Attorney-Client Confidentiality is a Moral Good: Expanding Protections of Confidentiality and Limiting Exceptions

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I. INTRODUCTION

According to Aristotle, general legal rules will be inadequate in certain instances, due to the injustice these rules may cause when applied to specific fact patterns. As Aristotle argued in the *Nicomachean Ethics*, his foundational text on ethical principles:

> [A]ll law is universal but about some things it is not possible to make a universal statement which shall be correct. In those cases, then, in which it is necessary to speak universally, but not possible to do so correctly, the law takes the usual case, though it is not ignorant of the possibility of error. . . . When the law speaks universally, then, and a case arises on it which is not covered by the universal statement, then it is right, where the legislator fails us and has erred by over-simplicity, to correct the omission—to say what the legislator himself would have said had

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[h]e been present, and would have put into law if he had known.[1]

As a result, Aristotle emphasized the need to create equitable exceptions to general legal rules in the overall pursuit of justice.

Immanuel Kant offered a different ethical argument in his *Grounding of the Metaphysics of Morals*, in which he stated: "Hence there is only one categorical imperative and it is this: Act only according to that maxim whereby you can at the same time will that it should become a universal law."[2] Thus, Kant argues that ethical rules should only be framed as universal principles and that justice can only be founded upon a general ethical rule that can transcend all factual particulars.

This article will take the side of Kant, arguing that confidentiality to the client is a moral good, and thus should be one of the lawyer's fundamental maxims, with as few exceptions for disclosure as possible.[3] Currently, Rule 1.6 of the *ABA Model Rules of Professional Conduct*, which deals with confidentiality, is replete with exceptions.[4] That the *Model Rules* take a position is problematic for a number of reasons, in

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1. ARISTOTLE, THE NICOMACHEAN ETHICS 99 (David Ross trans., Oxford Univ. Press 2009).

2. IMMANUEL KANT, GROUNDING FOR THE METAPHYSICS OF MORALS WITH ON A SUPPOSED RIGHT TO LIE BECAUSE OF PHILANTHROPIC CONCERNS 30 (James W. Ellington trans., Hackett Publ'g 3d ed. 1993).

3. A similar position has been taken by Albert Alschuler, who asserted: "[T]he obligation of confidentiality is not a categorical imperative. Hardly anything is. Nevertheless, it comes close, and to view it merely as an 'interest' to be balanced against all other interests seems too easily to countenance dishonesty and the betrayal of clients by members of the legal profession." Albert W. Alschuler, *The Preservation of a Client's Confidences: One Value Among Many or a Categorical Imperative?*, 52 U. COLO. L. REV. 349, 355 (1981). While I agree substantially with Alschuler's article, this article will investigate in greater depth than Alschuler's article why confidentiality should be conceived of as a moral good.

4. ABA Model Rule 1.6 deals with confidentiality. It states:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
  (1) to prevent reasonably certain death or substantial bodily harm;
  (2) to 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;
  (3) 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;
  (4) to secure legal advice about the lawyer's compliance with these Rules;
  (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
  (6) to comply with other law or a court order; or
  (7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

particular because attorney-client confidentiality should be viewed as a moral good—which would counsel in favor of having as few exceptions as possible (since exceptions are always created to abrogate the moral good, they always run the risk of producing an immoral outcome).

This article will start by explaining why the role of the attorney is not an "amoral" one, as Richard Wasserstrom contends.[5] It will instead demonstrate that the attorney takes on a profoundly moral role in his or her position as a professional representing a client in a legal action. The lawyer seeks to serve as an effective counsel by gaining as much information as possible from client disclosure, which is underpinned by a confidential relationship between the client and attorney. This article will contend that confidentiality is a moral good and will then explain why certain violations of this moral good might be warranted while others are not. Ultimately, this analysis will seek to serve as a starting point for a stronger defense of the attorney-client confidential relationship against the erosion it has endured under the *Model Rules*.

II. THE LAWYER AS AN AMORAL PROFESSIONAL? A SKEPTICAL INQUIRY

An important objection to strong protections for attorney-client confidentiality is the argument that it disconnects the attorney from common moral precepts. This objection has been raised by Richard Wasserstrom, who contends many people believe that common moral precepts may not apply to the lawyer acting in a professional role:

> The job of the lawyer, so the argument typically concludes, is not to approve or disapprove of the character of his or her client, the cause for which the client seeks the lawyer's assistance, or the avenues provided by the law to achieve that which the client wants to accomplish.[6]

Wasserstrom continues in his observations by noting:

> The lawyer's task is, instead, to provide that competence which the client lacks and the lawyer, as professional, possesses. In this way, the lawyer as professional comes to inhabit a simple universe which is strikingly amoral—which regards as morally irrelevant any number of factors which nonprofessional citizens might take to be important, if not decisive, in their everyday lives.[7]

Thus, according to Wasserstrom, confidentiality allows a lawyer to disconnect him or herself from practical moral considerations, in order to serve the client's

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MODEL RULES OF PROF'L CONDUCT R. 1.6(a)–(c) (2018) [hereinafter MODEL RULES]. This paper will focus in particular on Model Rule 1.6(b)(1)–(3) and the problems with allowing for broad disclosure rules that permit the attorney to violate the confidential relationship protected by Model Rule 1.6(a).

5. *See* Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 1 (1975).

6. *Id*. at 8.

7. *Id*.

interest. Yet Wasserstrom is not convinced by these assertions. Instead, he asks: "Is it right that the lawyer should be able so easily to put to one side otherwise difficult problems with the answer: but these are not and cannot be my concern as a lawyer?"[8] For Wasserstrom, an attorney's responsibilities, such as confidentiality to the client, may be detrimental to the legal profession.

However, there are several problems with Wasserstrom's argument. First, Wasserstrom assumes the existence of an analytic category called "amorality." As Wasserstrom states: "The accusation is that the lawyer-client relationship renders the lawyer at best systematically amoral and at worst more than occasionally immoral in his or her dealings with the rest of mankind."[9] Wasserstrom apparently divides morality into three categories: moral, amoral, and immoral. Yet this assumption may be suspect. Wasserstrom never explains why there must be a third analytic category falling between the moral and immoral.[10] Perhaps Wasserstrom is assuming that there is a moral gray area between moral and immoral. Yet amorality as a third category is unnecessary even under this assumption. Instead, Wasserstrom could simply argue that there is a duality between moral and immoral, and that to define when a value moves from one to the other is sometimes difficult. By changing the framework of analysis, and instead understanding that there is a simple duality between the moral and immoral, one can easily recognize that the decision to allow a lawyer to represent his or her client zealously is a value that can be either moral or immoral (but not "amoral").[11]

Second, Wasserstrom's argument about amorality appears to apply to the worldview constructed by lawyers in their own professional realm. Wasserstrom states:

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8. *Id*. at 8.

9. *Id*. at 1.

10. For an example of a dualist understanding of morality (i.e., a moral-immoral dichotomy) that contrasts with Wasserstrom's three-pronged version of morality, *see* PLATO, THE REPUBLIC 101 (G. R. F. Ferrari ed., Tom Griffith trans., Cambridge Univ. Press 2000) ("Evil can never understand either goodness or itself, whereas goodness, if its natural gifts are improved by education, will in time gain a knowledge both of itself and of evil. So though the good man can become wise, in my view, the bad man cannot.").

11. Interestingly, it appears that commentators on Wasserstrom's article have not objected to his third category of "amorality." *See, e.g*., Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 11 AM. B. FOUND. RES. J. 613, 614 (1986) ("Although *this amoral role is the accepted standard within the profession*, no generally accepted moral justification for it has been articulated." (emphasis added)). Wasserstrom might offer a defense of "amorality" as a category, following a philosopher such as Friedrich Nietzsche, who sought to move past the categories of morality and immorality. *See* FRIEDRICH NIETZSCHE, BEYOND GOOD AND EVIL: PRELUDE TO A PHILOSOPHY OF THE FUTURE 3 (William Kaufman ed., Helen Zimmern trans., Dover Publications 1997) ("*To recognise untruth as a condition of life*: that is certainly to impugn the traditional ideas of value in a dangerous manner, and a philosophy which ventures to do so, has thereby alone placed itself beyond good and evil."). Yet such an effort would still require a fundamental justification of the category of "amorality," as opposed to moral-immoral dualism, which Wasserstrom does not offer in his article.

> [O]ne central feature of the professions in general and of law in particular is that there is a special, complicated relationship between the professional, and the client or patient. For each of the parties in this relationship, but especially for the professional, the behavior that is involved is to a very significant degree, what I call, role-differentiated behavior.[12]

Thus, according to Wasserstrom once role-differentiation has occurred, and the lawyer acts not as an ordinary person, but as a professional, the lawyer takes on an amoral role in which common morality does not apply. Wasserstrom argues: "[T]his is significant because it is the nature of role-differentiated behavior that it often makes it both appropriate and desirable for the person in a particular role to put to one side considerations of various sorts—and especially various moral considerations—that would otherwise be relevant if not decisive."[13] However, Wasserstrom appears to downplay the importance of the process that creates the "role-differentiated behavior" of the lawyer. Through this process, during which the attorney-client relationship is created, the lawyer's subsequent actions for his or her client take on moral legitimacy.

The *1908 Canons of Professional Ethics* issued by the ABA demonstrate how the process of creating the boundaries of role-differentiated behavior for a professional involves important moral value judgments. The *1908 ABA Canons* are important because they offer a moral aspirational emphasis on the lawyer's professional conduct than the more prosaic Model Rules. Indeed, Benjamin Barton noted this in his analysis of the evolution of the rules of professional responsibility, stating:

> [T]he profession has divided what was once the single unifying goal for bar associations and lawyer regulators—providing moral, ethical, and practical guidance on how to practice law—into two quite distinct, and in some ways contradictory goals, thus undercutting the entire project. The original, unified goal is best embodied by the ABA Canons of Professional Ethics, which provided both general moral and ethical advice and specific practical advice to lawyers. This unified statement was first split by the adoption of the *ABA Code of Professional Responsibility*, which separated the general (entitled "canons" and "ethical considerations") from the mandatory minimums ("disciplinary rules"), and then the *Rules of Professional Conduct*, which eliminated the broadly moral altogether.[14]

With regard to the lawyer's role-differentiated behavior, it is helpful to analogize this to the role-differentiated behavior of the scientist. As philosopher Richard Rudner has argued: "In general . . . before we can accept any hypothesis,

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12. Wasserstrom, *supra* note 5, at 3.

13. *Id.*

14. Benjamin H. Barton, *The ABA, the Rules, and Professionalism: The Mechanics of Self-Defeat and a Call for a Return to the Ethical, Moral, and Practical Approach of the Canons*, 83 N.C. L. REV. 411, 420–21 (2005) (footnotes omitted).

the value decision must be made in the light of the seriousness of a mistake, that the probability is *high enough* or that, the evidence is *strong enough*, to warrant its acceptance."[15] Thus, the scientist must make a value judgment as to whether or not he or she will be willing to accept the outcome of an experiment that was run. This applies even to probability.[16]

Some might object, as Rudner notes:

> [T]hat while it may be a function of the scientist *qua member of society* to decide whether a degree of probability associated with the hypothesis is high enough to warrant its acceptance, *still* the task of the scientist *qua* scientist is *just the determination* of the degree of probability or the strength of the evidence for a hypothesis and not the acceptance or rejection of that hypothesis.[17]

However, Rudner explains why this objection is incorrect:

> For the determination that the degree of confirmation is say, *p*, or that the strength of evidence is such and such, which is on this view being held to be the indispensable task of the scientist *qua* scientist, is clearly nothing more than *the acceptance by the scientist of the hypothesis that the degree of confidence is p or that the strength of the evidence is such and such;* and as these men have conceded, acceptance of hypotheses does require value decisions.[18]

Thus, at a minimum, even if it is conceded that scientists do not make value judgments once they assume the role of scientist (which is a strong assumption that may not necessarily be the case), prior to taking on their role as a scientist they make important value judgments, and these value judgments will always frame their role as a scientist.

A similar principle applies to lawyers. Moral value judgments are made before the lawyer takes on his or her role as lawyer. These moral value judgments frame the lawyer's work, by placing immoral acts outside the realm of the lawyer's reach, and create a moral world which (though it may include many gray areas) should not be termed "immoral" and certainly not "amoral." A good example of these moral value judgments can be seen in Canon 15 of the *1908 ABA Canons of Professional Ethics*, entitled "How Far a Lawyer May Go in Supporting a Client's Cause."[19] Some of these value judgments are prohibitions against what the lawyer must not do while others are positive prescriptions about what the lawyer should, and indeed must do.

Canon 15 begins by defining the limits of a lawyer's course of conduct. According to the Canon:

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15. Richard Rudner, *The Scientist* Qua *Scientist Makes Value Judgments*, 20 PHIL. SCI. 1, 3 (1953).
16. *Id.*
17. *Id.* at 4.
18. *Id.*
19. CANONS OF PROF'L ETHICS Canon 15 (1908) [hereinafter 1908 CANONS].

> Nothing operates more certainly to create or to foster popular prejudice against lawyers as a class, and to deprive the profession of that full measure of public esteem and confidence which belongs to the proper discharge of its duties than does the false claim, often set up by the unscrupulous in defense of questionable transactions, that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause.[20]

Thus, a lawyer has to make a moral value judgment about whether a client's case would create a false claim—meaning a claim that is outside the bounds of the law—and this allows the lawyer to make a moral value judgment. It is analogous to the scientist who must determine whether "the probability is *high enough* or that, the evidence is *strong enough*, to warrant its acceptance."[21] This allows the lawyer to refuse a case that he or she believes is outside the bounds of the law or is immoral. These decisions place significant moral burdens upon the lawyer, even before he or she takes on a role-differentiated position as an attorney serving a client. This moral decision-making cannot be overstated.

Of course, these determinations may vary based upon the attorney's own legal and moral understanding. As Rudner notes with regard to scientists, "clearly how great a risk one is willing to take of being wrong in accepting or rejecting the [scientific] hypothesis will depend on how seriously in the typically ethical sense one views the consequences of making a mistake."[22] The same is true for lawyers, because the lawyer's decision as to whether a case violates the law and morality may depend heavily on the lawyer's own legal and moral understanding, which will determine the options that the lawyer has going forward. However, it does not matter that there may be a spectrum of possible legal and moral options according to each lawyer's proclivities; what does matter is the simple fact that the lawyer makes legal and moral value judgments in every case.

Moreover, once the lawyer assumes his or her role as attorney for a specific client, moral decision-making is not over, particularly when the client asks the lawyer to violate the law. The *1908 Canons* state:

> [I]t is steadfastly to be borne in mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane.[23]

Once again, the *Canons* limit the lawyer's scope of practice—the lawyer must refuse to act in a way that would violate these tenets, and in doing so, the lawyer's duties to the client cannot traverse into areas of action that most people would

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20. 1908 CANONS Canon 15.
21. Rudner, *supra* note 15, at 3.
22. *Id.*
23. 1908 CANONS Canon 15.

consider immoral (for example, assisting a client in lying on the stand, or helping a client burn down a building to destroy evidence).

In addition, the *1908 Canons of Professional Ethics* are predicated on the notion that a lawyer's representation of a client is a moral good. According to Canon 15: "The lawyer owes 'entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability,' to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied."[24] Thus, the Canons take the position that it is a moral good for a lawyer to zealously represent a client. The lawyer, trained in the law, steps in as the client's agent to ensure the client can effectively achieve justice. As Albert Alschuler has stated:

> People with legal problems need help; they often do not understand the complicated legal system in which they are enmeshed. Their sense of fairness (as well as ours) is enhanced when they need not fend for themselves—when they are entitled to the services of other people who understand the system and whose function within the system is to be on their side.[25]

We could imagine a world in which a different substantive value is emphasized. As Wasserstrom points out, "[t]o be sure, on occasion, a lawyer may find it uncomfortable to represent an extremely unpopular client."[26] Thus, we could create a rule which states it is morally good to represent a client, but only if that client is popular. Or, as Wasserstrom states:

> Just imagine what would happen if lawyers were to refuse, for instance, to represent persons whom they thought to be guilty. In a case where the guilt of a person seemed clear, it might turn out that some individuals would be deprived completely of the opportunity to have the system determine whether or not they are in fact guilty.[27]

Once again, a rule could be created which states it is morally good to represent a client, but only if the lawyer believes that client is not guilty. If these rules better comported with our moral sensibilities, we could easily follow them instead of the *1908 Canons*. However, the reason we choose not to is because we think it is a moral good for a client to have a lawyer who effectively represents him or her—and that it would be immoral for a lawyer to refuse to do so in unpopular actions or in criminal cases.[28]

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24. *Id.*
25. Alschuler, *supra* note 4, at 351–52.
26. Wasserstrom, *supra* note 5, at 9.
27. *Id.* at 9–10.
28. Once again, this is analogous to the value judgment a scientist makes. As Rudner explains:

> Obviously our decision regarding the evidence and respecting how strong is "strong enough", is going to be a function of the *importance*, in the typically ethical sense, of making a mistake in accepting or rejecting the hypothesis. Thus, to take a crude but easily manageable example, if the hypothesis under consideration were to the effect that a toxic ingredient of a drug was not present

Indeed, the *Canons* emphasize that this is the reason why zealous representation is morally justified:

> No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense.[29]

It is a moral good for a lawyer to zealously represent his client because this will allow the client the best opportunity to achieve justice under the law.

Wasserstrom underemphasizes the importance of the moral value judgments that frame the role-differentiated behavior of the lawyer. Yet, as the discussion above makes clear, the legal profession requires decision-making with profound moral implications, even before the attorney takes on their role serving the client. Lawyers must make moral decisions when choosing whether or not they can take up a client's cause of action, and lawyers should not turn down representation if the client is unpopular or possibly guilty of a criminal charge. This is done because in the *1908 Canons* the ABA emphasized that it is a moral good for a client to be represented by a competent attorney.[30]

III. CONFIDENTIALITY AS A MORAL GOOD

Confidentiality is one of the means through which the lawyer serves his or her client as effectively as possible. As Comment 2 to Model Rule 1.6 states:

> in lethal quantity, we would require a relatively high degree of confirmation or confidence before accepting the hypothesis—for the consequences of making a mistake here are exceedingly grave by our moral standards. On the other hand, if say, our hypothesis stated that, on the basis of a sample, a certain lot of machine stamped belt buckles was not defective, the degree of confidence we should require would be relatively not so high. *How sure we need to be before we accept a hypothesis will depend on how serious a mistake would be*.

Rudner, *supra* note 15, at 2. The *ABA Canons* make similar value judgments. A good example is the indigent criminal defendant, who cannot afford an attorney. *See* Gideon v. Wainwright, 372 U.S. 335, 344 (1963) ("[*R*]*eason and reflection*, require us to recognize that, in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be *an obvious truth*." (emphasis added)). Zealous representation of a client—even if the client is indigent, unpopular, or possibility guilty—is seen as a moral good, and thus the *Canons* were framed in such a way as to ensure that this moral good is protected. The lawyer assumes a profoundly moral position by complying with the *Canons* in these circumstances.

29. 1908 CANONS Canon 15.

30. *See* Powell v. Alabama, 287 U.S. 45, 69 (1932) ("Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.").

> A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. . . . This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.[31]

Yet this begs the question: what is a lawyer to do if the client refuses to heed the lawyer's advice? Or if the client discloses information about an ongoing crime, or a crime that they plan on committing? Should there be exceptions to the confidentiality rule allowing for the lawyer to disclose in these instances?

Once again, this depends on how we conceive of the duty of confidentiality. An instructive case for answering these questions is the famed *Buried Bodies Case*. In that case, defense attorneys Frank Armani and Francis Belge were told by their client, Robert Garrow, that he had murdered several teenagers and he disclosed the locations of the bodies of two of his victims.[32] Armani and Belge traveled to the places Garrow had discussed and located the teenagers' bodies.[33] Although the families of these teenagers and the public at large implored Armani and Belge to disclose information from their discussions with Garrow,[34] and some even issued a death threat against the attorneys,[35] Armani and Belge refused to violate their duty of confidentiality.[36] In an interview with Frank Armani, one of his interviewers, law professor Richard Zitrin, noted that when Armani was asked why he did not disclose the confidences of his client, Armani responded by stating: "It's a question of which is the higher moral good."[37] Zitrin stated that he found Armani's statement to be quite potent because this was "[n]ot ethics versus morals. It's a very, very human response. Of all the things I've ever heard in this field, that maybe [sic] the most single powerful statement."[38] Armani did not adopt the view held by Wasserstrom that the lawyer takes on an "amoral" role—instead he viewed confidentiality as a moral good. Moreover, if confidentiality is conceived of as a moral good, as Armani believed, it is easier to understand why

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31. MODEL RULES R. 1.6 cmt. 2.

32. Symposium, *The Buried Bodies Case: Alive and Well after Thirty Years*, 2007 PROF. LAW. 19, 19 (2007).

33. *Id.*

34. *Id.*

35. *See id.* at 31.

36. *See id.* at 19. Eventually, confidences were violated, as discussed in further detail in Part IV below.

37. *Id.* at 25 (emphasis added).

38. *Id.*

allowing violations of the confidential relationship could be detrimental, and indeed even immoral. The more violations of confidentiality that we permit under the law, the more we undermine a moral good and create an immoral outcome. Thus, creating manifold exceptions to confidentiality undermines a moral good, thereby running a high risk of creating more immoral outcomes. For why would we need more and more exceptions to a powerful rule that we believe in as a moral good?

The creation of exceptions to confidentiality is also problematic from a practical lawyering perspective. In his interview about the *Buried Bodies Case*, Armani stated: "I had never read the canons of ethics, didn't know they existed, didn't know they were part of the judiciary law."[39] This is important because it demonstrates the limitations of creating rules of professional responsibility. Even if all lawyers today know that there are rules of professional responsibility, there is no guarantee these lawyers will know or remember all the details set forth in those rules or that they will even check them. For this reason it is particularly important to set down simple, axiomatic expressions governing rules of professional responsibility, such as attorney-client confidentiality, because these axioms will be far easier for attorneys to grasp and remember. In his interview, Armani noted that there were a few principles that he knew were foundational to his role as an attorney: "[W]hen I took my oath . . . I went to Syracuse[, New York]. I was admitted in the fourth department. The oath was to defend the Constitution of the United States, the Constitution of the State of New York, and *to keep inviolate the secrets and communications of our clients*. And that's what we went by. That's . . . That oath was a sacred oath to us."[40] This is a simple and clear rule that stuck with Armani throughout his legal practice.[41] The creation of numerous exceptions to the attorney's duty of confidentiality makes practical lawyering difficult if not impossible. A simple rule, such as the proposal that confidentiality should be broadly construed, has the virtue of allowing lawyers to easily understand what their duties are, particularly in difficult cases where the application of ethical rules will be most necessary.

As a practical concern, allowing the client to disclose his or her concerns or secrets to the attorney, with the assurance of confidentiality, more effectively facilities entry by the two actors into what Professor Stephen Pepper has termed a "moral dialogue."[42] Within this framework, according to Pepper, "the lawyer's

39. *Id*. at 29.

40. *Id*. (emphasis added).

41. One of Armani's interviewers, law professor Lisa Lerman, missed this point when she stated: "This might be food for thought about how to get our students to pin down a few principles. Maybe there should be more elaborate oaths. . . . There's a question." *Id*. How many law students could recite from memory the rules governing confidentiality and the numerous exceptions, let alone the other rules of professional conduct? No doubt few, if any. It stands to reason that more elaborate oaths will not solve this issue—but having simple and clear rules might.

42. Pepper, *supra* note 11, at 630–32.

full understanding of the situation, including the lawyer's moral understanding, can be communicated to the client."[43] This allows the lawyer to continue assessing the morality of particular legal choices, even when the lawyer has taken on his or her professional role as an attorney. At the same time, Pepper points out, this method allows the lawyer to more effectively serve the client because "[t]he autonomy of the client remains in that she is given access to all that the law allows, but the client's decisions are informed by the lawyer's moral judgment."[44]

A parallel to the attorney-client relationship that may help to shed light on the "moral dialogue" framework is the relationship between the priest and penitent. This similarity has been raised by various attorneys and judges. In his interview, Armani discussed an emotional exchange he had with his mother over the "Buried Bodies Case."[45] Armani stated: "My mother asked me if I was insane [because he was protecting confidences told him by a serial murderer]."[46] One of Armani's interviewers, law professor Lisa Lerman[47] noted that Armani had likened his role as an attorney to that of a clergyman: "One time you told me that you analogized your obligation as being like that of a priest. . . ."[48] Likewise, the U.S. Supreme Court in *United States v. Nixon* drew this comparison in the context of attorney-client privilege and priest-penitent privilege, stating:

> [G]enerally, an attorney or a priest may not be required to disclose what has been revealed in professional confidence. These and other interests are recognized in law by privileges against forced disclosure, established in the Constitution, by statute, or at common law. Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.[49]

This comparison is particularly useful in light of the clear parallels between confidentiality governing the lawyer and the seal of the confessional governing the priest.[50] As theologian David W. Fagerberg has explained: "Private confession arose out of a desire for more frequent access to confession and absolution . . . coupled with a desire for spiritual direction."[51] In 1215, the Fourth Lateran Council issued a canon on the seal of the confessional in the Catholic Church,

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43. *Id.* at 630.
44. *Id.*
45. Symposium, *supra* note 32, at 31.
46. *Id.*
47. *Id.* at 19.
48. *Id.* at 31. According to Lerman, Armani's mother responded by saying, "But Frank, you're not a priest." *Id.*
49. United States v. Nixon, 418 U.S. 683, 709 (1974).
50. The same is true for the evidentiary rules governing these relationships—the attorney-client privilege and the priest-penitent privilege, as noted in *United States v. Nixon*. *See id.* at 709–10.
51. David W. Fagerberg, *The Sacramental Life*, *in* THE OXFORD HANDBOOK OF CATHOLIC THEOLOGY (Lewis Ayres and Medi-Ann Volpe eds., 2015) (ebook).

though the confidentiality of a penitent's confession to a priest had been discussed since at least the 300s.[52] According to the Fourth Lateran Council:

> Let the priest absolutely beware that he does not by word or sign or by any manner whatever betray the sinner; but if he should happen to need wiser counsel let him cautiously seek the same without any mention of person. For whoever shall dare to reveal a sin disclosed to him in the tribunal of penance we decree that he shall be not only deposed from the priestly office, but that he shall also be sent into the confinement of a monastery to do perpetual penance.[53]

Clearly, this canon was created as a rule without exceptions and with strict enforcement against the priest when violated. The firmness of this rule continues to this day—the contemporary Catholic Church's Code of Canon Law states:

> The sacramental seal [of confession] is inviolable; therefore, it is a crime for a confessor in any way to betray a penitent by word or in any other manner or for any reason. An interpreter, if there is one present, is also obliged to preserve the secret, and also all others to whom knowledge of sins from confession shall come in any way.[54]

Currently, if a priest breaches the seal of the confessional, the punishment is excommunication.[55] Thus, the penitent's confession is governed by the strictest measure of confidentiality—ensuring that the penitent fully discloses to the priest his or her moral shortcomings. This is essential because, as theologian Fagerberg notes: "[t]he priest may guide the examination of conscience, but the confession must be freely given."[56] This is parallel to the attorney-client relationship, because the client needs to disclose all the pertinent factual details to the lawyer as freely as possible, so the lawyer can fully understand the situation facing the client.[57]

In the priest-penitent relationship, once the penitent has confessed to the priest, the priest can then take on the role of moral advisor to the penitent. As Fagerberg describes: "A common image for the priest is that of the physician who searches out the circumstances of the sinner and of the sin, so he may prudently decide what sort of remedy he ought to apply."[58] Thus, the priest takes on a role as advisor to the penitent, and suggests the solution to heal the penitent's shortcoming. This is similar to the "moral dialogue" proposed by Stephen Pepper in the

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52. *See* Michael J. Mazza, *Should Clergy Hold the Priest-Penitent Privilege?*, 82 MARQUETTE L. REV. 171, 174 (1998).

53. *Id*. at 174 (quoting R. S. Nolan, *The Law of the Seal of Confession*, *in* 13 THE CATHOLIC ENCYCLOPEDIA 649 (Charles G. Hebermann et al. eds., 1912)).

54. *Id*. at 175 (quoting 1983 CODE c.983 §§ 1, 2).

55. *See id*. (citing 1983 CODE c.1388 §§ 1, 2).

56. Fagerberg, *supra* note 51, at 6.

57. *See* MODEL RULES R. 1.6 cmt. 2.

58. Fagerberg, *supra* note 51, at 6.

attorney-client relationship. As Pepper explains using the context of an "example of the lawyer cross-examining a witness known to be truthful in such a way as to suggest to the jury that the witness might be lying."[59] Pepper notes that:

> [L]ooking at the dialogue with the moral input coming from the lawyer, if the lawyer is the one morally troubled by such a cross-examination and the client is not, the lawyer's perception may engage or educate the client, or the client's overall regard for the lawyer may be sufficient for the client to agree that the tactic should not be used.[60]

The lawyer, akin to the priest, uses his own moral prudence to advise the client about the best course of action, steering the client away from the morally suspect course toward the morally justifiable action. Indeed, this is the very vision of the *Model Rules*, which state: "Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld."[61] The stronger the protection of client confidentiality, the more likely it is that the client will fully disclose relevant facts, allowing the lawyer to more effectively take on their role as the client's moral advisor. As Frank Armani stated: "[A]s a defense counsel, I always feel that I should know all the facts."[62] Confidentiality between the attorney and client is essential for this purpose.

IV. WHEN ARE CONFIDENTIALITY EXCEPTIONS SENSIBLE?

Certain exceptions to confidentiality may be warranted—but if we conceive of confidentiality as a moral good, these exceptions should be rather narrow, because otherwise we run the risk of undermining the moral good.

Once again, the "Buried Bodies Case" is instructive. Ultimately, Armani did reveal some confidential information with regard to his client, Robert Garrow. As Armani's interviewer, Lisa Lerman noted: "Garrow was eventually convicted and sent to prison. Then he escaped from prison. Once he escaped from prison, you [Armani] provided some information to the law enforcement authorities about where they might find your client."[63] According to Armani, the reason he disclosed his client's confidences was due to the extreme nature of the threat: "I was on a death list [created by Garrow]. He had sued me. And my family was threatened, my wife and children. Nothing goes before that."[64] Indeed, the threat to Armani's daughter was particularly alarming – as Lerman noted:

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59. Pepper, *supra* note 11, at 631.
60. *Id*.
61. MODEL RULES R. 1.6 cmt. 2.
62. Symposium, *supra* note 32, at 24.
63. *Id*. at 30.
64. *Id*.

> [O]ne day when Frank was in the courtroom with Garrow, Dorina [Armani] came into the courtroom to see her dad, and Garrow turned and looked at her and said, 'Nice to see you again Dorina.' Since Garrow had never met Dorina before, it suddenly became apparent that he might have been stalking her.[65]

This conclusion was reasonable based on Garrow's previous actions—Armani noted that Garrow had been arrested for having sexual relations with two underaged girls who were about 10 or 11 years old.[66] Thus, the threat to Armani's daughter Dorina was quite real. As a result, according to Armani, once Garrow escaped from prison: "I felt that my primary duty to society and to my family was to get him recaptured and locked up to serve his sentence."[67] For Armani, the only reason he violated his client's confidentiality was because of a credible threat to physical harm—a serial murderer and sex offender had made threats toward him, and may have stalked his daughter. Thus, Armani was following what has become Model Rule 1.6(b)(1): "(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonable believes necessary: (1) to prevent reasonably certain death or substantial bodily harm. . . ."[68]

Yet there is a question as to how far such an exception should be drawn. Violent actions are not always easily predictable. A more difficult example than the "Buried Bodies Case" is *Tarasoff v. Regents of the University of California*.[69] Although *Tarasoff* dealt with the psychologist-patient relationship, it is useful in elucidating the problems with creating exceptions to confidential disclosures. In *Tarasoff*, "Prosenjit Poddar killed Tatiana Tarasoff"[70] and:

> Tatiana's parents, allege[d] that two months earlier Poddar confided his intention to kill Tatiana to Dr. Lawrence Moore, a psychologist employed by the Cowell Memorial Hospital at the University of California at Berkeley. They allege[d] that on Moore's request, the campus police briefly detained Poddar, but released him when he appeared rational. They further claim that Dr. Harvey Powelson, Moore's superior, then directed that no further action be taken to detail Poddar. No one warned plaintiffs [Tatiana's parents] of Tatiana's peril.[71]

This case is distinguishable on its facts from that of the "Buried Bodies Case." In the "Buried Bodies Case," Garrow had numerous run-ins with the law for murder and sex crimes, which made his threats credible, but in contrast the only indication that Poddar might harm Tarasoff was his disclosure to his psychologist.

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65. *Id.*
66. *See id.* at 24.
67. *Id.* at 30.
68. MODEL RULES R. 1.6(b)(1).
69. Tarasoff v. Regents of the Univ. of California, 17 Cal. 3d 425 (Cal. 1976).
70. *Id.* at 430.
71. *Id.*

Such a threat may not be credible for a variety of reasons, as noted by the majority in *Tarasoff*:

> Defendants contend . . . that imposition of a duty to exercise reasonable care to protect third persons is unworkable because therapists cannot accurately predict whether nor not a patient will resort to violence. In support of this argument amicus representing the American Psychiatric Association and other professional societies cites numerous articles which indicate that therapists, in the present state of the art, are unable reliably to predict violent acts; their forecasts, amicus claims, tend consistently to overpredict violence, and indeed are more often wrong than right.[72]

In light of this contention, it is sensible to conclude that the interest in psychologist-patient confidentiality should often override a duty to warn third parties about possible violence, since it is extremely unclear whether this violence will actually ensue. Indeed, this is probably even more true for attorney-client confidentiality because the lawyer is not a trained psychologist or psychiatrist and is less apt to successfully diagnose when violent thoughts will be made manifest through violent acts.

Moreover, there are other policy reasons to conclude that the confidential relationship is more important than any duty to warn. As the dissenting judge in *Tarasoff* noted: "Until today's majority opinion, both legal and medical authorities have agreed that confidentiality is essential to effectively treat the mentally ill, and that imposing a duty on doctors to disclose patient threats to potential victims would greatly impair treatment."[73] The dissenting opinion argued that from a public policy perspective "the guarantee of confidentiality is essential in eliciting the full disclosure necessary for effective treatment"[74] and explained that, "without substantial assurance of confidentiality, those requiring treatment will be deterred from seeking assistance."[75] This is a sound policy conclusion because creating affirmative duties to disclose or allowing professionals to disclose at their own discretion creates a perverse incentive. When you want people to disclose as much as possible, they are less likely to do so if they know such disclosures could be used against them in the future. Thus, a patient will be less likely to disclose violent thoughts to a therapist, knowing that the therapist might disclose this information to third parties. This will prevent the healing process. Similarly, a client will be less likely to disclose immoral and perhaps even violent tendencies to a lawyer, knowing that an attorney may disclose this information to the police, thereby preventing the lawyer from taking on the role as the client's moral advisor in an effort to dissuade the client of their contemplated course of action.

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72. *Id*. at 437-38.
73. *Id*. at 452 (Clark, J., dissenting).
74. *Id*. at 459 (Clark, J., dissenting).
75. *Id*. at 458 (Clark, J., dissenting).

Applying this type of analysis to the case of *Purcell v. District Attorney for the Suffolk District* indicates that the opinion of the court in that case is also questionable.[76] In *Purcell*, Joseph Tyree, a man who had been fired from his job servicing an apartment building and who was in danger of being evicted from his apartment spoke with Jeffrey Purcell, a lawyer at Greater Boston Legal Services.[77] According to Purcell, he "decided, after extensive deliberation, that he should advise appropriate authorities that Tyree *might* engage in conduct harmful to others. He told a Boston police lieutenant that Tyree had made threats to burn the apartment building."[78] As a result of Purcell's disclosure:

> The next day, constables, accompanied by Boston police officers, went to evict Tyree. At the apartment building, they found incendiary materials, containers of gasoline, and several bottles with wicks attached. Smoke detectors had been disconnected, and gasoline had been poured on a hallway floor. Tyree was arrested and later indicted for attempted arson of a building.[79]

The Massachusetts Supreme Judicial Court concluded with relatively little analysis that "[t]here is no question before this court, directly or indirectly, concerning the ethical propriety of Purcell's disclosure to the police that Tyree might engage in conduct that would be harmful to others."[80]

However, such a conclusion is not so obvious. In particular, the finding of the Supreme Judicial Court is problematic because it does not grapple with what may happen in the next case with a similar fact pattern. In the next case, a client who is plotting a criminal act but who is aware of the finding in *Purcell* with regard to confidentiality will know that discussion about this planned criminal act with his or her lawyer could be disclosed to law enforcement authorities by the lawyer. As a result, the client will not discuss the planned criminal act with the lawyer, and will carry out the criminal act to completion—without any preventative mechanism. Thus, the Supreme Judicial Court has created a perverse incentive for such a client, and has ultimately made it more difficult to prevent future criminal acts. While the Supreme Judicial Court might rely on the fact that many clients will not know the *Purcell* analysis regarding confidentiality, this hardly seems to be a reasonable basis for creating an exception to one of the lawyer's fundamental duties. At worst, this appears to trade on the client's possible ignorance—a client who does not know about *Purcell* may be tricked into disclosing to their lawyer, but a clever client who does know about

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76. Purcell v. Dist. Att'y for the Suffolk Dist., 424 Mass. 109 (Mass. 1997).

77. *See id.* at 110.

78. *Id.* (emphasis added). It is interesting that the court states Tyree "might" engage in criminal activity, *id.*, not that he was almost certain to engage in it based on past proclivities (such as Garrow in the "Buried Bodies Case"). This places a lawyer in an uncomfortable position of having to predict the future—which is particularly problematic for a lawyer such as Purcell, who appears to only have met his client once. *See id.*

79. *Id.*

80. *Id.* at 110–11.

Purcell will stay silent.[81] Instead, if the court had protected confidentiality, it would have made it more likely that clients like Tyree would continue to disclose, thus providing the lawyer with the opportunity to take on the role of moral advisor for the client, thereby placing the lawyer in a position to dissuade the client from the contemplated course of action. While the lawyer's counseling may not always be successful in dissuading the client, it is preferable to the system established under the *Purcell* rule, which incentivizes clients not to disclose and thus creates no mechanism to prevent contemplated criminal acts.

V. WHAT IS A LAWYER TO DO? A PRESCRIPTION FOR MOVING FORWARD

Ultimately, what should the lawyer do if the client decides to carry out an illegal act, even after the lawyer has attempted to use his or her position as moral counselor to dissuade the client? Since, as noted above, the lawyer makes a moral choice to assume the role of attorney for a client with a legitimate legal claim, the lawyer should also be allowed to dissolve the attorney-client relationship when such a relationship would force the lawyer to commit immoral acts (while maintaining the confidentiality of information shared by the client with the lawyer over the course of this relationship). The *Model Rules* provide two instances in which such a dissolution would be reasonable, according to Rule 1.16(b)(2)-(3): "(b) . . . [A] lawyer may withdraw from representing a client if: . . . (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent; [or] (c) the client has used the lawyer's services to perpetrate a crime or fraud . . . ."[82] The lawyer could withdraw (1) if the client has told the lawyer that he or she is going to commit a criminal or fraudulent act, or (2) if the lawyer discovers that the client is currently committing a criminal or fraudulent act.

However, attorney withdrawal should not also require the lawyer to disclosure confidential information, because this would create the same issue as in *Purcell*. If a client knew that disclosure was possible or perhaps even required, then the client would be incentivized not to tell the lawyer all relevant facts (including possible criminal acts), since the client would understand that true confidentiality did not govern. Once again, this would create a perverse incentive for the clever client not to disclose.

It is useful to place this in the context of a specific case, the *OPM Leasing Services Inc*. case.[83] In that case, "[t]he company [OPM Leasing Services Inc.] defrauded banks of more than $210 million by obtaining loans on forged

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81. *See* Alschuler, *supra* note 3, at 352 ("When a client has relied on an attorney's pledge of confidentiality, violation of that pledge is no trivial thing.").

82. MODEL RULES R. 1.16(b)(2)-(3).

83. ANDREW L. KAUFMAN ET AL., PROBLEMS IN PROFESSIONAL RESPONSIBILITY FOR A CHANGING PROFESSION 96 (6th ed. 2017).

computer leases,"[84] and "[a]t some point, [OPM's] lawyers learned about the fraudulent loans and realized that its services had been used to obtain them."[85] Ultimately, OPM's law firm "finally withdrew when it learned that loans it had closed following the company's disclosure were also fraudulent."[86] OPM found new legal representation, and "[w]hen asked by a lawyer at OPM's new law firm why they had withdrawn, the senior partner at the old firm . . . stated only that the termination was a mutual agreement but the circumstances could not be discussed because of confidentiality obligations,"[87] which meant that "[b]efore the frauds were discovered, OPM used its new law firm to close $15 million in additional fraudulent loans."[88]

A court could create an exception to disclosure between the old and new law firm and punish the old firm in the OPM case for failure to disclose. However, once this rule is created, companies that commit frauds, such as OPM, will be even more likely to hide facts and lie to lawyers, because they know any confidential information they discuss may be disclosed to a new firm they use. Moreover, disclosure from the old firm to the new firm would not prevent OPM from continuing to lie to the new firm, and to try to distance itself from any fraud that the old firm accused it of (for instance, it would not be difficult for senior management at OPM to say that the "bad apples" who had committed the earlier fraud were fired or placed on leave, which might lead the new firm to believe that the fraud was no longer ongoing). Instead, withdrawal should have been seen by the new firm as a red flag—and should have led to more decisive investigation into OPM's transactions, which might have prevented the continued fraud, without creating a perverse incentive on the part of OPM not to disclose.

Withdrawal of a lawyer from an attorney-client relationship can act a signal to other attorneys that a crime or fraud may have occurred. Withdrawal would also indicate to the new attorney that they should ask the client for more information with regard to the circumstances behind the withdrawal. If the new attorney finds fraud, then withdrawal should occur again. After several attorneys have withdrawn their service, this should serve as a red flag to the authorities that some crime or fraud has possibly occurred, and that an investigation should transpire.

There has been a debate over whether this should be a "noisy withdrawal," in which the lawyer withdraws and also goes through the process of "disclaiming prior opinions"—a matter discussed by the ABA's Standing Committee on Ethics and Professional Responsibility in its August 8, 1992, Formal Opinion 92-

84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*

366.[89] With regard to this ABA opinion and the issue of a completed fraud, commentators George Vermant and Simon Lorne stated that:

> The Opinion concludes that a lawyer may not disclaim or revoke an opinion upon withdrawing from a representation even if the client has used the opinion to perpetrate a now-complete fraud. Indeed, the Opinion asserts gratuitously that the withdrawing lawyer may not even volunteer information about the withdrawal to successor counsel who inquires.[90]

However, this does not appear to be "gratuitously" offered in light of the argument made with regard to OPM above. Disclosure to a new law firm will do nothing to prevent past frauds, and indeed forcing the old firm to disclose these facts does nothing to prevent the company from lying to the new firm.

Circumstances should perhaps be different in the case of a continuing fraud. The ABA Formal Opinion 92-366 "authorizes a noisy withdrawal if the lawyer's opinion is in some sense being used in a continuing fraud."[91] With continuing fraud, a noisy withdrawal allows the firm to raise a red flag, and thus allows a lawyer to prevent fraud while also refusing to disclose client confidences.

The "noisy withdrawal" in cases of continuing fraud, or multiple withdrawals by different lawyers or law firms, is preferable to the rule developed by the Securities and Exchange Commission governing confidentiality. This rule, 17 C.F.R. § 205.3(d)(2), dramatically undercuts confidentiality by stating:

> An attorney appearing and practicing before the [Securities and Exchange] Commission in the representation of an issuer may reveal to the Commission, without the issuer's consent, confidential information related to the representation to the extent the attorney reasonably believes necessary: (i) To prevent the issuer from committing a material violation that is likely to cause substantial injury to the financial interest or property of the issuer or investors; (2) To prevent the issuer, in a Commission investigation or administrative proceeding from committing perjury, proscribed in 18 U.S.C. § 1621; suborning perjury, proscribed in 18 U.S.C. § 1622; or committing any act proscribed in 18 U.S.C. 1001 that is likely to perpetrate a fraud upon the Commission; or (iii) To rectify the consequences of a material violation by the issuer that caused, or may cause, substantial injury to the financial interest or property of the issuer or investors in the furtherance of which the attorney's services were used.[92]

If violating confidentiality was treated with significant concern in the "Buried Bodies Case," and was sometimes questionable even in instances where there might be loss of life or a serious crime, such as *Tarasoff* and *Purcell*, there is no reason why preventing financial harm should allow the lawyer to violate his or

89. *See* George W. Vermant & Simon M. Lorne, *Balancing Act: The Noisy Withdrawal, ABA Opinion Weighs Subtleties of Client Fraud, Lawyer Confidentiality*, 2 BUS. L. TODAY 40, 40 (1993).

90. *Id.*

91. *Id.*

92. 17 C.F.R. § 205.3(d)(2)(i)-(iii) (2003).

her confidential relationship with the client. Confidentiality should be even stronger in both criminal and civil cases where there is no threat of bodily harm to another person. This is particularly true because confidentiality is a moral good—as discussed above. In a case where there is imminent threat of death or bodily harm to someone, the moral rule can be abrogated because this requires the lawyer to have a high level of assurance that another human life may be in danger. When placed in the shoes of Frank Armani, whose family was threatened by a killer,[93] the vast majority of attorneys and people in general would likely find it difficult to maintain that a human life can be outweighed by the lawyer's confidential relationship with their client. Using the tried and true common law method, we can then ask whether other harms are sufficiently analogous to the loss of human life and limb, and if they are this would provide an equally compelling need to create an exception to the moral good served by lawyer-client confidentiality.[94] Such an exception to the moral rule of confidentiality in cases of criminal and civil financial harm would require us to view financial harm as equal to or worse than the harm induced by the possible death or maiming of a human being. It is difficult to maintain that a client committing a fraudulent act, such as making a material misstatement in a document dealing with the issuance of stock, creates evils analogous to a client mutilating or taking the life of another person. Perhaps a utilitarian perspective could be adopted, maintaining that human life can be measured in dollars and then compared to the dollars lost by financial harm. Yet such an assessment is needlessly complicated, and the utilitarian position is quite contestable if one views the loss of money from her stock portfolio as something fundamentally different from the injury or death of another person, be it her mother, father, friend or neighbor. Since financial harm is not analogous to the threat of imminent death or injury to another person, or at the very least it is highly debatable whether these harms are analogous, then financial harm cannot possibly outweigh the moral good served by lawyer-client confidentiality in the same way that danger to human life does, and no exception should be made for the threat of financial harm.

The Commission's rule is also problematic because there is no reason to shift the burden onto the attorney, placing the responsibility on the lawyer to disclose ongoing fraud to the Commission, rather than placing the duty to investigate solely on the Commission. Withdrawal, especially the "noisy withdrawal," acts as a signaling mechanism whereby the burden is placed on the government to determine the instances where fraud may be occurring. It also allows the attorney to maintain his or her confidential relationship with the client. This creates

93. *See* Symposium, *supra* note 32, at 30.

94. *See* Emily Sherwin, *A Defense of Analogical Reasoning in Law*, 66 U. CHI. L. REV. 1179, 1179–80 (1999) ("The analogical method, as commonly practiced, works something like this: confronted with unsettled questions, the judge surveys past decisions, identifies ways in which these decisions are similar to or different from each other and the questions before her, and develops a principle that captures the similarities and differences she considers important. This principle in turn provides the basis for the judge's own decision.").

stronger protections for the attorney-client confidential relationship without undermining its content, which helps the lawyer to effectively serve the client while also providing a mechanism for lawyers to deal with instances where the client refuses to follow a lawyer's moral advice.

VI. CONCLUSION

The lawyer's role as lawyer is not "amoral." It is profoundly moral, because it allows the lawyer to take on a role that will help to achieve justice for the client. And the lawyer is not without recourse if the client is seeking an immoral outcome—the lawyer can refuse to create an attorney-client relationship, thereby preventing the client from using the lawyer's services for an immoral purpose. Once the lawyer has created an attorney-client relationship, confidentiality of client disclosure governs. This allows the client to disclose as much information as possible to the attorney. Thus, confidentiality is a moral good, because it is a tool that the lawyer and client can both rely on in order to help the lawyer find the best course of action to achieve justice for the client. Moreover, the lawyer does not shed his or her moral reasoning once the attorney-client relationship has been created—the lawyer can act as the client's moral advisor, helping the client to better understand which strategies may be moral and which may be immoral. Ultimately, if the client refuses to accept the lawyer's moral judgment, the lawyer also has a means through which he or she can ensure that their services are not used to produce an immoral outcome—the lawyer can withdraw (though still holding fast to the client's confidences).[95]

Moreover, confidentiality should act as a general rule with few exceptions—and these exceptions should only be applied in extremely dangerous circumstances, such as in the "Buried Bodies Case." The first rationale for having few exceptions is a moral one—if confidentiality is a moral good, then violating this moral good would in most instances be immoral, and thus exceptions to the moral good are quite risky, because they may often lead to immoral outcomes. The second rationale for having few exceptions is practical—lawyers and clients will likely have a relational breakdown if the client fears that his or her confidences may be

95. A limit on the ability to withdraw is placed on the criminal defense lawyer. As Albert Alschuler has noted:

> In performing his service function, a lawyer may counsel a client to consider whether he should follow the higher course of full disclosure even at great cost to the client himself. If the client refuses to do so, however—if, for example, he insists on his privilege not to incriminate himself and therefore refuses to reveal the location of his victims' bodies—the lawyer cannot properly take the client's decision from him and thereby defeat his exercise of a constitutional right. Even when the client rejects the higher course, the attorney certainly does not do so. To the contrary, the attorney serves the higher purpose of his profession by remaining loyal to his client.

Alschuler, *supra* note 3, at 355 n.18. The lawyer would not be able to withdraw in this instance because the goal of accomplishing justice for the client—in this instance, a zealous defense—is best served by the constitutional right against self-incrimination.

revealed, and without all of the client's facts, the lawyer will be unable to effectively serve the client.

While some jurisdictions have moved toward the erosion of confidentiality, notably in *Purcell v. District Attorney for the Suffolk District* and in the Security and Exchange Commission's rule in 17 C.F.R. § 205.3 (d)(2)(i)-(iii), this should not be accepted as a fait accompli. Confidentiality lies at the heart of the lawyer's service—it is a moral good that Frank Armani and Francis Belge sought to protect at great personal costs, enduring a criminal indictment, disciplinary action, ostracism in their Syracuse community, and even threats against their lives.[96] We should continue to expect nothing less from lawyers in our time.

96. *See* Symposium, *supra* note 32, at 19–20.