to consider noncompliance with other rules that should be followed."[243] As President Theodore Roosevelt once stated, failure to enforce the law inevitably breeds "contempt for law."[244] If Model Rule 1.6 is not enforced in cases of historical disclosure, compliance with the ethical rules "becomes haphazard."[245] Some attorneys will feel obligated to follow the disclosure prohibition "even if the bar does not intend to enforce it across the board," while other lawyers will not feel the same obligation.[246] As a result, clients who

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attorney for violating the ethical responsibility to remain silent.").

238. *See supra* Part II.B.1 (discussing the potential benefits of historical disclosure).

239. The National Organization of Bar Counsel is an association of lawyers whose members enforce attorney ethics rules. Nat'l Org. of Bar Counsel, NOBC, *at* http://www.nobc.org/ (last visited Mar. 28, 2001).

240. Telephone Interview with Robert Saltzman, President-Elect, National Organization of Bar Counsel (Mar. 4, 2001) (on file with the Fordham Law Review).

241. *See* 2 Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice § 14.6, at 557 (5th ed. 2000) ("Malpractice liability can be predicated on a breach of a confidentiality. The attorney's motive in breaching the duty of confidentiality is not material since an unauthorized disclosure is the wrong."); Pizzimenti, *supra* note 11, at 463 ("[C]lients can maintain various civil causes of action for disclosure of... confidences.").

242. Apparently, no lawyer has been sued for donating his papers to a repository. *See* Trimble, *supra* note 131, at 445.

243. Zacharias, *supra* note 20, at 355 (emphasis omitted).

244. Marjorie E. Kornhauser, Corporate Regulation and the Origins of the Corporate Income Tax, 66 Ind. L.J. 53, 63 n.30 (1990) (citing Seventh Annual Message, 42 Cong. Rec. 67, 68 (Dec. 3, 1907)); *see also* Kenneth R. Davis, *A Model for Arbitration Law: Autonomy, Cooperation and Curtailment of State Power*, 26 Fordham Urb. L.J. 167, 176 (1999) ("When law is not enforced, society suffers because legal norms erode. Legal norms need exercise like muscles, and they will atrophy from disuse.").

245. Zacharias, *supra* note 20, at 354.

246. *Id.*

rely on the prohibitions on disclosure may be deceived.[247] Therefore, the integrity of the Model Rules would be best protected by amending Model Rule 1.6 to cover historical disclosure and provide guidelines for what some attorneys are already doing with regard to disclosure of client information.[248]

Archivists have developed various means to deal with the issue of confidential client information in attorney files, including sealed collections, closed collections, limited access collections and attorney screening.[249] These solutions, however, do not solve the problem of Model Rule 1.6 violations.[250] A sealed collection, in which only the donor has access to the files for a specified period of time,[251] may protect client confidences in the immediate future, but most are only sealed for a set time.[252] When the collection is opened, the duty of client confidentiality is violated.[253] If the collection is never opened, the beneficial historical information that the files contain[254] is never released. Indeed, it is pointless for an attorney to donate her files to an historical repository if they will never be opened for research purposes.

A closed collection, in which archivists sift through the files before the collection is sealed,[255] also does not withstand Model Rule 1.6 scrutiny. When the archivists review the documents before closing the collection, client confidences are exposed to the eyes of someone other than the client's attorney.

A limited access collection, in which the donor dictates who has access and under what conditions,[256] likewise does not adequately address confidentiality issues. Regardless of the restrictions that the donating attorney puts on access to the collection, he is still allowing others to look through files that contain client confidences. Joseph Rauh's agreement with the Library of Congress,[257] for example, is

247. *See id.* This lack of enforcement "breeds distrust of lawyers" because observers see that "at least some lawyers are willing to disobey ethical regulations." *Id.*

248. *See id.* at 354 n.15 ("Arguably, nonenforcement incorporates de facto exceptions into the strict confidentiality rules, thereby changing the prevailing law without forethought and debate.").

249. *See supra* notes 140-44 and accompanying text.

250. *See* Legal Ethics Comm. of the D.C. Bar, Op. 128 (1983) ("Donor-imposed restrictions on access to papers disclosing client confidences or secrets are not sufficient to avoid the ethical restrictions on disclosure unless they are agreed to by the affected clients.")

251. *See supra* note 140 and accompanying text.

252. *Id.*

253. *See supra* note 90 and accompanying text (stating that the duty of confidentiality is perpetual).

254. *See supra* Part II.B.1 (discussing the potential benefits to history of information in lawyers' files).

255. *See supra* note 142 and accompanying text.

256. *See supra* note 143 and accompanying text.

257. *See supra* notes 136-39 and accompanying text.

subject to this criticism. Even if researchers do not publish information about living clients obtained from Rauh's files, they are still accessing information protected by the duty of confidentiality.[258]

Even the attorney screening method, in which attorneys other than the client's attorney look through the donated files and remove documents that contain client confidences,[259] violates Model Rule 1.6. While confidential client information is kept from the public with this method, that information is still being disclosed to someone outside the lawyer-client relationship. The lawyers retained by the repository to screen the files obtain access to this information. The fact that they are attorneys does not constitute an adequate justification: they do not represent the client's interests. Model Rule 1.6 does not contain an exception for disclosure to other attorneys.[260] Additionally, some consider this review as a mere token exercise that does not actually serve to protect clients.[261]

Finally, while the above methods may provide some protections, archivists most commonly ignore the duty of confidentiality altogether,[262] which obviously does not protect clients. With attorneys and archivists failing to handle confidential files appropriately, the donating process should be covered by rules that afford the client better protection.

Because of the potential benefits that an historical disclosure exception would provide,[263] the likelihood that such an exception would have a minimal effect on client candor,[264] and the fact that attorneys are already making such disclosure without protecting client confidences,[265] an exception to the duty of confidentiality must be adopted. Realizing the importance of disclosure for historical purposes, others have attempted to create such an exception. The next section analyzes these previous proposals to allow for historical disclosure.

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258. Professor Freedman criticized the Rauh agreement because it allows researchers to look through files without clients' consent. Kaplan, *supra* note 5.

259. *See supra* note 144 and accompanying text.

260. *See* Model Rules, *supra* note 7, R. 1.6 (b) (listing exceptions to confidentiality, none of which authorizes disclosure to other attorneys simply because they are attorneys).

261. *See* McReynolds, *supra* note 134, at 2.

262. Law libraries were asked in a 1991 survey if their "confidential collections" were "open for research." Trimble, *supra* note 131, at 450. The overwhelming majority indicated that the collections were open—most with some restrictions. *Id.* Five libraries indicated that their confidential collections were closed either for a term of years (ranging from four to fifty) or until the death of the donor. No library indicated that the confidential collections would never be opened. *Id; see also* McReynolds, *supra* note 134, at 7 (stating that the Huntington Library in California, which houses a large number of law-related manuscripts, sees "the problem of client confidentiality as the responsibility of the donor").

263. *See supra* Part II.B.1.

264. *See supra* notes 183-229, 232-35 and accompanying text.

265. *See supra* notes 131-39, 236-62 and accompanying text.

B. *Previous Attempts to Craft an Historical Disclosure Exception*

Legal scholars have previously recognized the potential benefits of an historical disclosure exception to the duty of confidentiality and have proposed such an exception.[266] Unfortunately, these proposed amendments to the duty of confidentiality do not address many of the problems raised by such an exception.

The most comprehensive attempt to address the issue was undertaken in a student Note by Bonnie Hobbs in 1992.[267] Hobbs proposed that the following rule be added to ethics codes:

> (A) A lawyer may disclose information relating to the representation of a client, including information in written form, that the lawyer reasonably believes to be of historical significance, for the sole purpose of research and scholarship use,
>
> (1) with the informed consent of an individual client or entity client, or
>
> (2) with the consent of a deceased or dissolved client's representative.
>
> The lawyer may disclose the information only after full disclosure to and consultation with the client or the client's representative, and under such terms and conditions as the client or representative may dictate, including any restrictions the client or representative may wish to impose upon access to papers left in the possession of an archivist or institution.
>
> (B) If, after making every reasonable attempt to obtain consent, the lawyer
>
> (1) is unable to locate the client or a representative, and consent is therefore unavailable, or

266. *See* Johnson, *supra* note 96, at 98; *infra* notes 277-85 and accompanying text (discussing Johnson's proposal); *see also* Hobbs, *supra* note 96, at 202; *infra* notes 267-76 and accompanying text (discussing Hobbs' proposal). Some suggestions have involved the prosecutor's duty of confidentiality. For example, a student Note in 1995 suggested a rule to govern when prosecutors may disclose information after the end of prosecution. *See* Glavin, *supra* note 96, at 1846-47. This proposed rule, however, addresses from whom the prosecutor should obtain consent before disclosure, *id.*, and therefore is not inconsistent with Model Rule 1.6. A student piece from 1998 about post-case prosecutorial disclosure is slightly more relevant. *See* Luna, *supra* note 96, at 165. The author suggested a rule that implicitly authorizes prosecutors to make disclosures and simply states, "[w]hen considering if the waiver of her duty of confidentiality is in the public's interest, a prosecutor should consider the totality of circumstances." *Id.* at 185-86. Luna's Note also suggested commentary listing the factors that a prosecutor should consider when making the decision to disclose. *Id.* at 186. These factors, however, do not include an assessment of the historical benefit of the disclosure. *See id.*

267. Hobbs, *supra* note 96.

> (2) the lawyer makes a good faith determination that obtaining consent will be excessively burdensome or otherwise impracticable, and
>
> (3) there is no previous agreement with the client regarding the disposition of the information.
>
> The lawyer may disclose the information twenty-five years after the death of the client or the dissolution of an entity client, subject to whatever terms and conditions the lawyer may deem necessary or appropriate.[268]

Hobbs' proposed rule does not provide sufficient protection for client confidences. Most problematically, Hobbs' exception would allow attorneys to disclose information that they deem has historical value twenty-five years after the death of the client[269] without a consideration of the negative impact of such disclosure or positive impact of the information if released earlier. Specifically, this time limit on the duty of confidentiality does not take into account that a disclosure may cause harm to the deceased client's reputation or embarrassment to his family.[270] It also does not contemplate information that could be released sooner than twenty-five years without negative consequences. Such a broad, and, yet, at the same time, rigid exception would undermine any encouragement confidentiality may give clients to be full and frank with their attorneys.[271] At the same time, it would not allow disclosure of information that could be beneficial to historians in a prompt manner.[272]

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268. *Id.* at 202.

269. *Id.* The principal drafter of the Model Rules has suggested that there may already be a time limit on the duty in the Model Rules. In 1988, Geoffrey Hazard told the National Law Journal:

> Although I admit the rule on its terms speaks in perpetuity, any rule is always external to some social context and any system of rules contemplates that balance. Here, you've got to weigh the protection of confidences against our writing of history. My own view is that once all the players are dead and you skip a generation—say, 25 years—confidentiality ought not apply.

Kaplan, *supra* note 5.

270. Arguably, Part (A) of Hobbs' amendment addresses potential embarrassment or harm to the client and his family by requiring the informed consent of the client or, in the case of a deceased client, his representative. *See* Hobbs, *supra* note 96, at 202. An embarrassed client or family member would likely not consent to the disclosure. If the attorney is unable to locate the client to obtain consent, however, then Part (B) of Hobbs' proposal goes into effect and the information may be released twenty-five years after the client's death. *Id.* Considerations of potential embarrassment to the client or his family are not required in such a situation.

271. *See supra* notes 77-79 and accompanying text (explaining that one justification of the duty of confidentiality is to encourage clients to tell their attorneys all relevant information). *But see supra* notes 184-87, 224-29 and accompanying text (providing intuitive and empirical evidence that the duty of confidentiality may not affect whether clients are candid with their attorneys).

272. *See supra* Part II.B.1 (discussing the benefits of such information).

Furthermore, the rule proposed by Hobbs provides lawyers with wide discretion when deciding whether to make historical disclosures, but does not address outside influences that might tempt attorneys to abuse that discretion. Even with the strict confidentiality rules currently in place, attorneys have succumbed to desires for financial profits and have disclosed client confidences for pecuniary gain.[273] Under the Hobbs proposal, the same lure of monetary gain[274] may be present, but after twenty-five years the ethical prohibitions will be gone. Once the protection period has expired, some attorneys undoubtedly will make the decision to disclose based not on the altruistic motive of informing history, but on the money that they will receive.[275] The long time lapse may diminish this concern somewhat because public interest, and therefore the potential lucrativeness of disclosure, will wane with time in many cases. In many highly publicized cases, however, interest can be great more than twenty-five years after the death of the client, and thus the attorney may still benefit even after the time lapse.[276] Any rule, such as the one proposed by Hobbs, that gives attorneys such broad discretion must include restrictions that will prevent lawyers from abusing that discretion.

In 1998, Hannibal Johnson also advocated an exception to the confidentiality rule.[277] Johnson's rule is as follows:

> Public communication, oral or written, by a lawyer of information relating to representation of a former client is generally discouraged. In those cases in which the lawyer desires publicly to communicate information relating to the representation of a former client, the lawyer should seek both to consult with the former client with respect to [the] subject [to] which the prospective disclosure pertains and to obtain said former client's consent to the prospective disclosure. Factors to be considered by a lawyer, in his or her considered discretion, in determining whether disclosure of such information is proper in the absence of client consultation and consent include:

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273. *See supra* notes 126-30 and accompanying text.

274. An attorney in possession of valuable information could receive many benefits including:

> (i) lucrative book deals (and, to a lesser extent, sales of sensational stories to tabloids); (ii) appearances on talk shows (calculated, of course, to generate book sales and promote the business and professional interests of the guest); (iii) high-dollar speaking engagements and public appearances; and (iv) fame for its own sake (i.e., self-promotion).

Johnson, *supra* note 96, at 87.

275. *See supra* note 130 and accompanying text.

276. There can be little doubt that the attorney with the hypothetical information about Lee Harvey Oswald from the Introduction, *see supra* notes 1-5 and accompanying text, could benefit financially from that information even today, almost forty years after Oswald's death.

277. Johnson, *supra* note 96.

> (a) The potentiality, extent, and nature of the harm to the former client which may result from the disclosure;
>
> (b) The benefit to the public which may result from disclosure;
>
> (c) The impact on the public perception of the legal profession of the disclosure;
>
> (d) The extent to which the information sought to be disclosed has become generally known or may become generally known from an alternative source; and
>
> (e) The impact of the disclosure on the administration of justice and the harm of the public which may result in the absence of the disclosure.
>
> Notwithstanding the foregoing, a lawyer shall not disclose, in the absence of client consultation and consent, matters communicated to the lawyer in confidence by the client during the representation if such matters are subject to the lawyer-client evidentiary privilege.[278]

Johnson's rule does not explicitly refer to disclosures for the benefit of history, but states that one of the factors an attorney should consider when deciding whether to disclose client information is "[t]he benefit to the public which may result from the disclosure."[279] Because the basis of an historical disclosure exception to confidentiality is that such disclosure could benefit the public,[280] Johnson's rule covers such an exception.

While Johnson's proposal would allow some form of historical disclosure, it fails to address some serious concerns. Similar to the Hobbs proposal, Johnson's rule does not address the financial incentives that may lure an attorney to disclose client confidences.[281]

Additionally, the scope of the rule is unclear. The proposed exception states that the attorney cannot disclose any information that would be covered by the attorney-client privilege absent client consent.[282] While much of the information that is covered by the attorney-client privilege would be the same information that is protected by the duty of confidentiality, the two doctrines are not the same,[283] and they have different exceptions.[284] Johnson's proposal would adopt a rule that is intended only to govern when lawyers can be compelled to testify to establish the ethical duties of an attorney. Furthermore, the attorney-client privilege extends past the death of

278. *Id.* at 98.
279. *Id.*
280. *See supra* Part II.B.1.
281. *See supra* notes 273-76 and accompanying text (discussing problems of incentives for attorneys to disclose under the Hobbs proposal).
282. Johnson, *supra* note 96, at 98.
283. *See supra* notes 13-16 and accompanying text.
284. *See* Deborah L. Rhode & David Luban, Legal Ethics 230 (2d ed., 1995) ("[T]he attorney-client privilege is riddled with exceptions that are generally not exceptions to the duty of confidentiality.").

the client.[285] Thus, even absent the other problems, Johnson's proposed rule would be ineffective in informing history in cases where the client is deceased. Since the privilege would still apply after the client's death and the client obviously could not consent after death, this rule would not allow historical disclosure after the death of the client.

The rules that have been proposed to address the conflict between the duty of confidentiality and the benefits to history are flawed because they do not provide sufficient protection for client confidences. In an attempt to address the shortcomings of these prior proposed rules, the next section proposes a new amendment to Model Rule 1.6 that more fully addresses the problems and issues pertaining to historical disclosure of client information.

C. *A Proposed Amendment to Model Rule 1.6 to Allow Attorneys to Make Historical Disclosure*

1. The Text of the Proposed Amendment

Disclosure of historically relevant client information would provide an enormous benefit to society and would fill gaps in the historical record.[286] Both practicing attorneys and legal commentators have already recognized this potential benefit.[287] Additionally, both intuitive and empirically based reasons lead to the suspicion that historical disclosure would not have a significant negative effect on clients' frankness with their attorneys.[288] In light of these considerations, such an exception should be adopted. The following proposed amendment would authorize historical disclosure in the proper circumstances. The amendment should be added to Model Rule 1.6 immediately following paragraph (b):[289]

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285. *See* Swidler & Berlin v. United States, 524 U.S. 399 (1998) (holding that the attorney-client privilege survives the death of the client).

286. *See supra* Part II.B.1 (discussing the possible benefits of historical disclosure).

287. *See supra* notes 123-39 and accompanying text (practicing attorneys); notes 266-85 and accompanying text (legal commentators).

288. *See supra* Part II.B.2.

289. The amendment should be added immediately following the current language. The text of the current rule is as follows:

> (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).
>
> (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
>
> (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
>
> (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to

> (c) A lawyer may make his or her files and papers pertaining to the lawyer's representation of a deceased client available to historical repositories, including any parts of files that may reveal information covered by paragraph (a), provided that:
>
> (1) the sole purpose of the disclosure is to inform history;
>
> (2) the lawyer receives no financial benefit from the release of the files; and
>
> (3) after a review of the files, the attorney is reasonably convinced that the potential benefit to historical knowledge that could be gained from the information in the files outweighs any potential harm to the deceased client's reputation, family or property.
>
> If the attorney is deceased, the representative of his or her estate may make any disclosures that the attorney may have been able to make under this rule.

This proposed amendment[290] addresses both the potential negative effects on client candor and the potential benefit to history stemming from the disclosure.

First, an attorney could not make any disclosures until the client whose confidences are being disclosed is deceased. Until that time, unless the information fits into one of the other exceptions to Model Rule 1.6,[291] the client must give his informed consent before the lawyer can release any confidential information. This includes organizational or corporate clients, who, in this context, would be considered deceased when they are dissolved or cease to exist.[292] This requirement may lead to more donations of files related to individuals than corporate entities because many corporations never dissolve. While that result may be unfortunate, the requirement is necessary. If corporate clients expected that their communications might be disclosed before the dissolution of the corporation, they might censor what they tell their attorneys for both potential liability and reputational reasons. The proposed amendment requires that the attorney wait until after the death or dissolution of the client because as long as the client is alive, the decision to disclose should be made by the client. Crafting the rule this way makes the exception less likely to

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> 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.

Model Rules, *supra* note 7, R. 1.6.

290. While this proposal is for an amendment to the Model Rules, jurisdictions that retain the Model Code should also adopt this amendment. The amendment would be added as paragraph (E) of DR 4-101 in the Model Code.

291. *See supra* notes 73-75 and accompanying text (listing exceptions to Model Rule 1.6).

292. *Cf.* Hobbs, *supra* note 96, at 202 (advocating a rule that would allow historical disclosure twenty-five years after "the dissolution of an entity client").

affect client candor and is a responsible compromise with the demands of history.

Second, the proposed amendment limits the purpose of disclosure to informing history. Lawyers should not be able make their papers available for other reasons. If information in the files does not have historical value, the duty of confidentiality would require that the information be kept secret. This provision in the rule protects against lawyers releasing their files for nonaltruistic reasons, such as vindictiveness. If the files do not have historical value, a vindictive lawyer cannot disclose the information. If the information has historical value, there is some danger that unscrupulous attorneys might circumvent this requirement and claim that their motives were pure. The next section of the amendment, however, prohibits lawyers from benefiting financially from the disclosure.[293] Thus, even if the attorney's motive is unsavory, he cannot obtain material benefit from releasing the information.

Not allowing attorneys to benefit financially from the disclosure also protects clients and the reputation of the bar. Because lawyers profiting from the disclosure of deceased clients' confidential information would not project a respectable image of attorneys in general,[294] this provision ensures that disclosures under the historical exception will not reflect poorly on the practice of law. Yet, this rule would not prohibit attorneys from writing about information in files that they donated to historical repositories. Because the donating attorneys may not benefit financially, they likely would not be able to write a book about the information contained in the files. They could, however, write a law review article using the information, provided they received no compensation for it.[295] Additionally, they could give interviews to news organizations to provide the historical context for the information in the file, provided they were not paid for the interview and did not reveal confidential information not contained in the files.

The proposed amendment further protects clients by requiring an attorney contemplating disclosure to review the files in question and determine that the potential benefit outweighs the potential harm. This provision protects the client in several ways.

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293. Section (c)(2) of the amendment requires that the attorney who donates his files "receive[] no financial benefit from the release of the files."

294. The bar is already subject to scorn and ridicule by many laypeople. As any law student or lawyer knows all too well, there are numerous unflattering, but often amusing, jokes about the profession. *See, e.g.*, The New Yorker Book of Lawyer Cartoons (1993); (A) LAW(t of) FUN, *at* http://www.duhaime.org/fun.htm (last visited Mar. 2, 2001).

295. For example, under this rule, the attorney from the Leo Frank example, William Smith, *see supra* notes 153-63 and accompanying text, could write a law review article about the moral dilemmas faced by attorneys in situations in which they know their client is guilty of a crime for which someone else was convicted.

If the representation concluded years before the lawyer is considering donating the files to an historical repository, the attorney most likely will not remember everything in those files. Requiring the lawyer to review the files before disclosure ensures that she will be familiar with their contents. While performing the review, the attorney may discover information she had forgotten that could be damaging to the deceased client; such information, therefore, should cause the attorney to reconsider her decision to donate the files.

The file review also gives the attorney the opportunity to redact embarrassing information. Nothing in this amendment would force disclosing attorneys to donate entire files. If during the file review the lawyer discovered damaging information, she could withhold that part of the file when making the donation. Historians will likely not favor the idea of attorneys redacting information before donating files. They may argue that lawyers are not historians and thus do not fully understand what information is important to historians. Yet, if the attorney is not able to redact embarrassing information, she may not be able to donate any of the file.[296] Allowing the attorney to redact some information enables the attorney to release as much information as possible without causing harm to the client.

Finally, this provision requires attorneys to balance the benefit of the disclosure with the harm that could be caused to the deceased client and his or her family.[297] If the information has little historical value or the potential harm from the disclosure is substantial, disclosure would be inappropriate. This provision will make the decision whether or not to disclose in most cases fairly simple. The majority of cases are of little historical significance and disclosure of client confidences involved in such cases will not provide much, if any, benefit to history.

In high profile cases, however, the balancing calculus will be more challenging and will depend on the specific facts involved. The attorney in those situations must remember that the scales are weighted toward nondisclosure. If the lawyer is not reasonably convinced that the benefit outweighs the harm, he should not donate his files. This decision should not be made in a vacuum and the attorney should take into account objective factors. Factors to consider when assessing the historical value of the information include

296. When the attorney is considering whether to redact information from files, she should consider the same objective factors that are to be considered in determining whether to donate the files. *See infra* notes 298-303 and accompanying text.

297. Some historians may argue that an attorney is not equipped to judge the historical benefit of the information. In some cases, such as the information possessed by the hypothetical attorney in the Introduction, *see supra* notes 1-5 and accompanying text, the historical benefit will be obvious. In many cases, however, the value of the information may be less obvious. While there may be some merit to this objection, the attorney in possession of the files is, ethically, the only one who can do this balancing. Review by an historian would violate the duty of confidentiality.

the extent to which the information is already widely known or suspected,[298] whether significant public interest in the matter continues to exist and the amount of time that has elapsed since the event in question. If the information is already widely known, the damage done to the deceased client's reputation by disclosing embarrassing information is not substantial. As more time passes, the potential harm to the client is diminished, especially if public interest in the event is still high. When determining the potential harms of disclosure, the attorney should consider whether the information could expose the client's active estate to potential civil liability,[299] whether the information would stain the reputation of the deceased client,[300] or whether the information would harm the client's living relatives. If the information could expose the client's estate to liability, disclosure would not be appropriate.[301] Because some clients may be concerned about their reputation after their death,[302] consideration of the effect the disclosure might have on that reputation is necessary. Finally, consideration of family members who survive the client may affect candor if the client is not assured that those family members will be protected.[303] Therefore, the attorney should consider what effect the disclosure might have on living relatives for whom the client may have had concern.

The last part of the proposed amendment addresses the donation of an attorney's papers after the death of the attorney. The Model Rules govern only attorney conduct and impose no obligations on laypeople.[304] Therefore, if a layperson has possession of an attorney's files after the attorney's death, that person has no obligation to follow the dictates of Model Rule 1.6. She could thus choose to donate all of the deceased attorney's files, including papers that contain

298. *Cf.* Johnson, *supra* note 96, at 98 (proposing a disclosure rule in which attorneys considering making disclosures should consider, *inter alia*, how widely known the information already is).

299. *See infra* note 307.

300. *Cf.* Cohen v. Jenkintown Cab Co., 357 A.2d 689 (Pa. Super. Ct. 1976). In *Cohen*, a Pennsylvania appellate court held that after the death of the client, the necessity of the information should be balanced with the harm done to the former client when deciding if the attorney-client privilege should apply. *Id.* at 693. The court found that an attorney could testify that his deceased client admitted to committing perjury and striking a pedestrian with his car. *Id.* at 691. The court inexplicably stated that the disclosure did not "contain scandalous and impertinent matter which would serve to blacken the memory" of the deceased client. *Id.* at 693.

301. In such a situation, the attorney may remedy the problem by waiting until the close of the client's estate before making the disclosure.

302. *See supra* note 102.

303. *See supra* note 103 (discussing evidence that clients care about family members who survive their death).

304. *See* Model Rules, *supra* note 7, Scope ("The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies."); *see also* Miss. St. Bar, Op. 114 (1986) (stating that laypeople are not obligated to follow attorney ethics rules).

embarrassing client confidences, without regard to the duty of confidentiality.[305] While the Model Code encourages lawyers to "provide for the protection of the confidences and secrets of his client following the termination of the practice of the lawyer, whether termination is due to death, disability, or retirement,"[306] this encouragement is unenforceable, especially after the death of the attorney.[307] If the attorney leaves his papers to another lawyer or a lawyer is the executor of the attorney's estate, that attorney is bound by the Model Rules.[308] Because of this, the proposed amendment to Model Rule 1.6 gives an attorney in possession of a deceased lawyer's papers guidance on whether and how he can donate those files to historical repositories.

2. Application of the Proposed Amendment to Model Rule 1.6

This Note began with a hypothetical story about disclosures by Lee Harvey Oswald to his attorney in the days before his death.[309] It would be appropriate now to address how the proposed amendment to Model Rule 1.6 would operate in such a situation.

If the hypothetical attorney wished to disclose the information he received from Oswald, he would first have to ensure that Oswald had in fact died. For obvious reasons, in this situation, the inquiry would be easy to complete.

The next step would be for the lawyer to review the files that he is considering disclosing. After this review, he would have to balance the potential benefit of the information to historical knowledge against its potential harm to Oswald's reputation, property, or living family. Information revealing who assassinated President Kennedy would have obvious significant historical importance and thus would be eagerly sought by many historians. The release of such information would pose little harm to Oswald's reputation or property. Indeed, since he is currently regarded by most people as Kennedy's killer, information pointing to another shooter would deflect reputational harm away from Oswald and toward someone else. Oswald's initial concern in the hypothetical about protecting his

305. This fact could also be used to justify an exception for historical disclosure. Clients still disclose information to their attorneys even though the confidences may be revealed at the attorney's death if their papers are left to nonlawyers.

306. Model Code, *supra* note 39, EC 4-6.

307. Once an attorney is dead, she is obviously beyond the reach of the disciplinary process. She is not, however, beyond the reach of the civil system while her estate is still active. If an attorney can be sued by a client for breaching the duty of confidentiality, *see supra* note 241, then her estate may be liable for the same lapse. Thus, it would behoove laypeople who are the executors of deceased lawyers' estates to be conscious of the duty of confidentiality.

308. *See* Miss. St. Bar, Op. 114 (1986).

309. *See supra* notes 1-5 and accompanying text.

family would likely not be a concern now that almost forty years have passed since the Kennedy assassination.

If the attorney concluded that the balancing test favored disclosure, which would likely be the case, he would have to ensure that his sole purpose for making disclosure was to inform history. The files would have to be donated because the attorney could not benefit financially from their release. The attorney could simply donate the files to an historical institution such as the Library of Congress or the John Fitzgerald Kennedy Library and Museum. In this manner, historians would gain valuable information about the Kennedy assassination in a way that would likely have little effect on clients' willingness to be frank with their attorneys.

The amendment to Model Rule 1.6 proposed in this Note equips attorneys with the ability to donate files that contain valuable information to historical repositories. The attorney who wishes to do so must consider objective factors to determine whether the information has true value. He must then balance that value with the harm that the disclosure might cause, such as civil liability, reputational harm and harm to the client's living family. If clients are reasonably assured that these factors will be considered, this type of disclosure should have minimal effect on client candor.

CONCLUSION

In 1988, the National Law Journal asked in an editorial, "[w]hat kind of ethics code would seriously countenance that generations for all time could not learn the secrets of crucial earlier events solely because of" the duty of confidentiality?[310] The editorial concluded that adding an exception for historical disclosure "is an idea whose time has come."[311] Unfortunately, except for a few proposals,[312] little has been done to answer that call. It is still time for ethics code drafters to recognize the benefits of an exception to Model Rule 1.6 for historical disclosure. This Note provides an amendment that would promote these benefits while still protecting the client candor that is necessary in an effective attorney-client relationship.

310. *History vs. Ethics*, *supra* note 96.
311. *Id.*
312. *See supra* Part III.B.