

# Confidentiality Explained: The Dialogue Approach to Discussing Confidentiality with Clients

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“[A] little inaccuracy sometimes saves tons of explanation.”  
– Saki, *Clovis on the Alleged Romance of Business*<sup>1</sup>

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1. SAKI, *Clovis on the Alleged Romance of Business*, in *THE SQUARE EGG AND OTHER SKETCHES WITH THREE PLAYS* 135, 136 (Kessinger Publ'g 2005) (1924).

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## I. INTRODUCTION

Many lawyers begin their initial meeting with a client by explaining, “Everything between us is confidential.”<sup>2</sup> Generally, lawyers believe that this language will make the client trust the lawyer and encourage the client to share confidential information.<sup>3</sup> Nonetheless, this statement is a lie. The legal and ethical rules governing lawyers make some exceptions to confidentiality mandatory and others discretionary.<sup>4</sup> Moreover, the utility of pledging absolute confidentiality is questionable. First, clients are generally familiar with the concept of lawyer-client confidentiality from other experiences with lawyers or from popular culture,<sup>5</sup> and many clients already (mistakenly) think confidentiality is absolute.<sup>6</sup> Second, empirical evidence does not support the assumption that clients rely on a guarantee of absolute confidentiality when they decide whether to be candid with their lawyers.<sup>7</sup> Third, pledging absolute confidentiality creates the potential for betraying clients’ trust if lawyers later determine that they must disclose their clients’ confidences without having explained the bounds of confidentiality in the first place.

Commentators have offered alternatives to promising absolute confidentiality. Some seek to make the representation an honest one. They urge lawyers to promise not to exercise their discretion to disclose certain confidences, or even to pledge to commit civil disobedience when legal obligations would require disclosure if lawyers are going to commit themselves to absolute confidentiality. Other commentators suggest that lawyers provide clients with a very general reference to the existence of exceptions to confidentiality under the rules. A last group of commentators urges a very detailed description of these exceptions.

This Article offers an alternative dialogue approach. Rather than view the issue of explaining confidentiality either as a strategy for gaining

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2. See *infra* text accompanying notes 45, 52–53.

3. See *infra* notes 56–59, 71 and accompanying text.

4. See *infra* Part II.A.

5. See *infra* note 49 and accompanying text; see also 1 GEOFFREY C. HAZARD, JR. ET AL., *THE LAW OF LAWYERING* § 9.2, at 9-6 (3d ed. 2010) (“[A]lthough the public does not have a good grasp of the intricacies of the [confidentiality] rule, it has a keen awareness that confidentiality . . . is at the heart of the [lawyer-client] relationship.”).

6. See *infra* notes 75–76 and accompanying text.

7. See *infra* notes 73, 79–86 and accompanying text.

client trust or an obligation necessary to comply with certain legal obligations, we propose understanding it as a key element in creating a relationship of dialogue grounded in honesty and mutual respect.

In doing so, we build on the work of the late Fred Zacharias, whose scholarship in this area provides both pathbreaking empirical insights and unwavering commitment to respecting client dignity.<sup>8</sup> Among Zacharias's contributions are his oft-cited empirical study suggesting that lawyers wrongly assume that clients would not share confidential information if clients accurately understood that exceptions to confidentiality exist and his analytic insight that lawyers' claim to mislead clients for their own good reveals a deep distrust of clients' capacity to participate in dialogue with the lawyer.<sup>9</sup> Zacharias viewed this perspective as reprehensible disregard for the client's basic human dignity.<sup>10</sup> Although his two articles on *Rethinking Confidentiality* are most on point, these concerns are evident throughout the exceptional body of work he contributed to professional responsibility scholarship.<sup>11</sup>

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8. See Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351 (1989).

9. See *id.* at 386–88.

10. Zacharias astutely described the “trade-off between misleading clients and encouraging disclosure for their own good,” and in response to his own empirical study, he concluded:

Nevertheless, if conscious considerations drive lawyers' willingness to deceive clients, they undermine confidentiality's autonomy rationale. Lawyers hardly enhance client “dignity” as self-determinative individuals by hiding the truth from them. Exaggerating confidentiality's scope may induce clients to trust their lawyers, but it is not a healthy basis for the trust. Rather, it represents a calculated decision to encourage an inappropriate overreliance upon the lawyers' services. If subsequently discovered, that decision jeopardizes rather than enhances effective representation.

*Id.* at 387.

11. See *id.*; Fred C. Zacharias, *Rethinking Confidentiality II: Is Confidentiality Constitutional?*, 75 IOWA L. REV. 601, 641–42 (1990) [hereinafter Zacharias, *Rethinking Confidentiality II*]; see also Fred C. Zacharias, *Coercing Clients: Can Lawyer Gatekeeper Rules Work?*, 47 B.C. L. REV. 455, 480 (2006) [hereinafter Zacharias, *Coercing Clients*]; Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335, 357–65 (1994); Fred C. Zacharias, *Harmonizing Privilege and Confidentiality*, 41 S. TEX. L. REV. 69, 75–77, 93–96, 108–09 (1999) [hereinafter Zacharias, *Harmonizing Privilege and Confidentiality*]; Fred C. Zacharias, *Integrity Ethics*, 22 GEO. J. LEGAL ETHICS 541, 553–65, 586 (2009) [hereinafter Zacharias, *Integrity Ethics*]; Fred C. Zacharias, *Limited Performance Agreements: Should Clients Get What They Pay For?*, 11 GEO. J. LEGAL ETHICS 915, 941 n.137 (1998) [hereinafter Zacharias, *Limited Performance Agreements*]; Fred C. Zacharias, *Limits on Client Autonomy in Legal Ethics Regulation*, 81 B.U. L. REV. 199, 211 (2001) [hereinafter Zacharias, *Limits on Client Autonomy in Legal Ethics Regulation*]; Fred C. Zacharias, *Professional Responsibility, Therapeutic Jurisprudence, and Preventive Law*, 5 PSYCHOL. PUB. POL'Y & L. 909, 915–16 (1999) [hereinafter Zacharias, *Professional*].

We also acknowledge our debt to Clark Cunningham, whose article *How To Explain Confidentiality?*<sup>12</sup> is the model for our effort to investigate lawyer-client conversations regarding confidentiality and to categorize commentators' approaches to explaining confidentiality, and the inspiration for us to offer our own dialogue approach. Although we do propose a framework for explaining confidentiality, we remain mindful of Cunningham's advice that offering a "set of 'how to' directions" poses the danger of undervaluing the profound difficulty of the task.<sup>13</sup>

In Part II, the Article explains the mandatory and discretionary exceptions to confidentiality under the duty of confidentiality and the attorney-client privilege,<sup>14</sup> examines lawyers' reasons for failing to explain these exceptions honestly, and identifies the legal and moral considerations requiring candor to the client on this topic. Part III describes the three alternatives commentators have proposed for explaining confidentiality—that lawyers should agree to keep information confidential, give a general explanation, or give a detailed disclosure. In Part IV, the Article proposes a new way to discuss confidentiality. It takes a middle ground between the general and detailed approaches in order to encourage an honest and trusting dialogue between lawyer and client.

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*Responsibility*]; Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303, 1358–70 (1995) [hereinafter Zacharias, *Reconciling Professionalism and Client Interests*]; Fred C. Zacharias, *The Future Structure and Regulation of Law Practice: Confronting Lies, Fictions, and False Paradigms in Legal Ethics Regulation*, 44 ARIZ. L. REV. 829, 848–49 (2002) [hereinafter Zacharias, *The Future Structure and Regulation of Law Practice*].

12. Clark D. Cunningham, *How To Explain Confidentiality?*, 9 CLINICAL L. REV. 579, 615–16 (2003).

13. *See id.* Professor Levin arrived at a similar conclusion after conducting her own empirical research:

It is easy to say that clients should be told about this confidentiality exception, but much more difficult to decide who should learn of the rule and to devise a palatable and meaningful way to tell clients. In theory, all clients should be told explicitly about the disclosure rule because all are entitled to know the rules that govern their communications with their lawyers. As a practical matter, such a requirement could confuse many clients and seriously interfere with the development of client trust, thereby affecting lawyers' ability to represent their clients.

Leslie C. Levin, *Testing the Radical Experiment: A Study of Lawyer Response to Clients Who Intend To Harm Others*, 47 RUTGERS L. REV. 81, 145–46 (1994) (footnote omitted).

14. For purposes of this Article, we are focusing on confidentiality exceptions that arise only under the duty of confidentiality and the attorney-client privilege. We recognize that other laws also create exceptions, *see, e.g., infra* note 25, and we believe that our framework for dialogue would apply to those exceptions as well.

## II. UNDERSTANDING CONFIDENTIALITY

The most common justification for keeping client communications confidential, whether under the ethical duty of confidentiality or the attorney-client privilege, is that clients will not fully share all relevant information with lawyers if they do not believe lawyers will keep that information confidential, and that lawyers need full information to represent clients effectively.<sup>15</sup> Other commentators have offered a nonconsequentialist rationale grounded solely in respecting client autonomy.<sup>16</sup> Although clients can of course consent to disclosure,<sup>17</sup>

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15. See *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (noting the purpose of the attorney-client privilege “is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice”); MODEL RULES OF PROF’L CONDUCT pmbl. para. 8 (2010) (“[A] lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.”); *id.* R. 1.6 cmt. 2 (stating that the lawyer’s obligation to maintain confidentiality “contributes to the trust that is the hallmark of the client-lawyer relationship” because the client is “encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter”); 8 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 2291, at 545 (John T. McNaughton ed., 1961) (arguing the policy of the attorney-client privilege is “to promote freedom of consultation of legal advisers by clients [by removing] the apprehension of compelled disclosure by the legal advisers”); see also GEOFFREY C. HAZARD, JR. ET AL., *THE LAW AND ETHICS OF LAWYERING* 347 (4th ed. 2005) (“The most cited justification for the principle of client confidentiality is encouragement of clients to communicate fully with the lawyer and to seek early legal assistance even about embarrassing matters.”); 1 HAZARD ET AL., *supra* note 5, § 9.2, at 9-10 (“Although empirical evidence of the extent to which clients rely on the principle of confidentiality is sparse at best, it is intuitively obvious that it must play *some* role in shaping lawyer-client relationships. Plainly, lawyers operating under a *binding* requirement of confidentiality will have at least some greater ability to gain the trust of some clients, and hence to serve them more effectively.”); EDWARD J. IMWINKELRIED, *THE NEW WIGMORE: A TREATISE ON EVIDENCE: EVIDENTIARY PRIVILEGES* § 3.2.3, at 160-61 (2d ed. 2010); DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 189-92 (1988); Levin, *supra* note 13, at 97; Zacharias, *supra* note 8, at 352-53.

16. See HAZARD ET AL., *supra* note 15, at 347 (“Another purpose served by confidentiality is . . . [t]o encourage people to rely on others . . . [by] trust[ing] those in whose hands they place their affairs.”); see also MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS’ ETHICS* § 3, at 45-69 (3d ed. 2004); *id.* § 5, at 129-39; Albert W. Alschuler, *The Preservation of a Client’s Confidences: One Value Among Many or a Categorical Imperative?*, 52 U. COLO. L. REV. 349, 349-55 (1981); Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1473 (1966); Stephen Pepper, *Why Confidentiality?*, 23 LAW & SOC. INQUIRY 331, 335-36 (1998).

17. See, e.g., MODEL RULES OF PROF’L CONDUCT R. 1.6(a) (2010) (explaining that clients can consent expressly or implicitly to disclosure of confidential information).

ethical rules and evidentiary rules provide a number of exceptions to confidentiality that permit or require disclosure without the client's consent.<sup>18</sup> After describing these exceptions, we will review the empirical studies of lawyers' explanations, and clients' understandings, of confidentiality. Next, we will explain lawyers' legal and moral obligations to communicate the existence of these exceptions to clients.

#### A. Exceptions to Confidentiality

Confidentiality doctrine, including both the ethical duty of confidentiality under the rules and the attorney-client privilege, balances the value that "the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients"<sup>19</sup> with a series of specific exceptions.<sup>20</sup> These exceptions fall roughly within three categories: harm prevention, client perjury, and lawyer protection.<sup>21</sup>

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18. Although both the lawyer's duty of confidentiality and the attorney-client evidentiary privilege "are based on the instrumental idea that clients will more likely confide fully in lawyers if they can do so behind a veil of secrecy" and also "based on the moral ideas of autonomy, privacy, and trust," there are still many important differences regarding scope between the ethical duty of confidentiality and the attorney-client privilege. 1 HAZARD ET AL., *supra* note 5, § 9.7, at 9-25. The scope of the lawyer's duty of confidentiality is broader than the attorney-client privilege. The duty of confidentiality extends to all "information relating to the representation of a client," whereas privilege applies only to confidential communications made from client to lawyer for the purpose of obtaining or providing legal assistance to client. Compare MODEL RULES OF PROF'L CONDUCT R. 1.6(a), with 8 WIGMORE, *supra* note 15, § 2292, at 554. Thus, the duty of confidentiality prevents lawyers from volunteering confidential information, while the attorney-client privilege protects against compelled disclosure of confidential communication in formal proceedings. See 1 HAZARD ET AL., *supra* note 5, § 9.2, at 9-6, § 9.7, at 9-25. Both the duty of confidentiality and the attorney-client privilege are subject to a number of parallel exceptions. See, e.g., *Purcell v. Dist. Attorney*, 676 N.E.2d 436, 438-41 (Mass. 1997) (grappling with the harm prevention exception to confidentiality and the crime fraud exception to privilege); FREEDMAN & SMITH, *supra* note 16, §§ 6.18-19, at 186-90 (discussing whether a client's intention to commit perjury is within protection of the attorney-client privilege, and whether a client testifying after having been warned is an implied waiver of privilege); HAZARD ET AL., *supra* note 15, at 356 n.33 (describing the lawyer-protection exceptions to both confidentiality and privilege).

19. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 6 (2010); see *supra* note 15.

20. See generally Roy M. Sobelson, *Lawyers, Clients and Assurances of Confidentiality: Lawyers Talking Without Speaking, Clients Hearing Without Listening*, 1 GEO. J. LEGAL ETHICS 703 (1988) (discussing at least fifteen exceptions to confidentiality worth explaining to a client); see also Paul F. Rothstein, "Anything You Say May Be Used Against You": A Proposed Seminar on the Lawyer's Duty To Warn of Confidentiality's Limits in Today's Post-Enron World, 76 FORDHAM L. REV. 1745, 1749-63 (2007) (offering a list of twenty-five exceptions that may be important for a client to know).

21. See HAZARD ET AL., *supra* note 15, at 347 (noting three categories in its overview of exceptions to confidentiality); Cunningham, *supra* note 12, at 581-82 (categorizing

The harm prevention exceptions allow lawyers to disclose confidential information in order to prevent harms to the client or to third parties.<sup>22</sup> Model Rule 1.6(b)(1) allows disclosure “to prevent reasonably certain death or substantial bodily harm,” either to the client, as in the case of potential suicide for example, or to a third party.<sup>23</sup> Rule 1.6(b)(2) and (3) permit disclosure

to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services; [and] . . . to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services.<sup>24</sup>

Last, rule 1.13 provides an additional ground for discretionary disclosure where a lawyer has actual knowledge of legal violations that threaten substantial injury to an organization, the lawyer has taken this information to the “highest authority” in the organization, the highest authority refused to take corrective action, and the lawyer is “reasonably certain” that substantial injury will occur without disclosure.<sup>25</sup>

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exceptions in this way because it was useful in tackling how to explain confidentiality to clients).

22. MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. 6.

23. *Id.* R. 1.6(b).

24. *Id.* Under some circumstances, these disclosures are mandatory. Rule 1.6(b)(2) and (3) track the attorney-client privilege doctrine, which provides for courts to require disclosure under these circumstances. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 63 (2000). A minority of states also require disclosure on their versions of Model Rule 1.6(b). *See, e.g.*, ARIZ. RULES OF PROF’L CONDUCT ER. 1.6(b) (2010); CONN. RULES OF PROF’L CONDUCT R. 1.6(b) (2010); FLA. RULES OF PROF’L CONDUCT R. 4-1.6(b) (2010); ILL. RULES OF PROF’L CONDUCT R. 1.6(c) (2010); N.D. RULES OF PROF’L CONDUCT R. 1.6(b) (2010); NEV. RULES OF PROF’L CONDUCT R. 1.6(c) (2010); N.J. RULES OF PROF’L CONDUCT RPC 1.6(b) (2010); TENN. RULES OF PROF’L CONDUCT R. 1.6(c) (2010); TEX. DISCIPLINARY RULES OF PROF’L CONDUCT R. 1.05(e) (2009); VA. RULES OF PROF’L CONDUCT R. 1.6(c) (2010); WASH. RULES OF PROF’L CONDUCT R. 1.6(b) (2010); WIS. RULES OF PROF’L CONDUCT FOR ATTORNEYS SCR 20:1.6(b) (2005). For purposes of our categories, we classify mandatory disclosure under the category of lawyer protection because lawyers would be disclosing in order to avoid punishment.

25. MODEL RULES OF PROF’L CONDUCT R. 1.13 (2010). Although we are limiting our analysis in this Article to the ethics rules and attorney-client privilege, other laws also create exceptions to confidentiality. With regard to corporate clients, such exceptions arise both under the Sarbanes Oxley regulations governing securities lawyers, *see* Sarbanes-Oxley Act of 2002, Pub. L. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28 & 29 U.S.C.), and under the doctrine of *Garner v. Wolfinbarger*,

We classify these exceptions as harm prevention because their purpose is to provide the lawyer with discretion to disclose in order to prevent harm. When disclosure to prevent harm is mandatory, such as in the minority of jurisdictions that require disclosure on these grounds,<sup>26</sup> or when the court requires disclosure under an exception to attorney-client privilege, we instead place the exception in the lawyer protection category where a primary purpose of disclosure is to avoid sanction.

Fred Zacharias described the harm protection exceptions as “fully paternalistic.”<sup>27</sup> Not only is the decision to disclose wholly the lawyer’s own, but the lawyer theoretically need not even consult with the client regarding the decision.<sup>28</sup> As a discretionary matter, the *Model Rules* do recommend consultation. They urge that before making a disclosure the lawyer should attempt to persuade the client to take action to avoid the need for lawyer disclosure.<sup>29</sup>

The second category of exceptions is the lawyer’s mandatory duty to disclose confidential information in order to prevent fraud on the court, particularly client perjury. Rule 3.3(a)(3) requires a lawyer to take “reasonable remedial measures, including, if necessary, disclosure to the tribunal” to prevent perjury from taking place or to remedy it if it has already occurred.<sup>30</sup> The commentary to rule 3.3 recommends that lawyers consult with clients, so that disclosure is a last resort.<sup>31</sup> Similarly,

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430 F.2d 1093, 1103–04 (5th Cir. 1970), which permits shareholders to obtain privileged information for good cause.

26. Arizona, Connecticut, Florida, Illinois, Nevada, New Jersey, North Dakota, Tennessee, Texas, Virginia, Washington, and Wisconsin have rules where disclosure is mandatory in order to prevent harm. See STEPHEN GILLERS ET AL., *REGULATION OF LAWYERS: STATUTES AND STANDARDS* 80–87 (2010).

27. Zacharias, *Limits on Client Autonomy in Legal Ethics Regulation*, *supra* note 11, at 211–12 (internal quotation marks omitted). The rules are described as “paternalistic” because of the rulemakers’ preference for a societal interest over the client’s interest in maintaining confidentiality. *Id.* at 211.

28. This is true even under Model Rule 1.13, which requires the lawyer to bring the subject of the disclosure to the attention of the highest authority of the organization. MODEL RULES OF PROF’L CONDUCT R. 1.13. If the highest authority does not act to protect the organization from injury, the lawyer need not consult again regarding whether to disclose under rule 1.13(c). See *supra* text accompanying note 25.

29. MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. 14 (2010) (“Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure.”).

30. See *id.* R. 3.3; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 120 (2000); see also *Nix v. Whiteside*, 475 U.S. 157, 171 (1986). Under the *Model Rules* and the *Restatement*, the client perjury exception is mandatory if necessary, unlike both the harm prevention exceptions and the lawyer-protection exceptions, which merely grant the lawyer permission to disclose client information if reasonably necessary.

31. See MODEL RULES OF PROF’L CONDUCT R. 3.3 cmt. 10 (2010) (recommending that once the lawyer becomes aware of false testimony, the lawyer’s first course of options should be to remonstrate with the client, advise the client of the lawyer’s duty of candor to the court, and see if the client will cooperate with correcting the false testimony).



rule 3.3(b) requires that “[a] lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.”<sup>32</sup> The phrase “if necessary” implies that the lawyer encourage the client to avoid or disclose fraud on the court in order to make the disclosure unnecessary, but neither the rule nor the commentary expressly recommends or requires consultation. Although the category seeks to prevent harm, the harm is a specialized one—the harm of fraud on the court to the legal system.<sup>33</sup> By making such disclosure mandatory, the rules make it a higher priority than prevention of harm to clients or third parties.<sup>34</sup> We distinguish the fraud-on-the-court category from the mandatory disclosures that fall under lawyer protection because the primary purpose of the perjury exception is to protect the legal system and not the lawyer.

The third category of confidentiality exceptions exists for lawyer protection and includes both mandatory and discretionary provisions. Under various circumstances, the lawyer either may or must disclose to protect the lawyer’s self-interest.<sup>35</sup> Rule 1.6(b)(4) and (5) permit lawyers to reveal confidential client information

to secure legal advice about the lawyer’s compliance with these Rules; [or] to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved,

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32. See *id.* R. 3.3(b).

33. See *id.* R. 3.3 cmt. 2.

34. See FREEDMAN & SMITH, *supra* note 16, § 5.11, at 151–58 (criticizing the higher level of importance given to mandatory exceptions over other more compelling reasons to reveal confidences that have been made discretionary exceptions); Limor Zer-Gutman, *Revising the Ethical Rules of Attorney-Client Confidentiality: Towards a New Discretionary Rule*, 45 LOY. L. REV. 669, 676 (1999) (describing a “hierarchy of protection” of interests that are benefited by confidentiality exceptions).

35. See DANIEL R. COQUILLETTE, *REAL ETHICS FOR REAL LAWYERS* 182 (2005) (describing how these provisions were adopted by lawyers as a self-serving exception to protect lawyer economic interests); Zacharias, *supra* note 8, at 370 (explaining that one of the motivations for adopting these provisions was “[w]hen the strict general prohibitions against disclosure affected the personal and economic convenience of lawyers most directly”). Lawyer-protection exceptions are also rationalized under the principles of agency, so that the beneficiary of a fiduciary relationship is not allowed to exploit the relationship to the detriment of the fiduciary. MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. 11 (2010); see Zacharias, *supra* note 8, at 361–62 & nn.46–47 (citing RESTATEMENT (SECOND) OF AGENCY § 395 cmt. f (1958)).

or to respond to allegations in any proceeding concerning the lawyer's representation of the client.<sup>36</sup>

The attorney-client privilege has a similar discretionary exception allowing a lawyer to waive the privilege for purposes of "[l]awyer [s]elf-[p]rotection."<sup>37</sup>

The lawyer-protection exceptions also include mandatory provisions. A court can order disclosure of information that is confidential under the *Model Rules* but not under the attorney-client privilege. This can include confidential information beyond the scope of the attorney-client privilege,<sup>38</sup> or within the crime-fraud exception that applies when a client

consults a lawyer for the purpose, later accomplished, of obtaining assistance to engage in a crime or fraud or aiding a third person to do so, or . . . regardless of the client's purpose at the time of consultation, uses the lawyer's advice or other services to engage in or assist a crime or fraud.<sup>39</sup>

The *Model Rules* have a related provision that uses permissive language to permit a lawyer to breach confidentiality "to comply with other law or a court order"<sup>40</sup> to make clear that obeying a disclosure order does not violate the rules.

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36. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(4)–(5) (2010). Disclosures are permitted in the context of fee collection disputes. *See id.* R. 1.6(b)(5); *id.* R. 1.6 cmt. 11; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 65 (2000) (stating a lawyer may use or disclose confidential client information in a compensation dispute); *see also* Doe v. United States (*In re Shargel*), 742 F.2d 61, 64 (2d Cir. 1984) (upholding a grand jury's inquiry into fees paid to lawyer); *In re Slaughter*, 694 F.2d 1258, 1259 (11th Cir. 1982) (holding no privilege for fee information). Disclosures are also permitted to establish defenses to malpractice claims or criminal charges. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(5); *id.* R. 1.6 cmt. 11; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 64 (2000) (stating a lawyer may use or disclose confidential client information in a lawyer's self-defense); *see also* Meyerhofer v. Empire Fire & Marine Ins. Co., 497 F.2d 1190, 1194–95 (2d Cir. 1974) ("[A] lawyer may reveal confidences or secrets necessary to defend himself against 'an accusation of wrongful conduct.'"); First Fed. Sav. & Loan Ass'n v. Oppenheim, Appel, Dixon & Co., 110 F.R.D. 557, 560, 567 (S.D.N.Y. 1986) (holding that a lawyer may disclose confidences in suit against the attorney brought by third party); *In re Friend*, 411 F. Supp. 776, 777 (S.D.N.Y. 1975) (holding the lawyer who was the target of a grand jury may disclose).

37. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 83 (2000); *see also* HAZARD ET AL., *supra* note 15, at 356 n.33.

38. *See supra* note 18.

39. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 82 (2000).

40. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(6) (2010).

*B. Empirical Evidence on Lawyer-Client Communications  
Regarding Confidentiality*

Existing empirical studies have shown both that clients are generally unaware of the specific exceptions to confidentiality rules and that many lawyers do not accurately explain confidentiality to clients.<sup>41</sup> They neither prove nor disprove lawyers' intuitions that clients require a pledge of absolute confidentiality, even if false, in order to share information with lawyers.<sup>42</sup>

*1. Lawyer Communications*

Zacharias noted that "the most striking revelation" of his 1989 published survey of lawyers and clients was that "lawyers overwhelmingly do not tell clients of confidentiality rules."<sup>43</sup> He discovered that 22.6% of the surveyed lawyers said that they never tell clients about confidentiality.<sup>44</sup> Of the lawyers who told their clients about confidentiality,

41. See Levin, *supra* note 13, at 97 & n.63 (stating that existing empirical research demonstrates that "as a practical matter, lawyers do not tell clients about the exceptions to confidentiality rules").

42. See IMWINKELRIED, *supra* note 15, § 5.2.2, at 311–35 (recognizing existing empirical research as more than the absence of proof that clients require privilege in order to be forthcoming with their lawyers because data suggests only "a small minority of clients . . . would be altogether deterred from consulting and that perhaps a significant minority would be dissuaded from being completely candid during the consultation," but still cautioning the limited amount of existing research); Zacharias, *supra* note 8, at 378 (finding empirical studies "support the notion that confidentiality rules have *some* impact on the way clients use attorneys. But they also cast doubt on whether the effect is as substantial as proponents of confidentiality presume"). But see FREEDMAN & SMITH, *supra* note 16, § 5.06, at 139–40 (criticizing the flawed methodology and misplaced reliance on existing empirical research as "authority that confidentiality is not important to candid disclosure by clients to lawyers").

43. Zacharias, *supra* note 8, at 382. Zacharias's study targeted both lawyers and laypeople, located in Tompkins County, New York. His study surveyed 63 lawyers and 105 laypeople, of which 73 were "clients" who previously consulted a lawyer. *Id.* at 379.

44. *Id.* at 382 (indicating that 22.6% of the surveyed lawyers said they almost never informed clients about confidentiality, and 59.7% said they inform clients less than 50% of the time). In addition, the study demonstrated that when the lawyers do explain confidentiality, 42.6% of those lawyers do it in the first meeting with a client, although 55.7% "wait until the client asks, seems to hesitate to confide, or until a specific problem of confidentiality arises." *Id.*; see Levin, *supra* note 13, at 124 (stating in her survey study of New Jersey lawyers that when the lawyers did explain state mandatory disclosure rules, about 25% did so at the first client meeting, while 42% did so when the issue came up).

most—72.1%—told their clients “only generally that all communications are confidential,”<sup>45</sup> and only 27.8% of lawyers told their clients about the exceptions to confidentiality.<sup>46</sup> Interestingly, the self-reported practice of lawyers in Zacharias’s study contrasted sharply with the surveyed client responses. Although all surveyed lawyers reported they discussed confidentiality with their clients,<sup>47</sup> 72.9% of clients said their lawyers never told them anything about confidentiality.<sup>48</sup> Only one out of the seventy-three surveyed clients—a mere 1.4%—recalled a lawyer mentioning specific confidentiality exceptions.<sup>49</sup> Most of these clients still claimed to know of confidentiality generally but received their information from friends, books, television, or other sources.<sup>50</sup>

A later study conducted by Leslie C. Levin in 1993 surveyed a large pool of lawyers in the state of New Jersey regarding their experiences with the state’s mandatory duty to disclose to prevent harm.<sup>51</sup> Levin’s study showed that lawyers discussed confidentiality with their clients “more than previously reported” but still did not talk about confidentiality exceptions.<sup>52</sup> She discovered that 95% of the surveyed lawyers told clients about confidentiality but that 65% had not informed any of their clients about their mandatory obligation to disclose confidential information in order to prevent harm.<sup>53</sup> Furthermore, most of the surveyed lawyers believed that their clients did not correctly understand the limited scope of confidentiality.<sup>54</sup> Levin concluded that her “study confirmed that lawyers do not tell most of their clients about the disclosure rules, even though they do not believe their clients understand the rules.”<sup>55</sup>

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45. Zacharias, *supra* note 8, at 386.

46. *Id.*

47. As stated above, 72.1% assured absolute confidentiality, although 27.8% told their clients about exceptions. *Id.*

48. *Id.* at 382–83.

49. *Id.* at 386.

50. *See id.* at 383 (stating 32.1% claimed to have “learned of confidentiality from friends, books, or television,” although “41.1% could not identify the source of their knowledge”); *see also* Zacharias, *Limited Performance Agreements*, *supra* note 11, at 941 n.137 (stating that society gains awareness of lawyer responsibilities through communities’ shared experiences, literature, and media).

51. *See* Levin, *supra* note 13, at 107–11. Levin’s study surveyed 776 New Jersey lawyers in total. *Id.* at 110 n.118.

52. *Id.* at 120.

53. *Id.* at 120–21 (“Another 23% of the respondents stated they had informed less than 10% of their clients of this disclosure obligation.”).

54. *Id.* at 122 n.183 (reporting that approximately 20% of surveyed lawyers believed that none of their clients correctly understood that there were circumstances where lawyers could disclose confidential information without their consent, although 40% believed that less than 10% of their clients correctly understood confidentiality exceptions).

55. *See id.* at 144.

Both Zacharias and Levin found that lawyers suggest that confidentiality is absolute because they believe that representation necessary to encourage clients to confide in them.<sup>56</sup> Levin aptly referred to this view as the perpetuation of “the myth of strict confidentiality.”<sup>57</sup> Many lawyers fear that discussing confidentiality exceptions with clients would interfere with client trust and that as a result clients would be less likely to reveal damaging information if they did not think their lawyers would keep it confidential.<sup>58</sup> Without the free flow of information from the client, it is believed that lawyers will not have the opportunity to prevent harm to another person or fraud on the court.<sup>59</sup> And yet, according to Zacharias’s study, only 3.2% of surveyed lawyers actually believed that absolute confidentiality was necessary for them to discourage potential client wrongdoing,<sup>60</sup> suggesting that this rationale for ensuring confidentiality is not actually relevant on a regular basis.<sup>61</sup>

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56. See *id.* at 141; see also Zacharias, *The Future Structure and Regulation of Law Practice*, *supra* note 11, at 849 (arguing that many code provisions, such as confidentiality rules, have underlying assumptions about the trustworthy image of lawyers designed to improve client trust).

57. Levin, *supra* note 13, at 141.

58. See *id.* at 122–23 (“Many New Jersey lawyers seem to discuss confidentiality in order to develop client trust and to encourage the free flow of client information. At the same time, most lawyers do not discuss the subject of mandatory disclosure unless they must do so, apparently because they feel that discussions about confidentiality exceptions interfere with client trust. These lawyers seem to believe they will obtain less than full disclosure from their clients if they promise anything less than complete confidentiality.” (footnotes omitted)); Zacharias, *supra* note 8, at 389 (stating that 66.1% of surveyed lawyers thought a primary reason for absolute confidentiality was “the need ‘to encourage clients to discuss their cases fully’”); see also STEPHEN ELLMANN ET AL., *LAWYERS AND CLIENTS: CRITICAL ISSUES IN INTERVIEWING AND COUNSELING* 246 (2009); cf. Elisia Klinka, Note, *It’s Been a Privilege: Advising Patients of the Tarasoff Duty and Its Legal Consequences for the Federal Psychotherapist-Patient Privilege*, 78 *FORDHAM L. REV.* 863, 894 (2009) (describing the “deterrence hypothesis,” in which it was believed that patients would be deterred from openly confiding in psychotherapists or seeking mental health treatment altogether when patients became aware of state laws requiring psychotherapists to disclose a patient’s intent to harm others, commonly known as a *Tarasoff* duty).

59. See Zacharias, *supra* note 8, at 389; see also Levin, *supra* note 13, at 97 (“Confidentiality proponents argue that if the client is deterred from communicating with counsel about those future plans by fear of attorney disclosure, then the attorney will not have the opportunity to prevent the wrongful act.”).

60. See Zacharias, *supra* note 8, at 389. Zacharias acknowledged that the questionnaire’s wording may have affected the statistical outcome because the surveyed lawyers may have thought that encouraging client communication is a prerequisite for preventing client misconduct. *Id.* Nonetheless, “even excluding confidentiality’s systemic justifications from the results, we are left with a third of the responses.” *Id.* And less than one-tenth of those lawyers selected the preventing misconduct rationale. *Id.*

61. See *id.*

The failure of lawyers to honestly explain the contours of confidentiality accords generally with empirical research regarding lawyers' communication with clients. These studies show that lawyers prefer to control client decisionmaking and as a result do not always communicate full information to clients.<sup>62</sup> With the exception of corporate representation where clients do appear to be in control and fully informed,<sup>63</sup> the studies also indicate that many lawyers have a deep mistrust of the capacity of clients to make their own decisions because lawyers view clients as categorically too emotional, unintelligent, selfish, or immoral to comprehend the best outcome of the representation.<sup>64</sup> When lawyers do present issues to clients, they often do so in a way that masks their mistrust for clients and frames their advice as if it is in the best interest of the client.<sup>65</sup>

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62. See DOUGLAS E. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* 114 (1974) (explaining a study focusing on personal injury cases in New York, in which over one-third of surveyed lawyers did not recognize any broad obligation to inform clients about their cases or allow them to take part in decisionmaking, and more than 80% of the surveyed lawyers "reject[ed] any obligation to disclose and discuss arguably material and specific legal alternatives involved in the claim").

63. See, e.g., EVE SPANGLER, *LAWYERS FOR HIRE: SALARIED PROFESSIONALS AT WORK* 64 (1986); Robert L. Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 STAN. L. REV. 503, 504-05 (1985).

64. See, e.g., Marvin W. Mindes & Alan C. Acock, *Trickster, Hero, Helper: A Report on the Lawyer Image*, 1982 AM. B. FOUND. RES. J. 177, 215-18 (demonstrating the findings of an empirical study that lawyers tend to assume clients have selfish motives); Tamara Relis, *"It's Not About the Money!": A Theory on Misconceptions of Plaintiffs' Litigation Aims*, 68 U. PITT. L. REV. 701, 713, 721-23 (2007) (showing the results of an empirical study focusing on medical malpractice to be that lawyers felt the reason plaintiffs sued was "solely or predominantly" for money, whereas most plaintiffs were actually motivated by seeking admission of responsibility, prevention of harm to others, answers to what happened, and retribution for misconduct, without even mentioning money); Ann Southworth, *Lawyer-Client Decisionmaking in Civil Rights and Poverty Practice: An Empirical Study of Lawyers' Norms*, 9 GEO. J. LEGAL ETHICS 1101, 1112 (1996) (reflecting on an empirical study focusing on civil rights and poverty issues where lawyers tend to control decisionmaking about cases because their clients were "unsophisticated," "had no idea what to do," or simply expected the lawyers to take charge); see also Abraham S. Blumberg, *The Practice of Law as Confidence Game: Organizational Cooptation of a Profession*, LAW & SOC'Y REV., June 1967, at 15, 22-29 (concluding from an empirical study looking at decisionmaking during plea bargaining that defense lawyers generally assume from their experiences that most clients are factually guilty and that they should exercise "client control" by trying to persuade clients to trust their recommendations to accept adequate plea bargains); Rodney J. Uphoff & Peter B. Wood, *The Allocation of Decisionmaking Between Defense Counsel and Criminal Defendant: An Empirical Study of Attorney-Client Decisionmaking*, 47 U. KAN. L. REV. 1, 55 (1998) (demonstrating the findings of an empirical study focusing on public defenders that most of the lawyers felt that they should dominate decisionmaking about strategy and tactics, even in the face of client opposition, because they assumed that criminal clients generally make bad decisions and have low intelligence).

65. See Lynn Mather, *What Do Clients Want? What Do Lawyers Do?*, 52 EMORY L.J. 1065, 1076 (2003) (describing how divorce lawyers remind their clients that their

2. *Client Attitudes and Understandings*

Very few studies have investigated what clients actually know about confidentiality exceptions and the effect this knowledge has on representation. Accordingly, little or no evidence exists to substantiate the presumption that clients would not confide in lawyers without the guarantee of absolute confidentiality.<sup>66</sup>

Prior to Zacharias's study, *The Yale Law Journal* conducted a survey of judges, accountants, marriage counselors, psychiatrists, psychologists, and social workers, as well as 125 lawyers and 108 laypeople "on their attitudes and practices regarding the privileged communications rule" for different professions.<sup>67</sup> The survey found that most laypeople were unaware of the attorney-client privilege.<sup>68</sup> More than half of laypeople either thought that lawyers should be allowed to reveal clients' confidences when asked to in court—37%—or did not take a position necessarily opposing disclosure—17.6%.<sup>69</sup> The survey results "indicated widespread faulty information concerning the attorney-client privilege."<sup>70</sup> Interestingly, surveyed lawyers believed that privilege encouraged client

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advice is in the client's best interest or "what the law requires" because it helps persuade clients to accept settlements or positions that lawyers feel are adequate, although these lawyers admit that their advice is often influenced by a number of other factors, such as maintaining a reasonable reputation with other lawyers and courts); *see also* AUSTIN SARAT & WILLIAM L.F. FELSTINER, *DIVORCE LAWYERS AND THEIR CLIENTS: POWER AND MEANING IN THE LEGAL PROCESS* 57, 146 (1995) (describing how divorce lawyers "construct meanings in the service of [their own] power" and may even exaggerate risk of loss to the client).

66. Shelly Stucky Watson, *Keeping Secrets that Harm Others: Medical Standards Illuminate Lawyer's Dilemma*, 71 NEB. L. REV. 1123, 1130–31 (1992) (noting such a conclusion is questionable and "in the abstract it is difficult to determine the extent of any effect"); *see supra* note 42; *cf.* Klinka, *supra* note 58, at 894–96 (noting a lack of evidence to substantiate the anticipated adverse effects upon the psychotherapist-patient relationship since the *Tarasoff* decision and the practice of psychotherapists advising their patients about the limits of confidentiality).

67. Comment, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1226, 1226–27 & 1227 n.6 (1962) [hereinafter *Functional Overlap*].

68. *Id.* at 1232. Approximately 55 of 108 surveyed laypeople thought that lawyers did not have a legal obligation to disclose confidential information if asked to do so in court. *Id.* app. at 1262, question 5.

69. *Id.* at 1236 n.60 (finding that although forty-nine surveyed laypeople endorsed having an attorney-client privilege, forty opposed it and nineteen expressed no opinion). Still, "for every four laymen who opposed the attorney-client privilege, there were five who favored it, which suggests substantial community support." *Id.* at 1236.

70. *Id.* at 1236 ("The mythical average American is, as likely as not, either misinformed or uninformed about the attorney-client privilege.").

candor “significantly more than laymen” believed it did.<sup>71</sup> Although half of surveyed laypeople said that the absence of any privilege for communications with lawyers would make them less willing to confide in lawyers, the findings asked about the existence of any confidentiality protection whatsoever and did not explore the respondent’s views on confidentiality protections that included limited exceptions.<sup>72</sup> At the same time, a substantial number—approximately 34%—said they would not be less likely to share confidences with lawyers if there were no guarantee of privilege, and another 15% did not know.<sup>73</sup> The study concluded that “most were willing to disclose to their attorney even on the erroneous assumption that the judge has the power to simply override the privilege ad hoc—strongly suggesting that they would still use an attorney’s services if the privilege were classified as qualified or conditional rather than absolute.”<sup>74</sup>

Twenty-seven years later, Zacharias enriched the limited empirical findings of the Yale study with his research. Zacharias’s study also revealed “widespread misunderstanding among clients as to the nature of confidentiality and its scope.”<sup>75</sup> Half of the surveyed laypeople in his study incorrectly thought that confidentiality was absolute.<sup>76</sup> Combining this statistic with the reported practice of his surveyed lawyers,<sup>77</sup> Zacharias concluded that “if lawyers inform their clients about confidentiality at all, they overstate its scope,” and perhaps worse: many

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71. *Id.* at 1232 & n.38 (finding that 90 of 125 surveyed lawyers responded affirmatively that if clients believe lawyers have a legal obligation not to disclose the client’s confidential communications then the effect will be to encourage client candor but 55 of 108 surveyed laypeople said they would be less likely to be candid with a lawyer if there was no privilege).

72. *See id.* app. at 1262, question 6 (finding that 55 of 108 surveyed laypeople answered that they would be “less likely to make free and complete disclosure” to their lawyers if they were aware that their lawyer had a legal obligation to disclose confidential information if asked to do so in court); *see also* IMWINKELRIED, *supra* note 15, § 5.2.2, at 325 (tempering the results of this part of the survey because the question “inquired only whether the elimination of a privilege would have *an* effect on their willingness to make full disclosure to their lawyers; it did not ask them to specify the extent of the effect or even to indicate whether the effect would be substantial or minimal”).

73. *Functional Overlap*, *supra* note 67, app. at 1262 (finding that 37 of 108 surveyed laypeople would not be less likely to make free and complete disclosures to their lawyer, and 16 did not know).

74. IMWINKELRIED, *supra* note 15, § 5.2.2, at 325–26.

75. Zacharias, *supra* note 8, at 381; *see* Watson, *supra* note 66, at 1130 (“It is doubtful that clients fully understand the confidentiality rules as they now stand—if indeed, the rules are explained to them at all.”).

76. *See* Zacharias, note 8, at 381, 383 (providing statistical data that 42.4% of laypeople surveyed thought that confidentiality was absolute, although 25% thought that the confidentiality exceptions were even more liberal than they actually are).

77. *See supra* notes 43–48 and accompanying text.



of the surveyed lawyers were even aware that their clients misunderstood the scope of confidentiality.<sup>78</sup>

Zacharias additionally found that roughly half of the surveyed laypeople—52.5%—said that they would be less forthcoming with information if they were not guaranteed confidentiality by their lawyers.<sup>79</sup> He tempered this statistic by cautioning that it is impossible to know whether this finding reflects how the surveyed people would act in a real-life setting.<sup>80</sup> Indeed, the half who said they would be less forthcoming “were operating on the incorrect assumption that current rules require absolute confidentiality.”<sup>81</sup> Zacharias also wisely pointed out the “extent to which confidentiality rules induce full disclosure depends in part on whether clients believe lawyers follow [those] rules,” and only about 20% of the clients that thought confidentiality was absolute in principle believed that their lawyers would actually follow this in practice.<sup>82</sup>

Although 52.5% of surveyed laypeople said they would withhold information if they were not guaranteed confidentiality, those respondents were told that the lawyer would keep information secret unless it were an unusual circumstance; Zacharias also discovered that “when the same respondents were asked whether they would still withhold information if the lawyer ‘promised confidentiality except for specific types of information which he/she described in advance,’” a small number—only 15.1%—reported that “they would withhold” information from their lawyer.<sup>83</sup> This statistic is significant for several reasons. First, as Zacharias noted, the figure “is not significantly different from the 11.3% of the surveyed clients who admitted to withholding information from

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78. Zacharias, *supra* note 8, at 386–87 (finding that close to half of the surveyed lawyers who overstated confidentiality in general terms thought that less than half of their clients actually had an accurate understanding of confidentiality, although almost three-quarters of those lawyers thought that more than three-quarters of their clients believed confidentiality was absolute).

79. *Id.* at 380 n.141, 386.

80. *Id.* at 380 n.141.

81. *Id.*

82. See *id.* at 383 (finding that 19.7% of surveyed clients believed attorneys “[always] keep information confidential” (internal quotation marks omitted)); see also *Functional Overlap*, *supra* note 67, app. at 1262, question 8 (finding that 34 out of 108 surveyed laypeople thought that a lawyer would refuse to disclose confidential information even if ordered to do so by a judge, although another 34 believed a lawyer would not refuse).

83. Zacharias, *supra* note 8, at 386.

their attorneys under current confidentiality rules.”<sup>84</sup> Second, the percentage of clients asserting they would share full information with the lawyer if the lawyer explained the specific confidentiality exceptions in advance—84.9%—is relatively close to the percentage of clients asserting they would share full information with lawyers who promise absolute confidentiality—72.1%.<sup>85</sup> Accordingly, the survey found an explanation of confidentiality that acknowledged specific exceptions to be roughly as effective as the pledge of absolute confidentiality for purposes both of effective representation and gaining information necessary to dissuade client misconduct, such as fraud on the court.<sup>86</sup> Based on these findings, Zacharias concluded that it is “the general sense of trust in attorneys as professionals—rather than particularly strict confidentiality rules—[that] fosters client candor.”<sup>87</sup>

### *C. Doctrinal, Moral, and Strategic Obligations To Disclose Confidentiality Exceptions*

As discussed in the preceding sections, the existing empirical evidence casts doubt on the assumption that clients require a pledge of absolute confidentiality. We now turn to whether lawyers have an obligation to explain to clients that exceptions to confidentiality exist. Neither the *Model Rules* nor *Restatement* expressly requires an explanation of the exceptions, but the duty to provide competent representation and honest communication mandates that lawyers both refrain from misleading clients and explain the exceptions to the extent relevant to the representation. The lawyer’s moral responsibility to the client is similar. Respect for client dignity requires that the lawyer tell the truth and provide information necessary for the client to make informed decisions.

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84. *Id.*

85. See *supra* text accompanying note 45.

86. Zacharias, *supra* note 8, at 386 (“It shows that clients never told of confidentiality [exceptions] may be as ready to provide information as clients who were informed.”); Zacharias, *Rethinking Confidentiality II*, *supra* note 11, at 641 (“Requiring lawyers to educate clients about limited attorney-client secrecy would probably encourage at least as much disclosure as maintaining a poorly understood, but exception-free, confidentiality rule.”).

87. See Zacharias, *supra* note 8, at 386; see also Levin, *supra* note 13, at 139 (“Surprisingly, the lawyers who threatened to disclose their clients’ plans but did not actually disclose reported that they did not necessarily experience a deterioration of their relationships with their clients,” and even “[w]hen bodily injury was at stake, the lawyers who actually disclosed client information damaged their relationships with their clients less than might be imagined.”). Indeed, William Simon notes that corporate managers share confidences with lawyers even when legal doctrines provide significant exceptions and the corporation itself may decide to disclose. William H. Simon, *After Confidentiality: Rethinking the Professional Responsibilities of the Business Lawyer*, 75 *FORDHAM L. REV.* 1453, 1468 (2006).

### 1. Legal Obligation To Explain Confidentiality Rules

The *Model Rules* do not mandate lawyers to explain their confidentiality obligation to clients as part of the creation of the lawyer-client relationship.<sup>88</sup> Rule 1.6, which includes both harm prevention and lawyer-protection exceptions, only suggests that the lawyer discuss the relevant exception with the client in order to avoid a disclosure that the lawyer has already decided to make if the client fails to take other corrective action.<sup>89</sup> Only when the disclosure is required, such as by court order, does rule 1.6 mandate a conversation with a client.<sup>90</sup> Rule 3.3, regarding fraud on the court, does require a conversation but again only when the lawyer has decided to disclose if the client fails to take corrective action.<sup>91</sup> The *Restatement* takes a similar approach.<sup>92</sup>

The *Model Rules* do require a lawyer to tell the truth when discussing confidentiality. Rule 1.4 on client communications emphasizes the importance of explaining relevant information to clients and only permits a lawyer to “delay[] transmission of information” in rare circumstances.<sup>93</sup> It assumes that information the lawyer provides will be honest and accurate. Other rules forbid a lawyer from lying as a general matter. Rule 8.4, defining “misconduct,” prohibits “conduct involving dishonesty, fraud, deceit, or misrepresentation.”<sup>94</sup> Rule 4.1 requires “[t]ruthfulness in [s]tatements to [o]thers.”<sup>95</sup>

Beyond avoiding dishonesty, the rules about informed decisionmaking also appear to require lawyers to explain confidentiality. Rule 1.4 requires lawyers to “explain a matter to the extent reasonably necessary

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88. See *supra* Part II.A. (discussing three areas of confidentiality exceptions in detail).

89. See MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 14 (2010).

90. See *id.* R. 1.6 cmt. 12 (“When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.”).

91. *Id.* R. 3.3 cmt. 10.

92. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 66(2) (2000) (bodily harm prevention exception); see also *id.* § 67(3) (financial harm prevention exception); Rothstein, *supra* note 20, at 1765 n.81 (arguing that if this kind of warning before disclosure is recommended as to the harm prevention exception, then it is also applicable to the lawyer protection exception and the client perjury exception).

93. MODEL RULES OF PROF'L CONDUCT R. 1.4 cmt. 7 (2010).

94. *Id.* R. 8.4(c).

95. *Id.* R. 4.1.

to permit the client to make informed decisions regarding the representation.”<sup>96</sup> Confidentiality of the client’s communications would be important and quite relevant to the client, especially to the extent that decisions on disclosure made at an early stage of the representation could have a significant adverse impact if they later implicate the lawyer’s discretionary or mandatory disclosure obligations. Another provision of rule 1.4 directly addresses one such situation that could develop—when a lawyer must “consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.”<sup>97</sup>

Roy M. Sobelson and Lee A. Pizzimenti have separately explained that a conversation regarding confidentiality is fundamental to the client’s decision whether to retain a lawyer and the lawyer’s ability to represent a client competently. Pizzimenti notes that a discussion of the limits of confidentiality is essential because any client would consider those limits material to determining which confidences to share with a lawyer.<sup>98</sup> She writes that “[a]ttorneys may deprive those clients of information critical to intelligent decisionmaking if they fail to apprise clients of those exceptions, thereby limiting client’s ability to choose rationally whether to confide in counsel.”<sup>99</sup> Pizzimenti analogizes this to

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96. *Id.* R. 1.4(b); see RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 20(3) (2000).

97. MODEL RULES OF PROF’L CONDUCT R. 1.4(a)(5) (2010).

98. Lee A. Pizzimenti, *The Lawyer’s Duty To Warn Clients About Limits on Confidentiality*, 39 CATH. U. L. REV. 441, 450 (1990); see Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41, 116 (1979) (stating courts “should require the lawyer to inform his client of the limits on representation” based on what a reasonable client would want to know about the representation); see also MODEL RULES OF PROF’L CONDUCT R. 1.0(e) (2010) (defining “[i]nformed consent” as a client’s agreement “to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct”). In reality, many lawyers may have difficulty admitting that confidentiality limits are material to a client. See *supra* notes 62–64 and accompanying text (discussing various empirical studies about lawyers’ encouragement, or lack thereof, of informed decisionmaking by clients).

99. Pizzimenti, *supra* note 98, at 450. By framing the issue in terms of informed consent about agreeing to representation, Pizzimenti also advocates that a lawyer’s failure to adequately explain confidentiality to a client should result in disciplinary action, and possibly civil liability, for mandatory disclosures that are required by law. *Id.* at 463–71. Zacharias adopted the same rationale when he advocated that both confidentiality and privilege rules should expressly require lawyers to warn clients about potential for disclosures at the outset of the representation. Zacharias, *Harmonizing Privilege and Confidentiality*, *supra* note 11, at 108–09; see Davalene Cooper, *The Ethical Rules Lack Ethics: Tort Liability When a Lawyer Fails To Warn a Third Party of a Client’s Threat To Cause Serious Physical Harm or Death*, 36 IDAHO L. REV. 479, 511–13 (2000) (favoring tort liability for a lawyer’s failure to warn); Watson, *supra* note

conflict situations.<sup>100</sup> If a lawyer chooses to disclose a client's threat of harm or future crime, then the "lawyer resolves a conflict in favor of third parties or the legal system," and likewise when a lawyer chooses to exercise one of the lawyer-protection exceptions, "she resolves the conflict in favor of herself."<sup>101</sup> As a result, Pizzimenti concludes that "a presumption should arise that attorneys must make the client aware of potential conflicts and how both parties may resolve them," and this must occur before the client chooses to confide in the lawyer.<sup>102</sup> Sobelson similarly argues that an explanation of the potential limits of confidentiality is "necessary for the fulfillment of an attorney's obligation to represent his client competently."<sup>103</sup>

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66, at 1139, 1144 (advocating for the recognition of a *Tarasoff*-modeled duty for lawyers); Rachel Vogelstein, Note, *Confidentiality vs. Care: Re-evaluating the Duty to Self, Client, and Others*, 92 GEO. L.J. 153, 170 (2003) (arguing to add a provision to Model Rule 1.6 that requires lawyers to advise clients about confidentiality exceptions); see also *State v. Hansen*, 862 P.2d 117, 122 (Wash. 1993) ("We hold that attorneys, as officers of the court, have a duty to warn of true threats to harm members of the judiciary communicated to them by clients or by third parties."); *Hawkins v. King Cnty. Dep't of Rehabilitative Servs.*, 602 P.2d 361, 365 (Wash. Ct. App. 1979) (stating in dicta that a lawyer's duty to warn about a client's intent to harm others may be mandatory if "it appears beyond a reasonable doubt that the client has formed a firm intention to inflict serious personal injuries on an unknowing third person" (internal quotation marks omitted)).

100. See MODEL RULES OF PROF'L CONDUCT R. 1.4 cmt. 5 (2010) ("The guiding principle [for explaining matters] is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent . . ."); see also *United States v. Blackman*, 72 F.3d 1418, 1425 (9th Cir. 1995) ("Attorneys should inform clients proffering cash in excess of \$10,000 for fees that they will normally be obliged to disclose fee-payer identity and the nature of the fee arrangement in filing [IRS] Form 8300."); Wash. State Bar Ass'n, Formal Op. 194 (1997) (interpreting Washington State Rule of Professional Conduct 1.4 to mean that "the lawyer must inform the client that when the client pays the lawyer more than \$10,000 in cash, but does not consent to reporting this information to the IRS, the lawyer will comply with the requirement that IRS Form 8300 be filed as required by law, omitting the identity of the client" (emphasis omitted)); Nat'l Ass'n Criminal Def. Lawyers Ethics Advisory Comm., Formal Op. No. 04-01, at 1, 5 (2004) (noting that a criminal defense lawyer had a duty to raise a conflict of interest to the client at the earliest possible time when he discovered his client's threat to choke a prosecutor and then commit suicide during trial that triggered his mandatory duty to disclose under state law).

101. Pizzimenti, *supra* note 98, at 476.

102. *Id.*

103. Sobelson, *supra* note 20, at 711 (relying on MODEL RULES OF PROF'L CONDUCT R. 1.1 (2010)).

Last, rule 8.4 appears to require a lawyer to explain the exceptions to confidentiality. Even if a lawyer does not lie regarding absolute confidentiality, the failure to say anything about the duty of confidentiality could itself constitute a misleading communication in violation of rule 8.4.<sup>104</sup> A reasonable client is likely to believe that a lawyer has a duty of confidentiality but is not familiar with the exceptions to that duty. The failure to explain the exceptions would mislead a reasonable client to believe that confidentiality is absolute either in general or in regard to the client's representation.

## 2. Moral and Strategic Benefits of Explaining Confidentiality

Respecting the client's dignity and creating a relationship of trust require lawyers, as a matter of moral responsibility, to discuss confidentiality exceptions with clients. Fred Zacharias eloquently wrote:

[C]lient "dignity" is respected most when clients are treated as individuals who can understand moral limitations on attorney conduct and are informed of those limitations. Informing clients of potential limits on zealous representation, so that clients can make their own decisions regarding how to act within the attorney-client relationship, enhances client autonomy. Lawyers with the deepest respect for client autonomy should be the most forthcoming in identifying regulatory and moral constraints on their behavior for the clients.<sup>105</sup>

As Zacharias explained, respect for the dignity of clients requires that "clients must understand the rules that will be applied to them."<sup>106</sup>

Providing clients with accurate information regarding confidentiality exceptions is fundamental to creating a relationship of mutual respect and trust. Zacharias observed that providing clients with this information is necessary to "support an honest attorney-client relationship that may enrich lawyer-client dialogue throughout the representation."<sup>107</sup> Clients have no reason to trust a lawyer who provides them with inaccurate information or fails to provide them with information they want. Only when lawyers and clients trust each other will they be able to foster a dialogue that encourages them to share information regarding what each values and to move beyond assuming

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104. Paul R. Tremblay, "Ratting," 17 AM. J. TRIAL ADVOC. 49, 86 (1993) (stating that when reading the anti-deceit provisions of Model Rule 8.4 with the revelation sections of Model Rule 1.6, "only one conclusion remains: Lawyers who opt to reveal client intended crimes must inform their clients of that intention").

105. Zacharias, *Reconciling Professionalism and Client Interests*, *supra* note 11, at 1370 (footnotes omitted).

106. Zacharias, *Harmonizing Privilege and Confidentiality*, *supra* note 11, at 108 n.183; see Levin, *supra* note 13, at 125 ("If a client's communications are not protected, clients are entitled to know it before they speak.").

107. Zacharias, *Harmonizing Privilege and Confidentiality*, *supra* note 11, at 109.

that each is a “cardboard” person acting only out of selfish interest<sup>108</sup> to recognizing that each is a whole human being with a wide range of “perceptions . . . passions and sufferings . . . reflections . . . relationships and commitments.”<sup>109</sup>

Robert A. Burt has described the impairment of lawyer-client relationships created without mutual respect and trust. He explains the “mutual wariness . . . in current practice” that consists of both the lawyer and the client approaching the relationship with mistrust: the client hesitates to share some of his actions or intentions with a lawyer because he is unsure how the lawyer will react, while the lawyer avoids asking about them to prevent any need for disclosure later.<sup>110</sup> Burt’s analysis explains why a false pledge of strict confidentiality is ineffective. Not only would many clients later come to understand the lawyer’s deceit, but Burt explains that wary clients are unlikely to trust the assurance of

108. See Spiegel, *supra* note 98, at 118 (“Respect for an individual’s autonomy requires an open exchange of views, although not necessarily acquiescence in anything that person desires.”).

109. DAVID LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY* 76 (2007). In a recent article, Katherine Kruse explains how lawyers generally construe clients as one-dimensional “cardboard clients” by uniformly characterizing them as wanting to maximize their own legal and economic interest. By overemphasizing the clients’ legal interests, lawyers risk minimizing or even ignoring the other cares, commitments, relationships, reputations, and values that real clients have. By not informing and consulting with the client about the limits of confidentiality, a lawyer is essentially objectifying the client based on an unfair generalization. See generally Katherine R. Kruse, *Beyond Cardboard Clients in Legal Ethics*, 23 *GEO. J. LEGAL ETHICS* 103, 103 (2010).

Dean Imwinkelried presents an intriguing summary of psychological literature as to what motivates clients to candidly share information with their lawyers. IMWINKELRIED, *supra* note 15, § 5.2.2, at 331. He criticizes the law about evidentiary privilege for assuming that laypeople are motivated by: “(1) the degree to which the consultation will contribute to the immediate resolution of the problem that prompted the layperson to consult the professional; and (2) the magnitude of the risk that any disclosure will later be used adversely against the layperson at trial.” *Id.* He further argues that the law “assumes that the typical layperson is so concerned about the second factor that without the assurance of confidentiality furnished by an absolute evidentiary privilege, the layperson would be unwilling to confide.” *Id.* And yet, research produced in psychological literature reveals a myriad of factors that significantly influence a layperson’s willingness to confide. *Id.* § 5.2.2, at 331–32. He notes that “the research has established such marked individual variations in tendency to disclose that any generalization about the decision-making of the ‘typical’ or ‘average’ layperson is suspect.” *Id.* § 5.2.2, at 332.

110. Robert A. Burt, *Conflict and Trust Between Attorney and Client*, 69 *GEO. L.J.* 1015, 1028 (1981); see also *id.* at 1033 (discussing the mutual mistrust between lawyers and corporate clients); *id.* at 1035–40 (describing the mutual mistrust between criminal defense lawyers and clients, in the context of plea bargaining).

total confidentiality and rely upon it to share secrets.<sup>111</sup> Indeed, when lawyers mislead—or fail to discuss—the contours of confidentiality, lawyers only undermine the possibility for a mutually respectful and trusting relationship.<sup>112</sup> Similarly, a lawyer who does not discuss confidentiality honestly forgoes the potential benefit of exploring questions that both client and lawyer may perceive as possible conflicts in a way that could build, rather than undermine, trust.<sup>113</sup> For example, a lawyer who views a client as preferring absolute confidence might discover that the client understands the importance of preventing harm to others or fraud on the court.<sup>114</sup> The client, in turn, is likely to view the lawyer as a person of principle upon whom the client can rely for wise counsel.<sup>115</sup> In any event, an honest conversation about the confidential exceptions would empower both the lawyer and client to make independent judgments about how much they choose to trust each other, and whether they would like to continue in a representative relationship.<sup>116</sup>

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111. *Id.* at 1031.

112. *Id.* at 1018–28.

113. *Id.* at 1019–20, 1031. The absence of a discussion between lawyer and client “robs both attorney and client of the opportunity to learn that each can adequately trust the other.” *Id.* at 1032; see Zacharias, *Harmonizing Privilege and Confidentiality*, *supra* note 11, at 109–10 n.188 (“[H]aving such a conversation at the outset of the representation helps structure the attorney-client relationship. Clients may be disappointed in particular positions a lawyer may take. However, by treating the client as an autonomous, decisionmaking equal from the beginning and explaining the limits of the lawyer’s personal willingness to obey the client, the lawyer treats the client with dignity. In the long run, this enhances, rather than detracts, from client trust. It also sets the stage for further frank discussions as dilemmas come to fruition down the road.”); Zacharias, *Reconciling Professionalism and Client Interests*, *supra* note 11, at 1364 (arguing that one of the benefits of having a conversation at the outset of representation is that both the lawyer and the client consider their own perceptions of appropriate conduct in response to ethical dilemmas and raise them in a neutral and objective manner); cf. Klinka, *supra* note 58, at 893 (discussing the formation of a “therapeutic alliance” that could result from an honest discussion between psychotherapists and patients about the limitations of confidentiality imposed by a psychotherapist’s *Tarasoff* duty).

114. See *supra* text accompanying notes 68, 72, 76–86 (discussing potential reasons why clients continue to confide in lawyers, even if they are aware confidentiality is not guaranteed).

115. Lawyers who choose not to disclose because they assume their clients would want it that way may discover that they were wrong; meanwhile, clients, after discussion with their lawyers, may understand why disclosure is necessary in certain situations. See Spiegel, *supra* note 98, at 117–19.

116. Informed decisionmaking about whether to begin a representation is also beneficial to the lawyer because

requiring lawyers to be active in assuring themselves that they are not being used or played the fool is fully commensurate with the idea that lawyers’ services are limited, and that clients should be told about those limitations early on. When it is still easy for the lawyer simply to refuse to become involved with the client, it makes good sense to require the lawyer to be *active* in taking responsibility for deciding whether to cast his lot with the particular



One can understand, though, why some well-meaning lawyers avoid discussing confidentiality. They may fear that such discussions could produce “some awkward moments, and perhaps even kill[] off some budding lawyer-client relationships.”<sup>117</sup> Although these lawyers may have to learn to improve their client counseling skills, if they do so they will gain significant rewards. The conversation regarding exceptions will itself promote trust. From the client’s perspective, “the lawyer has . . . displayed his trustworthiness in concrete terms.”<sup>118</sup> Indeed, empirical evidence indicates that clients find legal representation more satisfying when they are meaningful, active participants.<sup>119</sup> A discussion of client values may also help lawyers confront their mistrust of clients and place a check on their own motivations for controlling decisionmaking.<sup>120</sup>

By withholding an explanation about confidentiality rules from clients, lawyers assume down the road that they will be in a morally superior position to make a decision as to whether a client’s confidential communication should be shared with others.<sup>121</sup> And perhaps this is a

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client. Lawyers who accept clients unwisely will not lightly be heard to argue that they were caught unawares, for these rules impose a duty of vigilance at the very gates of access to the profession.

W. William Hodes, *The Code of Professional Responsibility, the Kutak Rules, and the Trial Lawyer’s Code: Surprisingly, Three Peas in a Pod*, 35 U. MIAMI L. REV. 739, 806 (1981).

117. *Id.* at 775; see Zacharias, *Reconciling Professionalism and Client Interests*, *supra* note 11, at 1365; see also Spiegel, *supra* note 98, at 118 (noting that in cases in which the lawyer’s decision is at odds with the client’s decision, the doctrine of informed consent would not require the lawyer to follow the client’s decision simply because the client does not consent; rather after discussing the issue with the client, the lawyer can make a decision and then justify it to the client, and if the client insists on the opposing decision, the lawyer would be able to withdraw from representation); Eli Wald, *Taking Attorney-Client Communications (and Therefore Clients) Seriously*, 42 U.S.F. L. REV. 747, 775 (2008) (dispelling reasons to forgo a discussion about confidentiality rules because even if clients misunderstand the rules or proceed to act impulsively in a way that will not benefit their best interests, “lawyers can address the concern by effectively explaining the information, per Rule 1.4(b), or explaining why the information is irrelevant given the decision facing the client”).

118. Hodes, *supra* note 116, at 786–87.

119. See ROSENTHAL, *supra* note 62, at 56–58 (concluding that clients who were actively involved in their cases and regularly demanded information from their lawyers got better case recoveries); Susan R. Martyn, *Informed Consent in the Practice of Law*, 48 GEO. WASH. L. REV. 307, 310 (1980) (arguing that informed consent protects client autonomy and benefits the attorney-client relationship).

120. Kruse, *supra* note 109, at 141; see *supra* notes 62, 65, and accompanying text.

121. See Judith L. Maute, *Allocation of Decisionmaking Authority Under the Model Rules of Professional Conduct*, 17 U.C. DAVIS L. REV. 1049, 1058 (1984) (“A paternalist

safe assumption, given the fact that the *Model Rules* specifically reserve the decision to disclose to lawyers.<sup>122</sup> Arguably, lawyers are “less personally and emotionally invested” in a legal matter and are considered “better situated in legal representation to bring moral considerations to bear.”<sup>123</sup> Shaffer and Cochran call this “godfather lawyering” because lawyers act as if they “know better than clients what will be in their clients’ interests.”<sup>124</sup> The traditional reason given by lawyers who choose not to explain confidentiality rules to clients is because they determine it is in the best interest of the client: only if clients candidly disclose full information will lawyers be able to adequately represent their clients.<sup>125</sup> This argument disregards the fact that decisions by lawyers not to explain confidentiality rules may be influenced by their “own wants, interests, and values,” such as appearing completely dedicated in order to win a retainer or gathering as much information as possible so as not to be surprised or embarrassed later on.<sup>126</sup>

Last, some lawyers may not explain confidentiality exceptions because they assume a situation implicating any confidentiality exception is rare.<sup>127</sup> But failure to discuss the exceptions creates the potential for

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lawyer is morally isolated from the client, acting in ways that she thinks will benefit the client without discourse about what the client wants or needs.”).

122. See *supra* notes 27–39 and accompanying text (describing the paternalistic nature of confidentiality exceptions). In a recent article, Eli Wald argues that the *Model Rules* encourage an asymmetrical exchange of certain types of information between lawyers and clients, such as “‘meta’ facts.” Wald, *supra* note 117, at 756. Meta facts are defined as “background and personal information” belonging to both the lawyer and the client. *Id.* For example, meta facts about the lawyer include the lawyer’s experience, expertise, reputation, and “how the attorney plans on exercising . . . professional judgment and discretion in revealing confidential client information.” *Id.* Wald argues that ethical rules are designed to “foster a ‘tell all’ attitude encouraging clients to disclose all . . . facts . . . to their attorneys,” although lawyers are not encouraged to reveal meta facts about themselves to their clients. *Id.* at 757, 768–69. Ultimately, the *Model Rules* make it “less likely that clients will be able to occupy the role of informed principals” in the lawyer-client relationship. *Id.* at 757.

123. Kruse, *supra* note 109, at 139; see Wald, *supra* note 117, at 770, 773–74.

124. See THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* 9 (1994); see also Pizzimenti, *supra* note 98, at 484.

125. See Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659, 667–69 (1990) (presenting a description of the traditional model of the lawyer-client relationship as trying to justify lawyer deception as necessary in order for lawyers to fulfill their duties to their clients, and criticism that lawyers are paternalistic, manipulative, and exploitative of their clients under the traditional model); see also *supra* notes 55–59, 65 and accompanying text.

126. Kruse, *supra* note 109, at 139; see Lerman, *supra* note 125, at 671–72 (arguing that a fundamental conflict of interest exists between lawyers and clients because many lawyers in private practice are primarily motivated to earn money).

127. Monroe Freedman and Abbe Smith feel that a discussion about confidentiality exceptions is unnecessary altogether because the likelihood of disclosure “is so slight that the harm that would be done to the lawyer-client relationship by a Miranda warning

disaster if the lawyer has to explain exceptions later, much less disclose a confidence. As Fred Zacharias noted, when lawyers manipulate clients into confiding under a general veil of confidentiality, it “undercuts another of confidentiality’s basic rationales: that confidentiality helps clients make informed choices and thus enhances their dignity and ‘autonomy.’”<sup>128</sup> Indeed, absent an explanation of the exceptions, “the most plausible alternative [to the client is] that the lawyer has . . . accept[ed] the client’s money now but [will be] betraying him later.”<sup>129</sup> Paul R. Tremblay analogizes this situation to “ratting”<sup>130</sup> on the ground that the lawyer is exploiting client intimacy.<sup>131</sup>

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on these particular issues far outweighs the marginal value of fairness to the exceptional client to whom the warning would be relevant.” FREEDMAN & SMITH, *supra* note 16, § 6.09, at 172. They argue:

The lawyer cannot serve the client as he deserves to be served if she does not know everything there is to know about the client’s case. Accordingly, the lawyer must urge him to tell her everything, and the lawyer must pledge confidentiality. Having given that pledge, we would be morally bound to keep it.

*Id.* § 6.09, at 171. And yet, Freedman and Smith admit that there are some moral values, such as the value of human life, or the fairness of defending oneself against formalized charges, that “may take precedence over truthfulness” and justify breaking the lawyer’s pledge. *Id.* They argue that “[i]n addition to the value at stake, the situation will occur so infrequently as to create no systemic threat; that is, there is no significant likelihood that the existence of this exception would make clients fearful of confiding in their lawyers.” *Id.*

128. Zacharias, *supra* note 8, at 381.

129. Hodes, *supra* note 116, at 786–87. Hodes argues that most criminals who bring in the . . . sack of stolen money to their lawyers have some vague idea that once those items are in the lawyer’s hands, they are forever immune from discovery. [But] [i]f a generation from now it is widely understood that this is not true, fewer such turnovers will occur, but that is a small price to pay for a generation of telling the truth about the legal profession.

*Id.* at 788 (footnote omitted). The benefits of using a “truth-in-lawyering” principle is that clients will be told about the reality up front, and this could lead to more trust of lawyers because “clients seeking prohibited assistance would at least be warned off rather than betrayed later, and clients seeking legitimate help, even if at the margins, could better understand and be more assured that they truly had the full, loyal help of their chosen counsel.” *Id.* at 810–11.

130. Tremblay, *supra* note 104, at 82; see Michael K. McChrystal, *Lawyers and Loyalty*, 33 WM. & MARY L. REV. 367, 406 (1992) (“[T]he limits on loyalty required by legality can be a trap for the client, whose ignorance may encourage a reliance wider than the loyalty that a lawyer can reasonably promise.”); see also Levin, *supra* note 13, at 144 (stating the cost of a lawyer’s failure to inform a client of disclosure rules includes “client distrust of lawyers, loss of client autonomy, and damage to lawyers’ internal standards of integrity”); Zacharias, *Harmonizing Privilege and Confidentiality*, *supra* note 11, at 95–96 (offering the following barrow of reasons for why it is inappropriate to mislead clients about what can be disclosed in confidence). Zacharias states:

Accordingly, discussion of the exceptions to confidentiality with clients is more than a legal obligation. It is necessary to create an honest and trusting relationship that respects the client's human dignity.

### III. EXPLAINING CONFIDENTIALITY: COMPARING THREE APPROACHES

To navigate the doctrinal, practical, and moral considerations regarding explaining confidentiality, commentators have offered several strategies, which we group into three approaches. The first seeks to make the pledge of absolute confidentiality an honest one. The second offers a general introduction to the exceptions, while the third provides a detailed description of the bounds of lawyer-client confidentiality.

#### A. Promising Nondisclosure

As we noted earlier, many lawyers either fail to mention confidentiality or pledge absolute confidentiality using language to the effect, "As you may know, everything between us is confidential."<sup>132</sup> In Part II, we explain that these approaches are false, misleading, and accordingly inconsistent both with the rules and with a lawyer-client relationship grounded in mutual respect and trust. Some commentators have sought to rescue the pledge of absolute confidentiality by making it an honest communication.

Lawrence J. Fox and Susan R. Martyn, for example, offer the concept of "Guaranteed Confidentiality,"<sup>133</sup> put into practice when a law firm's engagement letter promises never to exercise its discretion to disclose confidential client information.<sup>134</sup> In effect, the lawyer would agree never to disclose under the discretionary provisions of confidentiality

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At the simplest and most theoretical level, it is inconsistent with the notions that a lawyer is a client's agent, that clients have autonomy in asserting their legal rights that lawyers are supposed to support, and that the lawyer's function is to assist the client rather than the adversary or the state. More practically, to the extent it becomes known that lawyers' explanations of confidentiality are incomplete or misleading, clients increasingly will become unwilling to confide at all. That, in turn, may have negative consequences not only for the representation, but also for the legal system as a whole. *Id.* (footnotes omitted).

131. Tremblay, *supra* note 104, at 52.

132. See *supra* text accompanying notes 43–45, 52–53.

133. See LAWRENCE J. FOX & SUSAN R. MARTYN, RED FLAGS: A LAWYER'S HANDBOOK ON LEGAL ETHICS § 5.14(b) (2005).

134. *Id.*; see Richard W. Painter, *Toward a Market for Lawyer Disclosure Services: In Search of Optimal Whistleblowing Rules*, 63 GEO. WASH. L. REV. 221, 221 (1995) (proposing a voluntary regime that would permit lawyers to decide and inform clients which whistleblowing rules they will follow); Zacharias, *Coercing Clients*, *supra* note 11, at 480 (describing how lawyers and clients bargain around discretionary ethics rules).

doctrine.<sup>135</sup> Assuming that the rules would permit a lawyer to waive discretion,<sup>136</sup> this approach has the advantage of being honest, at least with regard to the harm prevention exceptions and the discretionary provisions of the lawyer-protection exceptions, including waiver of the right to use confidential information in defense of a malpractice action or in suing to recover unpaid fees.<sup>137</sup>

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135. In reality, these agreements may prove popular by the fact that many lawyers are not interested in exercising their discretion to disclose. See Zacharias, *The Future Structure and Regulation of Law Practice*, *supra* note 11, at 848–49 (“Lawyers tend to ignore altogether permissive rules that would permit them to avoid using evidence whose truthfulness they doubt or which authorize, but do not require, disclosure under attorney-client confidentiality rules. Presumably, the code drafters envisioned that lawyers would exercise their discretion under these rules, but lawyers rarely do—in part because lawyers fear that implementing the rules will open them up to competition from less ethical advocates.” (footnotes omitted)).

136. FOX & MARTYN, *supra* note 133, § 5.14(b). Zacharias contributed insightful scholarship to this issue. He argued that the ability of lawyers to contract around confidentiality rules is dependent not upon whether the rule leaves conduct up to the lawyer’s discretion, but rather whether the underlying purpose of the rule is to benefit a nonclient interest. Zacharias, *Integrity Ethics*, *supra* note 11, at 586–87. He classified professional rules as either rules of role or rules of integrity. Rules of role are created to emphasize “the lawyer’s obligations to protect clients’ rights” and define the lawyer’s role in the legal system. *Id.* at 553. Rules of integrity are created to impose “societally-imposed legal requirements” or allow room for other moral considerations. *Id.* at 554. For role rules, Zacharias argued: “To the extent a client wishes contractually to limit the ways in which a lawyer acts in the client’s interests, autonomy and market considerations should allow the client to do so.” *Id.* at 586. For integrity rules, lawyers should not be allowed to contract around mandated duties. *Id.* The problem of Model Rule 1.6(b) is really that it could be classified as either a role rule or an integrity rule. *Id.* at 564–65. To the extent that the purpose of a confidentiality exception is “to protect non-client interests,” Zacharias believed “clients should not be able to assume control over those interests by paying lawyers for that right.” *Id.* at 587.

Zacharias also predicted that certain clients who really value confidentiality may seek out lawyers willing to make nondisclosure agreements and those lawyers could conceivably charge premiums for that benefit. See Zacharias, *Coercing Clients*, *supra* note 11, at 480 (describing the effects when lawyers and clients bargain around discretionary ethics rules). Consequently, “individual clients of limited means will fear that they have not committed enough resources to assure adequate performance and loyalty by the lawyer.” Zacharias, *Limited Performance Agreements*, *supra* note 11, at 931.

137. See Pizzimenti, *supra* note 98, at 489. A discussion about certain confidentiality exceptions left up to discretion may be unnecessary when the lawyer prospectively decides not to disclose confidential information. Freedman and Smith state they could never justify breaching confidentiality to collect a lawyer fee, even if it is permitted by Model Rule 1.6(b)(2). FREEDMAN & SMITH, *supra* note 16, § 6.09, at 172 n.55. They also emphasize, with regard to the lawyer protection exception for establishing a defense against charges and claims, that “although the lawyer is not required to be heroic by remaining silent, she is permitted to do so.” *Id.* § 5.11, at 155 n.143. A similarly minded lawyer may feel comfortable entering a nondisclosure agreement about these exceptions.

But to make this pledge completely accurate and to create a foundation for a relationship of trust and respect, the lawyer would have to go even further. Following the lead of Monroe H. Freedman and Abbe Smith,<sup>138</sup> the lawyer would have to agree not to disclose even when required to do so under the mandatory provisions of the fraud on the court and lawyer-protection exceptions. Although this pledge makes the lawyer's commitment a truthful one, it suffers from an insoluble vulnerability. The mandatory provisions, such as the requirement to disclose fraud on the court, are legal requirements. The lawyer would have to agree to face civil and criminal sanctions in order to make the lawyer's promise a genuine one.<sup>139</sup> Moreover, given that an agreement to violate the law is unenforceable, to be truthful the lawyer would still have to inform the client that if the lawyer were to change her mind about complying with a mandatory disclosure, for example when facing a sentence for contempt, the client could not enforce the agreement not to disclose.<sup>140</sup>

### *B. General Explanations*

Commentators have offered different approaches to explaining confidentiality that rely on a general identification of exceptions to confidentiality.

Stefan H. Krieger and Richard K. Neumann, Jr. recommend that in initial interviews, lawyers should tell clients: "Before we go further, I should explain that the law requires me to keep confidential what you tell me. There are some exceptions, some situations where I may or must tell someone else something you tell me, but for the most part I am not allowed to tell anybody."<sup>141</sup> If clients have questions about what the exceptions are, the lawyer should explain them.<sup>142</sup> Otherwise, Krieger

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138. Freedman and Smith argue that the adversary system is already designed to take into account the situation of client perjury, via cross-examination. FREEDMAN & SMITH, *supra* note 16, § 6.09, at 172. There is also the condemned possibility of the lawyer engaging in intentional ignorance or refraining from calling the witness. *See id.* § 6.15, at 179; *id.* § 6.21, at 193.

139. *See* Pizzimenti, *supra* note 98, at 489 & n.218 (describing how a lawyer may decide "as a matter of personal ethics" not to disclose a client's perjury, "but she thereby runs the risk of violating an ethics rule and subjecting herself to discipline"). Freedman and Smith note that there is no easy solution to the ethical dilemma of dealing with client perjury; they even "acknowledge that [they] are less than completely satisfied with [their] own position." FREEDMAN & SMITH, *supra* note 16, § 6.22, at 193.

140. *See* McChrystal, *supra* note 130, at 408–09; Zacharias, *supra* note 8, at 368.

141. STEFAN H. KRIEGER & RICHARD K. NEUMANN, JR., *ESSENTIAL LAWYERING SKILLS: INTERVIEWING, COUNSELING, NEGOTIATION, AND PERSUASIVE FACT ANALYSIS* 89 (2d ed. 2003).

142. *Id.*

and Neumann conclude that most clients do not want to hear a lecture on all the exceptions at the start of the representation.<sup>143</sup> This approach puts the onus on the client to request more information that might be relevant about the lawyer's representation.<sup>144</sup>

This type of strategy is similar to the approach offered by David A. Binder, Paul Bergman, Susan C. Price, and Paul R. Tremblay in *Lawyers as Counselors: A Client-Centered Approach*,<sup>145</sup> the leading text on client counseling. It suggests that lawyers should discuss confidentiality generally at the outset of representation but also qualify it in a way, such as, "Now, there are some narrow exceptions to the confidentiality rules. It's unlikely you'll have to be concerned about them, but if at some point I have any worries along those lines I'll let you know."<sup>146</sup> In follow-up, the text recommends that the lawyer ask the client if there are any questions about confidentiality.<sup>147</sup> When clients are "reluctant" to share information, Binder and his colleagues suggest reiterating the lawyer's commitment to confidentiality.<sup>148</sup> They recommend that lawyers tell their clients: "Remember, unless you tell me you're planning to rob a bank or something like that, everything you tell me is confidential. I cannot and will not divulge anything you say without your express permission."<sup>149</sup>

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143. *Id.*

144. The duty to request more information that a client may find relevant can just as easily be made to fall upon the lawyer, as a duty to provide relevant information. In an article entitled *Lawyers and Loyalty*, Michael K. McChrystal offers:

A lawyer can generally satisfy the duty to advise by instructing the client that the lawyer must operate within the strict limits of the law in representing a client. In many circumstances, even this sort of warning may be unnecessary because of the unlikelihood that a misunderstanding will occur. The client's foreseeable reliance on the lawyer's agreement to be loyal imposes on the lawyer a duty to clarify the scope of that agreement when misunderstandings are likely to occur.

McChrystal, *supra* note 130, at 406. It is puzzling how the lawyer is to know that a client's misunderstanding about unspoken exceptions is reasonably foreseeable and relied upon by a client. *Id.*

145. See DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (2d ed. 2004).

146. *Id.* at 106; see Kruse, *supra* note 109, at 128 (describing the popularity of the client-centered approach to counseling in clinical legal education and its particular application to representing the poor or other marginalized clients, although the approach has been "slow to catch on in legal ethics").

147. BINDER ET AL., *supra* note 145, at 106; see *supra* note 144.

148. BINDER ET AL., *supra* note 145, at 241.

149. *Id.* (internal quotation marks omitted).

Although this client-centered approach strives for honesty and trust between lawyer and client, it fails to do so. First, the lawyer is the primary gatekeeper for discussion of confidentiality exceptions. Even while permitting the client to ask questions, the lawyer seeks to discourage such questions. In doing so, the approach implicitly views clients as scared, confused, and timid individuals who need reassurance of confidentiality. Further illustrating this paternalistic view are the strategy of using confidentiality to cajole sharing information and the humorous reference to the bank robbery, which implies that the confidentiality exceptions are too difficult for the client to handle. Second, the strategy of informing the client of the particular exceptions only when the lawyer deems them relevant is not a particularly effective one. Absent a conversation regarding specific exceptions, the lawyer will not have the benefit of the client's views on confidentiality and disclosure.

A better approach would be an honest discussion between lawyer and client about each other's interests and concerns about confidentiality, beginning from the first conversation between lawyer and client. Katherine Kruse has criticized Binder's approach to client-centered lawyering in the following way:

[T]he client-centered approach to problem solving can obscure important factors such as the client's personal connections and responsibilities toward others; the larger context of the systems within which the client operates; and the connections between the client's individual problems and the social justice issues at stake in the representation.<sup>150</sup>

Furthermore, Kruse observes that discussing exceptions only as they become relevant essentially limits "lawyer intervention to a strategy of last resort[.] [T]he client-centered approach misses the opportunity to theorize the more subtle, interactive, collaborative and client-empowering interventions that have arisen in its wake."<sup>151</sup>

Kruse has joined with her coauthors of another leading counseling text—Stephen Ellmann, Robert D. Dinerstein, Isabelle R. Gunning, and Ann C. Shalleck—to propose an alternative client-centered perspective that also relies on a general approach to confidentiality exceptions. At the very beginning of the lawyer-client relationship, they propose a typical discussion that may start like this:

For me to understand your case and figure out whether I can help you, I need to know the facts. The law realizes this and realizes that it is important for you to be able to speak to me fully and frankly. For that reason, ordinarily everything

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150. Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLINICAL L. REV. 369, 392 (2006).

151. *Id.* at 399.



you tell me is confidential. That means I won't, and can't, repeat it without your consent.<sup>152</sup>

Like the traditional client-centered approach, the emphasis is on building trust. The authors also recommend that the lawyer explain that there are exceptions to confidentiality without going into those exceptions in great detail. They suggest that the lawyer continue with the following language:

Now, you should know that this rule, like most rules, has some exceptions, and if it turns out to be necessary as we go along I will explain these to you in detail. But normally, as I've already said, what you tell me—even about things that may be embarrassing or even illegal—is confidential. That lets us talk frankly, which is what we need to do, and that's what I'd like to begin doing now.<sup>153</sup>

The authors contend that this language is accurate because it does not assert absolute confidentiality and clear because it avoids unnecessary details of specific exceptions that could confuse or scare the client.<sup>154</sup>

This approach recommends delaying discussion of specific exceptions until they become relevant. “[W]hen a confidentiality exception is in view,” the lawyer should explain it.<sup>155</sup> Without such an explanation, “the lawyer may not only betray the client but do so behind his back.”<sup>156</sup> Thus, lawyers should wait to talk about confidentiality limits until “those limits are really at issue in a particular case.”<sup>157</sup> The lawyer should make every effort to try to discuss the relevant confidentiality exception *before* the disclosure becomes necessary but not without—or possibly before—having a dialogue about the client’s conduct that prompts possible disclosure.<sup>158</sup> This approach acknowledges the risk that a client, upon hearing that there is an applicable limit to confidentiality, may become tightlipped and that the lawyer could unknowingly assist the client in perpetrating a crime or fraud.<sup>159</sup> The authors concede that

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152. ELLMANN ET AL., *supra* note 58, at 251.

153. *Id.*

154. *Id.*

155. *Id.* at 252–53 (providing an example that frames the discussion as the lawyer’s right to reveal the client’s communications to the authorities).

156. *Id.* at 252.

157. *Id.* at 247 n.70.

158. See *id.* at 252; see also Zacharias, *Professional Responsibility*, *supra* note 11, at 915 (“[L]awyers should question client objectives, both for the clients’ sakes and for the greater good. When appropriate . . . lawyers should engage in a moral dialogue with clients designed to encourage clients to take appropriate action even when that action may not maximize the clients’ financial interests.” (footnote omitted)).

159. ELLMANN ET AL., *supra* note 58, at 252–53.

this strategy would “perhaps selfishly protect the lawyer from facing a moral dilemma that needs to be faced.”<sup>160</sup> Despite this potential, the authors argue that this approach will “deepen the encounter between lawyer and client” when the advice regarding the relevant confidentiality exception leads to a dialogue that enlightens the client and steers him away from the misconduct.<sup>161</sup>

Waiting to discuss confidentiality exceptions until they become relevant ensures that clients are not overloaded with too much information that emphasizes lawyer loyalties to nonclient interests. The approach has the benefit of being accurate, honest, and ensuring client trust from the beginning of the relationship. Eli Wald argues that “a materiality-based communications rule [can] play a critical gatekeeper role guaranteeing that clients receive essential information necessary for their informed participation in the relationship,” but properly defining the standard of materiality and the communication’s timing is significant.<sup>162</sup> Although “a fact should not be deemed material simply because a client might consider it important,” the proper standard for materiality “would ensure that clients receive all information a reasonable client would consider relevant for his decision regarding the objectives of the relationship.”<sup>163</sup> Wald proposes the following addition to the commentary of Model Rule 1.4 dealing with client’s informed decisionmaking:

[G]eneral observations about how a lawyer may exercise her discretion about exceptions to confidentiality (a “Miranda” warning) are not ordinarily material. However, if developments in the representation lead the lawyer to entertain disclosure of confidential client information, then whether and how the lawyer plans to exercise her discretion to reveal confidential client information becomes material and must be communicated to the client promptly.<sup>164</sup>

The approach to explaining confidentiality propounded by Ellmann, Kruse, and their colleagues, as well as Wald, does not appear to sidestep many of the problems plaguing the traditional client-centered approach. The difference between when confidentiality exceptions become “relevant” versus “really at issue” or “material” to a client, through the eyes of the lawyer, seems semantic. And just because this approach recommends an explanation occur *before* the disclosure becomes necessary does not mean it avoids the problem of the lawyer alone interpreting when a discussion about relevant confidentiality exceptions become a necessity. Lawyers still function as the gatekeeper for a more

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160. *Id.* at 253.

161. *Id.*

162. *See* Wald, *supra* note 117, at 780–85.

163. *See id.* at 782, 790.

164. *Id.* at 791.

detailed conversation about confidentiality exceptions. The approach relies on lawyers recognizing certain client cues and anticipating a moment when confidentiality exceptions should be explained.

This approach is also problematic because clients must rely on a general explanation of confidentiality at the time when they are making a choice about whether to retain a lawyer. Clients would not have all potentially relevant information about limitations of the representation at the time they decide to hire a particular lawyer.<sup>165</sup> Furthermore, by foregoing an honest discussion about confidentiality up front, lawyers are presuming that upon hearing about confidentiality exceptions, clients would decide it is not in their interest to confide. Whether this is true or not, and the limited empirical evidence that exists seems to deflate this presumption, clients deserve to know the basic limitations on confidentiality when they are choosing a lawyer for representation.

### C. Specific Explanations

Some commentators propose that lawyers explain the confidentiality exceptions in detail at the outset of the lawyer-client relationship. They emphasize the importance of the lawyer's obligation to respect the client's dignity and empower the client to make informed decisions based on accurate information.<sup>166</sup> They assert that the failure to explain confidentiality fully at the beginning of the lawyer-client relationship "is morally problematic because it involves professionals trying to build and encourage trust and then using it to deceive."<sup>167</sup>

Pizzimenti proposes that lawyers should explain confidentiality to their clients by first giving a general explanation of confidentiality and covering its major exceptions so that "the client will have enough information to enable him to ask intelligent questions as specific confidentiality issues arise."<sup>168</sup> She believes that this will open up a "continuing dialogue" because "honesty about the limits of confidentiality will [likely] increase trust."<sup>169</sup>

Pizzimenti also advocates that when "it becomes clear to the attorney as the representation progresses that the client needs more specific

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165. See Pizzimenti, *supra* note 98, at 476; Sobelson, *supra* note 20, at 711.

166. See ROBERT F. COCHRAN, JR. ET AL., *THE COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH TO CLIENT INTERVIEWING AND COUNSELING* § 4-6(a)(1) (2d ed. 2006).

167. Pizzimenti, *supra* note 98, at 477.

168. *Id.* at 485.

169. *Id.* at 485 n.200.

information because an exception may apply, she should raise the issue again.”<sup>170</sup> She outlines several factors that are helpful for the lawyer to determine if the exception would be material to the client’s situation: the client’s relative sophistication, how likely the information within an exception would be confided, and the character of potential confidences.<sup>171</sup> However, Pizzimenti believes that none of these factors are dispositive and, in fact, use of the factors runs the risk of suggesting selective disclosure is appropriate or that a client’s needs can be standardized and depersonalized.<sup>172</sup> Ultimately, materiality should be decided on an individual basis, and the lawyer should “engage the client in an ongoing, personal discussion to enable her to determine what matters to the client.”<sup>173</sup>

Still, Pizzimenti anticipates that lawyers will have a “carefully worded speech” prepared at the outset of the relationship.<sup>174</sup> She offers the following model approach:

You should know that I work for you and that I consider it very important to keep your confidences. The attorney-client privilege essentially means that I cannot be forced to disclose information about discussions we have. For example, judges sometimes can order lawyers to disclose information, but they can’t make me tell them about whether you committed the crime [or acted negligently or breached the contract, et cetera]. You should know about some limits to the privilege, however. If I learn that you will lie or have lied on the witness stand, I must report that. I am also allowed to report if you tell me you are going to commit a crime. I may also report limited information to defend against claims made against me or to collect my fee, but I am allowed to report only that information necessary to meet those goals. For example, if we fight about my fee, I might be able to show my billing records, but I couldn’t just reveal all the things I know about you. Although there are times I may feel it is necessary to report information, I want to remind you that I take the privilege very seriously and would never lightly decide to share information.<sup>175</sup>

Pizzimenti’s model is markedly different from the client-centered counseling approaches. Although the lawyer has a continuing obligation to explore confidentiality exceptions as they become relevant, the client already has obtained a basic knowledge that allows the client to participate in an ongoing dialogue with the lawyer. The lawyer provides information the client needs to make decisions regarding whether to retain the lawyer and how to interact with the lawyer.<sup>176</sup> Pizzimenti

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170. *Id.* at 485.

171. *Id.* at 485–87.

172. *Id.* at 487.

173. *Id.* at 488.

174. *See id.* at 487.

175. *Id.* at 488–89.

176. *Id.* at 489 (“The final question is what consequences a failure to inform of exceptions should have. If a client does not have information reasonably necessary to

argues that if there is concern about the consequences of such a detailed explanation of confidentiality on the client's candor, then the ethical rules should be changed; as "long as [confidentiality exceptions] exist, however, the client should be aware of them."<sup>177</sup>

Sobelson's approach is even more comprehensive. Hoping to perfect an explanation that is both accurate and not "so complicated and frightening that it unduly chills the open and honest exchange of information," Sobelson proposes that a written explanation should be given to clients before the first interview and that clients should be given an opportunity to read and sign a form indicating their understanding of its terms.<sup>178</sup> He proposes covering approximately fifteen exceptions to

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make informed decisions, the lawyer has violated Model Rule 1.4(b) and should be subject to discipline.").

177. *Id.*

178. See Sobelson, *supra* note 20, at 772; see also COCHRAN ET AL., *supra* note 166, § 4-6(a)(1) (proposing that written, full explanations about confidentiality and fees should be given to clients before the initial interview, which would be a "more efficient manner than a mini-lecture at the beginning of the interview, when the client may not be listening intently"). Cochran and his colleagues propose accompanying the written explanation with a short verbal explanation at the first client interview, such as:

Before we get started, let me talk about those papers you received in the waiting room. One paper describes what lawyers call the rules on confidentiality.

That generally means that I cannot tell anyone what we talk about unless you give me permission, but that paper explains some of the exceptions to the rule.

*Id.* § 4-7.

At least one practice area of law makes use of this approach. The American Academy of Matrimonial Lawyers has published *Divorce Manual: A Client Handbook*, which is posted on its website. See AM. ACAD. OF MATRIMONIAL LAWYERS, DIVORCE MANUAL: A CLIENT HANDBOOK (2010), available at <http://www.aaml.org/library/publications/415/divorce-manual-client-handbook>. The *Divorce Manual* advises clients:

One of a lawyer's most fundamental ethical obligations is to maintain the confidentiality of client communications.

....

There are also several exceptions to your lawyer's duty not to reveal client confidences. A conversation in which a client tells a lawyer that the client intends to commit a crime or, in some states, a fraud, is not privileged and the lawyer could be forced to testify in court about the conversation. The privilege may also be lost if you or one of your witnesses commits perjury and in other circumstances which you should discuss with your lawyer. Also, if a lawyer is accused of wrongdoing by the client, the lawyer may reveal confidential information necessary to defend against the accusation.

*Id.* at ch. 10. In very basic terms, the *Divorce Manual* covers each of the three categories of confidentiality exceptions that are discussed, *supra*, in Part II.

Levin's study surveying New Jersey lawyers also showed that those "who practiced a substantial amount of family law were somewhat more likely to tell their clients of the [state's mandatory-harm-prevention exception] at the first substantive meeting than

confidentiality, including the fact and terms of the relationship, information conveyed for purposes other than obtaining legal advice, and communications made for the purposes of having the lawyer participate or aid in criminal, fraudulent, or wrongful activity.<sup>179</sup> Sobelson also proposes explaining the limits of confidentiality in a way that closely tracks the language of the ethical rules governing lawyers. For example, his model consent form reads:

Despite my obligations of confidentiality, I may be FORCED to reveal information under the following circumstances:

- (a) If a court orders me to;
- (b) If certain laws require me to;
- (c) If you intend to commit a crime or fraud in the future;
- (d) If you commit a fraud, such as perjury, while I am your lawyer.<sup>180</sup>

Although this approach gives clients the most thorough explanation of confidentiality when they are making a decision about retaining a lawyer, it has also received criticism. Ellmann and his colleagues argue that Sobelson's proposal is so detailed that it could confuse clients. They assert:

There is little point in raising issues that are very unlikely to bear on a client's case. In fact, there is a good reason *not* to provide such extraneous information: the lawyer's job is to provide expert information in clear fashion to a layperson, not to turn that layperson into a lawyer. Too much information can confuse rather than enlighten.<sup>181</sup>

Most matters will not implicate particular confidentiality exceptions.<sup>182</sup> Moreover, "[e]ven if a lawyer makes a good faith effort to explain the rules to clients, the clients are likely to remain confused at least as to

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lawyers in other practice areas." Levin, *supra* note 13, at 124 n.194. She hypothesized that family law practitioners probably anticipate that the subject of client wrongdoing could be raised with seriousness during the relationship, and although criminal defense lawyers have reason to share in this anticipation, they may be more concerned with "the immediate need to establish trust in order to obtain information." *Id.*

179. See Sobelson, *supra* note 20, at 772–73.

180. See *id.* at 773. Sobelson's form was drafted based on the 1969 *Model Code of Professional Responsibility*, and under modern *Model Rules of Professional Conduct* it would look slightly different. For example, he does not address the harm prevention exception, which, of course, would also vary between jurisdictions. Sobelson also proposes addressing the possibility of a legal malpractice suit or a fee collection suit, in which case the lawyer "may reveal information to the extent necessary to defend or otherwise protect [the lawyer]." See *id.*

181. See ELLMANN ET AL., *supra* note 58, at 246; see also Pizzimenti, *supra* note 98, at 485 (criticizing an explanation that is too detailed as "unnecessary" and "counterproductive" because the client does not need "an equivalent of a law school education").

182. For example, Ellmann and his colleagues point out that "it does seem safe to say that [Sobelson's] form offers advice that, in many respects, most clients would not need (most clients, for example, probably have no reason to want to keep their own identity secret)." ELLMANN ET AL., *supra* note 58, at 247–48; see Zacharias, *Harmonizing Privilege and Confidentiality*, *supra* note 11, at 108 & n.184.

details,” especially where aspects of confidentiality and its exceptions are ambiguous or colored by sources other than lawyers—television, literature, friends—that do not account for specific jurisdictional codes.<sup>183</sup>

In response, Sobelson emphasizes the lawyer’s duty to inform the client of important limitations. He argues: “The fact that the information is complicated or frightening is no excuse for hiding it.”<sup>184</sup> A less detailed explanation of confidentiality could cause the client to share “information he has the absolute right to keep secret.”<sup>185</sup> Sobelson asserts that “[a] client has a right to decide that some information is so sensitive that he does not wish to entrust it to a lawyer who will reveal it.”<sup>186</sup> Nonetheless, even Sobelson’s form is not exhaustive because it does not delineate the specific details of every possible confidentiality exception.<sup>187</sup>

Another concern is that when they understand the confidentiality exceptions, some clients may choose to end the lawyer-client relationship or choose to continue it but lie to their lawyers.<sup>188</sup> Sobelson argues that this happens already when a client fears a loss of respect from the lawyer if the client were to reveal his true motives or purposes.<sup>189</sup> Moreover, the concern regarding how clients would behave if they understood the law would seem to apply as well to the approach of providing a general explanation in advance and a specific explanation when it becomes relevant. Furthermore, Sobelson argues that if all lawyers were to comply with a thorough explanation of confidentiality, shopping around for lawyers who do not explain confidentiality exceptions would become futile.<sup>190</sup>

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183. Zacharias, *supra* note 8, at 365–66 (“As a practical matter, clients thus probably end up with only a general understanding that attorney-client conversations usually remain confidential but occasionally may be revealed.”).

184. Sobelson, *supra* note 20, at 774.

185. *Id.*

186. *Id.*

187. ELLMANN ET AL., *supra* note 58, at 247. Compare Sobelson, *supra* note 20, at 772–73 (discussing at least fifteen exceptions to confidentiality worth explaining to a client), with Rothstein, *supra* note 20, at 1754–61 (offering a list of twenty-five exceptions that may be important for a client to know).

188. ELLMANN ET AL., *supra* note 58, at 248; Hodes, *supra* note 116, at 787; Rothstein, *supra* note 20, at 1764, 1766.

189. Sobelson, *supra* note 20, at 774.

190. *Id.*

#### IV. CONFIDENTIALITY EXPLAINED: A DIALOGUE APPROACH

We propose a fourth alternative. Lawyers should explain confidentiality in a way that combines a general explanation of confidentiality with specific identification of the three categorical exceptions, while at the same time encouraging dialogue regarding the exceptions. We urge lawyers to address their mistrust of clients and their fear of clients' mistrust through honesty and dialogue.

In an initial consultation, a lawyer could explain confidentiality with language similar to the following:

I want you to know that I have an ethical obligation to maintain the confidentiality of information you share with me. I will not disclose this information unless you give me authorization or the law authorizes disclosure. The law authorizes disclosure in very few circumstances—to prevent serious bodily or financial harm to others, to prevent fraud on the court, and to protect my interests in very rare instances, such as if you were to sue me for malpractice or I were to sue you to collect fees. Even then, I could only disclose the information to the extent necessary. Do you have any questions about my obligation to keep your information confidential? If you have any questions about confidentiality at any point during our relationship, please let me know. We can talk about this again at any time. You should also know that if I feel we need to discuss these issues again, I will let you know. I want our relationship to be a two-way street.

This approach is direct and honest. It explains the confidentiality exceptions in a framework that encourages dialogue and demonstrates the lawyer's honesty and commitment to a mutual relationship. This dialogue approach treats clients as three-dimensional individuals who are able to process information and make their own decisions about what they value and not as the stereotypes that Kruse describes as a "cardboard" client.<sup>191</sup>

The dialogue approach offers significant advantages in comparison to a detailed explanation of exceptions, whether oral or in writing.<sup>192</sup> Both a lengthy oral explanation and a written form discourage dialogue. They imply that the explanation itself is the goal, as opposed to a conversation between lawyer and client. In addition, a detailed list of exceptions may overwhelm clients. By identifying the three categories of exceptions in nonlegal language, our approach seeks to strike a balance between providing sufficient information for the client to participate knowledgeably in the lawyer-client relationship without providing so much information that the client is overwhelmed.

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191. See *supra* notes 108–09 and accompanying text.

192. See *supra* text accompanying notes 181–83 (describing criticism of Sobelson's approach).



The dialogue approach also offers advantages over the general explanations of confidentiality.<sup>193</sup> The lawyer provides the client with enough information to ask further questions at the time of the initial client interview or in the future when either lawyer *or* client determines that the question is relevant.<sup>194</sup> In contrast, the approaches favored in the client counseling textbooks<sup>195</sup> make the lawyer the primary gatekeeper for future discussions. As Eli Wald cautions, lawyers too easily slip into a “one-way street” that neglects a client’s cares, fears, needs, or values.<sup>196</sup> Even a lawyer who is adept at identifying cues can never fully know what bears on the client’s interest. Like Pizzimenti, we believe that it is important to give clients enough information to enable them to ask intelligent questions about confidentiality and participate meaningfully in lawyer-client relationships.<sup>197</sup>

By encouraging dialogue, our proposal minimizes the danger that clients will use this information to lie to their lawyer. The lawyer’s willingness to share information on confidentiality exceptions at the commencement of the relationship indicates that the lawyer trusts and respects the client. The lawyer’s honesty and commitment to dialogue maximizes the chance that the client will trust the lawyer and honestly share information. Last, the available empirical evidence, such as Fred Zacharias’s pathbreaking work, indicates that knowledge of exceptions is not likely to dissuade clients from providing confidential information to their lawyers.

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193. This language was purposely selected in response to Wald’s well-argued concept that “the Rules design a communications regime that is intentionally a one-way street” resulting in an “inherent asymmetric gap in information between lawyers and clients.” Wald, *supra* note 117, at 757. By example, Wald illustrates how the doctrine of confidentiality encourages clients to reveal all facts to their lawyers by ensuring that their information will be protected, although lawyers are not encouraged to reveal “how [they] plan[] on exercising . . . professional judgment and discretion in revealing confidential client information.” *See id.* at 755–59.

194. *But see id.* at 791 (noting that “general observations about how a lawyer may exercise her discretion about exceptions to confidentiality (a ‘Miranda’ warning) are not ordinarily material” until “developments in the representation lead the lawyer to entertain disclosure of confidential client information”).

195. *See supra* Part III.B.

196. *See supra* note 193.

197. *See supra* notes 168–69 and accompanying text.

## V. CONCLUSION

We offer the dialogue approach to explaining confidentiality as a way for lawyers to begin a dialogue with their clients and to develop relationships of mutual respect and trust with their clients. We remain mindful of Cunningham's caution that "the four words 'How To Explain Confidentiality' need to have a question mark rather than a colon at the end of them; this phrase should be treated as a profoundly difficult question rather than as the title of a set of 'how to' directions for talking with clients."<sup>198</sup> By creating a framework for ongoing dialogue, we have sought to avoid Cunningham's trap of "'how to' directions" for explaining confidentiality or Wald's concern regarding a *Miranda* warning.<sup>199</sup> Nevertheless, a model offers a helpful starting point. Our proposal seeks to provide lawyers with a useful tool for fulfilling their professional responsibilities and to generate further conversation within the legal profession. And we also seek to honor the memory of Fred Zacharias, an outstanding scholar who inspires us with his unwavering commitment to the dignity of clients and the search for truth.

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198. Cunningham, *supra* note 12, at 615–16. Levin arrived at a similar conclusion, after conducting her empirical research:

It is easy to say that clients should be told about this confidentiality exception, but much more difficult to decide who should learn of the rule and to devise a palatable and meaningful way to tell clients. In theory, all clients should be told explicitly about the disclosure rule because all are entitled to know the rules that govern their communications with their lawyers. As a practical matter, such a requirement could confuse many clients and seriously interfere with the development of client trust, thereby affecting lawyers' ability to represent their clients.

See Levin, *supra* note 13, at 145–46 (footnote omitted).

199. See *supra* note 193.